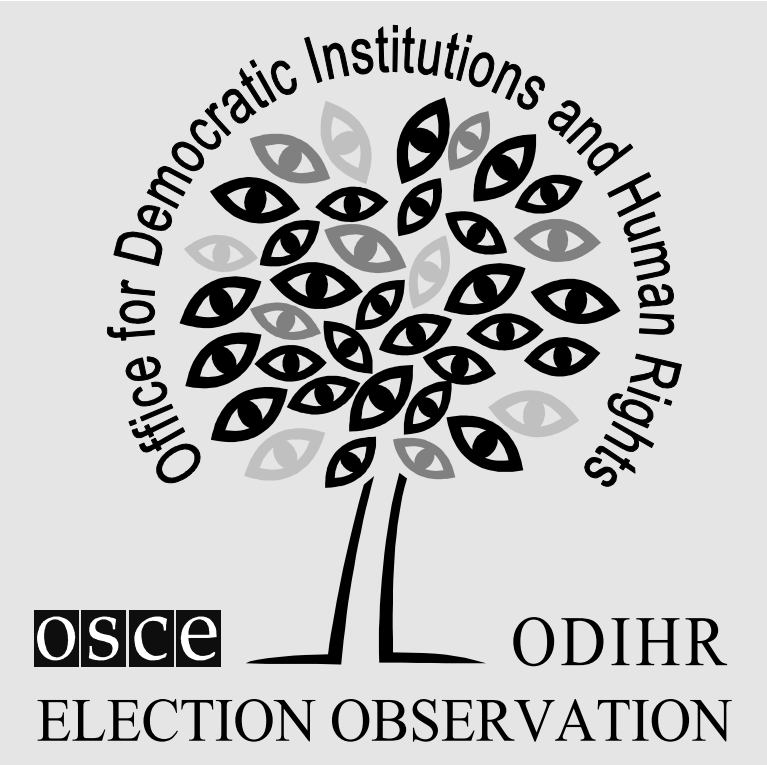
Office for Democratic Institutions and Human Rights

OSCE/ODIHR COMMENTS AND RECOMMENDATIONS FOR IMPLEMENTATION OF THE PARLIAMENTARY ELECTION LAW

FORMER YUGOSLAV REPUBLIC OF MACEDONIA PARLIAMENTARY ELECTIONS 15 SEPTEMBER 2002



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I. INTRODUCTION

This assessment reviews and comments on the "Law on Election of Members of Parliament in the Assembly of the Republic of Macedonia", or Parliamentary Election Law, which was adopted by the Assembly of the Former Yugoslav Republic of Macedonia (FYROM) on 14 June 2002. The assessment contains comments and recommendations on various aspects of the newly introduced election legislation with a view to its implementation during the forthcoming parliamentary elections scheduled to take place on 15 September.

On the occasion of previous election observation missions in the former Yugoslav Republic of Macedonia (FYROM), the OSCE Office of Democratic Institutions and Human Rights (ODIHR) has generally found that there was an adequate legislative basis.[1] The observations also found, however, that the provisions of the election laws – especially the previous Law on Election of Members of Parliament (1996, amended 1998) – were incomplete and sometimes vague or ambiguous.

During 2001, the Government began to develop a new Parliamentary Election Law. After the Draft Law was submitted to Parliament, in September 2001, ODIHR published a detailed commentary.[2] The Draft Law was preliminarily adopted by Parliament in April 2002, and the Government began to incorporate modifications proposed by Parliament and other sources.

After an intense process of negotiation and discussions among the main political parties, often facilitated by experts and representatives of the international community, the new Parliamentary Election Law and a new Law on the Voters' List were adopted on 14 June 2002 and a Law on Election Districts on 18 June. All three laws were published in the Official Gazette on 25 June. Pursuant to its terms, the new Parliamentary Election Law came into effect on 3 July 2002.

II. EXECUTIVE SUMMARY

The new Parliamentary Election Law represents a considerable advance over the previous legislation. Numerous improvements have been made in provisions that

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[1] *See* OSCE/ODIHR, *Former Yugoslav Republic of Macedonia; Municipal Elections, 10 September 2000: Final Report* (Warsaw, 17 Nov. 2000), 28 pp.; OSCE/ODIHR, *Former Yugoslav Republic of Macedonia; Presidential Elections, 31 October & 14 November 1999: Final Report* (Warsaw, 31 Jan. 2000), 24 pp.; OSCE/ODIHR, *Parliamentary Elections in the Former Yugoslav Republic of Macedonia, 18 October and 1 November 1998,* 27 pp.

[2] OSCE/ODIHR, "Comments on the Draft Law for the Election of Members of Parliament" (Warsaw, 20 Nov. 2001), 27 pp.

have been identified as problematic in previous observations. At the same time, however, significant deficiencies continue.

The new method of election for parliamentarians established through the Law – based on multi-district proportional representation (MPDR) – has several advantages. These include:

- Simplifying the election system so that a single method of election is followed, rather than a parallel system involving elections both in numerous single-mandate districts (SMD) and by national proportional representation (PR);
- Eliminating second-round elections in the SMDs; and
- In combination with an appropriate delineation of election districts, responding better to the political situation in the county and helping to reduce inter-communal tension by focusing electoral competition largely on an intra-communal basis.

