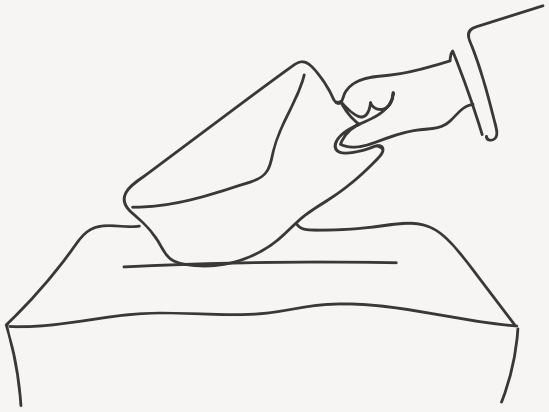
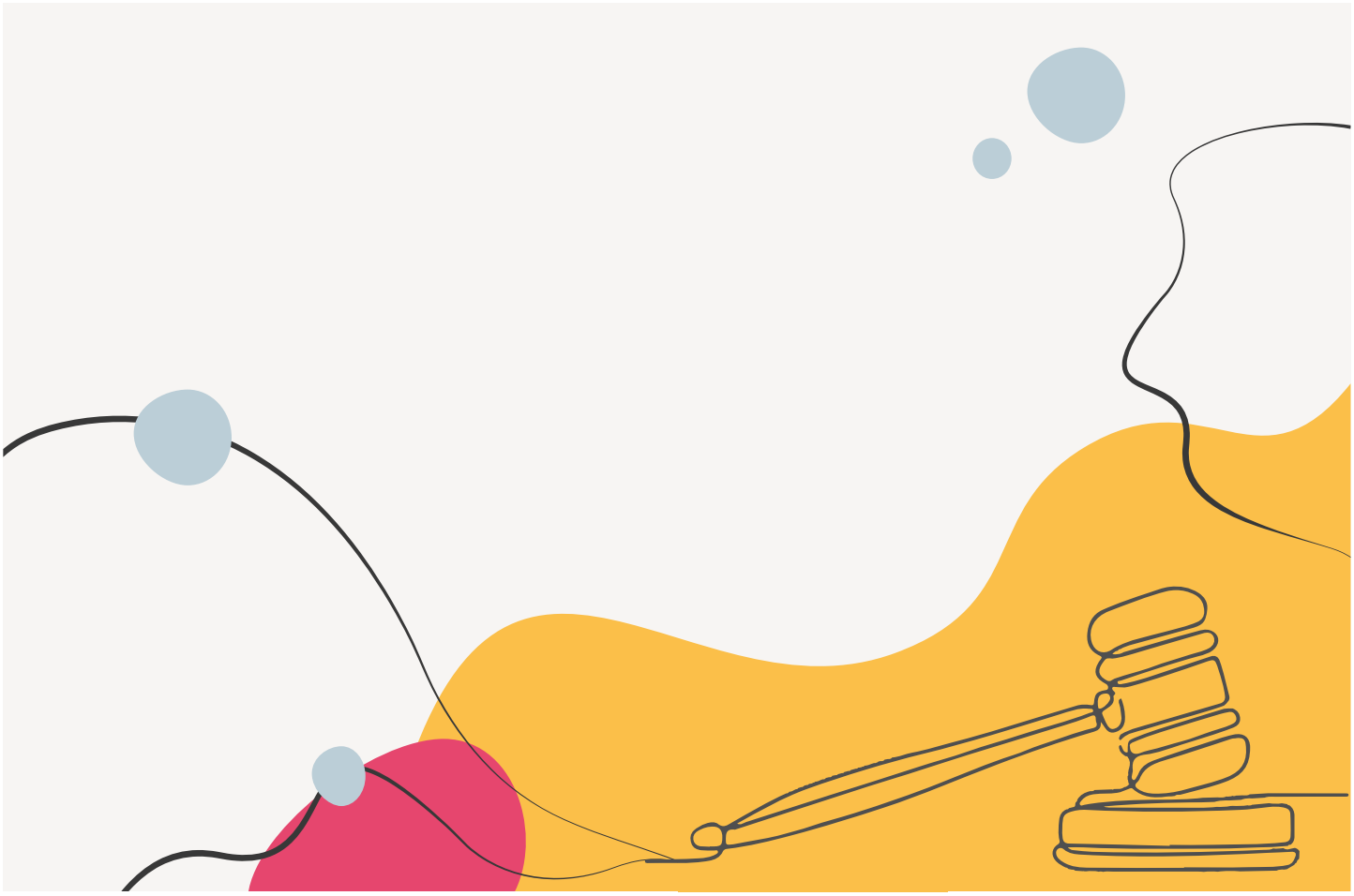
Analysis of Electoral Disputes



(The Elections of the Parliament of Georgia of October 31, 2020 – the First and Second Rounds)



Georgian Young Lawyer's Association

Georgian Young Lawyers' Association

ANALYSIS OF ELECTORAL DISPUTES

(THE ELECTIONS OF THE PARLIAMENT OF GEORGIA OF OCTOBER 31, 2020 – THE FIRST AND SECOND ROUNDS)

Tbilisi
2021

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INTRODUCTION

Resolution of electoral disputes in a transparent, impartial, timely and effective manner and on the basis of the principle of lawfulness is one of the key indicators for evaluating the quality of elections held in a country. Resolution of electoral disputes in accordance with law, interpreting the electoral legislation correctly, and applying it on the scale decided by the legislator are critical for the creation of a fair, equal, and competitive election environment. Considering the role and functions of the Parliament of Georgia, democratic elections assume a particularly great importance in the case of this body. Conducting the process within the limits set by the legislation ensures the formation of the country's supreme representative body in accordance with the people's genuine will. Therefore, it is important to ensure that the election administration and the courts adjudicate/make decisions on electoral disputes with the real spirit of the legislation.

The irregularities found in summary protocols after the first round of the parliamentary elections of 2020 assumed a particular political importance. Due to the imbalance and other irregularities found in the summary protocols of precinct election commissions (PECs), the number of complaints filed at the election administrations was high, especially in connection with the first round. On the polling day of the first round of the elections and in the subsequent period, a total of 2,091 complaints were filed at the district election commissions (DECs), out of which 270 complaints were granted/partially granted, 698 were not granted, and 1,117 were left without consideration due to various technical problems.[1] According to the public information provided by the Central Election Commission (CEC), on the polling day of the first round of the elections and in the subsequent period, 997 complaints were registered[2], which called for annulment of summary protocols of PECs and/or for recounting of the votes. After the second round, 5 complaints were registered with the same demand.[3] From the summary protocols of PECs appealed in common courts, the courts granted/partially granted the demand only in relation to 20 precincts. And after the votes were recounted, the votes received by electoral subjects were changed in the case of 12 PECs.[4]

It should be noted that the CEC has failed to provide us with processed information on the total number of PECs whose summary protocols were disputed by complaints (one complaint may call for the annulment of several summary protocols; at the same time, the 997 complaints filed by different electoral subjects may reiterate the demand to annul the summary protocols of one and the same PECs). Thus, as of preparation of this report, we have not identified the total number of PECs whose summary protocols were disputed by complaints.

As for the electoral disputes litigated by the Georgian Young Lawyers' Association (hereinafter the "GYLA"), the organization filed more than 300 complaints with regards to various irregularities in both the first and second rounds, 109 of which concerned the irregularities found in the summary protocols of PECs after the first round. From the 109 precincts in connection with which the GYLA filed the complaints (due to violations related to summary protocols), sealed documentation was opened and/or votes were recounted in relation to 31 precincts, from which the results of 5 precincts were changed, the results of 1 precinct were fully annulled, and the GYLA itself withdrew its demand in relation to 2 precincts.[5]

Considering the content of the complaints filed at the election administrations, it was expected that the DECs and, later, common courts would grant all the well-argued demands and the results of the problematic precincts would be recounted, although the shortcomings revealed in the process of adjudication of complaints, the large number of complaints left without consideration, and the small number of granted demands deepened the distrust towards the election results.

The present report aims to highlight the major trends and shortcomings in legislation that hinder the fair resolution of electoral disputes and give rise to distrust towards electoral processes. In the report, the GYLA evaluates the electoral disputes related to the parliamentary elections of 2020 – those that arose

[1] See the CEC's report "The Elections of the Parliament of Georgia of October 31, 2020". Accessible at: https://bit.ly/3qm8LW2 [Accessed on: 15/02/2021].

[2] The CEC has failed to provide us with processed statistical data on the number of PECs whose summary protocols were disputed by complaints.

[3] Letter (no. 03-02/51) of the CEC of January 26, 2021.

[4] Ibid.

[5] See the GYLA's report ,,Election Disputes of the Georgian Young Lawyers' Association", accessible at: https://bit.ly/3988Zty [Accessed on: 15/02/2021]; see also the GYLA's statement about the results of observation of the second round, accessible at: https://bit.ly/3rfox4D [Acccessed on: 15/02/2021].

in the pre-election period, on the polling day, and in the subsequent period. The report discusses the main shortcomings revealed in the process of adjudication of electoral disputes. It also analyzes the problematic practice reflected in the decisions taken by election administrations and courts. On the basis of the analysis, we have developed recommendations which, if taken into account, are going to contribute to the elimination of legislative barriers and/or problems in practice.

METHODOLOGY

The report covers the cases adjudicated in election administrations and common courts on the basis of the electoral legislation; it does not evaluate disputes in other bodies (including investigative bodies) that were related to the 2020 parliamentary elections and might have exerted an influence on both the electoral process and its outcomes.

The report was prepared using various instruments/sources:

- **Analysis of legislation and relevant standards** – While working on the report, we analyzed the relevant legal framework and international standards;
- **Decisions taken on electoral disputes** – The report relies on the analysis of decisions taken on electoral disputes litigated by the GYLA, other observer organizations, political parties, and members of DECs, as well as by natural persons. In addition to the cases litigated by the GYLA, we have used the CEC's electronic database of electoral disputes in order to find decisions taken on electoral disputes initiated by other entities.
- **Public information** – The GYLA has requested public information from the Central Election Commission of Georgia and included the relevant information related to the issues studied in the report.
- **Information provided by the GYLA's observers** – We have analyzed information received from 33 observers deployed by the GYLA to district election commissions; these observers monitored the process of receiving electoral documentation and summary protocols by DECs at the end of the polling day, on the one hand, and personally participated in the adjudication of the complaints filed by the GYLA, on the other.

MAIN FINDINGS

1. Georgia retains an essentially problematic legislation on the submission and resolution of electoral disputes. The shortness of statutory time limits for the adjudication of electoral disputes is a significant barrier in terms of preparation of proper substantiation of a complaint, collection of corresponding evidence, and submission of the complaint, the more so in the absence of a procedure of electronic submission of complaints.
2. The impossibility to appeal a decision on refusal to draw up an offense protocol to a court remains a challenge. Whereas the current practice of the election administration in connection with interpretation of electoral legislation often contradicts the law and is not uniform, judicial control on the decisions of the election administration is an opportunity to rule out doubts regarding the use of discretionary powers by election commissions.
3. The lack of proper regulations on the time limits for adjudication of cases in courts of appeals and service of decisions/rulings remains a problem. Specifically, the legislation does not provide for clear time limits for referring a case from the court of first instance to a court of appeals, commencement of consideration of an appeal by an appeals court, and serving the parties with a reasoned decision after the operative part of the decision/ruling of the appeals court has been announced, which reflects negatively on timely adjudication of electoral disputes.
4. In some cases, the election administration has problematically linked participation of public officers in pre-election canvassing during business hours and/or when performing their duties with the issue of misspending of financial resources. Thus, it was not independently assessed whether public officers participated in pre-election canvassing during business hours and/or when performing their duties. Such interpretation of law and ignoring of a clear and unequivocal requirement by the election administration damages the pre-election environment, significantly distanc-

es electoral subjects from equal pre-election conditions, and, at the same time, causes the politicization of the public service.

5. In almost all cases, the election administration determined the absence of the fact of participation of a member of the election commission in the pre-election canvassing through a social network only on the basis of the testimony of the alleged offender. This sets an even graver precedent in terms of a healthy election environment and fails to ensure the identification of the election administration as a politically neutral body.

6. The election administration didn't consider actions carried out during the pre-election period in support of individuals who had not been nominated for registration as candidates in a concrete period of time but had been identified as future candidates, as canvassing. Thus, the fact that a person is not formally registered as a candidate becomes a basis for the release from liability of persons not having the right to participate in pre-election canvassing.

