



Recommendations for Improving Electoral Environment

International Society for Fair Elections and Democracy

Georgian Young Lawyers' Association

Transparency International – Georgia

June 2018

Table of Contents

I.	Composition of the Electoral Administration	3
II.	Campaigning and Use of Administrative Resources	5
III.	Electoral Disputes	9
IV.	Mobile Ballot Box List	17

I. Composition of the Electoral Administration

a) Term of effect of precinct commissions

About the problem

Under para.21, Article 25 of the Election Code of Georgia, the first session of newly set up precinct electoral commissions (PECs) is held not later than the 30th day before Election Day, meaning that PECs start functioning one month prior to elections. However, the practice is different from the norm. Monitoring of elections over the past few years has demonstrated that PEC members do not work full-time during the one-month period and often they are absent from polling stations. This may be caused by the fact that due to their functions PECs have no actual work to do during this time. Therefore, it makes no sense for PECs to be set up and start operating one month prior to the elections. Reducing the term of effect of PEC members would be responsive to the existing needs and practice on the one hand, and on the other hand it will provide DEC members with more time to conduct essential and quality competitions for selection of PEC members as currently competitions are rather superficial.

Recommendation

PEC term of office should begin 10 days before elections.

b) Additional criteria for appointment of electoral commission members

About the problem

Low level of qualification of PEC members has proven to be problematic in a number of instances. This has been revealed in many of the past elections and is often highlighted in reports of monitoring organizations.¹ Low level of qualification of PEC members leads to violation of statutory procedures for opening of polling stations, polling, counting of votes and tabulation of results. Complaints filed by monitoring organizations concern such violations and majority of these complaints seek holding commission members that violated the law responsible. In most cases disciplinary sanctions are demanded, but in certain cases prescribed by law observers demand imposition of administrative liability. However, higher electoral commissions usually reject these demands.

The purpose of such demands is not only to ensure that individuals that violated the law are held accountable but more importantly, to register violations, identify problems in performance of the electoral administration and prevent future appointment in the electoral administration of individuals that have previously committed violations. However, despite many calls and recommendations of non-governmental organizations,² such individuals continue to be appointed in the electoral administration. For instance, 382 individuals who had been subjected to a disciplinary liability during the 2016

¹ Final report of monitoring the 2017 local self-government elections, International Society for Fair Elections and Democracy, p.32, <http://www.isfed.ge/main/1355/geo/>

Final report of monitoring the 2016 parliamentary elections of Georgia, Georgian Young Lawyers' Association, p.50 <https://gyla.ge/files/news/2008/%E1%83%90%E1%83%A0%E1%83%A9%E1%83%94%E1%83%95%E1%83%9C%E1%83%94%E1%83%91%E1%83%98-2016-GEO.pdf>

² Recommendations for improving the electoral environment, p.7, 10 Feb 2016, <http://www.isfed.ge/main/1007/geo/>

parliamentary elections were selected for commission membership by DEC members for the 2017 local self-government elections.³ Similarly, on 28 April 2018, during the parliamentary by-elections in Vani DEC, 9 commission members that had been selected in the electoral district had been subjected to a disciplinary sanction before – reproof/warning. More specifically, 4 of them had been subjected to a disciplinary sanction during the 2016 parliamentary elections, 2 of them – during the 2017 local self-government elections and 3 of them – during the 2014 local self-government elections.⁴

Such practice poorly reflects on the quality of work of PECs, renders imposition of liability useless and does nothing to prevent violations.

In addition, it is also a problem that often individuals that were appointed by political parties in electoral commissions during previous elections are appointed as professional members of PECs.⁵ Such practice renders selection of professional members pointless and calls their impartiality and objectivity into question, which in turn damages reputation of and trust towards the electoral administration. It is important to prevent appointment as professional members of individuals that had previously been appointed by parties in any electoral commission.

