



## **Coalition All for Fair Trials**

**Project:**

**Monitoring the Institutional Response  
against Election Irregularities**

**Progress Report**

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# Monitoring the Institutional Response against Election Irregularities

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# Progress Report under the Project - Monitoring the Institutional Response against Election Irregularities at the 2008 Early Parliamentary Elections

## Introduction

The Progress Report on the Institutional Response to the Election Irregularities is a deliverable under the Project “Monitoring the Institutional Response against Election Irregularities”, which the “All for Fair Trails” Coalition has been implementing since the second half of 2008, and which will continue in the first half of 2009. The Project is funded by the OSCE Spillover and Monitoring Mission in Skopje (in 2008) and by the Foundation Open Society Institute – Macedonia (in 2009). The overall project objective is to contribute to a democratic election process and to the rule of law in the Republic of Macedonia.

The general project goal stems from the situation occurring after the announcement of early parliamentary elections and the numerous irregularities which speaking in objective terms took place during the election process. The general assessment of domestic and international accredited observers is that the 2008 early parliamentary elections failed to meet the key OSCE and Council of Europe commitments and that the high number of irregularities points to the fact that certain segments of the election process have substantially deteriorated as compared with earlier election cycles. In the course of the election campaign, domestic and international election observers recurrently registered cases of violence and intimidation of voters and political opponents, and of the election administration<sup>1</sup>, especially in parts of the country with predominantly Albanian population. On Election Day, i.e. 1 June and during the consequent re-runs, the observers detected organized efforts to violently disrupt the process early on Election Day, which made it impossible for voters in many places to freely express their will.<sup>2</sup> At several polling

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<sup>1</sup> MOST Citizens' Association, Final Report on the 2008 Early Parliamentary Elections.

<sup>2</sup>Statement of Preliminary Findings and Conclusions, OSCE/ODIHR, 2 June 2008. In one of the incidents which took place in Aracinovo one person was fatally wounded, while another person was grievously injured by fire arms in an incident taking place in the Municipality of Cair. In Gostivar, two polling stations were closed after the election material was stolen by armed persons and all members of the Election Boards were thrown out of the polling stations. The voting was closed in the morning of Election Day in the Municipality of Cucer Sandevo, where approximately 30 unknown persons went into the polling station, intimidated the

stations the voting did not start at all because the election material had been stolen<sup>3</sup>, while at large number of polling stations there was ballot box stuffing, problems with the voting protocols as well as with identical signatures within the Voter Lists.<sup>4</sup>

In light of this election process context, the Project -“Monitoring the institutional response against election irregularities” attempts to present an objective and comprehensive picture of the institutional response to election irregularities, giving thus a contribution to the rebuilding of public trust in the election process and in the democratic capacities of the country. This is especially important considering the international obligations that the Republic of Macedonia has assumed (especially upon membership of the UN, OSCE, the Council of Europe and other international organizations) to conduct fair and democratic election process. Fair and democratic elections are a criterion for the successful and accelerated integration of the country into the European Union. The election process has been elaborated in detail in the last European Commission Progress Report on the Republic of Macedonia dated 5<sup>th</sup> November 2008.

The Project assembles the non-governmental sector, professional circles and the international community and as such it should serve as a roadmap guiding state institutions in the future better management of election irregularities.

This Progress Report provides a review of the state of play of activities undertaken by state institutions, according to information that the Coalition has succeeded in gathering in the last several months of the Project implementation activities. However, it should always be born in mind that a number of proceedings and institutional reactions against election irregularities, especially at the Public Prosecutor's Office and at the courts are still pending. In respect of information gathering, it should also be taken into consideration that in addition to the Coalition efforts, various institutions have informed about proceedings pursued with them according to various criteria and methodology. Furthermore, a number of issues covered by this Progress Report are only referred to as problems, and will

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Election Board members and stole the election material. Domestic and foreign observers noted numerous irregularities in the voting procedure.

<sup>3</sup> OSCE/ODIHR, Final Report - 2008 Early Parliamentary Elections, p.18. In the village of Gorna Banjica and in the Municipality of Saraj at two polling stations.

<sup>4</sup> OSCE/ODIHR, Final Report – 2008 Early Parliamentary Elections, p. 18

be elaborated in greater detail in the Final Report that should be completed in mid 2009.

The "All for Fair Trials" Coalition implemented the monitoring process following its standard methodology. Directly contacting the state institutions, as well as through its trial monitors network, the Coalition gathers empiric material, which is then analyzed by two consultants: Professor Tanja Karakamiseva, Ph.D.,<sup>5</sup> (author of the first part) and Aleksandar Cicakovski<sup>6</sup> (author of the second part). The Report has three parts: the first part regards the problems of the election process itself and issues directly connected with it, while the second part relates to the criminal law protection of the election process. The third part contains a brief summary of the preliminary conclusions based on the analyzed information. As different from its other monitoring projects, this time the Coalition expanded its focus on other state institutions, in addition to the judiciary. Therefore, the Report is a specific contribution in this sphere in the Republic of Macedonia and should be useful to several institutions: the judiciary, the executive power bodies and independent bodies involved in the election process.

Finally, in this introductory part it would be necessary to give a brief overview of the international and European standards on the implementation of fair and democratic elections, as a reference point, i.e. as a prism under which to consider and analyze the election process in the Republic of Macedonia.