7. The pre-election period of the parliamentary elections of 2020 saw cases of the use of administrative resources to which the election administration didn't respond effectively. The election administration refused to grant those complaints that concerned the participation of candidates for electoral subject in various state projects. According to the standard established by the election administration, measures that have not been announced to be carried out with the aim of supporting a concrete candidate are not considered as part of the election campaign (canvassing). In addition, the election administration indicated that all the said measures were public and anyone who wished so could attend them, which additionally ruled out the qualification of the measures as pre-election canvassing/campaign. Such a narrow interpretation of the use of administrative resources as part of pre-election canvassing/campaign gives an electoral advantage to the current ruling party and, consequently, creates an unlevel election environment. The foregoing, naturally, brings about the personification of government projects and their affiliation with concrete political subjects. As a result, it erases the dividing line between the state and parties.

8. The process of adjudication/resolution of electoral disputes revealed a trend of incorrect application/interpretation of the electoral legislation by the election administration. The election administration often interpreted the electoral legislation narrowly and, also, in a non-uniform manner. The process of adjudication of the disputes mainly had a formal character, and decisions on refusal to grant a complaint were taken in an inconsistent manner and without substantiation. The commissions didn't examine the factual circumstances mentioned in the complaint, didn't study the evidence submitted, and/or didn't obtain the evidence on their initiative. In addition, the commissions, as a rule, failed to summon witnesses and those individuals whose disciplinary liability they were going to consider, as is required by law. One gets the impression that such an approach was taken with the aim of evading complaints. Any kind of argument was used to justify the irregularities, due to which the entire process gave rise to the perception that the election administration didn't have the will to respond to irregularities effectively, which rendered the filing of complaints and the process of their adjudication a mere formality.

9. During the sessions of election commissions, the chairpersons of commissions tried to intimate their position to other commission members and, in this way, to indirectly exert an influence on their decision.

10. The working environment of several DECs had not been arranged properly, due to which observers could not properly observe the processes underway.

11. The commissions' approach to certain issues, including the issue of consolidation of similar complaints and leaving them without consideration, was inconsistent. If a commission didn't consolidate similar complaints, the consideration of even one of them became the grounds for leaving the others without consideration. As a result, not all authors of complaints were given an opportunity to present their arguments and relevant evidence with regard to the disputed issue.

12. Despite existing regulations, representatives of the GYLA were denied the opportunity to take part in sessions remotely and had to take part in them under conditions that were quite dangerous for their health, or were not able to exercise this right at all.

13. The right to draw up an amendment protocol on the following day was established with a low standard, and, as a rule, formulaic and unreliable statements, without studying additional evidence, became the grounds for amending the data. Sometimes an amendment protocol was drawn up

in such a way that it did not even present a formal explanation. The existing practice called into question the credibility of results included in appealed summary protocols. As a rule, the DECs and the courts deemed the statements of members of election commissions, amendment protocols drawn up on the following day, and/or ordinances adopted by DECs on their initiative as credible, despite their vagueness and unconvincing content and without any additional verification; they didn't open sealed documentations and didn't verify the facts by checking the data. Some DECs openly stated that they could not verify everything, as "This [DEC] is not a court".

14. The existing practice showed that, as a rule, neither the DECs nor the courts considered imbalance manifested in deficit as a violation, which became the grounds for refusing to recount the results of appealed precincts.

15. One more practice established by courts remains a problem. According to this practice, complaints related to the lawfulness on the summary protocol should be filed in the process of counting of votes. Otherwise, the claimant loses the opportunity to dispute the credibility of the data included in the protocol. The fact that no complaint was filed at the precinct in connection with the vote counting procedure cannot serve as the basis of credibility of data included in the summary protocol.

16. A number of shortcomings were identified in connection with imposing disciplinary liability on commission members. It was established that DECs didn't properly substantiate their ordinances on imposing or refusing to impose disciplinary liability on PEC members. In addition, when selecting a measure of disciplinary liability, DECs did not apply the rules of exercising discretionary powers in order to select an adequate measure of liability. And the common courts gave an incorrect interpretation to the legislative norms on imposing disciplinary liability and considered this issue as a discretionary power of DECs.

RECOMMENDATIONS

To the Parliament of Georgia

1. Increase the statutory time limits for filing complaints and adjudication of cases related to electoral disputes.
2. Unequivocally establish, by legislation, the right to file an appeal in a court against the election administration's decision on refusal to recognize an individual as an offender.
3. Regulate, by legislation, the time limit for referring case materials from the court of first instance to a court of appeals, the moment of commencement of consideration of an appeal in the court of appeals, and the time limit for serving the parties with a reasoned decision of the court of appeals.
4. Establish the right to file a complaint at the election administration electronically and define the corresponding procedure.
5. Ensure that, when appointing/electing a commission member, the commissions take into account whether or not disciplinary liability was imposed on the candidate for commission membership at the time of the latest elections.

To the election administration

1. Revise the existing practice in connection with the conduct of/participation in canvassing by public officers, employees of legal entities of public law, employees of non-entrepreneurial (non-commercial) legal entities established by the state or a municipality, and teachers of public schools and assess such action during business hours as a prohibited act, regardless of whether or not the individual concerned uses administrative resources in this process.
2. Qualify the participation in meetings in support of a concrete electoral subject/candidate for electoral subject on the part of individuals who are prohibited from conducting/participating in canvassing as participation in pre-election canvassing, regardless of whether the individuals concerned carry out an additional public action that contributes to or impedes the election of the candidate. At the same time, it is unclear what the election administration considers to be public action.

3. Consider measures as a part of pre-election canvassing when such measures contribute to and/or impede the election of a concrete individual, regardless of whether or not such measures have been announced to be carried out with the aim of supporting a concrete candidate.
4. Eliminate the practice of formal adjudication of complaints at DECs and increase the quality of substantiation of the decisions taken by DECs; contribute to the establishment of a uniform practice, including with regard to adjudication of similar types of complaints as part of one proceeding.
5. Refuse to consider the statements of members of PECs and/or amendment protocols drawn up on the day after the polling day as reliable evidence and verify their authenticity by examining other evidence.
6. Refuse to rely solely on the statement of an individual accused of violating the legislation when adjudicating a complaint and, instead of this, examine the circumstances of the case fully and thoroughly and respond effectively to the violation of the electoral legislation.
7. Ensure the exercise of the right of the author of complaint to submit additional evidence until the completion of adjudication of the complaint.
8. Ensure a working environment of DECs in which both the electoral documentation and summary protocols are received in one area. If necessary, the election commissions should ensure the remote conduct of sessions.
9. Increase the quality of substantiation required for ordinances on imposing or refusing to impose disciplinary liability on a member of a PEC; include in the ordinance the circumstances, facts, evidence, and arguments that were studied by the higher commission and became the basis of the adopted ordinance.
10. Ensure that DECs apply the rules of exercising discretionary powers when selecting a measure of disciplinary liability, so that the selected measure of liability is adequate. Specifically, when imposing disciplinary liability, the DECs should take into account its proportionality, the circumstances that mitigate liability, the absence of violations prior to imposition of liability, gravity of the misconduct, and the personality of the individual who committed the misconduct, which ultimately determines the adequacy of the sanction applied.

To common courts:

1. Exercise judicial control when the election administartion's decision on refusal to recognize an individual as an offender is appealed to a court.
2. Revise the judicial practice according to which statements, protocols drawn up on the day after the polling day, and/or summary protocols amended by an ordinance of a DEC are considered as credible without verification.
3. Verify the authenticity of summary protocols by examining all possible evidence, including by recounting of polling results, when there is a doubt about the accuracy of the data included in them.
4. Increase the quality of substantiation of court decisions and contribute to the establishment of a uniform practice that will be in conformity with law.
5. Revise the judicial practice according to which the establishment of the fact of disciplinary misconduct is considered a discretionary power of the election administration.

1. THE LEGAL FRAMEWORK ON THE PROCEEDINGS ON ELECTORAL DISPUTES

1.1. Introduction

Georgia held the parliamentary elections of 31 October 2020 with flawed legislation. The legislative amendments made in the election year made only insignificant changes to the procedures of adjudication of electoral disputes, which exerted a negative influence on the process of preparation, adjudication and resolution of electoral disputes. The first section of this report reviews the main challenges that existed in the regulations on the submission and adjudication of electoral disputes during the parliamentary elections of 2020.

1.2. Time limits for adjudication of electoral disputes

The shortness of time limits established by law for the adjudication of electoral disputes is a considerable barrier for the preparation of well-reasoned complaints and collection of relevant evidence. According to the Election Code of Georgia, a decision of a PEC/the head of a PEC may be appealed to a respective DEC within 2 calendar days after the decision is made, and the DEC is to review the appeal within 2 calendar days. The decision of the DEC may be appealed to a respective district/city court within 2 calendar days, and the district/city court is to consider the appeal within 2 calendar days. The decision of the district/city court may be appealed to a court of appeals within 1 calendar day after the decision is made, and the court of appeals is to review the appeal within 1 calendar day. The decision of the court of appeals is final and may not be appealed.[6] The shortness of time limits also affects the number of complaints filed, as the subjects cannot appeal all the respective decisions to the election commissions within the established time limits, the more so in a situation when there is no procedure for sending the complaint electronically.

1.3. Barriers related to applying to a court in the case of refusal to draw up an administrative offense protocol

The legislative amendments made in 2020 only dealt with the time limits for the resolution of cases of administrative offenses. The amendments to the Election Code determined a 10-day time limit for drawing up an administrative offense protocol by both the election administration and the courts. Election commissions are to make a decision on drawing up an administrative offense protocol within 10 days, and the same time limit applies to the courts.[7]

Despite the fact that the time limits for drawing up an administrative offense protocol and considering the case in a court were established by law, the lack of a mechanism for appealing a decision on refusal to draw up the protocol remains a considerable challenge. The GYLA appealed the problematic regulations to the Constitutional Court of Georgia in March 2020. As of the preparation of this report, the Court has yet to deliver a judgment on this case.[8]

According to a recommendation of the OSCE, "To allow for effective remedy, the law should provide for an expedited review of complaints requesting administrative sanctions on campaign violations. All election commission decisions, even if taken by an individual, should be subject to appeal".[9] The absence of a clear regulation at the legislative level reflects negatively on the practice of common courts. Specifically, the common courts have established a standard according to which: *[...] the court would only have been authorized to deliberate on the matter if the authorized body [...] had drawn up the administrative offense protocol. [...] the directive to draw up an administrative offense protocol does not belong to the category of issues to be considered by the court"*.[10] It should be noted that the legislation does not prohibit filing a complaint against a decision on refusal to draw up an administrative offense protocol, and it is a result of

[6] Organic Law of Georgia – Election Code of Georgia, Article 77, Paragraph 2.

[7] Organic Law of Georgia – Election Code of Georgia, Article 93, Paragraph 6.

[8] See the GYLA's statement about the constitutional complaint. Accessible at: https://bit.ly/3fmUOEX [Accessed on: 08/02/2021].

[9] OSCE/Office for Democratic Institutions and Human Rights, ODIHR Election Observation Mission Final Report, p. 20. https://bit.ly/3fkBurU [Accessed on: 08/02/2021].

[10] See the ruling of the Administative Panel of the Tbilisi City Court of December 17, 2018, on case no. 3/7839-18. See also the ruling of the Chamber of Administrative Cases of the Tbilisi Court of Appeals of December 20, 2018, on case no. 3B/3423-18.

incorrect practice formed by common courts,[11] which is a considerable hindering circumstance in terms of ensuring a healthy pre-election environment.

The Constitution of Georgia reinforces the electoral right and ensures the free expression of voters' will.[12] This right imposes on the State a positive obligation to take effective steps that will allow the voters to freely express their will. At the same time, non-governmental organizations play a tangible and particularly important role in the process of observation on elections. Therefore, the State is obliged to equip observer organizations with the ability to appeal decisions taken at any level of the election administration to make it possible to exercise judicial control on the degree of reasoning behind a respective official's refusal to draw up an administrative offense protocol. In addition, international practice also shows that it is not sufficient to adjudicate electoral disputes at an administrative body alone, and the existence of a mechanism for judicial control is also necessary.[13] Therefore, the absence of a clear legislative regulation on the aforementioned powers that persists to this day contradicts international standards and reflects negatively on the election environment.