Recommendation

The Election Code should prohibit appointment/selection of the following individuals as members of electoral commission:

- an individual who has violated the electoral legislation of Georgia and the violation is confirmed by the court – within four years after entry into force of the court’s decision;
- an individual who has been subjected to a disciplinary liability during previous elections – within two years after the fact;
- an individual who served as a member or a candidate of a political party over the last two years;
- an individual who served as a party-appointed member of an electoral commission during one of the last two elections.

c) Certification of PEC members

About the problem

The main reason why violations occur during elections is poor qualification of PEC members. One of the ways to address the problem is to introduce mandatory certification for PEC members. Under the existing legislation, only members of the central and district level commissions are required to have a certificate of an electoral official. Over the last few years, we have been recommending changes in the approach toward certification, so that it is responsive to the needs of different levels of electoral administration and the scope of their authority. In particular, two levels of certification exam should be introduced: for CEC and DEC membership good knowledge of the Constitution, electoral and administrative legislation and

³ Final report of monitoring the 2017 local self-government elections, International Society for Fair Elections and Democracy, p.16, <http://www.isfed.ge/main/1355/geo/>

⁴ [Information](#) reported by observers of the Georgian Young Lawyers’ Association

⁵ Report of monitoring the competition for selection of DEC members, International Society for Fair Elections and Democracy, 1 April 2016, <http://www.isfed.ge/main/1034/geo/>

other necessary skillset should be required, PEC membership should require sound knowledge of electoral procedures.

Based on certification, a database of candidates should be prepared and electoral administration should be staffed by randomly selecting candidates from this database, before every election. Candidates should be included in the database in consideration of the principle of geographic location.

Implementing such reform will help improve the level of qualification in the electoral administration, it will also promote objective selection of commission members to rule out any suspicions and accusations about selection of commission members (PEC members especially) on political grounds, based on pre-made lists, which continues to be a problem during every election.

Recommendation

Since the proposed reform is quite comprehensive and it is meant for a long-term perspective, before it is implemented we recommend incentivizing certification of PEC members by increasing salaries for certified commissioners. After some time, when a significant number of commissioners become certified, all PEC members should be required to have certificates.

The electoral administration should develop different levels of tests for PEC membership candidates, in consideration of the scope of PEC members' authority on Election Day.

II. Campaigning and Use of Administrative Resources

In 2013, the electoral legislation was amended to introduce certain limitations on use of administrative resources.⁶ However, based on the evaluation of the election cycle over the last few years, it is safe to say that problems continue to exist in this area, posing a threat to creation of a level playing field for elections.

a) Defining the agitation

About the problem

Inadequate definition of campaigning and participation in canvassing in the Election Code has created problems for electoral subjects and other stakeholders during pre-election period.⁷

Over the recent period, campaigning online using electronic media has become more frequent. There is no single approach towards such practice. Instead, existing norms are applied in an inconsistent manner. This is especially true for campaigning by electronic/social media during working hours by public officials. Some public officials have made political proclamations on their personal social media accounts.⁸

⁶ http://www.electionportal.ge/uploads/reforms/12/analysis_interfaction_group_recommendations_GEO.pdf

⁷ <http://www.osce.org/odihr/elections/110301?download=true>

⁸ <http://www.isfed.ge/main/1282/geo/>

In addition, it was unclear whether or not individuals with limited right to participate in or conduct election campaign could attend campaign events,⁹ including whether or not employees of the Ministry of Internal Affairs (MIA) could attend campaign events and if so, under what conditions. Regarding this issue, during the pre-election period of the 2013 elections, the Inter-Agency Task Force for Free and Fair Elections considered instructions prepared by the MIA and issued a recommendation that defined notion of canvassing and terms of participation in canvassing.¹⁰

Based on the instructions of MIA, only off-duty police officers can attend a campaign event not wearing a police uniform.¹¹ This is how the district and the appellate courts interpreted the matter, establishing that police officers dressed in civilian clothes are not prohibited from attending a campaign event, as they are off-duty.

Recommendation

The definition of campaigning provided in the Election Code should be further elaborated to define that it also includes dissemination of political calls using one's personal social media account.

The definition of campaigning should also include attending a campaign event, which will resolve the ambiguity that exists with regard to the issue.

Proposed formulation

Paragraph "z8" of Art.2 should be formulated in the following way:

"z8) **campaigning** - appeal to voters in favor of or against an electoral subject/candidate, as well as any public action facilitating or impeding its election and/or containing signs of election campaign, including attendance of a campaign event, the participation in organization/conduct of pre-electoral events, preservation or dissemination of election materials, work on the list of supporters, presence in the representations of political parties. Canvassing shall also include any action carried out through social media including through a personal account/page."

b) Participation of charitable organizations and employees of budget organizations in campaigning

About the problem

⁹ Art.45, Election Code

¹⁰ <http://www.justice.gov.ge/Multimedia%2FFiles%2FRekomendaciebi%2Fpdf%2FRecommendations%2030%2009%202013.pdf>