Several issues remain of concern with respect to application of the Law during the next parliamentary elections. To the extent possible, efforts should be made by the relevant authorities, including the State Election Commission and other State bodies, to address these issues through regulations, instructions or other programs. The following issues fall into the highest priority category:

- Role of police during elections – including with respect to police deployment and conduct at polling stations, security for other election operations, and investigation and enforcement of violations;
- Annulment of results, and repeat elections;
- Control on conduct of election officials;
- Early formation of election commissions; and
- Ballot validity rules.

In addition, numerous other issues exist based on an examination of the new Parliamentary Election Law itself, previous comments by OSCE/ODIHR and past experience. To the extent possible, these issues should be addressed through administrative means. They should also be resolved on a legislative basis in connection with future amendments to the election laws after the elections. Issues in this category include the following:

- Over-reliance on judicial appointees;
- Political party representatives;
- Voter lists;
- Absent voters;
- Uniform election code; and
- Permanent election administration.

III. BACKGROUND

Last year the Government began to develop a new parliamentary election law for the 2002 elections. After the draft law on this subject was submitted to Parliament, in

September 2001, ODIHR published a detailed commentary.[3] The Draft Law on the Election of Members of Parliament (hereinafter "Parliamentary Election Law") was preliminarily adopted by Parliament in April 2002, and the Government began to incorporate modifications proposed by the Assembly and other sources.

The Draft Parliamentary Election Law had at the time of first adoption not been modified from the form in which it had been submitted to Parliament the previous year. For example, the comments made by ODIHR in its November 2001 commentary were not reflected in the Draft at this stage.

By the time of initial adoption of the Draft Parliamentary Election Law, the four parties signatory[4] to the Ohrid Framework Agreement (OFA) had agreed on a new method of election to parliament based on a multi-district proportional representation (MDPR) system. When the Draft Law was first adopted, even the new method of election already agreed to by the leading ruling and opposition parties[5] had not yet been incorporated into the Draft, and the Government was accordingly instructed to do so. The Government referred the entire matter to the Ministry of Justice, which had developed the Draft Law.

After initial adoption of the Draft Parliamentary Election Law (and also a Draft Law on the Voters' List), the OSCE Spillover Mission to Skopje and the ODIHR jointly published further comments.[6] Experts from the International Community, including the EU Special Representative, Council of Europe, ODIHR and the International Foundation for Election Systems (IFES) also engaged in technical consultations with local experts, including from the MOJ and other organizations as well as political parties.

Substantial improvements in the Draft Parliamentary Election Law, as well as related provisions of the Draft Law on the Voters' List, were made by the Ministry of Justice as a result of this process. ODIHR still remained concerned, however, about various provisions. As a result, additional comments on the draft laws were provided to the Minister of Justice.[7]

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[3] OSCE/ODIHR, "Comments on the Draft Law for the Election of Members of Parliament" (Warsaw, 20 Nov. 2001), 27 pp.

[4] These are the two leading ethnic Macedonian-based parties, the ruling Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity (VMRO-DPMNE) and opposition Social Democratic Union of Macedonia (SDSM), and two ethnic Albanian-based parties, the Democratic Party of Albanians (DPA) and Party for Democratic Prosperity (PDP). (The DPA has been in the ruling coalition since the last elections, and the PDP has also been in government since a government of political unity was formed in 2001, in response to the political and security crisis.)

[5] Hereinafter, the terms "leading ruling and opposition parties" or "leading parties" will be used to describe the four parties signatory to the OFA; see previous footnote. This verbal formula has been adopted in order to simplify discussion of the appointment of members to election management bodies by these parties under the new Parliamentary Election Law, see below, and is not intended to imply anything about their leadership characteristics or election prospects.

[6] OSCE Mission / ODIHR, "Comments and Recommendations on Election Legislation Reform in the former Yugoslav Republic of Macedonia (FYROM)" (Skopje, 12 Apr. 2002), 6 pp.

[7] "Additional Comments of the OSCE Office of Democratic Institutions and Human Rights on the Draft Parliamentary Election Laws of the Former Yugoslav Republic of Macedonia (FYROM)" (Skopje, 6 May 2002)

Shortly thereafter, the draft election laws – including not only the Draft Laws on Parliamentary Elections and the Voters' List, but also a Draft Law on Election Districts – were resubmitted by the Minister to the Government. After consideration (and some modification) by government commissions, the three draft election laws were approved and prepared for resubmission to the Parliament for final action.

Despite agreement on the election laws, disagreements with respect to other OFA-related laws continued to delay final parliamentary action. Finally, the Laws on Election of Members of Parliament and the Voters' List were adopted on 14 June 2002 and the Law on Election Districts on 18 June. All three laws were published in the Official Gazette on 25 June. Pursuant to its terms, the new Parliamentary Election Law came into effect on 3 July.

The new Parliamentary Election Law changes the national political system to a multi-district proportional representation (MDPR) model. The Law provides for the formation of six electoral districts with closely comparable numbers of registered voters. The number of parliamentary mandates is kept at 120, with 20 parliamentarians to be elected from each district through proportional representation. Election contests are based on lists of candidates submitted by registered political parties and other submitters (coalitions of parties or "groups of voters").