1.4. The time limits for adjudicating an electoral dispute in a court of appeals and serving the decision

The regulations also have not changed in terms of improvement of time limits for adjudication of cases in a court of appeals and for serving the parties with decisions/rulings. The legislation does not include clear regulations on referring a case from the court of first instance to a court of appeals, commencement of adjudication of an appeal by a court of appeals, and serving the parties with a reasoned decision after the operative part of the decision/ruling of the appeals court has been announced. According to the Election Code, a decision of a PEC/the head of a PEC may be appealed to a respective DEC within 2 calendar days after the decision is made, and the DEC must review the appeal within 2 calendar days. The decision of the DEC may be appealed to a respective district/city court within 2 calendar days, and the district/city court is to consider the appeal within 2 calendar days. The decision of the district/city court may be appealed to a court of appeals within 1 calendar day after the decision is made, and the court of appeals is to review the appeal within 1 calendar day. The decision of the court of appeals is final and may not be appealed.[14] In addition, the Adminstrative Procedure Code of Georgia determines the procedures for adjudication and resoloution of administrative cases by common courts.[15] And unless otherwise specified by the Code, the provisions of the Civil Procedure Code of Georgia apply to the administrative legal proceedings.[16]

Neither the Election Code nor the Administrative Procedure Code regulate such procedural matters as referral of case materials from the court of first instance to the court of appeals and the moment of commencement of computation of the time limit for consideration of a case, although the Civil Procedure Code establishes that the court of first instance must refer the entire case, as well as all additional materials received, to the court of appeals immediately, but not later than 5 days.[17]

Thus, the analysis of the applicable legislation shows that a city court is obliged to refer the case materials to a court of appeals immediately, but not later than 5 days. Considering the tight time limits for adjudicating electoral disputes, it is impermissible to use the 5-day time limit, although the legislation does not specify that the case materials should be referred immediately in the case of electoral disputes, which might bring about a non-uniform practice.

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[11] The Constitutional Court of Georgia also points to the possibility to apply to a court on the basis of the right to a fair trial reinforced by Paragraph 1 of Article 31 of the Constitution of Georgia if the legislation does not contain a restriction of the right to apply to a court. See, for example, the record of session (no. 2/10/1264) of the Constitutional Court of Georgia of 27 July 2018 regarding the case of *Citizens of Georgia, Giorgi Mamaladze, Giorgi Pantsulaia and Mia Zoidze v. Parliament of Georgia*, Reasoning Part, Paragraph 20.

[12] The Constitution of Georgia, Article 24.

[13] See, for example, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, European Commission for Democracy through Law (Venice Commission), adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), p. 11, Paragraph 3.3. Accessible at: https://bit.ly/3p5PHu1 [Accessed on: 08/02/2021]; see also OSCE/Office for Democratic Institutions and Human Rights, ODIHR Election Observation Mission Final Report, p. 20. https://bit.ly/3fkBurU [Accessed on: 08/02/2021].

[14] Organic Law of Georgia – Election Code of Georgia, Article 77, Paragraph 2.

[15] Administartive Procedure Code of Georgia, Article 1, Paragraph 1.

[16] Administartive Procedure Code of Georgia, Article 1, Paragraph 2.

[17] Civil Procedure Code of Georgia, Article 371.

The issue of computation of the 1-day time limit given to the court of appeals for resolving disputes is also problematic – if the court of first instance fails to refer the appeal immediately, the court of appeals may have to adjudicate the case one or two days after the court of first instance delivers its decision, which contradicts the principle of adjudication of electoral disputes within tight time frames.

One more important issue is related to writing a reasoned decision and delivering it to the parties by the court of appeals. According to the Code of Elections, in the case of district/city courts, the decision must be delivered to the parties before 12:00 on the following day.[18] The legislation does not establish such an obligation in the case of courts of appeals. Considering the current practice, as a rule, the courts of appeals serve the parties with a reasoned decision after several days or weeks.

Despite the fact that the decision of the court of appeals on an electoral dispute is final and may not be appealed, it is essential to serve a reasoned decision in a timely manner, including due to the fact that the election administration may need to enforce decision of the court of appeals, which will be difficult without familiarizing with the argumentation of the court decision (the reasoning part).

Summary

Georgia retains an essentially problematic legislation on the submission and resolution of electoral disputes. The shortness of statutory time limits for the adjudication of electoral disputes is a significant barrier in terms of preparation of proper substantiation of a complaint, collection of corresponding evidence, and submission of the complaint, the more so in the absence of a procedure of electronic submission of complaints. _

The impossibility to file an appeal against a decision on refusal to draw up an administrative offense protocol remains a challenge. Whereas the current practice of the election administration with regard to interpretation of electoral legislation often contradicts the law and is not uniform, judicial control on the decisions of the election administration is the only means for ruling out doubts with regard to the application of discretionary powers by the election commission. In addition, judicial control is going to increase the standard of adjudication of administrative complaints, as well as the degree of substantiation of decisions of the election administration, to a large extent. Therefore, this mechanism is an important and fundamental tool for ensuring a healthy pre-election environment.

The legislative regulations also have not changed in terms of improvement of time limits for adjudication of cases in a court of appeals and for serving the parties with decisions/rulings.

Specifically, the legislation does not include clear regulations on referring a case from the court of first instance to a court of appeals, commencement of adjudication of an appeal by a court of appeals, and serving the parties with a reasoned decision after the operative part of the decision/ruling of the appeals court has been announced, which reflects negatively on the timely adjudication of electoral disputes.

[18] Organic Law of Georgia – Election Code of Georgia, Article 77, Paragraph 6.

2. ANALYSIS OF PRE-ELECTION DISPUTES

2.1. Introduction

The analysis of electoral disputes that took place in the pre-election period is based on the electoral disputes litigated by the GYLA, as well as on the cases litigated by other entities that were selected thematically and randomly. With regard to electoral disputes, the GYLA has studied 20 decisions of the Central Election Commission of Georgia, 104 decisions of DECs, 7 decisions of the courts of first instance, and 2 rulings of the courts of appeals. The disputes studied are distributed in the following way according to entities: in 55 cases, the authors of the complaints were observer organizations, 53 complaints belonged to electoral subjects, 16 complaints had been filed by physical persons, and 2 – by members of DECs.

2.2. Conduct of/participation in canvassing by means of social media

Canvassing through social media was common during the pre-election period. A number of complaints were filed in the election administration with regard to such acts carried out by public officers during business hours.[19]

As a result of adjudication of complaints, in a number of cases the election administration established a problematic standard, according to which during business hours public officers are prohibited from:

a) using the official website of only the respective budget-funded institution and/or using social media administered with budget funds; and/or b) posting information containing signs of pre-election campaign (canvassing) on personal pages of social media sites by using the means of communication and other types of equipment designated for state authorities or local self-government bodies and organizations funded from the State Budget of Georgia.[20] Thus, in a number of cases, the issue of prohibiting participation in a pre-election campaign through social networks during business hours has been linked by the election administration to the use of administrative resources by public officials.

Due to the established standard, the election administration didn't grant the complaints filed. The CEC explained that the acts indicated in the complaints had been carried out on personal Facebook pages of public officers, using their own equipment and by means of Internet resources purchased by them. **Such interpretation of the legislation by the election administration creates an opportunity for public officers to engage in canvassing through their personal pages of social media sites during business hours.**

In this respect, it is important to analyze the content and purpose of prohibition of public officers' participation in pre-election canvassing and to identify the real will of the legislator. The electoral legislation provides for a number of restrictions in connection with the conduct of and participation in election campaign (canvassing) and subjects this process to strict legal limits. Specifically, the law defines canvassing as "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 the participation in organization/conduct of pre-election events, storage or dissemination of election materials, work on the list of supporters, presence in the representations of political parties".[21] The law also defines a circle of persons who have the right to conduct and participate in pre-election canvassing – any person, save for categories of persons defined by law as exceptions, may conduct and participate in canvassing.[22] The said categories of exceptions include public officers – during normal business hours and/or when they are directly performing their duties, as well as employees of legal entities under public law (except employees of higher and vocational educational institutions, religious organizations and the Georgian Bar Association),

[19] See, for example, the complaint of the International Society for Fair Elections and Democracy of October 1, 2020 (registration no. 2985), accessible at: https://bit.ly/3p1zANH [Accessed on: 08/02/2021]; complaint of the International Society for Fair Elections and Democracy of October 21, 2020 (registration no. 4620), accessible at: https://bit.ly/3a1lKad [Accessed on: 08/02/2021]; complaint of the Georgian Young Lawyers' Association of October 23, 2020 (registration no. 4894), accessible at: https://bit.ly/3jrU8xP [Accessed on: 08/02/2021]; complaint of the Georgian Young Lawyers' Association of October 24, 2020 (registration no. 5086), accessible at: https://bit.ly/2YU6vcE [Accessed on: 08/02/2021]; complaint of the International Society for Fair Elections and Democracy of October 30, 2020 (registration no. 6045), accessible at: https://bit.ly/36MMs3Z [Accessed on: 08/02/2021].

[20] See, for example, Decision no. 189/2020 of the Ozurgeti DEC no. 60 of October 28, 2020, accessible at: https://bit.ly/3aIU0WU [Accessed on: 08/02/2021]; Decision no. 01-02/1588 of the Central Election Commission of Georgia of November 4, 2020, accessible at: https://bit.ly/3aLk17M [Accessed on: 08/02/2021]; Decision no. 01-02/1617 of the Central Election Commission of Georgia of November 11, 2020, accessible at: https://bit.ly/2LyrC1a [Accessed on: 08/02/2021].

[21] Organic Law of Georgia – Election Code of Georgia, Article 2, Subparagraph Z^8.

[22] Ibid., Article 45, Paragraph 4.

employees of non-profit (non-commercial) legal entities established by the State or a municipality, public school teachers – during the working hours, or during the fulfillment of official duties.[23]

The goal of the said provision is to form the public service as a politically neutral body. It should be noted that, in addition to the electoral legislation, the principle of political neutrality and impartiality is also reinforced by the Law of Georgia on Public Service. Specifically, according to this law, "Public servants may not use their official position for partisan (political) purposes and/or interests. Public servants may not participate in election campaigns either during working hours or when performing official duties".[24] According to the same law, public officers exercise their official powers in compliance with the principle of political neutrality, which involves their obligation to refrain from political activities during working hours to ensure the observance of the principle of impartiality in public service.[25]

At the same time, the legislation separates the circle of persons authorized to take part in pre-election canvassing from the right to use administrative resources during pre-election canvassing. The law prohibits persons who have the right to participate in pre-election canvassing from using administrative resources in the course of the election campaign in support of or against any political party, candidate for electoral subject, or electoral subject.[26] The prohibition of participation in canvassing and the prohibition of the use of administrative resources are two essentially different givens. The fact of using administrative resources by a public officer is not a precondition for recognizing the person as an offender because of participation in pre-electiopn canvassing.

The restriction of public officers' participation in pre-election canvassing during business hours and/or while performing official functions is related not to their misspending of financial resources but to spending their working time – working hours funded from the state budget – on canvassing in support of or against an electoral subject. In addition, both financial (material) and human resources constitute the state resources. The working hours of public officers are funded from the state budget, and spending this time on the canvassing for a concrete electoral subject constitutes the misuse of human resources paid for by the state budget. It is the legislator's will not to finance the time spent on such activities from the state and/or local budget.

Conversely, the election administration, in reviewing complaints, in some cases, linked and even equated these two issues with each other. Such interpretation of law and ignoring of a clear and unequivocal requirement by the election administration damages the pre-election environment, considerably distances electoral subjects from equal pre-election conditions and, at the same time, causes the politicization of the public service.

2.3. Conduct of/participation in canvassing by a member of election commission

Conduct of/participation in canvassing by members of election commissions was also a challenge during the pre-election period. According to the legislation, unlike public officers, who are only prohibited from canvassing during working hours, members of election commissions are subjected to a general prohibition, including during non-working time.[27] At the same time, election administration officers are prohibited from engaging in party activities.[28] The established restrictions are aimed at ensuring the formation of impartial and objective election commissions. Violation of this requirement of the legislation by a commission member reflects more gravely on the entire election environment and creates an expectation of biased and tendentious decisions from the election administration as well as a perception in the eyes of the public that they arbitrarily use their functions in favor of an electoral subject they approve of/like.

The election administration received numerous complaints that dealt with participation of members of election commissions in pre-election canvassing. For example, one of the complaints requested election administration's response to the fact that a member of PEC no. 12.20.56 of majoritarian election district no. 12 had shared information containing pre-election campaigning on her personal Facebook page.[29] The

[23] Ibid., Article 45, Paragraph 4, Subparagraphs H and J.

[24] The Law of Georgia on Public Service, Article 15.

[25] Ibid., Article 68.

[26] Organic Law of Georgia – Election Code of Georgia, Article 48.

[27] Organic Law of Georgia – Election Code of Georgia, Article 45, Paragraph 4 (A).