Namely, election law makes a distinction between European and international standards. The European standards are defined in European documents, while the international ones are most often contained in United Nations treaties and documents.

The standards are defined in two types of legal instruments: legally binding and those that are not legally binding instruments. The first group of legal instruments built on European standards and which do not have legally binding effects on states belong to the so called soft law.<sup>7</sup>

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<sup>5</sup> Associate Professor in the area of constitutional law and political system at the Justinian I Law Faculty and deputy member of the Venice Commission at the Council of Europe from the Republic of Macedonia.

<sup>6</sup> Legal analyst at the Most Citizens' Association and M.Sc. degree student in the area of criminal law and criminology at the Justinian I Law Faculty.

<sup>7</sup> Interesting considerations on "soft" law as a product of the globalization related changes that have shifted the role of the state onto an order promoting and protecting regulatory standards established following universal and not national standards. See in the work of: **D. Shelton, Commitment and Compliance:**

Despite the fact that these legal standards are not binding, however the authority of the organizations setting forth these standards produce their moral and expert value on which Europe particularly insists, by which they become politically binding (such as for example the OSCE standards).<sup>8</sup>

European legal instruments belonging to the “hard core” group contain binding election standards.<sup>9</sup>

International election standards having legally binding effect are contained in:

- Article 21 of the Universal Declaration of Human Rights;
- Article 25(b) of the International Covenant on Civil and Political Rights;
- Article 1 of the Convention on the Political Rights of Women;
- Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination; and
- Article 7 of the Convention on the Elimination of all Forms of Discrimination against Women, and others.

The increase in the number of international and European standards is an evident indicator of the progress achieved in the cooperation, democratization and the rule of law in the international community. These are instruments that in the process of harmonization, unification and application of the best values, principles, practices and

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#### **What Role for International Soft Law?**

<http://www.ceip.org/programs/global/semshelton.htm>.

<sup>8</sup> **Election standards of non- obligatory character are contained in:**

- a) 2002 election recommendations of the Venice Commission adopted in the form of **Code of Good Practices on Election Matters** adopted by the Parliamentary Assembly of the Council of Europe on 28 January 2003, endorsed by the Council of Europe Committee of Ministers;
- b) 2003 OSCE Recommendations on democratic elections to the participating states; and
- c) **Declaration on Criteria for Free and Fair Elections** adopted by the Inter - Parliamentary Council at its 154 th. session, Paris, 1994.

<sup>9</sup> These are: **First Protocol (Article 3) to the European Convention of Human Rights**, Article 6 of the **Convention on the Participation of Foreigners in Public Life at Local Level**, the jurisprudence of the **European Human Rights Court** regarding the application of Article 3 of the First Protocol, to the European Human Rights Convention, **the basic law- Article 8 b (1) of the EU Treaty, The Council Directives No. 93/109 and 94/80 and similar.**

techniques of democratic elections legitimize the political authorities of countries.

International and European standards are to be applied when there is a lack of international or European legally binding documents elaborating election related issues in greater detail. In search of a system integrating supranational standards in the area of elections, international organizations, the Council of Europe and the European Commission concentrate on promoting the so called macro-conditions as values and principles that would safeguard the democratic contents of free and fair elections. The organization of elections and election systems are traditionally part of the national jurisdiction of states.

## **Part I: Analysis of the 2008 Early Parliamentary Elections – Shortcomings and Established Problems Following the Election Process Stages in the Republic of Macedonia**

### **General Considerations on the Election Legal Framework Structure in the Republic of Macedonia**

Each country independently sets the rules which make the essence of the legal framework in the matters of elections, and the state has the right to autonomously decide what electoral system it will establish and what rules will be applied in conducting the election process. In making the choice of rules indeed the state must take due care of the obligations it has assumed as a signatory to international and European documents, which directly or indirectly regulate the matter of elections.

Upon becoming a member, the Council of Europe member states, among which the Republic of Macedonia as well, undertake to conduct elections (presidential, parliamentary and local) fully respecting and fulfilling the European standards.

This obligation is part of the European Convention of Human Rights.

Thus, the application of standards contained in the Venice Commission Code of Good Practices in Electoral Matters in the Republic of Macedonia is considered a necessary step in respecting and honoring assumed obligations. If a country decides not to apply the recommendations of the Venice Commission and consequently a citizen files an application at the European Human Rights Court claiming violation of a right under the European Convention on Human Rights, the state would have to offer the Court good explanation about the reasons why it has not followed the recommendations and Venice Commission Code, despite the fact that it is obliged to.

The legal framework regulating the elections in the Republic of Macedonia consists of the Constitution of the Republic of Macedonia, the

Election Code of the Republic of Macedonia, which entered into force on 31 March 2006, as well as the latest amendments and supplements to the Election Code.

The legal system of the Republic of Macedonia envisages several channels of protection of the voting rights and of ensuring fair and democratic election process. The first channel is the procedure for protection of voting rights pursued before election bodies in charge of providing legal conduct of the election process. Court protection of voting rights is envisaged against decisions of election management bodies, before the Supreme Court (before the Administrative Court after the October 2008 amendments to the Election Code). The second channel for institutional response to election irregularities is the misdemeanor procedure before misdemeanor courts. The criminal law response to the election irregularities is very important in this context, which is another form of court protection of voting rights (the criminal law response is elaborated in the Part II).