Subject to guidelines established in the Parliamentary Election Law, the actual electoral districts for parliamentary elections are established under special legislation. The Law on Election Districts was adopted a few days after the new Parliamentary Election Law. The electoral constituencies created under the Law on Election Districts do not reflect any established regional boundaries. They do not divide any of the current 123 legally established municipalities, and they generally follow the outlines of the 34 previous municipalities – which continue to serve as the location for the district offices of central government agencies.

To administer the new system, a four-tier structure of election bodies has been established: State Election Commission (SEC), six Regional Election Commissions (REC), 34 "Municipal" Election Commissions (MEC), and the approximately 2,975 precinct Election Boards (EB). In addition, numerous modifications were made throughout the Parliamentary Election Law to address the requirements of the new system as well as problems that had been experienced under the prior law.

IV. COMMENTS AND RECOMMENDATIONS

The new Parliamentary Election Law represents a considerable advance over the previous legislation. Numerous improvements have been made in provisions that have been identified as problematic in previous observations. At the same time, significant gaps and ambiguities continue to exist.

The new method of election for parliamentarians established through the Law – based on multi-district proportional representation (MPDR) – has several major advantages. These include:

- Simplifying the election system so that a single method of election is followed, rather than a so-called "parallel" system involving elections from both single-mandate districts (SMD) and national proportional representation (PR);
- Eliminating the second-round elections held in SMDs; and
- Reflecting better the political situation in the county, in combination with the delineation of election districts, by focusing electoral competition on an intra-communal rather than inter-communal basis.

However, several issues are of greatest concern with respect to application of the Law during the next parliamentary elections, as specified below. The relevant authorities, including the State Election Commission and other State bodies, should make efforts to address these issues through regulations, instructions or other actions.

In addition, numerous other issues exist which should be addressed through administrative means. They should also be resolved on a legislative basis through future amendments to the election laws, but after the upcoming elections.

A. High-Priority Actions

1. Role of Police during Elections

The precise role of the police in providing security for the elections is neither completely nor clearly described in the new Law. Further rules and understandings on this subject, including by both the election and internal security authorities, are required for successful implementation of the Law during the upcoming elections.

(a) Police Deployment and Conduct at Polling Stations

The main provision on election security in the Law is Art. 76, which solely addresses security during the period of voting at polling stations.[8]

This article is very similar to the corresponding article in the Draft Law reviewed by ODIHR last year. At that time, ODIHR commented *inter alia* that the provision did not clearly address the precise location of the police during voting, nor whether the police were permitted to enter the polling station without request of the election board (EB). Indeed, it was noted that an ambiguity was created on this very important point.[9]

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[8] "(1) The Electoral Board takes care of the peace and order at the polling station.
"(2) The Electoral Board may remove any person disturbing the peace and order at the polling station.
"(3) The facility in which the polling station is located shall be secured by the police during the conduct of voting.
"(4) The Electoral Board may ask assistance from the police for establishing order at the polling station.
"(5) No one is allowed to come into the polling station armed, except for the police in cases provided in paragraphs (3) and (4) of this Article."

[9] The ODIHR November 2001 commentary stated as follows:

> Art. 68(3) of the Draft Law adds, "The polling station is secured by the police during the conduct of voting." It is believed that this provision is intended to require a regular police presence only

After the Draft Law was returned to the Ministry of Justice for revision following initial adoption by Parliament, a modification was made to the key language in Art. 76(3) concerning the location of police deployment at polling stations, which resulted in the current formula, "The facility in which the polling station is located shall be secured by the police during the conduct of voting."

Notwithstanding all the dialogue on this issue between the International Community – particularly the OSCE Spillover Monitor Mission to Skopje and ODIHR – and local authorities, the provisions of the new Law still do not unambiguously provide that the police should remain outside polling stations and enter only upon request of the EB. This could cause problems on election day in terms of voter perceptions, effective policing and understanding of the respective roles of the EB and police providing security.

Recommendations:

- *It would be highly desirable for the State Election Commission to reach a specific agreement with the Ministry of Internal Affairs with respect to the deployment of police at polling stations. Such an agreement should include detailed understandings on whether and under what circumstances the police may enter a polling station, and in what zone around the polling station the police would normally operate.*

- *In addition, the SEC should issue instructions clearly identifying what persons are permitted to remain in polling stations during voting and the counting of ballots, and that the EBs should not permit unauthorised persons to enter and/or remain.*

(b) Security for Other Election Operations

The new Election Law makes only a few other references to police activities. One of these, Article 74, addresses security for the polling station upon closing (normally at 1900 hrs) and for members of the EB until they deliver the minutes and other election material to the MEC (normally by 2400 hrs).[10] Another, Article 91, addresses

outside the polling station during voting hours, but a new exception has also been added (Art. 68, par. 5) to the prohibition on armed persons within polling stations.
The presence of police outside polling stations might be valuable in deterring violence and intimidation against voters in the vicinity. Inside the polling station, similar practices can be deterred or responded to by calling the police in, which is provided for under Art. 68(4). …
With respect to unauthorized persons, there is still no overall prohibition on the presence in polling stations of persons who are not specifically authorized to be in attendance. The closest language in the Draft Law (Art. 68, par.2) establishes that, "The electoral board may remove any person disturbing the peace and order of the polling station." New Art. 93 would, however, make the presence of "persons not related to the conduct of the elections" a basis for annulling the results at polling stations.