[28] Ibid., Article 16, Parahraph 3.

[29] Complaint of citizen Giorgi Kuchuloria of October 27, 2020 (registration no. 455), accessible at: https://bit.ly/2YUywRq [Accessed on: 08/02/2021].

Rustavi DEC no. 20 relied on a statement of the member of PEC no. 12.20.56 that she had "liked", shared, and uploaded all the materials on her Facebook page using her own Internet resources and she had not used state and municipal property and resources for that purpose. Therefore, the election administration didn't consider the action of the PEC member as a violation of the legislation.[30] **At the same time, in almost all cases, the absence of a violation of the election law by a member of the election commission was asserted only on the basis of the testimony of the alleged offender.** This sets an even graver precent in terms of a healthy election environment and fails to ensure the identification of the election administration as a politically neutral body.

One should also pay attention to the issue of attendance of members of election commissions at rallies and explanations made by the election administration in this regard. For example, one of the complaints[31] dealt with the participation of the chairperson of the Varkhani PEC no. 7 in a meeting that the majoritarian MP candidate of the Georgian Dream in Akhaltsikhe, Adigeni, Aspindza and Borjomi municipalities held with the population. The photos of the meeting were published on the candidate's official Facebook page. The Adigeni DEC no. 38 pointed to the concept of pre-election canvassing and explained that *"Pre-election canvassing cannot be manifested in inaction. Accordingly, attendance at a rally does not provide the composition of participation in pre-election canvassing, [...] unless it is accompanied by a concrete public action carried out by the person concerned at the rally which contributes to or impedes the election of the candidate. [...] The brief stopping at the [...] meeting of the chairperson of the election commission (i.e. greeting acquaintances) cannot be considered as participation in pre-election canvassing as defined by the Organic Law of Georgia – Election Code of Georgia"*.[32]

Such interpretation of the concept of pre-election canvassing does not correspond with the real essence and purpose of the prohibition established by the legislation. Attendance and participation of a member of the election administration in meetings in support of a candidate for electoral subject should be considered as an action that contributes to the election of the concrete candidate. Accordingly, such action should be qualified as participation in pre-election canvassing. At the same time, it is also unclear what is considered as a public action carried out while attending a rally for the purposes of qualifying an action as participation in pre-election canvassing. For example, in one case, complaints[33] that concerned the presence of a DEC member at a rally supporting the election bloc United National Movement – United Opposition Strength in Unity resulted in the recognition of the DEC member as an offender on the grounds that he had openly participated in the event.[34] In this case, the court indicated that the member of the DEC had acted publicly and his behavior actually prompted the people to support the election bloc United National Movement – United Opposition Strength in Unity. However, the court's decision does not make it clear how the said case differs from other similar cases in which the presence at a rally was not considered as participation in canvassing.

It is important that the election administration exercise supervision on the observance of legislation by members of election commissions as part of adjudication of complaints and ensure an effective response to their participation in pre-election canvassing. According to the law, the election administration is an administrative body that is independent from other public bodies within the limits of its powers.[35] It is noteworthy that the Central Election Commission (CEC), which is the highest organ of the election administration of Georgia, is obliged to ensure the holding of elections, oversee the process of implementation of the electoral legislation, and ensure its uniform application.[36] In addition, similarly to the highest administrative organ – the CEC, precinct/district election commissions and all of their members are obliged to ensure the conduct of elections in a transparent and fair environment and to observe the requirements of the Constitution of Georgia and the Election Code of Georgia. The prohibition of participation of members

[30] Decision of the Rustavi DEC no. 20 of November 6, 2020, accessible at: https://bit.ly/2MzUxCA [Accessed on: 08/02/2021].

[31] Complaint no. 20/1-50 of the International Society for Fair Elections and Democracy of October 21, 2020, accessible at: https://bit.ly/3jqK2NK [Accessed on: 08/02/2021].

[32] Decision no. 49 of the Adigeni DEC no. 38 of October 30, 2020, accessible at: https://bit.ly/2N4z7wW [Accessed on: 08/02/2021].

[33] Complaint of citizen Giorgi Kuchuloria of October 7, 2020 (registration no. 434), accessible at: https://bit.ly/2MFmiJG [Accessed on: 08/02/2021]; complaint of Zurab Choniashvili, a representative of the Georgian Dream – Democratic Georgia, of October 4, 2020 (registration no. 391), accessible at: https://bit.ly/3tADSzq [Accessed on: 08/02/2021].

[34] Decision no. 4/a-410-20 of the District Court of Bolnisi of October 15, 2020, accessible at: https://bit.ly/2MHezei [Accessed on: 08/02/2021].

[35] Organic Law of Georgia – Election Code of Georgia, Article 7, Paragraph 1.

[36] Ibid., Article 14, Paragraph 1(A).

of election commissions in canvassing serves to ensure that these bodies are independent and are perceived as such by the public. And violation of this requirement and leaving it without a response damages the election environment.

2.4. Canvassing in favor of an unregistered person

The pre-election period saw a number of cases when persons without the right to conduct pre-election canvassing carried out various actions in support of an unregistered person, although the election administration didn't grant the complaints related to these cases. As the grounds for refusing to grant the complaints, the election administration pointed to the circumstance that only an action carried out for the benefit of a person nominated for registration at the respective election commission with the aim of participation in elections could be considered as canvassing. Thus, the fact that a person is not formally registered as a candidate becomes a basis for the release from liability of persons not having the right to participate in pre-election campaign.

For example, one of the complaints concerned canvassing for Zaur Dargali, a candidate of the Georgian Dream, by a member of PEC no. 23.[37] The Marneuli DEC no. 22 refused to grant the complaint,[38] explaining that at the time of carrying out the disputed action, Zaur Dargali had not been nominated for registration with the aim of taking part in the parliamentary elections of October 31, 2020, which rules out a violation of law. The Isani DEC no. 5[39] interpreted the norm in the same manner in connection with one of the complaints[40] whose author pointed to a public officer's participation in canvassing.

One should also mention a different practice in relation to the said issue. In particular, one of the complaints[41] concerned a Facebook post shared on Septemnber 4 by a member of the Khelvachauri DEC no. 83, which read as follows: *"Good luck to Misha Bolkvadze, the candidate of the United National Movement for the majoritarian MP of Khelvachauri, Keda, Shuakhevi and Khulo"*. In this case, too, Misha Bolkvadze had not been registered as an electoral subject at the time of the action, although the chairperson of the Khelvachauri DEC no. 83 drew up an administrative offense protocol,[42] while the District Court of Khelvachauri found the person guilty of the offense.[43]

It is important that legislation should provide a mechanism to ensure that actions taken in favor of/ against persons who are not formally nominated for registration in the respective election commission do not be left without a response.

2.5. Use of administrative resources

The pre-election period of the parliamentary elections of 2020 saw cases of using administrative resources to which the election administration didn't respond effectively. In particular, in one of the cases, the complaint concerned a rally titled "Let's clean the world", which was held with the involvement of the Commission on Education, Science, Culture, Sport and Tourism of the Kobuleti City Council and the Youth City Council of Kobuleti and whose participants included Zaal Mikeladze and Tsotne Ananidze, majoritarian MP candadates of the Georgian Dream – Democratic Georgia.[44] The information about the candidates' activ-

[37] Complaint of the election bloc United National Movement – United Opposition Strength in Unity of September 29, 2020 (registration no. 337), accessible at: https://bit.ly/36QkowI [Accessed on: 08/02/2021].

[38] Decision no. 64 of the Marneuli DEC no. 22 of September 29, 2020, accessible at: https://bit.ly/2YZCIz3 [Accessed on: 08/02/2021]; Decision no. 66 of the Marneuli DEC no. 22 of September 29, 2020, accessible at: https://bit.ly/3rvYqXI [Accessed on: 08/02/2021]; Decision no. 77 of the Marneuli DEC no. 22 of October 1, 2020, accessible at: https://bit.ly/3jooEZA [Accessed on: 08/02/2021].

[39] Decision no. 023/20 of the Isani DEC no. 5 of September 16, 2020, accessible at: https://bit.ly/2Lt141f [Accessed on: 08/02/2021].

[40] Complaint of Giorgi Vashadze – Strategy Aghmashenebeli of September 9, 2020 (registration no. 031), accessible at: https://bit.ly/2N3cLfo [Accessed on: 08/02/2021].

[41] Complaint of citizen Giorgi Kuchuloria of October 20, 2020 (registration no. 01/173), accessible at: https://bit.ly/3tAf1eY [Accessed on: 08/02/2021].

[42] Administartve offense protocol no. 01550 drawn up by the chairperson of the Khelvachauri DEC no. 83 on October 30, 2020, accessible at: https://bit.ly/3tBopyL [Accessed on: 08/02/2021].

[43] Decision of the Khelvachauri District Court of November 9, 2020, on case no. 820510020004067064(4-277/2020), accessible at: https://bit.ly/2YPP5Oe [Accessed on: 08/02/2021].

[44] Complaint of the International Society for Fair Elections and Democracy of October 13, 2020 (registration no. 3825), accessible at: https://bit.ly/2YUEuBO [Accessed on: 08/02/2021].

ities in the pre-election period was published on the official Facebook pages of the Kobuleti City Council. The author of the complaint believed that the publication of this information on the official webpages of the City Council had violated the law which prohibits the use of administrative resources in the course of the election campaign in support of a political party or a candidate for electoral subject, as well as the use of the means of communication, information services, and other kinds of equipment designated for municipal bodies and organizations funded from the State Budget of Georgia.[45]

The Kobuleti DEC no. 81 didn't share the position of the author of the complaint regarding the commission of the offense by the Kobuleti City Council. The DEC explained that *"[...] the rally was motivated by a concrete goal. In particular, it was entirely oriented at the topic of environmental protection. Accordingly, the said event cannot be considered as a part of the pre-election campaign. In addition, the participants of the said rally did not make any appeal to voters in support of or against an electoral subject/candidate for electoral subject, and they did not carry out any public actions that contributed to or impeded their election"*.[46]

With a similar explanation, the election administration refused to grant several other complaints[47] that concerned the participation of candidates for electoral subject in various state projects and established a standard according to which events which have not been announced to be held with the aim of supporting a concrete candidate are not considered as a part of the election campaign (canvassing).[48] At the same time, the election administration indicated that all the said events were public and anyone who wished so could attend them, which also ruled out the qualification of the events as pre-election canvassing/campaign.

Such a narrow interpretation of the use of administrative resources as part of pre-election canvassing/campaign gives an electoral advantage to the current ruling party and, consequently, creates an uneven election environment. The foregoing naturally brings about the personification of government projects and their association with concrete political subjects. As a result, it erases the dividing line between the state and parties. Specifically, it is unclear why the election administration considered that only events announced in advance for the purpose of campaigning can be regarded as a part of the pre-election campaign (canvassing). The electoral legislation defines pre-election canvassing much more broadly and considers any public action that contributes to or impedes the election of an electoral subject/candidate for electoral subject as canvassing. Participation of candidates for electoral subject in various projects carried out by the state undoubtedly contributes to the election of these candidates. This obviously gives the candidates an electoral advantage and makes the implemented projects associated with them, which might constitute covert help provided to these candadates for electoral purposes.

It is all the more illogical to appeal to the circumstance that the events held were public and anyone who wished so could attend them, in order to rule out the qualification of the events carried out by the election administration as pre-election campaign (canvasing). As a rule, any meeting held in a public area, including pre-election campaign/canvassing, is public in its essence and concrete persons cannot be prohibited from taking part in it. Thus, appealing to this argument on the part of the election administration in order to avoid considering the action as pre-election campaign (canvassing) is completely irrelevant.

Summary

The process of adjudication/resolution of the disputes of the pre-election period of the 2020 parliamentary elections revealed tendencies of incorrect application/interpretation of the electoral legislation by the election administration. The election administration often interpreted the electoral legislation narrowly and in a non-uniform manner. An impression is made that such an approach had been taken with the aim of evading complaints. Any kind of argument was used to justify the irregularities, due to which the entire process gave rise to the objective perception that the election administration didn't have the will to respond to the irregularities effectively. And this rendered the process of filing and adjudication of complaints meaningless.

[45] Organic Law of Georgia – Election Code of Georgia, Article 48.

[46] Decision no. 01/72 of the Kobuleti DEC no. 81 of October 23, 2020, accessible at: https://bit.ly/3aLzYuZ [Accessed on: 08/02/2021].

[47] See, for example, the complaint of the International Society for Fair Elections and Democracy of October 13, 2020 (registration no. 3828), accessible at: https://bit.ly/3cO7CTi [Accessed on: 08/02/2021].