The scale and efficiency of the institutional response to election irregularities is determined by the legal instruments, but even more by the institutional capacities and by the will for their consistent application by competent bodies. The issue is complicated by the fact that the political structure that has acquired legitimacy at the elections is to detect and prosecute the perpetrators of election irregularities<sup>10</sup>. However, in democratic societies in which the rule of law is respected there is no other alternative considering that citizens expect previously accepted rules of the game to be respected and perpetrators to be punished, and if not citizens lose their trust in the election process and the regularity of elections is under suspicion, which ultimately calls into question the legitimacy of elected representatives.

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<sup>10</sup> Kambovski, Penal Law, special part, III edition, Skopje 1997, p. 139.

## **1. Registration of Voters and Updating the Voters' List – Shortcomings and Established Problems**

The Final Report of the MOST Citizens' Association establishes problems with the Voters' List<sup>11</sup>. The same findings are contained in the OSCE/ODIHR Election Observation Mission Final Report, which stresses that during Election Day, potential voters were not allowed to vote in 8 % of polling stations visited by the OSCE/ODIHR EOM since they could not be found at the Voters' List.<sup>12</sup>

## **2. Nomination Procedure**

### **Shortcomings and Problems in the Nomination of Candidates**

At the 2008 early elections several problems were established in the procedure for nominating candidates and the procedure of establishing lists of candidates:

- a) Six candidate lists of the United Macedonian Forces- All-Macedonian Worker's Party were not accompanied with statements accepting the candidacy certified by Notary Public;
- b) The confirmed list of candidates for election of members of the Assembly for the Electoral District No. 6 submitted by VMRO-NP were not provided with an opened giro account designated with "for election campaign" within 48 hours after the list had been confirmed;
- c) Names and surnames of the candidates on the lists of the Social Democratic Party of Macedonia similar to the names and surnames of the first ranked candidates at the lists of the Sun Coalition;
- d) At the candidate list for the Electoral District No. 2 of the VMRO-DPMNE led Collation there was a candidate who had been sentenced to at least six month imprisonment under a final court verdict.

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<sup>11</sup> See: 2008 Early Parliamentary Elections, **MOST Citizens' Association Final Report, Skopje 2008, and (p.17)**.

<sup>12</sup> See: 1 June 2008 Early Parliamentary Elections, OSCE/ODIHR Election Observation Mission, Final Report, Warsaw, 20 August 2008, (p.10).

## **Institutional Response to the Established Problems**

In respect of the first situation, the State Election Commission adopted a decision rejecting all six candidate lists of the Macedonian United Forces – All-Macedonian Worker's Party on grounds of incomplete documentation.

In the second situation, the State Election Commission adopted a decision annulling the already confirmed list since the VMRO-NP did not abide by the legally prescribed 48 hour period for opening a giro account designed "for election campaign" after the confirmation of the list, as required by Article 71, paragraphs 1 and 2 of the Election Code.

As regards the third situation, the State Election Commission concluded that the candidate lists of the Social-Democratic Party of Macedonia fulfilled the legal conditions and that consequently there were no legal conditions for annulment of the lists.

In respect of the fourth situation, the State Election Commission adopted a decision confirming the candidate list explaining that the Constitutional Court of the Republic of Macedonia had assumed the position that this could not be a condition for electoral function.

### **3. Election Campaign and Media Presentation**

#### **Shortcomings and Problems in Organizing and Conducting Election Campaign, and in the Procedure of the Media Presentation of Election Candidates**

1. There was a violation of Article 186 of the Election Code- destruction of election posters (flags of political parties) during pre-election rallies of political parties, as well as several disturbances of the public peace and order.
2. The first more serious problem occurring at the last election campaign, which is a recurrent problem emerging at all previous parliamentary and other elections, was the start of the election campaign before the prescribed date through early presentation to citizens of the candidates at media outlets. This is a violation of Article 74 of the Election Code,

according to which the election campaign starts 20 days before the election date and lasts up to 24 hours before Election Day.

3. The legal provisions for equal approach to the presentation of electoral programs of candidates were disregarded. Furthermore, it must be emphasized that before it adopted a decision on self-dissolution, the Assembly of the Republic of Macedonia did not adopt a decision on the guidelines on equal access to media presentation upon the proposal of the Broadcasting Council by which it violated Article 75, paragraph 3 of the Election Code of the Republic of Macedonia. The Broadcasting Council adopted guidelines on media presentation.

4. The obligation on the duration of election presentation in terms of balanced and unbiased coverage of elections in the overall programs of the media outlets, as well as the proportionality principle in respect of the number of confirmed candidate lists were also disregarded.

5. The election silence was violated especially on 31 May and 1 June, and in the reruns on 14 and 15 June at some polling stations; the silence was violated by several media outlets.<sup>13</sup>

6. The Municipalities and the City of Skopje did not meet the legal obligation of designating the place where it was permitted to place posters without a fee by each submitter of candidate lists.