[10] Art. 74 provides:
"(1) After closing the polling station, the police shall secure the facility in which the polling station is located, and the Electoral Board shall remove all unauthorized persons from the facility.

security during the transfer of election materials from the EBs to the MECs, and from the MECs to the RECs.[11] (The former provision is somewhat redundant with that previously described, in Art. 74 [2].)

These provisions are plainly incomplete and should not be taken to describe all the electoral activities for which proper police security may be required, which include among other things:

- Receipt of election materials at the polling station the day before the elections, and storage (including overnight) prior to the commencement of voting;
- Transfer of election material from the RECs to the SEC; and
- Security for election commissions (MECs, RECs and SEC) during their operations, at least whenever they are in possession of sensitive election materials (including unused or voted ballots, filled-in minutes, and any verification seals or the like), at all times on election day, and until the results of the elections are announced.

Recommendation:

- *The SEC should determine which aspects of election operations are not explicitly addressed in the Election Law, and if necessary reach an agreement with the Ministry of Internal Affairs on security for these operations.*

(c) Investigation and Enforcement of Violations

Chapter XII of the Law creates penalties for violations of election laws. Only one article specifically establishes criminal penalties.[12] Another article, however, protects voters from being called to account over their voting.[13] Numerous other articles describe activities – which also could require police investigation – which are subject to civil penalties (i.e., fines). Finally, the criminal laws of the country establish numerous election-related offenses.

"(2) The police shall also secure the Electoral Board until the handover of the minutes and the election material to the [Municipal?] Election Commission, if such a request has been made by the Electoral Board."

[11] The relevant paragraphs are as follows:
"(4) The election material shall be submitted to the Municipal Election Commission by the president of the Electoral Board accompanied by interested Electoral Board members or representatives of the submitters of lists and representatives of the police, if necessary.
"(5) The election material shall be submitted to the Regional Election Commission by the president of the Municipal Election Commission accompanied by the interested Municipal Election Commission members or representatives of the interested submitters of lists and representatives of the police, 3 hours after the receipt of the election material from the Election Board."

[12] Art. 111: "A person preventing the elections and voting, violating and misusing the right to vote, violating the voter's freedom of choice, bribing at the elections and voting, destroying electoral documents and committing election fraud, shall be punished pursuant to the provisions of the Criminal Code."

[13] Art. 3(2): "Nobody is allowed to call the voter to account for his/her voting, or ask him/her to say whom he/she has voted for or why he/she has not voted."

Recommendations:

- *The SEC and the Ministry of Internal Affairs should have consultations on how the police should approach investigating and responding to potential violations of voter rights and other criminal and civil violations of the election laws.*

- *The Ministry of Internal Affairs should arrange training for police involved in election-related duties, and if possible develop procedures on how to respond to election violations including upon request by election officials.*

- *The Ministry of Internal Affairs, in co-operation with the SEC, should prepare and implement a plan for policing the elections, including a specification of which units would be deployed, their locations, and duties.*

- *During and after the elections, the SEC should refer all evidence of violations of the criminal laws in connection with the elections to the relevant authorities for investigation and, if necessary, prosecution.*

2. Annulment of Results, and Repeat Elections

Under the previous election system, some of the most severe irregularities reflected in previous ODIHR observations occurred in connection with second round elections in the former single-mandate districts (SMDs). Serious irregularities also occurred in areas where results at certain polling stations were annulled, and repeat elections were required. (Often, several repeat elections had to be conducted.)

The international community has indicated on various opportunities its concern about potentially widespread repeat elections being required under the applicable provisions of the new Law.[14] Concern over this provision is justified particularly in view of the

[14] Art. 100 provides:

"(1) The State Election Commission shall, with a decision, annul the voting at the polling station in the following cases:
if the secrecy of voting has been violated;
if there is a voting disruption of longer than 3 hours;
if the police do not respond to the intervention request by the Electoral Board, pursuant to Articles 74, 76 and 77 of this Law [related to post-voting security for the EB, security of the polling station during voting, and suspension of termination of voting at a polling station], while there was a need for that and it influenced the conduct of the voting at the polling station.
"(2) The State Election Commission shall, with a decision, annul the voting at the polling station also in the following cases:
if the number of ballots in the ballot box is larger then the number of voters who voted, and that number affects the results of the voting on election district level;
if some person or persons vote for other person(s), and that number affects the results of the voting on election district level.
"(3) A complaint against the decision of paragraphs (1) and (2) of this Article may be lodged with the Supreme Court of the Republic of Macedonia through the State Election Commission within 24 hours.

possibility that annulment of the results at a small number of polling stations, or even a single, polling station could potentially affect the allocation of mandates to the larger number of candidates elected through PR. This in turn reflects the fact that the election districts for this purpose are much smaller than the previous single constituency and the results more easily affected by the shift of a small number of votes. Delay of final results could in turn lead to tension and instability, as well as difficulty in assembling a post-electoral coalition and forming a new government.