[48] See, for example, decision no. 02/54 of the Telavi DEC no. 17 of October 21, 2020, accessible at: https://bit.ly/3aBXnPi [Accessed on: 08/02/2021]; see also decision no. 02/53 of the Telavi DEC no. 17 of October 21, 2020, accessible at: https://bit.ly/2YT5VvI [Accessed on: 08/02/2021].

3. ELECTORAL DISPUTES ON THE POLLING DAY

3.1. Introduction

This section reviews the decisions taken by DECs in connection with irregularities detected by the GYLA's observers on the polling day. With this purpose, we have analyzed 22 decisions taken by various DECs.

The purpose of this section is not to analyze the decisions of DECs with regard to all the irregularities detected on the polling day. Considering the large number and gravity of the irregularities, among the disputes litigated by the GYLA we have selected those related to two most relevant issues – interference with the exercise of observers' rights and violation of the rule of sealing of electoral documentation.

3.2. Interference with the exercise of observers' rights

The polling days of both the first and second rounds of the 2020 parliamentary elections saw numerous cases when observers were hindered from performing their activity. At individual polling places, the GYLA's observers' ability to observe the voting was restricted; they became targets of aggression and were subjected to physical assault. At some polling places, the observers were not allowed to write a comment in the log-book and to register a complaint. Several observers were forced to leave the polling places.[49]

The GYLA applied to the DECs with a request to respond to a number of violations of observers' rights.[50] The decisions adopted by the DECs with regard to the complaints filed revealed the following trends:

- The DECs accepted the statements of members of PECs, whose content contradicted the complaint, unconditionally and without verification;
- The DECs didn't explore other factual circumstances related to the case and didn't grant the demands indicated in the complaint.[51]

For example, the Marneuli DEC adjudicated a complaint of the GYLA which concerned physical and verbal assault on the GYLA's observer by a representative of another observer organization. As the chairperson of the PEC had failed to respond to the incident, the GYLA, in its complaint filed at the DEC, demanded the application of disciplinary liability against the chairperson of the PEC due to his undue fulfillment of official duties. The chairperson of the PEC submitted to the DEC a statement in which he indicated that at the time of the incident he was in the corridor, and when he returned to the polling place, the incident had already been eradicated. On the basis of the statement, the DEC refused to establish the fact of undue fulfillment of powers by the chairperson of the PEC. The DEC also indicated that this didn't constitute a serious violation of the electoral legislation.[52]

The Samgori DEC adjudicated a complaint in which the GYLA's observer stated that she had not been allowed to write a comment in the log-book, while after an argument with commission members she was allowed to do so. The secretary of the commission modified the text of the observer's comment, on which the observer filed a complaint. After the GYLA's observer had written the complaint, an observer of another organization who was at the same polling place demanded that she withdraw the complaint. One of the demands in the complaint addressed to the DEC was to draw up an administrative offense protocol due to interference with the observer's activities.

The DEC refused to grant the complaint, indicating that both the comment and the complaint had been written by the observer and, accordingly, no interference had taken place.[53] In its decision, the DEC failed to pay attention to the observer's reference to the effort it had taken her to write the comment. In addition, the decision does not make it clear whether the DEC studied the action of the secretary of the PEC who arbitrarily modified the comment made in the log-book, which also constitutes gross interference with the exercise of the observers' rights. The mere fact that the observer managed to write the comment

[49] The Georgian Young Lawyers' Association, Evaluation of the parliamentary elections of 31 October 2020. Accessible at: https://bit.ly/2PbogTl [Accessed on: 08/02/2021].

[50] According to Article 91 of the Organic Law of Georgia – Election Code of Georgia, "Any restriction of the rights referred to in this Law for domestic/international observers, electoral subjects, and media representatives, or hindering their activities shall be subject to a penalty imposed on the respective persons in the amount of GEL 500".

[51] See the act of the Rustavi DEC no. 20 of November 10, 2020; Ordinance no. 260/2020 of the Kutaisi DEC no. 59 of November 2, 2020; Ordinance no. 41/2020 of the Martvili DEC no. 65 of November 2, 2020.

[52] Ordinance no. 31/2020 of the Marneuli DEC no. 22 of November 2, 2020.

[53] Notification no. 06/02-201/2020 of the Samgori DEC no. 6 of December 1, 2020.

and the complaint (which concerned the interference with the observer's rights) does not mean that the commission was acting lawfully. An observer should be able to freely exercise his/her rights guaranteed by the electoral legislation without any additional efforts.

3.3. Submission of electoral documentation to DECs in violation of the procedure established by law

Submission of electoral documentation in violation of the procedure established by legislation was one of the prominent problems. The legislation establishes the rules of sealing of documentation after the polling is completed and its submission to DECs.[54]

Despite the fact that the DECs established the fact of submission of unsealed electoral documentation, in some cases, they still failed to impose liability on the respective members of election commissions. Obviously, disciplinary liability of commission members is not an end in itself; it is extremely important to maintain and store electoral documents in the established manner, so that it is possible to study them as credible documents if they are disputed. Submission of electoral documents in unsealed form increases the risks of interference in them.

Different DECs have applied different practices with regard to this issue. For example, in the second round of the elections, the Kutaisi DEC imposed disciplinary liability on the secretary of a PEC due to submission of an unsealed log-book.[55] In connection with the same irregularity, the Poti DEC explained that "The said documents were sealed immediately after the DEC received them, and this fact didn't cause any damage. The irregularity allowed by the PECs is not a gross violation of the electoral legislation. It has not exerted any influence on the free expression of voters' will and on the polling and election results". On the basis of this argumentation, the Poti DEC didn't consider it appropriate to apply disciplinary liability in relation to the chairpersons and secretaries of PECs.[56]

Despite the fact that the violation of the electoral legislation was established, the Poti DEC didn't apply disciplinary liability in relation to PEC members, which is unjustified. The statement of the commission contradicts an imperative provision of the electoral legislation.[57] The polling day log-book is an extremely important document that contains information on procedures carried out on the Election Day. The polling day log-book is one of the pieces of evidence to be studied both in the court and the DEC. For this very reason, it is extremely important to submit it to the DEC in a sealed form, so that no data can be entered or modified, which will make it difficult to adopt an objective decision on the case. In spite of the fact that the log-book was sealed immediately after the DEC received it, it had been transported in an unsealed condition, which made it possible to enter/add data to the log-book without the supervision of other members of the commission or observers.

Summary

An ordinance adopted by a district election commission is an individual administrative act. The rules of its adoption and issuance are regulated by the Election Code of Georgia, although, when disputed, it is necessary to verify its compliance with both the Election Code of Georgia and the General Administrative Code of Georgia. Therefore, it must meet the standard of substantiation and the decision must be based on full and thorough examination of the factual circumstances of the case. The examination of factual circumstances includes collection and studying of evidence, hearing statements, etc.

As a rule, the DECs adopted unsubstantiated ordinances, indicating only the relevant articles and failing to explain how they had arrived at the concrete decision based on the factual circumstances of the dispute. In addition, they made differing decisions in connection with uniform violations. When familiarizing with the ordinances, one gets the impression that the complaint was adjudicated by an opposing party rather than by an administrative body and that the actions of the commission were directed not at thorough examination of the case and making an objective decision, but at rejecting the demands made and the factual circumstances mentioned in the complaint.

[54] According to Paragraph 11 of Article 62 of the Election Code of Georgia, the log-book must be closed after polling results are summarized; it must be signed by the chairperson and the secretary of the PEC and certified with the PEC seal. The log-book must be sealed together with applications/complaints received and forwarded to the higher DEC together with the summary protocol(s) of a PEC and other sealed documents.

[55] Ordinance no. 466/2020 of the Kutaisi DEC no. 59 of November 24, 2020.

[56] Ordinance no. 63/2020 of the Poti DEC no. 70 of November 2, 2020.

[57] Organic Law of Georgia – Election Code of Georgia, Article 62, Paragraph 11.

4. ELECTORAL DISPUTES RELATED TO SUMMARY PROTOCOLS

4.1. Introduction

A summary protocol is a document evidencing the polling and election results, and it's important to ensure that it reflects the polling results very accurately and the data entered in the protocol are not modified/deleted arbitrarily.[58] The irregularities in summary protocols assumed a particular political importance in the 2020 parliamentary elections. A number of complaints were filed at the DECs due to imbalance in the summary protocols of PECs and other types of irregularities. Considering the content of the complaints, it was expected that the DECs and, later, common courts would grant all the well-argued demands and the results of the problematic precincts would be recounted, although the shortcomings revealed in the process of adjudication of complaints and the small number of the demands granted, as well as the large number of complaints left without consideration, deepened the doubts about the credibility of the results of appealed precincts.

In this section, we review the irregularities identified in the summary protocols and analyze 30 ordinances of DECs and decisions of common courts.

4.2. Statements of PECs, amendment protocols drawn up on the following day, and data corrected on the basis of ordinances of DECs

The election administration mainly used the following mechanisms to correct the imbalance (excessive or deficit imbalance) in summary protocols: specification of data on the basis of a statement of a PEC; drawing up an amendment protocol on the day after the polling day; correction of data by DECs on the basis of their own ordinances.

According to the legislation, "If any mistake is made during filling out a summary protocol, in order to correct it, an inscription 'corrected' shall immediately be put alongside the respective data in a summary protocol. An election commission shall draw up an amendment protocol that shall specify the amended data entered into a summary protocol and the date and time of drawing up the protocol. All members of an election commission attending the election commission session shall sign the amendment protocol. A commission seal shall be put on the amendment protocol, the amendment protocol shall be registered in the log-book, and shall be attached to the summary protocol in which the data were amended".[59]

As a result of amendments made to the Election Code of Georgia in 2017, the PECs were given the right to draw up a protocol amending the summary protocol of the polling results of the PEC "when needed, not later than the day following the polling day" – if there are statements of the members of a respective PEC and/or other legal and factual grounds.[60] In the event of discovering a violation, the DECs are also authorized to change the data in the PEC summary protocol of polling results.[61]

In practice, the PECs often use the right to draw up an amendment protocol on the following day. The DECs also resort to the practice of changing the data in the summary protocols of PECs. The credibility of an amendment protocol drawn up in this manner and/or of an ordinance of a DEC depends on the degree of credibility of the statement of a commission member and on what other evidence was studied/evaluated to provide the basis of amending the data.

The current practice shows that the powers granted by law have been established with a low standard, and data are amended on the basis of formulaic and unreliable statements, without exploring additional evidence. Sometimes an amendment protocol is drawn up in such a way that it does not even present a formal explanation. The existing practice calls into question the credibility of results included in appealed summary protocols. For example, the Batumi DEC deemed as credible a statement of the chairperson and the secretary of PEC no. 28.79.12 written on November 2 and specified the data of the summary protocol of the PEC by an ordinance without studying additional evidence. The content of the statement was as follows:

[58] Ibid., Article 70, Paragraph 2.

[59] Ibid., Article 70, Paragraph 4.

[60] Ibid., Article 26, Paragraph 2, Subparagraph D[1].

[61] Ibid., Article 21, Subparagraph E.

„We inform you that, due to the loaded and tense working environment, a mechanical shortcoming took place. Specifically, in box no. 4 (the box for voters' signatures) of all the four summary protocols [...], the number 874 should be written instead of 865 [...]".[62]

The protocol amending the summary protocol of PEC no. 05.06.94 in the Samgori Electoral District was drawn up on the day after the Election Day and was based on statements which read as follows: *"I inform you that I forgot to get 2 voters to put signatures in the list during the voting. I ask you to take this into account"; "I forgot to get 5 voters to put signatures during the voting, which I discovered at the time of counting the ballot papers. The mistake was caused by the fact that there was commotion at the polling place and I couldn't concentrate".*[63]

The protocol amending the summary protocol of PEC no. 12.20.86 in the Rustavi Electoral District was amended by the PEC on the following day is such a way the grounds for amending the data are unclear.[64]

4.3. Excessive imbalance – the practice of DECs and courts

The electoral legislation establishes the procedure of filling out a summary protocol. A summary protocol specifies the total number of voters participating in the elections and the number of votes cast for electoral subjects, as well as the number of invalid ballot papers.[65] Accordingly, the sum of the number of invalid ballot papers and that of votes cast for electoral subjects must coincide with the total number of voters participating in the elections. There is an exception for cases when a commission member makes an error during the voting (forgets to get a voter to put a signature, issues fewer or more ballot papers), about which a proper explanatory statement should immediately be written, which should be taken into account at the time of drawing up the summary protocol.[66] If the statement was drawn up after the summary protocol, this gives rise to a well-founded doubt that the writing of the statement served to eliminate imbalance in the summary protocol.