¹¹ By virtue of Art.25 of the Constitution and Art.1.2 of the Law on Assemblies and Manifestations, members of military forces and the Interior Ministry personnel including police officers have no right to assembly. In addition, based on Art.45.4 of the Election Code, they are prohibited from conducting an election campaign and participating in it. Under Article 11 of the European Convention of Human Rights and Fundamental Freedoms, the exercise of the right to assembly and association can be subjected to restrictions if it involves members of the armed forces, the police or the administration of the state. It is also important to consider the Guidelines on Freedom of Peaceful Assembly prepared by the OSCE Office for democratic Institutions and Human Rights (ODIHR) and by the Council of Europe's Venice Commission (second edition, www.osce.org/odihr/73405), according to which lawful restrictions should not be imposed on freedom of assembly of the law enforcement officers (including the police and the military) or state officials, unless the restriction is directly related to fulfillment of their official duties, and if it is, the restriction should be imposed to the extent necessary in consideration of fulfillment of their professional duties.

There have been instances of employees of budgetary organizations (school and kindergarten teachers, employees of legal entities of public law – LEPLs) attending campaign meetings of the ruling party as a group, which gave an impression that such attendance was organized and mandatory. This impression was confirmed in individual cases.

In the past we have found instances where a non-commercial legal entity conducted charity work in favor of the ruling party (e.g. by participating in provision of free diagnostic tests to public school teachers). Since the organization was not registered according to the law as a charitable organization and did not have the status of a charitable organization, both the electoral administration and court found that the organization had not violated election laws and more specifically the rule on conducting and engaging in canvassing. The electoral administration explained that for the Election Code purposes only charitable organizations are prohibited from conducting and engaging in canvassing, not physical or legal persons that conduct charity work.¹²

Recommendation

Participation of employees of budget organizations in campaigning during working hours should be prohibited by law.

With regard to charitable organizations it should be established that for purposes of the Election Code, an organization is considered charitable whether or not it is registered with the tax agency as a charitable organization.

Proposed formulation

Subparagraphs “g” and “h” of para.4 in Article 45 should be formulated in the following way:

“g) charitable and religions organizations, as well as legal entities that conduct charity work pursuant to Article 10 of the Tax Code, whether or not they have been granted the status of a charitable organization provided in Art.32 of the Code;

h) employees of budget organizations – during normal business hours and/or when they are directly performing their duties.”

c) Participation of aliens in campaigning

About the problem

In the process of campaigning ahead of the 2016 parliamentary elections, instances of participation of aliens in campaign meetings using electronic means of communication were found.¹³ Although complaints were filed, electoral administrations failed to take any legal actions in response to these facts. They explained that the case involved an alien who was not on the Georgian territory and therefore, his action prohibited by the Election Code could not have served as the basis for imposing the administrative

¹² <https://sachivrebi.cec.gov.ge/info.php?id=3735>

¹³ <https://gyla.ge/ge/post/gubernatoris-moadgile-samushao-saatebshi-socialur-qselshi-agitacias-etseoda>

penalty provided in the Georgian legislation, including for drawing up a protocol (report) of an offence. The electoral administrations rejected the complaints¹⁴ and upheld decisions of lower commissions.¹⁵

Recommendation

We believe that in such cases the person that organized participation of an alien in campaigning should be subjected to liability.

Proposed formulation

The following para.7¹ should be inserted in Art.45:

“7) Witting participation of unauthorized individuals in campaigning shall be considered violation of election campaign (canvassing) rules established by the present Law by the campaign event organizers.”

Article 79 should be formulated in the following way:

“Article 79. Participation in election campaigning in violation of law

Participation in election campaigning in violation of the requirements of this Law and/or ensuring participation of unauthorized individual in campaigning - shall be subject to a penalty in the amount of GEL 2 000.”

d) Participation of officials in campaigning

About the problem

Often officials are involved in election campaigning in favor of the ruling party. Although political officials do not violate the law by participating in electoral processes, this undermines creation of a level playing field for elections. By virtue of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, there should be “a clear separation between the State and political parties.”

Recommendation

The legislation should draw a clear line between party-related activities and public service. We believe that deputy ministers and governors should not have the right to participate in campaigning without any restrictions.