Specifically, several sub-provisions of Article 100 are problematic. For example:

Paragraph (1) requires the results of voting at a polling station to be annulled by decision of the SEC in the event *inter alia* that "the secrecy of voting has been violated". ODIHR has previously underlined the violations of ballot and other aspects of vote secrecy that have been observed in previous elections. Nevertheless, the absence of any qualifier with respect to the seriousness of the violation in question makes it difficult to limit or predict the application of this provision.

In this connection, it should also be noted that group or proxy voting inherently violates the secrecy of the vote. In view of the extent of these practices in previous elections, it would be quite likely that they could lead to numerous annulments under this paragraph.

However, the latter issue is separately taken up in paragraph (2) of the article, where it is specified that annulment in such cases is required only if the "number [of these votes] affects the results of the voting on the election district level". Applying the usual principles of statutory interpretation,[15] the specific mention of a rule for this case limits the applicability of the general provision. Therefore, paragraph (1) should be interpreted not to require annulment based on group/proxy voting as violations of secrecy, but only if the additional requirement of paragraph (2) is met.

Paragraph (2) describes two other situations in which the SEC would be required to order annulment, but only if "the number [of votes] affects the results of the voting on the election district level". In addition to the case of proxy/group voting, this would apply if the number of ballots in the ballot box is larger than the number of voters recorded as having cast ballots.

The question with respect to the items in paragraph (2) concerns the meaning of the quoted phrase. Does it mean that all the votes in question should be counted for one list or another in determining whether the results could be different? Or counted in a way which reflects the results otherwise voted at that polling station or in the district at large – i.e., the percentage of votes recorded for the various lists there?

"(4) The Supreme Court of the Republic of Macedonia shall be obliged to act upon the complaint within 48 hours following its receipt.
"(5) The voting at the polling station, which has been annulled, shall be repeated within 14 days of the day of voting."

[15] *Expressio unius est exclusion alterius.* («The expression of one thing is the exclusion of the other. »)

Finally, it should be noted that the action of the SEC under this article would be subject to judicial appeal. While the courts could review the situation *de novo*, it could well be the case that they would show deference to the decision of the SEC unless it were deemed arbitrary or without proper foundation.

Recommendations:

- *In approaching complaints seeking annulment of results and repeat elections at polling stations, the SEC should adopt the following approaches – either as a general rule or in connection with the resolution of particular cases:*

  - ✓ *Violations of voting secrecy under Art. 100 (1) should not be considered grounds for annulment if they are* de minimis, *unintentional, caused by the voter's own negligence (such as "open voting" outside the voting screen) or voluntary surrender of his/her right to secrecy (including through family, group or proxy voting).*

  - ✓ *Evidence of introduction of excess ballots, or ballots voted by proxy or in group, into the ballot box should only constitute grounds for annulment under Art. 100 (2) only if the number of such ballots could – in combination with other cases for which similar complaints have been received – affect the outcome of the results in the election district. In making the latter determination, the SEC should extrapolate the results at each polling station based on the other voted ballots which have been counted there.*

3. Control on Conduct of Election Officials

Many of the observed irregularities and even illegalities in previous elections have actually involved election officials themselves. Sometimes the activities in question have been blatant, and reported by witnesses including international observers. Despite this, there are no known cases in which election officials (including all persons who are authorised or instructed to work on the elections) have been made subject to criminal or civil penalties.

Recommendations:

- *The SEC should develop a code of conduct, for signature by all election officials, which specifies that they understand they are liable to the civil and criminal penalties specified in the Election Law and other laws in the event they engage in prohibited actions while they are carrying out election work.*[16]

- *The SEC should apply the civil penalties specified in Chapter XII of the Election Law (Penalty Provisions) to election officials who themselves violate, or participate in a violation by others, of the relevant provisions.*

[16] *See* International Foundation for Election Systems (IFES), "Pre-Election Assessment in Macedonia: Phase II, Election Operations" (Skopje, Mar. 2002), p. 4.

4. Early Formation of Election Commissions

Due to the delayed enactment of the new Election Law and late appointment of the SEC, there are potential conflicts between various provisions in the law relating to the formation of the regional election commissions (REC) and municipal election commissions (MEC). Provisions in the main body of the Law require the SEC to appoint the RECs within 20 days of its own formation,[17] and the RECs to appoint the members of the MECs within 30 days of their formation.[18] One of the articles in the last chapter of the Law, however, requires the RECs to be established not later than 50 days before the elections,[19] and the MECs not later than 40 days before them.[20]

Although the latter provisions are contained in a chapter entitled "Final and Transitional Provisions", the article in question does not contain any qualifier indicating how those requirements relate to the separate requirements in other places in the law. Therefore there is no legal reason to conclude that they supersede the earlier ones, although one might suspect that they were intended to do so. It would appear that both requirements should be satisfied if possible, considering that there is enough time to do so.

The SEC has already indicated its intention to move ahead quickly on formation of the RECs and MECs. Under a work plan adopted by the SEC on 16 July,[21] the SEC has undertaken to see that RECs are appointed by 26 July and MECs by 5 August. Not only would this satisfy the most restrictive requirements contained in the law, but it would also have beneficial effects on election administration in terms of giving the RECs and MECs the most time possible for preparing for the elections.