The practice we have studied for the purposes of the report shows that the DECs mainly used the practice of adopting an ordinance on the basis of statements of PEC members in order to correct the excessive imbalance, and in some cases the DECs considered the amendment protocols drawn up on the basis of the statements as sufficient and didn't open the sealed documentation and recount the votes.

For example, the Batumi DEC used the statements of the chairperson and the secretary of a PEC and, on their basis, adopted ordinances on correcting the data in summary protocols in order to correct the excessive imbalance.[67] In individual cases, the imbalance could not be eliminated and the excessive imbalance remained despite the adoption of an ordinance.[68]

Similarly to the case of the Batumi DEC, the Kutaisi DEC also corrected the imbalance (excessive imbalance) in summary protocols by adopting an ordinance. The demands made in the complaint concerned the annulment of the summary protocol, as well as recounting of results and imposition of disciplinary liability on members of the respective commission. The DEC didn't grant any demands made in the complaint and indicated that "there is a statement of the secretary of the commission in connection with the said inaccuracy". According to the ordinance, "a violation of the electoral legislation that would constitute [...] the legal grounds for imposing disciplinary liability on the respective member of the commission cannot be confirmed".[69]

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[62] Results of precinct no. 28.79.12 published on the CEC's website. Accesible at: https://results.cec.gov.ge/#/ka-ge/election_43/prot/1090af98-e9df-4002-ae08-934d32a2035d [Accessed on: 15/02/2021].

[63] Results of precinct no. 05.06.94 published on the CEC's website. Accessible at: https://results.cec.gov.ge/#/ka-ge/election_43/prot/8cbf43c6-eb5d-4112-aa5e-74dab871ac30 [Accessed on: 08/02/2021].

[64] Results of precinct no. 12.20.86 published on the CEC's website. Accessible at: https://results.cec.gov.ge/#/ka-ge/election_43/prot/e9717b45-ff2f-4386-85e9-5649deff38cb [Accessed on: 08/02/2021].

[65] Organic Law of Georgia – Election Code of Georgia, Article 71, Paragraph 3, Subparagraphs I, K and L.

[66] Instruction for Members of Precinct Election Commissions, approved by Decree no. 21/2020 of the CEC of August 24, 2020.

[67] Ordinance no. 133/2020 of the Batumi DEC no. 79 of November 4, 2020; Ordinance no. 135/2020 of the Batumi DEC no. 79 of November 4, 2020.

[68] Ordinance no. 104/2020 of the Batumi DEC no. 79 of November 4, 2020.

[69] Ordinance no. 279/2020 of the Kutaisi DEC no. 59 of November 4, 2020.

The Isani DEC didn't deem the imbalance (excessive imbalance) in a summary protocol as a violation and explained that an amendment protocol had been drawn up on the basis of a statement of commission members, by which the data in the summary protocol were corrected.[70]

The demand to recount the results due to excessive imbalance was only granted in rare cases. For example, the Marneuli DEC granted a complaint related to excessive imbalance and explained that it had studied "the mistakes made at the time of drawing up the summary protocol and believes that this part of the demand (annulment of the protocol and recounting of votes) should be granted".[71]

It is interesting to look at the decisions of the DEC and the courts about the complaint of the Gldani PEC no. 08.10.99 which concerned the lawfulness of the summary protocols of majoritarian and proportional elections. There was an excessive imbalance by 63 votes in the summary protocol of the majoritarian elections and an excessive imbalance by 30 votes in the summary protocol of the proportional elections held in this precinct. On the day after the voting, an amendment protocol was drawn up on the basis of a statement of the commission members that *"a mistake was made in the numbers"*. The DEC refused to grant the complaint on this basis. In addition, despite the amendment protocol, there was still imbalance in the summary protocol. When considering this case, the Tbilisi City Court explained that "the numerical results of the voting held with the proportional electoral system correspond with one another, while there is an imbalance by 3 votes in the results of voting held with the majoritarian system, although one should also mention that a statement of the secretary of the PEC which was provided to the DEC as part of the consideration of another complaint contains an explanation of the said difference".[72] The City Court also explained that the existing imbalance – 3 votes – could not have an influence on the election results. The Court of Appeals paid a particular attention to the fact that "none of the members of the PEC expressed any complaints about the amended data when they signed the amendment protocol. The amendment protocol was signed by a sufficient number of commission members, which was based on their knowledge acquired by participation in the procedure of summarization of the polling results".[73]

These examples reinforce the incorrect practice according to which a statement of commission members, without studying of the respective electoral documents, is considered as a sufficient factual and legal pre-condition for drawing up an amendment protocol on the following day. The court is obliged to study the lawfulness of the decision adopted by the DEC and, if the DEC has not properly studied the issue, annul the appealed decision and direct the DEC to study/examine the factual circumstances and evidence once again, which should involve the opening and verification of relevant electoral documentation. In different cases, this documentation may be the polling day log-book, table list of voters and/or complete documentation, including unsealed ballot papers.

Contrary to the said practice, the Tbilisi City Court delivered an essentially lawful and well-reasoned decision on one case. Specifically, the Tbilisi City Court annulled the summary protocols and amendment protocols of several PECs belonging to the Didube DEC and directed them to recount the results. The Court indicated in the substantiated decision that "At a number of precincts, the protocols were drawn up on the day after the polling day, although it is noteworthy that the case materials do not include any information, statements of members of the respective PEC and/or other legal and factual grounds for the amendment protocols".[74] This principle is reflected in the Election Code which states that **the drawing up of an amendment protocol should be based on the relevant grounds; otherwise, the data contained in it should not be considered as credible, especially when the amendment protocol was drawn up on the day after the polling day. It is important to ensure that, when verifying the lawfulness of summary/amendment protocols, both the election administration and the courts are guided by the international standard of administrative proceedings; they should not consider the statements of PEC members alone as sufficient at the time of verification of a summary protocol and should double check the circumstances cited in the statements by examining other objective evidence.**

[70] Ordinance no. 095/2020 of the Isani DEC no. 5 of November 5, 2020.

[71] Ordinance no. 69/2020 of the Marneuli DEC no. 22 of November 4, 2020.

[72] Decision no. 3/7116-20 of the Tbilisi City Court of Novebmer 8, 2020.

[73] Ruling no. 3B/2064-2020 of the Tbilisi Court of Appeals of November 10, 2020.

[74] Decision no. 3/7125-20 of the Tbilisi City Court of November 8, 2020.

4.4. Deficit imbalance – the practice of DECs and courts

The electoral legislation establishes the procedure of filling out a summary protocol. A summary protocol specifies the total number of voters participating in the elections and the number of votes cast for electoral subjects, as well as the number of invalid ballot papers.[75] If the sum of the number of votes cast for electoral subjects and that of invalid ballot papers is less than the total number of voters participating in the elections, an imbalance manifested in deficit must be indicated in the summary protocol. Despite the fact that the legislation does not include a direct instruction on how the body adjudicating a dispute should respond to a case of deficit imbalance, such form of imbalance is quite problematic, especially when there is a deficit imbalance by a large number of votes.

The deficit imbalance can have various reasons. For example, the data in the summary protocol may have been counted incorrectly, and, after the sealed documentation is opened, one may find valid votes in it, which will correct the imbalance. The deficit imbalance might also be related to one of the forms of election rigging, the so-called carousel. The carousel implies the following: a voter does not cast the ballot paper into the ballot box and covertly takes it out of the polling station. The ballot paper taken out of the polling station, on which the desired candidate has been circled, is given to another voter who casts the ballot paper into the ballot box and takes another ballot paper received at this polling station out of the polling place, etc. This mechanism deprives the voter of the opportunity to make his/her choice freely. Thus, a deficit imbalance in the summary protocol may be indicative of the use of the mechanism of the so-called carousel.

It should be emphasized that it is possible to prevent the imbalance (deficit imbalance) in the summary protocol. The main thing is to ensure that the commission member who supervises the ballot box accurately fulfills the instruction determined by the electoral legislation. It is within the functions of the commission member supervising the ballot box to control whether or not the voter coming out of the voting booth places the ballot paper in an envelope and then casts it into the ballot box.[76]

The existing practice shows that, as a rule, neither the DECs nor the courts consider imbalance manifested in deficit as a violation, which is a problematic practice. For example, the Marneuli DEC adjudicated complaints related to deficit imbalance and refused to grant the demand to recount the votes on the grounds that an amendment protocol had been drawn up that had eradicated the inaccuracy.[77] The Saburtalo DEC received a complaint related to imbalance (deficit imbalance) in summary protocols. The DEC didn't substantiate either from factual or legal point of view why the imbalance in the protocols was not a problem and stated that the errors in the summary protocols were "of technical character".[78] In the same case, the court also refused to grant the complaint despite considerable deficit imbalance. The Tbilisi City Court noted that "it is practically impossible to verify whether the voters placed all the ballot papers in envelopes. Accordingly, the claimant's deliberation that if the number of votes cast is less than the number of voters participating in the elections, this circumstance must become the grounds for annulling the summary protocol and recounting the results is devoid of any basis."[79] The Tbilisi City Court made the same explanation in one more case: "During the polling procedure, it is practically impossible to verify whether or not the voters place all the ballot papers in envelopes. Accordngly, if, at the time of summarizing the results, it turns out that the number of ballot papers in envelopes that were cast into the ballot box (the sum of valid and invalid ballot papers) is less than the number of voters participating in the elections, and if this difference cannot exert an influence on the polling results, this circumstance may not become the grounds for recounting the results".[80]

4.5. The procedure of appeal in connection with summary protocols

In connection with appealing against summary protocols of PECs during the 2020 parliamentary elections, the courts retained the incorrect practice according to which they establish that a party should be deprived of the possibility to appeal against a summary protocol if they failed to file a complaint about

[75] Organic Law of Georgia – Election Code of Georgia, Article 71, Paragraph 3, Subparagraphs I, K and L.

[76] Instruction for Members of Precinct Election Commissions, approved by Decree no. 21/2020 of the CEC of August 24, 2020.

[77] Ordinance no. 69/2020 of the Marneuli DEC no. 22 of November 4, 2020.

[78] Ordinance no. 97/2020 of the Saburtalo DEC no. 3 of November 4, 2020.

[79] Decision no. 3/7115-20 of the Tbilisi City Court of November 8, 2020.

[80] Decision no. 3/7116-20 of the Tbilisi City Court of November 8, 2020.

irregularities revealed during the summarization of votes. In particular, the courts referred to Article 72 of the Election Code that concerns the filing of complaints related the vote counting procedure at the time of counting of votes and explained that "the said articles include a comprehensive list of measures that an authorized person can take if any type of violation is discovered at the time of counting of the votes. In the given case, the claimant failed to present and refer to any kind of evidence that would confirm that the process of counting of votes at the aforementioned PECs was conducted in gross violation of the requirements of the Organic Law of Georgia – Election Code of Georgia, which caused incorrect counting of votes and inclusion of incorrect data in the summary protocols. In the case of existence of such circumstances, the authorized person of the electoral subject was obliged to file a complaint addressed to the chairperson, deputy chairperson, or secretary of the respective PEC from the moment of opening of the ballot box to the drawing up of the summary protocol, which was not done in this concrete situation".[81] A similar approach is taken in a decision of the Batumi City Court.[82]

The courts indicated that the electoral subject was obliged to respond in an appropriate manner to violations at the time of counting of the votes.[83] Setting this pre-condition by a court would have been justified if the authorized person (who appealed against the summary protocol within two days) had attended the vote counting procedure. Otherwise, imposing such a burden on the claimant is unlawful, on the one hand, and, constitutes an incorrect interpretation of the electoral legislation in terms of both the appeal procedures and the distribution of the burden of proof, which creates additional barriers for the parties, on the other. If a representative of an observer organization/electoral subject does not attend the vote counting process, they can appeal against the summary protocol of the PEC as an individual administrative act at the respective DEC within two calendar days after its adoption. In addition, the fact that no complaint was filed (by another subject) at the PEC in connection with the vote counting procedure cannot serve as the basis of credibility of the data included in the summary protocol.

Summary

The current practice shows that the powers granted by law have been established with a low standard, and data are amended on the basis of formulaic and unreliable statements, without studying additional evidence. Sometimes an amendment protocol is drawn up in such a way that it does not even present a formal explanation. The existing practice calls into question the credibility of results included in appealed summary protocols. The drawing up of an amendment protocol or adoption of an ordinance should be based on the relevant grounds; otherwise, the data contained in them should not be considered as credible, especially when the amendment protocol was drawn up on the day after the polling day. It is important to ensure that, when verifying the lawfulness of summary/amendment protocols, both the election administration and the courts are guided by a proper standard of administrative proceedings; they should not consider the statements of PEC members alone as sufficient at the time of verification of a summary protocol and should double check the circumstances cited in the statements by examining other objective evidence.