Proposed formulation

Para.z5 of Article 2 should be formulated in the following way:

z5) **political official** - the President of Georgia, an MP of Georgia, the Prime Minister of Georgia, other members of the Government of Georgia, members of the Supreme Representative Bodies of the

¹⁴ Decision no.02-44 of Chairperson of Batumi Dec no.79, dated 6 August 2016; decision no.69 of Chairperson of Gardabani Dec no.21, dated 8 August 2016 and complaints with CEC reference number 2719 and 2751

¹⁵ <http://cesko.ge/res/docs/CG326.pdf>

Autonomous Republics of Abkhazia and Ajara, heads of the Governments of the Autonomous Republics of Abkhazia and Ajara, as well as a member of a local self-government representative body and the head of its executive body.”

III. Electoral Disputes

a) Group of claimants

About the problem

Based on the past experience, leaving complaints without consideration because different observers of an organization had filed a complaint with district and precinct electoral commissions over the same incident is a problem. There were several instances when citing the said grounds DEC recognized ISFED observer that filed a complaint with the DEC as unauthorized individual and refused to consider the complaint. They also explained that the complaint should have been filed by an observer who was stationed at the PEC concerned, detected the violation and filed a complaint with relevant PEC. Such statement is completely unacceptable and undermines monitoring mission.

Any accredited observer carrying out a monitoring mission acts within the mandate and on behalf of the organization that s/he represents, based on instructions that it has received from the organization. Lodging complaints is an integral part of the monitoring activities and cannot be viewed separately. A complaint lodged by an observer is a complaint lodged by the organization and name of a particular observer that lodged the complaint is of no substantial importance. Because of the specific nature of the Election Day, an observer cannot leave the precinct to lodge a complaint with the DEC. This will hinder the monitoring process and make it impossible for the organization to conduct monitoring and release comprehensive findings about the process.

Although the problem was not large-scale and such incidents were found only in several DEC, it is important to regulate the issue by the legislation to make sure that DEC don't leave complaints without consideration without a valid reason. To address the issue, relevant clarification was included in the guidebook for electoral disputes adopted by the CEC in 2016 but the practice has proven that the measure was inadequate because it couldn't effectively eliminate such incidents.

An observer represents an organization with the status of an observer at a polling station and acts according to interests of the organization before the electoral administration or court. In addition, Article 78 of the Election Code that defines group of claimants for different types of disputes establishes a differentiated approach for an organization with the status of an observer and its representative (observer). According to the said article, an organization with observer status is a claimant in a certain type of disputes, while in other types of disputes before district or central electoral commission the organization's observer is the claimant. Here we must also note that in similar types of disputes – e.g. appealing PEC summary protocol due to a decree of higher election commission, an organization with observer status has the right to file a complaint in court, while complaints about recognizing or not recognizing polling results in a polling station due to a decree of a DEC can be filed only by an observer of an organization with observer status, in appropriate DEC. This creates certain problems for local

monitoring organization to effectively manage their own resources, especially considering the fact that they are quite busy during a pre-election period and even more so on the Election Day.

It is also important to revise certain paragraphs in Article 78 stipulating that a monitoring organization has no right to be a claimant and file a complaint in court over violation of an electoral law.¹⁶

Recommendation

The Election Code must clearly stipulate that any observer of an organization with observer status has the right to file a complaint concerning violations that other observers of the organization detected and filed a complaint about.

There should not be such clear distinction and an organization with observer status should be able to be named as a claimant in all disputes where under the applicable legislation only its representative has the right to file a complaint in court.

It is also important to further elaborate the group of claimants and give local monitoring organizations the right to file a complaint in all cases provided in Article 78 of the Election Code (e.g. registration of a representative of an electoral subject).

Recommended formulation

a) Paragraphs 10 and 11 of Article 78 should be formulated the following way:

„10. The following entities shall have the right to file a complaint with the court concerning the electoral registration of a party, electoral bloc, initiative group of voters, and their representatives:

a) a party, an electoral bloc, a representative of an initiative group of voters to the CEC (during elections for the President of Georgia), an organization with observer status, if the CEC chairperson did not register the party, the electoral bloc, the initiative group of voters or their representatives, or cancelled their registration;

b) a party, an electoral bloc, a representative of an initiative group of voters to the respective DEC (during elections for a local self-government representative body Sakrebulo and the Parliament of Georgia through the majoritarian electoral system), an organization with observer status, provided the DEC chairperson failed to register the initiative group of voters, or their representatives, or provided the CEC cancelled their registration;

c) a party, an electoral bloc, a representative of an initiative group of voters to the CEC (during elections for the President of Georgia), an organization with observer status, if they believe that the party, the electoral bloc, or the initiative group of voters have been registered in violation of the requirements of the electoral legislation of Georgia;

d) a party, an electoral bloc, a representative of an initiative group of voters to the respective DEC (during elections for the Parliament of Georgia and for a Sakrebulo held under the majoritarian electoral system), an organization with observer status, if they believe that the initiative group of voters has been registered in violation of the requirements of the electoral legislation of Georgia.