Recommendation:

- *The SEC should carry on its plan for an early establishment of the RECs and MECs, and in any event no later than the earliest dates required under the Law.*

5. Ballot Validity Rules

ODIHR has previously commented that the provisions of the Law[22] concerning the validity of voted ballots are ambiguous and inconsistent.[23]

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[17] Art. 16(5)
[18] Art. 20(6)
[19] Art. 126(3)
[20] Art. 126(4)
[21] "SEC Sets Terms for Realization of Parliamentary Elections", Macedonian Information Agency, 16 Sept. 2002
[22] Art. 88, which reads as follows:

> "(1) The ballot is valid if it has been circled in the way prescribed in Article 83 of this Law.
> "(2) A valid ballot is considered to be one from which in a reliable and unambiguous way it may be established for which list of candidates the voter has cast his/her vote.
> "(3) The ballot shall be invalid should it not be completed, or should there be more than one list of candidates circled."

[23] See ODIHR, Nov. 2001 Comments, in which it was stated (p. 18):

Recommendations:

- *The SEC should issue an instruction concerning the validity of ballots, to make clear that a ballot shall be considered valid if properly marked in the way described in the Law, or if it is otherwise marked in a way such that the intention of the voter can be established in a "reliable and unambiguous way", but not if it has not been filled in or if more than one list of candidates is circled.*

- *If possible, the SEC could develop more detailed guidance on this subject for reference by Election Boards.*

II. Other Actions

1. Over-Reliance on Judicial Appointees

Administration of elections under the previous and new Election Law relies heavily on appointment of judges to election commissions. ODIHR previously noted this aspect, indicating that it was understandable that some countries tend to turn to judges for neutral election administration. The point was also made, however, that judges do not always make the best election administrators in an overall sense.[24]

The New Election Law takes the reliance on judicial appointees a step further. In addition, modifications agreed by the leading political parties after first adoption of the Draft Law would tend to compromise the judicial appointees to election commissions in terms of their appearance of neutrality.

Four members of the SEC are required to be judges of the Supreme Court, two each appointed by Parliament "with the agreement of" the leading ruling and opposition political parties.[25]

"The provisions on ballot validity (Art. 83) should be amended to allow ballots to be counted provided the *voter's preference* can be clearly determined.
"After the 1998 parliamentary elections, in which this issue arose, the Parliamentary Election Law was amended to provide for validity of an improperly marked ballot provided the intent of the voter is clear. In case of certain types of improper marking, however, a ballot could still not be considered valid. The current provisions are repeated without modification in Art. 81 of the Draft Law [footnote deleted].
"The effort to address this issue does not appear completely satisfactory, however, since the additional provision on voter intent appears to be in conflict with that concerning the prescribed form of completing a ballot. Also, while additional rules are established in Art. 81(3), there is no provision for supplementary rulemaking or instructions by election authorities."

[24] ODIHR, Nov. 2001 Comments, *op. cit.,* pp. 21-23.

[25] Art. 13 (1)-(2). The formula "with the agreement of" the political parties was changed from "upon the proposal of" the parties. This modification was suggested by the international facilitators in order to respond to the concern of Supreme Court judges that their political independence and appearance of neutrality could be lost if they became associated with the political parties in that way. In fact, however, the parties did propose these members in letters to the Speaker of Parliament.

The SEC appoints the presidents and their deputies of the six RECs from among judges of the Courts of Appeal. Two additional members and their deputies are appointed from among judges of the Primary Courts, "upon proposal" of the leading ruling and opposition parties.[26]

The presidents and their deputies on the 34 MECs are also appointed by the SEC, but among judges of the Primary Courts (located on that territory). Two other members and their deputies must also be judges of the Primary Courts, similarly selected "upon proposal" of the parties.[27]

As a result of these provisions, at least 244 judges would serve in election administration – four from the Supreme Court, 12 from the Courts of Appeal, and 228 from the Primary Courts (nearly ½ the total number of Primary Court judges)! Of these, 140 – four members of the Supreme Court and 136 judges of the Primary Courts – potentially will have their political independence and neutrality called into question by being selected for their positions on election commissions by political parties.

These provisions are plainly not sustainable. As a result, future elections in the country, no matter whether parliamentary, presidential or local, could in all probability not be administered largely by judges. While these arrangements may have permitted resolution of a political disagreement in view of the upcoming parliamentary elections, they will require new approaches for the appointment and selection of election administrators in future.

Recommendation:

- *Legislative amendments will be required prior to future elections so that the composition of election commissions shall no longer be largely comprised of judges, including judges whose political neutrality could be questioned as a result of the manner of their appointment to election commissions for the current parliamentary elections.*

2. Political Party Representatives

Certain political parties – from the ruling and opposition group – continue to have the right to select members of all election management bodies (EMB), including the SEC, RECs, MECs and Election Boards (EB). Under the new Law, these parties will normally be those on either side which "have won the largest number of votes in the last elections for members of Parliament".[28]

In the past ODIHR observations have noted that the applicable provisions have sometimes been problematic.[29] The general formula in the new Law is no longer

[26] Art. 17 (1)-(3)
[27] Art. 21 (1)-(3)
[28] *See, e.g.,* Art. 13 (1)-(2) (for the SEC; the provisions regarding other EMBs are comparable).
[29] Sometimes the election results which would qualify a party to appoint a representative were not the most recent ones, referred to national and not local elections in the case of new local elections, or

subject to the same problems, but remains vague in terms of exactly which parties have the right to select representatives when there are more than one in each group – government and opposition.