As a rule, both the DECs and the courts consider the statements of members of PECs, amendment protocols drawn up on the following day, and/or ordinances adopted by DECs as credible, despite their vagueness and unconvincing content and without any additional verification. Both the election administration and the courts mainly refuse to open sealed documentation and to verify the facts by checking the data.

The existing practice shows that, as a rule, neither the DECs nor the courts consider deficit imbalance as a violation, which is a problematic practice.

One more practice established by courts remains problematic. According to this practice, complaints related to the lawfulness of a summary protocol must be filed in the process of counting of votes; otherwise, the claimant loses the opportunity to dispute the credibility of the data included in the protocol. The fact that no complaint was filed at the PEC in connection with the vote counting procedure cannot serve as the basis of credibility of data included in the summary protocol.

[81] Decision no. 3/7115-20 of the Tbilisi City Court of November 8, 2020.

[82] Decision no. 3/673-20 of the Batumi City Court of November 7, 2020.

[83] Decision no. 3/7115-20 of the Tbilisi City Court of November 8, 2020.

5. THE PROCESS OF ADJUDICATION OF ELECTORAL DISPUTES IN DECS

5.1. Introduction

This section of the report reviews the process of work of DECs at the time of adjudication of electoral disputes and is mainly based on information received from 33 observers deployed to the DECs by the GYLA and 11 ordinances adopted by the DECs. The observers of the GYLA observed the process of receiving electoral documentation and summary protocols by DECs at the end of the polling day, on the one hand, and personally participated in the adjudication of the complaints filed by the GYLA, on the other.

5.2. The formal character of adjudication of complaints

The adjudication of the GYLA's complaints at the DECs has revealed the formal character of the process. Despite the fact that the DECs mainly gave enough time to representatives of the GYLA for submitting and substantiating the complaints, an impression was made that the DECs had made a decision on the complaints in advance and only listened to the arguments formally. For example, the Gldani DEC no. 10 had prepared draft ordinances with relevant outcomes and reasoning before it started to adjudicate the complaints. Thus, the legal arguments stated at the time of adjudication of the complaints didn't have any influence on the attitude created in advance and, finally, the pre-prepared draft documents were adopted in the form of an ordinance. The chairperson of the Gurjaani DEC no. 12 presented her opinion to the commission members before they listened to the authors of the complaints and, by doing so, tried to influence the members. And at the Khelvachauri DEC no. 83, the chairperson of the commission put the outcome which he supported himself to a vote, by doing so, he tried to intimate to other members of the commission what kind of decision they were supposed to support.

In addition to formal adjudication of complaints, there was a tendency of DECs not understanding their powers properly. A number of DECs intimated to representatives of the GYLA in the process of adjudication of complaints that the district election commission "is not a court" and that their incomplete examination of the issue could be rectified by a court. For example, the chairperson of the Didube DEC stated at the time of adjudication of a complaint that they could not verify everything, as "this [DEC] is not a court".[84]

5.3. Examination of evidence and the standard of proof

Responding properly to violations of law is one of the best means of preventing similar violations in the future, which will ultimately ensure the creation of a healthy election environment and summarization of polling day results in a lawful and fair manner. Therefore, it is important to evaluate the extent to which the process of adjudication of complaints makes it possible to respond effectively to electoral irregularities. Specifically, in connection with complaints filed at the election administration, election commissions tended to rely only on statements of addressees of the complaints and failed to study additional circumstances, which, in a number of cases, rendered these bodies completely incapable of meeting the challenges they faced and fulfilling their function. In cases when the only source of information was the statement of the alleged offender, there was little, practically negligible, possibility to ascertain the objective truth on the matter. Naturally, the alleged offenders are not neutral, but rather interested parties. Accordingly, they are less likely to willingly acknowledge that they committed an offense or other violation of the electoral legislation. As a result, a considerable part of violations of law may be left without a response, which damages the electoral process.

For example, in relation to various complaints, the election administration shared the position of addressees of the complaints, refused to recognize them as offenders, and indicated that the information containing pre-election canvassing had been shared on social media pages not by the persons accused of an offense but by their spouses,[85] children, or even mothers-in-law.[86]

[84] Information provided by GYLA's observer.

[85] Decision no. 52 of the Adigeni DEC no. 38 of November 4, 2020, accessible at: https://sachivrebiapi.cec.gov.ge/api/file/DownloadFile?id=8c375d0b-2878-4f88-938b-70c0ef9e463a [Accessed on: 15/12/2021].

[86] Decision no. 79 of the Kharagauli DEC no. 48 of October 27, 2020, accessible at: https://sachivrebiapi.cec.gov.ge/api/file/DownloadFile?id=2d3478b4-a4a0-434c-8f23-8cc252f0d3c3 [Accessed on: 15/12/2021].

In connection with yet another complaint, the Khulo DEC no. 84 refused in writing to grant the complaint, relying fully on a statement of a person accused of an administrative offense. The election administration also relied on statements of alleged offenders when deciding on other similar complaints.

In addition, the DECs didn't usually study the presented evidence in full and didn't search for them on their initiative; they didn't summon and hear witnesses and individuals whose disciplinary liability was considered as part of the complaints filed. For example, instead of summoning PEC members to take part in the adjudication of a complaint, the chairperson of the Mtatsminda DEC no. 1 noted at the session that he had spoken to the commission members and studied the circumstances of the case himself. The chairperson sounded out the received information at the session, although he didn't present any evidence, including an interview protocol or a similar piece of evidence, which would confirm the communication with the respective members of the commission, on the one hand, and the accuracy of the information sounded out at the session, on the other.[87]

In certain cases, the commissions refused, without substantiation, to accept the evidence presented by authors of complaints. For example, the Mtskheta DEC no. 27 didn't take into consideration an additional piece of evidence submitted by a representative of the GYLA, arguing that the claimant had been obliged to submit it together with the complaint.[88] And the Martvili DEC didn't consider a circumstance mentioned in the complaint as confirmed and didn't take into consideration a photo submitted by the author of the complaint as evidence only because the commission members suspected that the photo had really been taken in the concrete district. The commission made the following statement: *„Maybe this photo was taken in another district, why should the commission trust this piece of evidence/photo?"*[89] The commission didn't study the issue thoroughly and didn't verify whether or not the author of the complaint (observer) had been at the concrete DEC at the time when the photo was taken; the commission also failed to examine the relevant electoral documentation whose sealing was being considered as part of the complaint.

A part of DECs summoned PEC members before the adjudication of complaints and got them to write statements that would refute the facts mentioned in the complaints. For example, after familiarizing with the GYLA's complaint, the Khelvachauri DEC no. 83 summoned the respective members of the PEC shortly before the session and got them to write statements that would refute the shortcomings mentioned in the complaint and practically do away with the complaint's prospects of being granted.[90]

For the Marneuli DEC, the violation of the lot-casting procedure didn't turn out to be sufficient grounds for imposing relevant liability on the chairperson of a PEC. According to the complaint, the chairperson of the PEC violated the lot-casting procedure, assigned the duties of commission members using pieces of paper of different colors, and conducted the lot-casting procedure in this way. For the body adjudicating the complaint, the statement of the chairperson that the duties had been assigned in full conformity with the law turned out to be convincing.[91]

Identification and documentation of violations for the purposes of electoral disputes is a difficult process in its essence. Therefore, it's natural that a number of unlawful acts cannot be discovered. Even when a violation of legislation has been identified and authors of a complaint demand relevant response, the inaction of the election administration and its refusal to study the issue thoroughly renders the spending of time/resources on the identification of violations and filing complaints completely meaningless. And this makes it impossible to create a healthy election environment and ensure the conduct of fair, democratic elections. Thus, it is important that the election administration study the issues related to the complaints fully and objectively and respond to violations of the electoral legislation in a timely and effective manner.

5.4. The practice of adjudication of uniform complaints

The DECs have different practices in connection with adjudication of uniform complaints. Some DECs consolidated the complaints of different subjects that dealt with one and the same issue into one proceeding and then adopted a common ordinance, while some of them considered the complaints according to the

[87] Information provided by GYLA's observer.

[88] Information provided by GYLA's observer.

[89] Ordinance no. 32/2020 of the Martvili DEC no. 65.

[90] Information provided by GYLA's observer.

[91] Ordinance no. 32/2020 of the Marneuli DEC no. 22 of November 2, 2020.

order in which they had been filed, which created the basis of leaving late complaints on the same issue without consideration. And a part of the DECs consolidated the uniform complaints only if their authors themselves filed motions with such request.[92] This information is not included in the ordinances and the GYLA received it from its observers. In addition, at the time of adjudication of several complaints at the Rustavi DEC no. 20, the commission adopted an ordinance on leaving them without consideration explaining that another subject had already filed a complaint on the same issue, although it ultimately indicated different grounds for leaving the complaint without consideration in the ordinance.[93]

It is important that DECs have a uniform practice and consolidate different subjects' complaints on one and the same issue into one proceeding on their initiative. This will eliminate the formal grounds for leaving late complaints without consideration and all authors of complaints will be given an opportunity to submit their arguments and relevant evidence with regard to the disputed issue.

5.5. The problem related to holding sessions of commissions remotely during the pandemic

The Chairperson of the CEC, by the ordinance of November 11, 2020, adopted a temporary procedure of holding the sessions of district election commissions with the aim of preventing the spread of the infection caused by the novel coronavirus (Covid-19). According to this regulation, persons authorized to attend a session, including authors of a complaint, could take part in a session remotely and/or by electronic means.[94] It should be noted that the Chairperson of the CEC tasked the Finance Department and the Electoral Information Technology Department of the Apparatus of the CEC, respectively, with implementing the procurement procedure and providing technical support for the sessions.[95]

Despite this regulation, the DECs rejected a request of several representatives of the GYLA to remotely take part in a session with the argument that the DECs didn't have the necessary technical means. For example, a member of the Nadzaladevi DEC no. 9 was diagnosed with coronavirus, while other members of the commission were the latter's contacts, due to which a representative of the GYLA requested to be allowed to take part in the session remotely, although the DEC failed to ensure the remote conduct of the session and, finally, our representative had to state her position about the complaint by phone. In addition, an observer of the GYLA was not given an opportunity to remotely participate in a session at the time of adjudication of a complaint at the Mtatsminda DEC no.1. At the Samgori DEC no. 6, the GYLA's representative learned that members of the commission were contacts of a person infected with the virus only after arriving at the session. In connection with this, our representative expressed his discontent with the fact that the persons participating in the session had not been informed of this fact in advance, in reply to which the chairperson of the DEC stated: *"Those of you who feel uncomfortable can leave the session"*. Thus, despite the relevant regulation, the DECs failed to conduct the sessions remotely.

5.6. The working space of DECs

It is important to ensure that the working space of DECs is arranged in such a way that observers have an opportunity to observe the ongoing processes properly. In the case of several DECs, such an environment didn't exist. For example, at the DECs of Mtatsminda and Mtskheta, the summary protocols and electoral documents were accepted in different rooms, which made it impossible for one observer to observe the processes properly. The Mtatsminda DEC no. 1 is situated in a three-storey building. After the voting was completed, commission members on the first floor were accepting sealed documents, the secretary – on the second floor – was accepting summary protocols and log-books, and observers were on the third floor. The room of the secretary of the DEC was so small that it was impossible for all observers at the DEC to be in the room.

[92] Ordinances no. 151/2020 and no. 157/2020 of the Batumi DEC no. 79 of November 4, 2020; Ordinance no. 22/2020 of the Mtatsminda DEC no. 1 of November 4, 2020; Ordinance no. 91/2020 of the Ozurgeti DEC no. 60 of November 5, 2020.

[93] Information provided by GYLA's observer.

[94] Ordinance no. 262/2020 of the Chairperson of the Central Election Commission of November 11, 2020, Article 2.

[95] Ibid., Articles 8 and 9.