¹⁶ Citing para.10 of Article 78 of the Election Code, the court rejected the complaint of GYLA's observer, explaining that it is not within an observer's powers to examine and react on issues related to registration of a representative of an electoral bloc (decision of Zugdidi District Court dated 19.06.2014, case #020310014526651(3/41-14)).

11. The following entities may file a complaint with the court concerning a decree of an election commission chairperson on the registration of a candidate for President of Georgia, of a party list submitted by a party/an electoral bloc running independently in the elections, of individual candidates entered into the list, of a candidate nominated in a single-seat electoral district, and of a Mayoral/Gamgebeli candidate:

a) a party/an electoral bloc running independently in elections, a majoritarian candidate, a representative of an initiative group of voters to the CEC (during elections for the President of Georgia), a representative of an initiative group of voters to the respective DEC (during elections for the Parliament of Georgia and for a Sakrebulo held under the majoritarian electoral system), an organization with observer status, if the CEC Chairperson did not register the candidate for President of Georgia, the candidate for Mayor of Tbilisi, the party list presented by the party/the electoral bloc, individual candidates entered into the list, and if the DEC chairperson did not register the candidates nominated by a party/an electoral bloc, or by an initiative group of voters during elections for the Parliament of Georgia, or did not register a party list presented by a party/an electoral bloc, or individual candidates entered into the list, or the candidates nominated by a party/an electoral bloc/an initiative group of voters during Sakrebulo elections, or the Mayoral/Gamgebeli candidates nominated by a party/an electoral bloc during elections for Mayor/Gamgebeli of a self-governing city (other than Tbilisi)/community, and/or if the chairpersons of the above commissions cancelled their registration;

b) a party registered for elections and independently running in the elections, a registered electoral bloc, a representative of a registered initiative group of voters to the CEC (during elections for the President of Georgia), an organization with observer status, if they believe that the CEC Chairperson registered a party/electoral bloc list, individual candidates entered into a party/electoral bloc list, a candidate for President of Georgia, or a candidate for Mayor of Tbilisi in violation of the requirements of the electoral legislation of Georgia, and also if individual candidates entered into the party/electoral bloc list fail to meet the requirements referred to in the Constitution of Georgia and other legislative acts of Georgia or those requirements have been fulfilled in violation of the procedure defined by the legislation of Georgia;

c) a party registered for elections and independently running in the elections, a registered electoral bloc, a representative of an initiative group of voters to the respective DEC (during elections for the Parliament of Georgia and for a Sakrebulo held under the majoritarian electoral system), an organization with observer status, if they believe that the DEC chairperson registered a party/electoral bloc list, individual candidates nominated under the majoritarian system or entered into the party/electoral bloc list, or Mayoral/Gamgebeli candidates of a self-governing city (other than Tbilisi)/community in violation of the requirements defined in the electoral legislation of Georgia, and also if individual candidates nominated through the majoritarian system or entered into the party/electoral bloc list fail to meet the requirements of the Constitution of Georgia and other legislative acts of Georgia or those requirements have been met in violation of the procedure defined by the legislation of Georgia;

b) Para.21 of Article 78 should be formulated the following way:

„21. The following persons may file a complaint with the court concerning a DEC decree declaring voting results valid or invalid in an electoral precinct: a representative of a party, of an electoral bloc, of an

initiative group of voters, a majoritarian candidate, a Mayoral/Gamgebeli candidate of a self-governing city/community, an organization with observer status in the DEC concerned.”

c) The following para.25 should be inserted in Article 78:

„25. If an applicant/plaintiff in a precinct commission is an observer of an organization with observer status, other registered observers of the organization shall have the right to file an application/complaint with the DEC concerning the same violation, while if an applicant/plaintiff is a representative of an electoral subject in a precinct electoral commission, the electoral subject’s representative in appropriate DEC shall have the right to file an application/complaint with the DEC concerning the same violation.”

b) Forms of Complaints and Lawsuits

About the problem

In electoral disputes lawsuits and appeals are lodged in courts using forms approved by the High Council of Justice (HCoJ). These are the forms that are usually used in civil and administrative proceedings where a complaint can be filed within a period of one month, and are not tailored to specific needs of electoral disputes where terms for appeal are minimal – mostly 2 days. Filling out these forms or getting appropriate legal consultation for filling them out is a challenge for individual citizens and other persons with the right to appeal.