One of the "Final and Transitional Provisions", however, gives special rules for the selection of EMB members for these elections by four political parties.[30] These rules reflect the unique circumstances created by the formation and then partial collapse of a government of political unity formed in response to the security crisis that occurred during 2001.

The four parties that have the right to select representatives on EMBs for the 2002 are the two main ethnic Macedonian-based parties, VMRO-DPMNE and SDSM, and two ethnic Albanian-based parties, DPA and PDP. These are also the four parties that negotiated the Ohrid Framework Agreement for resolution of the political issues raised by the conflict, and participated in the development of implementing actions including the new election laws and other legislation.

It could happen, however, that one of the parties entitled to select members of EMBs would no longer attract wide-scale support during future elections. That party could, of course, enter an electoral coalition that might achieve wider support. Clearly, other parties would have an incentive to enter into such a coalition since it could enable them to gain significant representation in the membership of EMBs, including the EBs.

At the same time, other parties that have substantial support might not be able to gain representation on the EMBs. The latter parties, and indeed all other list submitters, do however have the right to have non-voting representatives present during the operations of all EMBs.[31]

Finally, under the new general provisions, parties will become entitled to propose members of the EMBs by virtue of the results of the previous national elections. This would be based on the total number of votes they receive nation-wide. As a result, parties that may have obtained a greater percentage of the vote in the election district would not necessarily obtain representation on the REC or the MECs within that district. This is similar to the situation commented upon by ODIHR with respect to previous elections, except that relying on the national results might be better justified under the new Law in light of the fact that the boundaries of the six districts could change substantially prior to future parliamentary elections.

Recommendations:

- *For the 2002 parliamentary elections, special effort should be made to ensure that political parties with substantial political support can participate as fully*

simply were not clear (*e.g.,* whether the results in question were based on the overall vote total in all elections or just the national PR contest). *See* ODIHR reports on the 1998 parliamentary elections, 1999 presidential election, and 2000 local elections.

[30] Art. 125 (2) & (4).

[31] Art. 31

as possible in the proceedings of the EMBs as representatives of list submitters, even if they are not entitled to select members of the EMBs.

- *For future parliamentary elections, the provisions on selection of EMB members by political parties should be amended by making clearer exactly which parties on the ruling and opposition sides would be entitled to select such members.*

3. Voter Lists

Deficiencies in the Voter List (VL) have been noted in previous ODIHR observation reports, but the scale of the problems could not be fully determined. It appears likely that the VL – which is perhaps generally accurate (although not without defects) with respect to citizens located within the country – contains many more names than those citizens who are residing in the country. This is due to large-scale emigration, and the absence of records concerning departed citizens.

The OFA committed the four parties to support a new national census, as well as to arrange early parliamentary elections. Both the census and the elections were delayed, with the result that the elections have to be held before the census can be conducted.

The presence on the VL of a large number of names of persons who are not currently residents of the country provides considerable opportunities for the fraudulent casting or recording of votes. The best safeguard against these practices is the integrity and vigilance of election officials, to prevent repeat voting, multiple voting, ballot box stuffing and illegal entry of ballots into the count.

Recommendations:

- *After the national census is conducted, a major effort should be undertaken to correct the Voter List, including by eliminating the names of non-resident citizens.*

- *Similarly, the authorities should provide for those persons resident in the country, but who have not been permitted to obtain citizenship, to become citizens and registered voters.*

4. Absent Voters

Like its predecessor, the new Parliamentary Election Law contains no provision under which voters who are outside the country or otherwise absent from the areas of their residence in the country may vote. ODIHR has previously noted that this situation prevents voting by otherwise qualified citizens who are temporarily away from home. An exception is provided only for voters on special lists, which are normally drawn up to facilitate voting by security forces, patients and prisoners among others.

As a result of the conflict in 2001, thousands of persons were forced to flee their homes. Most have been able to return, but some continue to live outside their home areas. These include both internally displaced persons (IDPs) and refugees.

It must also be recognised that a very large, but undetermined, number of citizens is living overseas. Many if not most of these have resided overseas for over a year, and may not have any intention of returning to live. To date the difficulty of registering and servicing potential voters overseas has been a factor impeding efforts to create an absentee voting system.

The OFA commits the signatory parties to facilitate the return of IDPs and refugees to their homes. The international community has also engaged in a number of programs to achieve this objective. It was hoped and expected that most if not all of these persons would have been able to return home prior to the parliamentary elections.

Since return of the IDPs and refugees has not been complete, the international community (IC) urged the government and political parties to provide a means for these people to vote in the upcoming elections. Subsequently, the Minister of Justice informed representatives of the IC that these voters would be accommodated through additional special lists, to be authorised under the new Law on Voters' Lists.