7. In several cases there was an evident infringement of Article 84 of the Election Code regarding spending of funds for election campaign beyond the permitted limit set for each campaign organizer. The political parties' financial reports were incomplete, lacking precision of the expenditure items, stating unrealistic expenditure amounts compared with the really spent funds for the election campaign. The Project Final Report will contain

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<sup>13</sup> For more details see the Information of the Broadcasting Council of the Republic of Macedonia presented at a press conference of 26 June 2008. On 31 May the election silence was violated by MTV 1, MTV 2- Albanian language program, Macedonian Radio - I Channel, TV Sitel, TV Sutel from Skopje, TV Zdravkin from Veles, TV KISS from Tetovo, TV Gurra from Kicevo, and TV Nova from Gevgelija. On 1 June- Election Day the silence was violated by TV Sitel, TV A1, TV Alsat M, Radio Channel 77, TV Skynet, TV BTR, and TV MTM from Skopje, TV Nova from Kumanovo and TV Kiss from Tetovo, while on 14 June the election silence was violated by MTV -1, TV Alsat M, Macedonian radio- Channel I, and TV Kiss from Tetovo, and on 15 June the day of rerun elections at several polling stations the silence was not observed by MTV 1 and TV Channel 5. The Council informed the Electronic Communication Agency about these cases, which on its part has instituted several misdemeanor proceedings in accordance with the Election Code.

a detailed elaboration of the problems related to financial reports, political party financing and control by relevant state institutions.

## **Institutional Response to the Established Problems**

1. The Ministry of the Interior filed only one request for institution of misdemeanor proceedings at the Tetovo First Instance Court for violation of Article 186 of the Election Code against destruction of election posters (flags of political parties) at a place designated for poster placement before a regularly scheduled rally. There were another eight misdemeanor charges filed with the first instance courts of: Tetovo, Gostivar, Kumanovo, Struga and Stip against violation of the public peace and order under the Law on Offenses against the Public Peace and Order, the Law on Arms, and under the Law on Security of Road Traffic. Charges were brought against 18 persons who perpetrated or were accomplices in the perpetration of these misdemeanors. These misdemeanors were committed during the election campaign and on Election Day mainly on the territory of Tetovo and Gostivar (six cases), and only one case in Stip, Struga and Kumanovo each.

2. In the context of early start of the election campaign through early media presentation of party candidate lists, there has been no institutional response noted (i.e. reaction by relevant institutions in terms of punishing entities (media outlets) that had started the campaign early). The State Election Commission stated that it was not matter of early start of campaign, qualifying these instances as political activities of candidates.

3. The Broadcasting Council of the Republic of Macedonia pronounced 45 warnings in accordance with the Law on Broadcasting and 132 non-binding recommendations in accordance with the Guidelines on Media Presentation and the most often violations were the following: a) expenditures for political advertising more than the permitted limit; b) abuse of programs which are not related to the elections for purposes of election campaigning; c) allocating more than the permitted time for political advertising; d) inappropriate publication of data on public opinion polls and similar.

The Electronic Communication Agency has filed 28 charges against violation of the election silence in pursuance with the Election Code, while in 12 of these cases first instance court judgments have been adopted.

In 8 cases there have been court rulings pronouncing fines for legal entities in the amount of 200.000 MKD, in 2 cases there was a court ordered fine of 210.00 MKD for one legal entity, and in one case a fine of 100.00 MKD was pronounced against one legal entity, and in one case the court ordered 300.000 fine against one legal entity. There have been also 8 court judgments fining the responsible persons at the media outlets with an amount of 10.000 to 30.000 MKD<sup>14</sup>.

There have been 4 appeals filed with the Court of Appeals in Skopje against first instance judgments, one of which has been rejected on grounds of its being submitted outside the legally prescribed period.

#### **4. Election Administration and Election Day**

##### **Shortcomings and Problems of the Election Administration - State Election Commission (SEC), Municipal Election Commissions (MEC), Election Boards (EB) and Shortcomings and Problems on Election Day**

1. According to the final report of the MOST Citizens' Association, its observers reported that in 45 cases the Election Boards did not possess all the required election materials and there were 303 cases reported of belated opening of the polling stations, which are deficiencies in the work of Election Boards.

2. Other shortcomings in the work of Election Boards are the noted cases of ballot box stuffing, setting fire on and taking away election material, proxy voting, family and group voting, non application of the procedure for identification of voters and similar.

3. During the voting of persons serving the army, prison inmates and of internally displaced persons, the observers of the International election monitoring mission noted 5 cases in which the Election Boards did not ensure appropriate conditions for secrecy of voting i.e., in 24% of observations the rules for the voting process were not fully respected.<sup>15</sup>

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<sup>14</sup> The information is taken over from observer questionnaires filled in by the observers of the All for Fair Trials Coalition, prepared for the requirements of this Project.

<sup>15</sup> See: 1 June 2008 Early Parliamentary Elections, OSCE/ODIHR Election Observation Mission, Final Report, Warsaw, 20 August 2008, (p.23).

4. In a large number of cases, the State Election Commission has not raised misdemeanor charges in the previously referred to cases (early start of election campaign, non designation of places by municipalities for free of charge placement of posters and other promotional materials and similar).

5. The SEC did not manage to ensure maximum protection for election contestants, when their rights had been threatened during the election campaign.

### **Institutional Response to the Established Problems**

1. The SEC dismissed 6 chairpersons of Municipal Election Commissions in Saraj, Lipkovo, Tetovo, Brvenica, Bogovinje and Gostivar due to serious election irregularities.