Recommendation

The process of appealing should be simple, which can be achieved by introducing special forms. Because there is a very tight timeframe for appealing in electoral disputes, the HCoJ should prepare simple forms for only electoral disputes (appealing a decision, an action or omission of the electoral administration), in view of the fact that these forms must be fulfilled in a very short period of time, unlike in other cases.

c) Summarization of polling results at DECs

About the problem

Under Article 124 of the Election Code of Georgia, a DEC shall, based on protocols of PECs and decisions of district/city courts, summarize polling results. Based on the formulation of the Article, a district commission is not obligated to consider the appellate court’s decision in the process of summarization of the results. The law does not envisage what happens if after summarization of polling results at a district commission the appellate court, say, invalidated precinct commission results or made any other decision that affects election results.

Recommendation

DECs should take into account final decisions of all levels of court when summarizing polling results.

Proposed formulation

Para.1 of Article 124 should be formulated the following way:

„1. A DEC shall, based on protocols of PECs and decisions of district/city and appellate courts, summarize polling results at its session and shall enter them into summary protocols of final results of elections held under majoritarian and proportional systems.”

d) Handing over a court’s decision

About the problem

The Election Code prescribes a timeframe for handing over a district/city court’s decision to parties but it does not provide any such timeframe for handing over an appellate court’s decision to parties.

Recommendation

The Election Code should prescribe a timeframe for handing over an appellate court’s decision to parties, as provided in the case of a district/city court.

Recommended formulation:

Para.6 of Article 77 should be formulated the following way:

„6. If a lawsuit/complaint is lodged with the court, the court shall immediately inform a DEC/CEC about receipt of the lawsuit/complaint and about the decision once it is delivered. The decision of the district/city and appellate courts shall be handed over to parties before 12:00 on the following day.”

e) Lodging an appeal with the court over a refusal of the electoral administration to draw up a protocol of administrative offences

About the problem

During the pre-election period of the 2016 parliamentary elections, the Georgian Young Lawyers’ Association lodged a complaint in Tbilisi City Court over the CEC’s refusal to draw up a protocol of administrative offences¹⁷ but the board of administrative case of the court refused to admit the appeal.¹⁸

The court explained that when an appeal is lodged over a refusal to draw up a protocol of administrative offences, the court was not authorized to examine lawfulness of the decision that has been appealed, because the court was authorized to handle the issue only if the CEC granted the complaint and drew up corresponding protocol of administrative offence. The court found that the appeal did not fall under the category of cases handled by the court and refused to admit it.

The Georgian Young Lawyers’ Association filed a private complaint with the appellate court concerning Tbilisi City Court’s decision, demanding invalidation of the refusal to admit the complaint and returning the case back to Tbilisi City Court for judging the complaint on its merits. The Appellate Court fully

¹⁷ <http://cesko.ge/res/docs/CG326.pdf>

¹⁸ Decision N3/6002-16 of Tbilisi City Court’s Board of Administrative Cases, dated 14 August 2016.

upheld the arguments of Tbilisi City Court about refusal to admit the complaint and rejected the private complaint.¹⁹

This indicates that decrees of the CEC (or any other body) refusing to apply such sanctions cannot be appealed, which runs against the commitments undertaken before the OSCE and international standards.²⁰

Recommendation

The Election Code should directly define the possibility to appeal in court refusal of the CEC chair and of authorized representatives (officials) of the CEC and relevant DEC to draw up a protocol of administrative offences.

f) The rule of preparing summary protocol amendment protocols

About the problem

DECs and different levels of courts provide inaccurate interpretation of para.2”d¹” in Art.26 of the Election Code.

Often DEC members do not attend the meeting for drawing up amendment protocols the day after Polling Day. Some fail to attend the meeting for invalid reasons, which may serve as grounds for subjecting them to disciplinary liability. However, in the process of drawing up summary protocol amendment protocols for the 2017 local self-government elections, this matter was not adequately evaluated and the fact that only majority of PEC members drew up protocols was not found to be a violation of law.

Recommendation

Para. 2”d¹” in Art.26 should be amended.