In the event, the Voter List Law provides for voting on special lists – aside from the ordinary categories of voters – only for the IDPs, not refugees.[32] Notwithstanding that this provision does not address the situation of the refugees in neighbouring countries, it was agreed to by all political parties who participated in the inter-party talks. Thus the only way for the votes of these persons to be cast legally would be for them to return to their home areas on election day.

Recommendation:

- *In future, after completion of the planned national census and correction of the voter list to remove the names of non-resident citizens, a means should be found to permit voters who are necessarily absent from their home areas on election day to cast their ballots as absentees.*

5. Uniform Election Code

In previous elections, ODIHR observed several deficiencies in the legislative basis, including of the main election law, the Parliamentary Election Law. The observed deficiencies included:

- Vague, ambiguous or inconsistent provisions both within the Parliamentary Election Law and among the various election laws;
- Questions concerning the power and scope of the SEC's mandate, including the need for clear authority to issue rules and instructions, and to play a role in all elections; and the

[32] Law on the Voters' List, Art. 30(4)

- Ability of the SEC to undertake pro-active programs to improve the quality of the elections process, such as through civic education, voter information and training of election workers.

The new Parliamentary Election Law is a distinct improvement over the previous one. Numerous vague or ambiguous provisions have been eliminated, either through redrafting or as a result being dropped as part of the change of election system.

At the same time, the new Law does not begin to create the basis of a uniform election code. The SEC is not granted much broader authority in the past, nor has the scope of its power over all election-related matters been significantly expanded.

Even the new Law – and not only its Final and Transitional Provisions[33] -- would have to be amended for upcoming parliamentary elections. This is because numerous permanent and temporary changes were mingled together in the Law, rather than being separated into different legislative vehicles. So, for example, the next parliamentary elections (as well as other elections, including local ones) will in all probability occur within different "municipalities" than those listed in the main body of the text. In addition, the Law does not contain a definition of the term "municipality", so that it should be clearly determined whether established legal municipalities, the electoral municipalities created under the Law for administrative purpose, or other meanings of the word are being used at several points.[34]

Recommendation:

- *After the upcoming parliamentary elections, but before future elections, efforts should be made to improve and reconcile the election laws so that they can operate as a uniform code.*

6. Permanent Election Administration

Previous ODIHR observations have also recommended that a number of permanent election administration functions be strengthened. The improvements called for include:

- Voter information and education (the latter especially targeted against proxy/group voting);
- Improving the quality of election materials (including ballot-papers and their packaging);
- Developing regulations to implement the law and improve election administration (such as by defining evidentiary standards for election appeals);
- Controlling election officials and increasing enforcement against violations of election laws and regulations;
- Training election workers; and

[33] Chap. 13
[34] *Id.,* Art. 24

- Developing and making recommendations on further areas of regulation (including on control of media fairness and reporting of financial contributions and expenditures of election campaigns).

In some respects, the SEC and other election commissions could be strengthened under the new Law. The SEC is authorised to form an independent secretariat,[35] for example, but funding for the operations of a secretariat after the election period would have to be obtained later. The RECs are also authorised to form a secretariat, but only of regular civil servants.[36] A larger number of election commission members will be appointed to definite terms, and not only for the election period.

At the same time, as noted previously, the SEC has not been granted substantial additional rulemaking authority under the new Law. An administratively strengthened SEC could undoubtedly do more to improve the quality of the current and future elections processes. But its activities in this regard could be strengthened, rendered more effective, and protected from judicial or other challenges if its regulatory authority were clearly established in law.

Recommendations:

- *The Election Law should be enhanced by a more general grant of rulemaking authority to the SEC to enable it to address a broad range of issues in election administration.*

- *After the elections, additional funding should be provided to the SEC to enable it to establish a secretariat and develop programs to improve future election administration.*

[35] Parliamentary Election Law, Art. 14(4)
[36] *Id.,* Art. 18(3)

ABOUT THE OSCE ODIHR

The Office for Democratic Institutions and Human Rights (ODIHR) is the OSCE's main institution to assist participating States "to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and … to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society" (1992 Helsinki Document).

The ODIHR, based in Warsaw, Poland, was created in 1990 as the Office for Free Elections under the Charter of Paris. In 1992, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today it employs over 80 staff.

The ODIHR is the lead agency in Europe in the field of **election** observation. It co-ordinates and organizes the deployment of thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, the ODIHR helps participating States to improve their electoral framework.

The Office's **democratization** activities include the following six thematic areas: rule of law, civil society, freedom of movement, gender equality, trafficking in human beings and freedom of religion. The ODIHR implements more than 100 targeted assistance programs, seeking both to facilitate and enhance State compliance with OSCE commitments and to develop democratic structures.

The ODIHR **monitors** participating States' compliance with OSCE human dimension commitments. It also organizes several meetings every year to review the implementation of OSCE human dimension commitments by participating States.

The ODIHR provides advice to participating States on their policies on **Roma and Sinti.** It promotes capacity-building and networking among Roma and Sinti communities, and encourages the participation of Roma and Sinti representatives in policy-making bodies. The Office also acts as a clearing-house for the exchange of information on Roma and Sinti issues among national and international actors.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR website, which also contains a comprehensive library of reports and other documents, including all previous election reports and election law analyses published by the ODIHR.