2. The SEC did not replace the members of Election Boards where there were irregularities in the election process established, such as ballot box stuffing.

3. The Ministry of the Interior has informed that of the 25 cases of instituted internal disciplinary proceedings, 18 have been completed, and in 13 cases 13 police officers have been subject to disciplinary sanctions-15% salary reduction for a period of 6 months, while in the other 5 cases the proceedings have been completed and the disciplinary measures are pending. In seven other cases the proceedings are underway, then 13 police officers have been suspended and the misdemeanor proceedings instituted against them are pending<sup>16</sup>.

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<sup>16</sup> See: **Information on Disciplinary Cases in MOI Related to Election Irregularities (10 August)**, as well as the **OSCE/ODIHR Final Report, 2008**, (p.29).

## 5. Voting and Protection of Voting Rights

### Shortcomings and Problems in the Voting Procedure and Protection of Voting Rights

1. The following filed complaints to the SEC regarding the elections held on 1 June 2008: DPA (15 in total), DUI (13 in total), Sun -Coalition for Europe (1 in total), TMRO (1 in total), and the VMRO-DPMNE led Coalition (28 in total). The complaints were filed against violations of the Election Code in the voting procedure at 376 polling stations.
2. The following filed complaints with the SEC regarding the re-runs on 15 June 2008: DPA (16 in total) and DUI (8 in total).<sup>17</sup>
3. The following filed complaints to the SEC regarding the re-runs on 29 June 2008: Party for Democratic Prosperity (4 in total)<sup>18</sup>.

### Institutional Response to the Established Problems

1. The SEC processed all submitted complaints within the legally prescribed period and adopted decisions.<sup>19</sup>
2. The SEC annulled the results from 197 polling stations, 38 of which were annulled ex officio, while the results from the remaining polling stations were annulled on grounds of incorrect or unsigned protocols by the members of the EB, as well as on grounds of proxy voting, then discrepancy between the number of voters who had voted and the number of ballots in the boxes and similar.

It is indicative that during the complaints and appeals procedure after the first election round, in reviewing the election material from 100 polling stations, in 94 polling stations the SEC established irregularities most often perpetrated by multiple voting by one person<sup>20</sup>. The evidence of such

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<sup>17</sup> See: <http://www.sec.mk:90/index.php/prigovoriresenija/-01062008>,  
<http://www.sec.mk:90/index.php/prigovoriresenija/-15062008>,  
<http://www.sec.mk:90/index.php/prigovoriresenija/dik2906>.

<sup>18</sup> The legal grounds of the complaints will be elaborated in greater detail in the Project Final Report.

<sup>19</sup> The SEC decisions and the complaints, i.e. the rulings of the Supreme Court will be elaborated in greater detail in the Project Final Report.

<sup>20</sup> OSCE/ODIHR Election Observation Mission, Early Parliamentary Elections 2008, Final Report, page 21

irregularities were most often Voters' Lists, on which several voters had been signed with the same handwriting as if the allegedly signed person had voted, and in a number of cases the number of used ballots did not correspond to the number of voters that had exercised their voting right. In all these cases, despite the grounds giving rise to suspicions that a crime had been committed the election management bodies did not report the cases.

3. Three political parties filed appeals with the Supreme Court of the Republic of Macedonia against decisions of the SEC.<sup>21</sup>

## **6. Shortcomings and Problems in the Counting Procedure**

1. In 111 polling stations the counting was assessed as bad by the OSCE observers i.e. as very bad in 15% of the observed polling stations.

2. In MEC's where these 111 polling stations are there was bad or very bad tabulation of results noted.

## **Institutional Response to the Established Problems**

1. In most of the polling stations where there were such irregularities, the SEC adopted a decision annulling the voting.

## **7. Election Campaign Financing and Financial Reports**

### **Shortcomings and Problems in Processing Financial Reports of Political Parties on Election Campaign Financing**

1. All submitted financial reports on the election campaign expenditures were incomplete, lacking precision of the expenditure items, stating unrealistic expenditure amounts compared with the really spent funds for the election campaign. The Project Final Report will contain a detailed elaboration of the problems related to financial reports, political party

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<sup>21</sup> See: 1 June 2008 Early Parliamentary Elections, OSCE/ODIHR Election Observation Mission, Final Report, Warsaw, 20 August 2008, (p.26).

financing and control by relevant state institutions taking into consideration data of the election related report of the State Audit Office.

### **Institutional Response to the Established Problems**

As regards the campaign financing, in its Report the OSCE/ODIHR stresses that expenditures by the main campaigners greatly exceeded the ceiling and that in practice, there is no effective control on campaign financing.<sup>22</sup> The Conclusions adopted at the session of the State Commission for Prevention of Corruption held on 5-6 August 2008 support such findings. In spite of such a situation, thus far the SEC has not instituted misdemeanor proceedings against violations of the provisions on election campaign financing in pursuance with Article 180 of the Election Code, nor have criminal liability proceedings been instituted under Article 165-a of the Criminal Code.