Not only commission members but also all individuals present at the polling station when the summary protocol was prepared should be summoned to attend the meeting for drawing up amendment protocols the day after Polling Day. The protocol for summoning PEC members by technical means should also be prepared.

g) Revision of electoral documentation

The fact that DECs make decisions based exclusively on statements of PEC members irrespective of seriousness of violation concerned is the most serious problem. Naturally, when a violation is detected it is important that relevant commission members provide their statements describing their opinion about circumstances of the violation, which can serve as evidence in the process of examination of the case by a district commission. However, DECs have established a completely unacceptable and unfair practice with regard to using these statements. While such practice was detected in past elections, it turned into a clearly-identifiable negative trend during the local self-government elections in 2017. DECs accept statements of PEC members as credible and sufficient evidence for establishing circumstances of any

¹⁹ Decision N3b/1508-16 of Tbilisi Appellate Court’s Board of Administrative Cases, dated 18 August 2016.

²⁰ <https://www.osce.org/ka/odihr/elections/georgia/375682?download=true>

violation, irrespective of seriousness of violation concerned, be it rewriting of data in summary protocols, number of votes received by a subject and number of votes cast not reconciling in a protocol, or omission of any required information.

Notably in many of such instances these statements are written after Polling Day at district commissions, which makes the practice of viewing the statements as the only and sufficient evidence for establishing factual circumstances even more unacceptable. It is unclear how can a statement written several days after the violation was committed be considered credible information.

These statements allow DEC's to avoid revision of polling results, irrespective of seriousness of violations (e.g. rewriting data in a summary protocol, numbers not reconciling, etc.), which calls election results into question and undermines trust towards elections as well as the electoral administration.

Recommendation

The law should define cases when an electoral commission is required to review electoral documentation and election results.

Proposed formulation

The following para.”d¹” should be inserted in Art.21:

“d¹) shall open relevant electoral documentation and re-count polling results, if, in the summary protocol prepared by a PEC, number of votes received by subjects, number of voters or invalidated ballots have been rewritten, or the sum of votes received by subjects and invalidated ballots exceeds the number of voters that participated in elections, or in other cases based on a reasoned decision of the electoral commission.”

h) Interference with functions and work of an electoral commission

About the problem

Both the electoral administration and common courts have established a faulty practice with regard to Article 91¹ adopted through changes introduced in the Election Code in 2017, which prescribes administrative liability for interfering with functions and activities of an electoral commission.

By its resolution dated 6 September 2017, Samtredia DEC found an individual guilty of violation provided in Art.91¹ and ordered her to pay a fine of GEL 500. The fact that the individual entered the building of Samtredia DEC no.54 through the auxiliary entrance together with accompanying individuals and recorded the situation inside the building on her camera was found to be an objective element of the violation provided in Art.91¹ by the court. According to the protocol of violation, comments made by the individual while recording resulted confused electoral commission members and in order to sort out the situation they had to stop the working process – verification of supporter lists.²¹

In a similar case, by its 12 September 2017 resolution Telavi District Court found an individual guilty of violation provided in Art.91¹ of the Election Code. In this particular case, chair of Telavi DEC no.17

²¹ Resolution of Samtredia District Court in case no.4/298-17, dated 6 September 2017

alleged that the individual entered her office without permission to disrupt an internal meeting.²² The chairperson subsequently expelled the individual out of the building and prepared a protocol of administrative offence the following day stating that the individual had interfered with functions and activities of the commission.²³ According to the information available to us, there was no meeting of the DEC that day. The resolution was appealed in the board of administrative cases of Tbilisi Appellate Court. Following a trial without oral hearing, the court upheld the decision of the first instance court.²⁴

In cases of Samtredia and Telavi, decisions of relevant courts and electoral officials illustrate the problem of making a distinction between obstruction and interference with activities/functions of a commission. To eliminate such ambiguities, it is important that competent bodies provide correct interpretation of the norm. It is equally important that the norm is amended to make a legal distinction between the notion of obstruction and interference with activities/functions of a commission, and allow establishment of whether interference with functions/activities of a commission also entails obstruction and breaching of order, which carries a fine of GEL 500 in addition to expulsion from the electoral administration premises.

Recommendation

To ensure more clarity, definition of disruption and interference with functions and activities should be provided.