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<sup>22</sup> OSCE/ODIHR , Final Report – 2008 Early Parliamentary Elections, p. 11

## Part II: Criminal Law Protection of the Election Process

### General Considerations

The Criminal Code of the Republic of Macedonia defines nine crimes against the election process: Preventing elections and voting (Article 158), Violation of the voting right (Article 159), Violation of the voter's freedom of choice (Article 160), Misuse of the voting right (Article 161), Bribery at elections and voting (Article 162), Violation of the confidentiality of voting (Article 163), Destruction of electoral documents (Article 164), Electoral deceit (Article 165), Abuse of funds for financing electoral campaign (Article 165-a).<sup>23</sup> They are systematized in a separate chapter (Chapter 16) which is entitled "Crimes against Elections and Voting". The common overarching object of protection of the provisions on crimes against elections and voting is the election system which is a set of principles and procedures that are to ensure free, direct and democratic elections, which on its part is a fundamental value of the constitutional order of the Republic of Macedonia. Another common object of protection is the active and passive voting right, i.e. the right to equal, general and direct suffrage, the right of every citizen of to perform a public office and the principle of exercise of such rights only through free elections by secret ballot.

After the amendments and supplements to the Criminal Code<sup>24</sup>, the legal essence of all crimes has been changed in respect of prescribed punishments, making the sentences drastically stricter, while some of the crimes have been changed in terms of the description of their elements, and under the new Article 165-a a new incrimination has been introduced "abuse of election campaign funds". The legal essence of the crimes ensures solid criminal law protection. However, the practice shows that in respect of some of the incriminated acts there is certain vagueness, while as regards some of the election irregularities there has not been full criminal law protection provided. This emphasizes the need for certain corrections and precise definition of the acts of perpetration of certain crimes, as well as certain gradation in respect of some crimes by envisaging qualified forms of the crime, but also privileging some of the acts in order to make the criminal law policy towards such crimes more

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<sup>23</sup> This is a new incrimination introduced with the 2006 amendments.

<sup>24</sup> Official Gazette of the Republic of Macedonia No. 73/06.

lenient. The Final Report will provide comparative considerations, as well as proposals and suggestion regarding the identified problems, defined using a comparative law method. In continuation of this Report there is a review of certain aspects of the criminal law protection in practice after the 2008 early parliamentary elections.

## **1. Reported Persons**

After the 2006 parliamentary elections, the basic Public Prosecutors' Offices received criminal charges against 28 persons in total<sup>25</sup>, while after the 2008 early elections the Ministry of the Interior filed 211 criminal charges against 213 persons<sup>26</sup> and the political party - DUI filed 11 criminal charges against 142 persons<sup>27</sup>.

Such a significant increase of the number of reported perpetrators of crimes compared with the 2006 elections could be interpreted as a result of substantial violations of certain segments of the election process through increased number of cases of violence and intimidation, which ultimately has been noted by the election observers. This, on the other hand, could be interpreted as an increase of the efficiency in the detection and prosecution of offenders by the relevant bodies.

## **2. Structure of Reported Crimes**

Based on the information that the Coalition has received in the communications from the Public Prosecutors' Offices it can be noticed that the highest number of proceedings have been instituted against the crime of preventing elections and voting, while a significantly smaller number of proceedings are related to the crimes of abuse of voting right, violation of voting rights and against the crime of destruction of electoral documents. In this respect, most of the instituted proceedings against the crime of preventing elections and voting are related to the criminal offense under Article 158, paragraph 2. This means that the concerned persons are mainly suspected of having committed the crime with use of fire arms of explosive devices, or by using violence against several persons, which also applies to cases in which the criminal offence has been committed by an

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<sup>25</sup> Vitlarov, Analysis of the criminal law protection of elections and voting, 2008

<sup>26</sup> Data provided by the OSCE Spillover Monitoring Mission in Skopje.

<sup>27</sup> Communication from the Tetovo Public Prosecutor's Office dated 24 November 2008.

organized group or at several polling stations. The violent manner of committing the crimes is confirmed with the fact that in large number of cases, persons suspected of the crime preventing elections and voting are at the same time prosecuted for the crime of illicit manufacturing, keeping and trade in arms and explosive materials.

Comparing the structure of reported offenses with the structure of irregularities established by observers (see context) it can be noticed that the most frequently occurring irregularities noted by observers are family and proxy voting and ballot boxes staffing which on its part would suggest that the structure of reported crimes would predominantly consist of acts that can be subsumed under the crimes of abuse of voting right, violation of the secrecy of voting and violation of the freedom of choice of voters. Yet, this structure is not the established structure of the reported crimes.

### **3. Areas where the Reported Crimes have been Committed**

As regards the area where the reported crimes have been committed, it can be noticed that the largest number of crimes have been reported with the Gostivar Public Prosecutor's Office (Debar included), which has opened 23 cases against 111 persons<sup>28</sup>, then with the Tetovo Prosecutor's Office which opened 20 cases against 83 persons and 2 unknown persons<sup>29</sup>, then the Skopje Public Prosecutor's Office opened 5 cases against 19 persons, the Struga Public Prosecutor's Office opened 2 cases against 3 persons and the Strumica Public Prosecutor's Office opened 1 case against 1 person. In connection with the issue whether the offenses have been perpetrated at a polling station, based on the communications of the Public Prosecutors' Offices which contain brief description of the criminal law acts it can be noticed that there are large number of crimes committed outside the polling stations.

Such data point to the fact that the largest number of the crimes has been committed in the western parts of the country and it is interesting that a certain number of crimes against elections and voting have been perpetrated outside the polling stations.

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<sup>28</sup> Communication of the Gostivar Public Prosecutor's Office to the Coalition All for Fair Trails, dated 28 October 2008.

<sup>29</sup> Communication of the Tetovo Public Prosecutor's Office to the Coalition All for Fair Trails, dated 24 November 2008.

#### **4. Organized Perpetration of Reported Crimes**

It can be noticed that as far as 74% of the cases prosecuted by the Gostivar Public Prosecutor's Office<sup>30</sup> and 65% of the cases prosecuted by the Tetovo Public Prosecutor's Office<sup>31</sup> against election and voting related crimes, have been perpetrated by 3 or more persons. This is confirmed by the fact that most of the persons charged are prosecuted for the crime of preventing elections and voting under Article 158, paragraph 2 since the crime has been committed by an organized group or in several polling stations which leads to the conclusion that there has been a certain level of organization and coordination among the perpetrators of crimes against elections and voting for purposes of committing this type of crimes. This conclusion is supported by case no. K 45/08 in which seven persons have been convicted of the crime of criminal association under Article 394 of the Criminal Code. In this case, the Court has determined that the purpose of the establishment of the group is committing crimes against elections and voting.

#### **5. Activities by the Public Prosecutors' Offices**

In the context of the activities of the Tetovo Public Prosecutor's Office in respect of reported cases, based on the data that the All for Fair Trails Coalition received under the communication of 24 November 2008, it can be established that in 20 cases proceedings were instituted upon criminal charges submitted by the Tetovo Internal Affairs Department. In respect of cases opened with the date of the communication by the Tetovo Public Prosecutor's Office inclusive, in 10 cases a request for investigation against 53 persons has been submitted. In 3 cases involving 10 persons and 2 unknown offenders, after the conducted investigation supplementary investigative activities have been requested. In 6 cases involving 12 persons, indictments have been instituted after a completed investigation. In one case involving 8 persons after the completed investigation the case was returned to the Public Prosecutor's Office for a decision. Based on the said communication it can be noticed that DUI has filed 11 criminal charges against 142 persons. The Tetovo Public Prosecutor's Office has requested

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<sup>30</sup> Communication of the Gostivar Public Prosecutor's Office to the Coalition All for Fair Trails, dated 28 October 2008.

<sup>31</sup> Communication of the Tetovo Public Prosecutor's Office to the Coalition All for Fair Trails, dated 24 November 2008.

the necessary information from the Tetovo Internal Affairs Department in respect of these charges.

In the context of the activities of the Gostivar Public Prosecutor's Office in respect of reported cases, based on the data that the All for Fair Trails Coalition received under the communication of 28 October 2008, it can be established that in 23 cases proceedings have been instituted upon criminal charges submitted by the Gostivar Internal Affairs Department. In respect of the opened cases, up to the date of the communication, in 9 cases involving 55 persons the investigation is pending, while in 14 cases involving 56 persons the necessary information is gathered.

The Skopje Public Prosecutor's Office has instituted proceedings in 5 cases against 19 persons, in which criminal charges have been dismissed or the investigation has been interrupted in respect of 8 persons.

The Struga Public Prosecutor's Office has instituted proceedings in 2 cases against 3 persons, while the Strumica Public Prosecutor's Office has instituted proceedings in one case against one person in which the investigation has been interrupted. The information on the proceedings instituted by the Public Prosecutors' Offices, and the sources of the information are presented in a table contained in an Annex to this analysis.

One of the major problems that affect the efficiency of prosecution of perpetrators of criminal offences against elections and voting by the public prosecutors is the impossibility of ensuring legally relevant evidence<sup>32</sup>. Owing to lack of evidence there have been numerous statements renouncing the further prosecution in the reported crimes. The problem stems from the fear among voters and the election administration to give witness statements because of threats by party activists. Thus, there have been examples of change of a statement already given in an interview and before an investigative judge, as well as examples of avoiding the fulfillment of this civic duty.<sup>33</sup> On the other hand, there has also been lack of coordination noted between the prosecution bodies and the SEC in the process of ensuring legally relevant evidence. Hence, only in a small number of cases, the Public Prosecutors' Offices have requested information from the SEC regarding certain criminal law events, despite that fact that extensive evidence has been established by the SEC in the procedures for protection of voting rights.

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

## 6. Duration of Proceedings

Based on information on the thus far observed cases, as regards the period from the moment of receipt of the indictment by the courts to the scheduling of the first hearing, it can be concluded that only in 50% of the cases the legally prescribed period of 30 days for scheduling a hearing has been respected. However, it should be noted that the delays in the scheduling of the first hearing are not very long.

In terms of the duration of already completed first instance proceedings, as regards the period starting with the filing of the indictment to the publication of the judgment, in 1 case the proceedings lasted 15 to 30 days, in 1 case the proceedings lasted up to 45 days and in 2 cases the proceedings lasted 100 days, which in connection with the observed proceedings points to the fact that persons indicted with crimes against elections and voting perpetrated at the 2008 early parliamentary elections have been tried within reasonable period and with a rather high level of urgency of the procedure.