Proposed formulation

The following paragraph “z19” shall be inserted in Article 2 of the Election Code:

“Obstruction – actions of an individual authorized to be present at a polling station, which obstructs an electoral commission member in the course of performance of his/her functions provided in the Election Code, shall qualify as obstruction of work of the electoral commission. Performance of duties by observers and representatives of media and electoral subjects, including instructing to abide by requirements of the law as well as criticizing electoral commission members, should not be considered obstruction and breaching of order.”

The following paragraph “z20” shall be inserted in Article 2 of the Election Code:

“Interference with functions and activities – actions of an individual authorized to be present at a polling station, with which the individual directly assumes functions of a member of the electoral commission provided in the election Code, shall qualify as interference with functions and activities of the electoral commission. Performance of duties by observers and representatives of media and electoral subjects, including instructing to abide by requirements of the law as well as criticizing electoral commission members, should not be considered interference with functions and activities.”

i) The rule of imposing disciplinary liability

Disciplinary liability of PEC members

²² <https://www.youtube.com/watch?v=t0l2h6I881s>, <https://www.youtube.com/watch?v=tJinn1axZSY>

²³ Resolution of Telavi District Court in case no.4/568-17, dated 12 September 2017

²⁴ Resolution of Tbilisi Appellate Court in case no.4/a-731-17, dated 26 September 2017

About the problem

In previous elections we have detected cases when DEC's found disciplinary violations committed by PEC members but did not apply a measure of disciplinary liability stating that term of office of the PEC member concerned had already expired by the time the decision about him/her was made.

Recommendation

To ensure that disciplinary violations are responded, if a complaint is filed against a PEC member his/her term of office should be extended until the final decision about their disciplinary liability is made. Extension of the term does not require paying the PEC member for the extended period, because the two matters are regulated by separate norms. Pursuant to para.2 of Article 9 of the Election Code, "PEC members and head officers (based on a higher DEC decree) shall receive salaries from the funds allocated for holding elections from the 30th day before Election Day, until the higher DEC draws up a summary protocol of polling results."

Proposed formulation:

Para.14 in Art.25 of the Election Code of Georgia should be formulated in the following way:

"14. The term of office of a PEC member shall commence at the first session of the PEC and shall terminate upon drawing up of the summary protocol of polling results in the respective DEC. Exception is allowed for term of office of a PEC member involved in a complaint over possible disciplinary violation. In such case, term of office of the PEC member concerned shall be extended until the final decision about his/her disciplinary liability is made."

IV. Mobile Ballot Box List

About the problem

Mobile ballot box list plays an important role in realization of the right to vote for individuals that are unable to cast their votes at polling stations on Polling Day due to their health or disability.

Pursuant to para.2 of Article 33 of the election Code, if a voter is unable to visit polling station on polling day, he/she should apply to the PEC for mobile voting at least two days before the polling day. The voter should be entered into the mobile ballot box list after the PEC secretary registers and endorses with his/her signature a written application or telephoned verbal application of a voter specifying the precise time of the telephone call and the telephone number.

Pursuant to para.4 of Article 33, number of voters entered into the mobile ballot box list may not exceed 3 per cent of the voters on the unified list of voters per electoral precinct. After reaching the maximum number of voters, the respective DEC will decide on adding more voters to the mobile ballot box list by the two-thirds of members attending the DEC session.

Notably, when entering voters into the mobile ballot box list PECs do not examine factual circumstances or verify whether health and disability is actually preventing a voter from visiting a polling station, etc.

In addition, there have been instances in practice when applications for inclusion in the mobile ballot box list were submitted on behalf of other individuals and these individuals were then entered into the mobile ballot box list. In addition, sometimes voters learned that they had been entered into the mobile ballot box list without their consent and complained about it.²⁵

Recommendation

We believe that a voter should be entered into the mobile ballot box list solely based on applications of the voter himself/herself or his/her family member. The application should be provided to relevant PEC by the voter himself/herself or his/her family member. No one but the voter or his/her family member should be allowed to file a request with a PEC on behalf of the voter for his/her inclusion in the mobile ballot box list. In addition, a telephone call may not serve as the legal basis for entering a voter into the mobile ballot box list. If a voter is unable to visit polling station and he/she has no family, based on a notification received over the phone or by any other means, relevant PEC should verify the need to include the voter into the mobile ballot box list and make subsequent decision.

²⁵ <https://gyla.ge/ge/post/gadasatani-yutis-siashi-amomrchevelta-sheyvana-shesadzloa-siskhlis-samartlis-danashaulis-nishnebs-sheicavdes>