In the context of delays of the main hearing, in 6 monitored cases there has been a delay of up to 30 days, in one case there has been a delay of 31 to 60 days, and in 1 case there has been a delay of more than 60 days, which has ultimately lead to a new main hearing. In only 20% of the cases the delay is owed to absence of one of or more of the relevant parties to the case, while in 80% of the cases the hearing has been delayed for purposes of gathering new evidence or for purposes of preparation by the defense. It is interesting that there has been no case of delay of the main hearing due to not ensuring the presence of the indicted person, which could lead to the conclusion that the measures of ensuring the presence of the indicted have been rationally used. It is also characteristic that in cases in which pretrial detention has been ordered, the proceedings have been accelerated which is quite logical since cases in which there is pre-trial detention are processed following the principle of urgency.

In pursuance with the received data, the most often reason for delay of the main hearing is the need to gather evidence (in 50% of the cases) which supports the argument that ensuring legally relevant evidence is the main problem in processing these crimes. In this case, this is the main reason for (not) ensuring continued, uninterrupted conduct of the main hearings.

## Part III: Conclusions

Based on the above presented considerations on the state of play of proceedings as part of the institutional response to election irregularities, the following conclusions can be drawn:

1. There is an evident need **to strengthen the capacities of the State Election Commission at all stages of the election process.** The activities should mainly be focused on advancing the personnel, professional, expert, technical and education capacity of the State Election Commission, as well as on the need for better coordination between the SEC and the other state bodies providing logistic support for the election process (Ministry of Justice, Ministry of the Interior, Civil Servants Agency and similar).
2. The fact that **at the early parliamentary election, the SEC did not ensure maximum protection** of election contestants when their rights had been threatened in the course of the election campaign implies the need for **stronger determination and resolve of the State Election Commission in enforcing the legal provisions.** The SEC needs to show greater interest in actively designing solutions (guidelines, opinions, etc.) aiming at qualitatively improving the election process in the Republic of Macedonia.
3. The State Election Commission is to demonstrate readiness to swiftly and resolutely deal with all problems arising from the work of lower instance election bodies. The SEC is to demonstrate the same determination in dealing with irregularities caused by election contestants. The State Election Commission cannot allow itself to be passive and not institute misdemeanor proceedings in cases of evident violation of legal provisions by election contestants, especially during the election campaign. The need of explicitly envisaging that the **SEC is to institute and process misdemeanor proceedings and pronounce misdemeanor sanctions** is once again emphasized. **It is necessary to legally define the SEC as a body competent to institute and process misdemeanor proceedings.**
4. Considering the established violations of legal provisions regarding election campaign financing by the election contestants, there is a need for amending the legislation regarding the period in which the audit reports

are to be submitted to the SEC, and there should be provisions introduced setting forth direct consequences for the election contestants in case the State Audit Office finds unlawful spending of funds in the course of the campaign.

5. In respect of the manner of perpetration of crimes, the elements of using violence in committing crimes against elections are on the rise.

6. There is no efficient institutional response to the activities violating the freedom of choice, inalienability of voting rights and secrecy of voting.

7. The stricter penal policy for crimes against elections and voting introduced in 2006 has not produced positive results in terms of the overall prevention.

8. There is a great reduction of the number of cases from one onto the other stage of criminal prosecution.

Annex Table of Criminal Cases

P l a c e	Persons charged by the MOI <sup>1</sup>	Number of persons regarding whom:				Indictment has been instituted	First instance judgments have been adopted	Persons acquitted of the charges	Number of persons pronounced guilty
		Proceedings have been instituted by the Public Prosecutor's Office <sup>2</sup>	Criminal charges have been dismissed or the investigation has been interrupted	Investigation is requested or is already under way or the necessary information is gathered					
Skopje Public Prosecutor's Office	37	19	8	1	10	3	0	13 <sup>3</sup>	
Tetovo Public Prosecutor's Office <sup>4</sup>	69	83	-	80	3	1	0	1 <sup>5</sup>	
Gostivar Public Prosecutor's Office <sup>6</sup>	102	111	3	108	1	1	1	0	
Struga Public Prosecutor's Office <sup>7</sup>	1	3	-	2	1	1	-	1 <sup>8</sup>	
Strumica Public Prosecutor's Office <sup>9</sup>	2	1	1	0	0	-	-	-	

<sup>1</sup> Data provided by the OSCE.

<sup>2</sup> Public Prosecutor's Office of the Republic of Macedonia, 2 September 2008.

<sup>3</sup> 1 person to prison sentence of 6.5 years, 6 persons sentenced to 6 years prison sentence each, 2 persons sentenced to 5 years and 3 month imprisonment each, 2 persons sentenced to 1.5 year imprisonment each, 1 person sentenced to 1 year imprisonment and 1 person sentenced to 3 years imprisonment .

<sup>4</sup> Tetovo Public Prosecutor's Office 24 November 2008.

<sup>5</sup> 1 person sentenced to 1 year imprisonment.

<sup>6</sup> Gostivar Public Prosecutor's Office, 31 October 2008.

<sup>7</sup> Public Prosecutor's Office of the Republic of Macedonia, 2 September 2008.

<sup>8</sup> 1 person sentenced to one year imprisonment.

<sup>9</sup> Public Prosecutor's Office of the Republic of Macedonia, 2 September 2008.