Summary

The process of adjudication of complaints at the DECs mainly had a formal character; the commissions didn't thoroughly examine the factual circumstances indicated in the complaint, didn't study the evidence submitted, and/or didn't obtain the evidence on their initiative. In addition, the commissions, as a rule, failed to summon witnesses and those individuals whose disciplinary liability was considered, as is required by law. During the sessions of the commissions, several chairpersons of commissions tried to intimate their position to commission members and, in this way, to indirectly exert an influence on their decision. One should mention the trend that the commissions accepted the statements of members of PECs without any additional examination and analysis of the issue and didn't demand that they submit any evidence. The commissions had quite inconsistent approaches to certain issues, including the issue of consolidation of similar complaints and leaving them without consideration. Despite the existing regulations, on several occasions, representatives of the GYLA were not allowed to participate in the session remotely and had to participate in the session under conditions that were quite dangerous for their health, or were unable to exercise this right at all.

6. THE PRACTICE OF IMPOSING DISCIPLINARY LIABILITY

6.1. Introduction

In this section we have used the information on disputes litigated by the GYLA in DECs and courts, as well as public information provided by the Central Election Commission.

According to the public information provided by the CEC, on the polling day of the first round of the 31 October 2020 elections of the Georgian parliament and in the subsequent period, a total of 862 complaints related to the imposition of disciplinary liability were registered, out of which 224 complaints were granted/partially granted. And out of the 22 complaints regarding the imposition of disciplinary liability that were registered on the polling day of the second round of elections and in the subsequent period, 9 complaints were granted. As for the imposition of disciplinary liability by courts, the courts of first instance granted 1 of 13 complaints registered in the period after the first round, while the courts of appeals didn't grant any of the 5 appeals filed. After the second round of elections, the courts of first instance refused to grant only 1 registered complaint. The court of appeals also refused to grant the appeal on the same case. Information on measures of disciplinary liability is also important for statistical purposes. The total number of sanctions that were imposed on members of PECs/DECs on the basis of complaints registered after the first round amounts to 569, including 431 verbal warnings, 134 written warnings, 3 instances withholding a salary, 1 reprimand, and zero cases of dismissal from position held. The total number of sanctions imposed in the second round amounts to 24, including 11 written warnings, 13 verbal warnings, and zero cases of other sanctions.[96]

This section of the report aims to explore: 1) the extent to which the DECs substantiated the ordinances on imposing or refusing to impose disciplinary liability on members of PECs; 2) the extent to which the DECs applied the rules of exercising discretionary powers at the time of selecting a measure of disciplinary liability in order to select an adequate measure of liability. 3) the standard of imposition of disciplinary liability in common courts.

6.2. The essence of disciplinary liability and shortcomings in its implementation in practice

The Election Code of Georgia defines disciplinary misconduct by members of PECs and DECs and the respective measures of liability.[97] The following actions are considered as misconduct committed by members of PECs and DECs: culpable non-performance or improper performance of official duties; gross violation of the electoral legislation of Georgia and the respective election commission regulations; refusal to perform the mandatory signing of summary protocols of polling and election results; etc.

If a member of a PEC/DEC commits disciplinary misconduct, the higher election commission may apply disciplinary measures against him/her, such as: verbal warning, written warning, withholding a part of the official salary and, the strictest measure, early termination of powers.

The electoral legislation imperatively defines the cases that are considered as disciplinary misconduct. When disciplinary misconduct has been committed, the Election Code gives the higher election commission discretionary powers to select an adequate measure of disciplinary liability by balancing private and public interests.

Imposition of disciplinary liability on a member of a PEC/DEC in cases defined by the Election Code serves to identify cases of disciplinary misconduct, on the one hand, and to reveal those members of an election commission who fail to properly perform their duties and, by doing so, pose a danger to the conduct of the electoral process without shortcomings, on the other. Therefore, imposition of disciplinary liability on a member of a PEC/DEC identifies electoral irregularities, highlights problems in the work of the election administration, and prevents future appointment of persons who violate the electoral legislation in the election administration.

However, despite the fact that imposition of disciplinary liability on a member of a PEC/DEC has a hindering effect on the appointment of persons violating the electoral legislation in the election administration, the electoral legislation does not make it possible to achieve this goal, because at the time of appointment

[96] Letter (no. 03-02/51) of the CEC of January 26, 2021.

[97] Organic Law of Georgia – Election Code of Georgia, Article 28.

of members of PECs/DECs, past instances of imposition of disciplinary liability are not taken into consideration.

6.3. The standard of imposition of disciplinary liability in DECs

According to the Election Code, the respective higher election commission must apply simple administrative proceedings under the General Administrative Code of Georgia for imposing disciplinary measures against DEC and PEC members.[98] Disciplinary measures are imposed by an ordinance of the election commission, which, in its content, is an individual administrative act. The General Administrative Code of Georgia makes administrative bodies obliged to ensure that individual administrative acts issued in writing include written substantiation.[99] In addition, as the imposition of disciplinary liability is a measure that restricts rights, the necessity to substantiate the act increases even more.

It is also important that a disciplinary measure imposed on a member of election commission should be adequate to the gravity of the disciplinary misconduct committed by him/her. In order for a DEC to adopt a substantiated decision and select an adequate disciplinary measure for the misconduct of a PEC member, it should indicate, in the ordinance, the factual circumstances that are essential for imposing liability on the commission member. At the same time, as the selection of a disciplinary measure constitutes the discretionary powers of the DEC, it should exercise these powers in compliance with the rules of using discretionary powers. In particular, when imposing disciplinary liability on a member of a PEC/DEC, the election commission should take into account its proportionality, the circumstances that mitigate the liability, the absence of violations prior to imposition of liability, the gravity of the misconduct, and the personality of the individual committing the misconduct, which ultimately determines the adequacy of the sanction applied. Taking the decision within discretionary powers makes the administrative body obliged to select the most acceptable decision from several options by balancing public and private interests and by acting in compliance with the legislation.

By analyzing the complaints filed by the GYLA in the DECs, we have ascertained that in most cases the DECs didn't properly substantiate the ordinances on imposing or refusing to impose disciplinary liability on members of PECs, and in some cases they failed to substantiate them at all. In addition, there were cases when at the time of imposing disciplinary liability the DECs used a text of evaluation that was not intended for deciding the issue of disciplinary liability of a PEC member. For example, none of the 4 ordinances of the Ambrolauri DEC studied for the purposes of the report contains a reasoning part that would substantiate why the commission considers that there are grounds for refusing to grant the demands made in the complaint.[100] According to the general Administrative Code, the substantiation should precede the operative part of an individual administrative act, although in the said ordinances the descriptive part is followed by the operative part by which the commission refuses to grant the complaint, without examining the relevant factual and legal circumstances relevant for adopting an ordinance.

The analysis of the ordinances of the DECs also shows that the commissions often used an inappropriate test of evaluation to decide whether concrete behavior should be regarded as the grounds for imposing disciplinary liability. For example, in the ordinance of the Poti DEC, the commission indicates that submission of the unsealed log-book and the summary protocols to a DEC is not a serious violation of the electoral legislation and does not have an effect on free expression of voters' will and on the polling and election results, due to which it is unjustified to impose disciplinary liability on PEC members.[101] The purpose of disciplinary liability is to prevent violations of the electoral legislation. And conducting the electoral process without shortcomings is important in order not to pose a danger to free expression of voters' will, on the one hand, and to ensure that the will expressed by voters will translate into the final results of elections, on the other. Some violations of the Election Code, due to their character, might affect the final results of elections, while others might not. **When imposing disciplinary liability, a DEC should pay attention to whether the action of a PEC member contradicts the electoral legislation, not to whether the said action affects election results.** The deliberation on the effect of the action on election results is important when a DEC discusses the issue of annulment of polling results and holding a repeated vote. Thus, since in the

[98] Organic Law of Georgia – Election Code of Georgia, Article 28, Paragraph 4.

[99] Law of Georgia – General Administrative Code of Georgia, Article 53, Paragraph 1.

[100] Ordinances of the Ambrolauri DEC no. 44: no. 24/2020; no. 25/2020; no. 28/2020 and no. 29/2020.

[101] Ordinance no. 63/2020 of the Poti DEC no. 70.

given case the issue in question was the imposition of disciplinary liability on commission members, the DEC was supposed to verify whether the commission members had violated the Election Code by submitting an unsealed log-book to the DEC, not whether the said misconduct could have affected the election results.

Therefore, it is important that the DECs make correct use of the preconditions for imposing disciplinary measures that are provided for by the Election Code and not confuse them with the preconditions for the annulment of polling results and holding a repeated vote.

The analysis also shows that, in most cases, the DECs failed to substantiate why they applied a concrete measure when imposing liability for misconduct committed by a commission member. Imposition of measures of disciplinary liability on PEC members constitutes the discretionary powers of DECs, and the DECs are obliged to take into account the proportionality of the measure when exercising these powers, which ultimately determines the adequacy of the sanction applied. Contrary to this, the analysis of the ordinances of the DECs shows that in some cases the same DEC imposed different disciplinary measures on members of different PECs for one and the same misconduct, without explaining the need for application of different measures.

For example, we can discuss two ordinances issued by the Ozurgeti DEC.[102] According to both ordinances, the GYLA believed that the digits alongside the electoral subjects in the summary protocols had been modified. On the basis of this misconduct, the GYLA demanded the imposition of disciplinary liability on the chairpersons and secretaries of the PECs. The Ozurgeti DEC established that a procedural violation had taken place, due to which it applied disciplinary liability against the chairpersons and secretaries of both PECs. In one case, the DEC applied a written warning and in another case – a verbal warning as the disciplinary measure, without substantiating the exercise of the discretionary powers in different ways. The failure to explain the reason for the application of different disciplinary measures for one and the same misconduct brings the adequacy of the disciplinary liability under question and shows the practice of improper exercise of the discretionary powers by DECs.

6.4. The standard of imposition of disciplinary liability in common courts

One additional goal of the analysis of the strategic litigation by the GYLA was to find out how the common courts view the issue of imposition of disciplinary liability on PEC members due to electoral misconduct, specifically, which standard they apply when they evaluate an ordinance of a DEC which refused to grant the demand to impose disciplinary liability on PEC members.

According to the argumentation used by the courts, considering and deciding on the issue of imposition of disciplinary liability on PEC members constitutes the discretionary powers of DECs. According to the General Administrative Code, if an administrative body is granted discretionary powers to resolve an issue, it is obliged to exercise the powers within the limits established by law and solely for the purpose of exercising the powers it has been granted.[103] In the cases litigated by the GYLA in common courts, the courts deemed that when the DECs exercised their discretionary powers to refuse to impose disciplinary liability, they did not exceed the limits established by law and/or ignore the purpose for which they had been granted the said powers.[104]

It is also noteworthy that the aforementioned standard that was established by common courts could also be observed at the time of adjudication of electoral disputes of the past years. According to an explanation made by the Tbilisi City Court in an electoral dispute related to the parliamentary elections of 2016, imposition of disciplinary liability on the chairperson of a PEC constitutes the discretionary powers of a DEC and, accordingly, the appropriateness of application of an administrative measure should be evaluated and decided on by a collegial body – the respective higher election commission, and, in the case of an administrative dispute, the judicial control only involves the verification of the lawfulness of an action and/or legal act of an administrative body and it doesn't involve the verification of the appropriateness

[102] Ordinances of the Ozurgeti DEC no. 60: no. 92/2020 and no. 93/2020.

[103] Law of Georgia – General Administrative Code of Georgia, Article 6.

[104] Decision no. 3/673-20 of the Batumi City Court of November 7, 2020, as well as ruling no. 3/B-441-20 of the Kutaisi Court of Appeals of November 9, 2020.

of the decision taken by the collegial administrative body.[105] The Tbilisi Court of Appeals agreed with the deliberation of the Tbilisi City Court and noted that the court could not verify the reasonableness of the decision taken by the DEC.[106]

As a summary of the standards established by court decisions, we can say that, for years now, the judicial practice has regarded the consideration and resolution of the issue of disciplinary liability, as well as selection of a disciplinary measure, as a part of the discretionary powers of higher election commissions. As noted above, there are only a few court decisions in which the court deemed the resolution of the issue of imposition of disciplinary liability as the obligation imposed on higher election commissions by the electoral legislation and considered the selection of a disciplinary measure as the discretionary powers of higher election commissions. The trend established in the judicial practice constitutes an incorrect interpretation of legislative norms, on the one hand, and fails to properly ensure the achievement of the goals of disciplinary liability, on the other.

The Election Code[107] unequivocally determines what can be regarded as disciplinary misconduct; accordingly, qualification of an action of a member of a lower election commission as misconduct is an obligation, not discretionary powers, of a higher election commission. The higher election commission may select a relevant disciplinary measure for electoral misconduct within the limits of its discretionary powers.[108] Such approach to the issue is important for ensuring a uniform application of the electoral legislation.

Summary

The analysis of the disputes litigated by the GYLA in the DECs and the courts of first and second instance, as well as the public information requested and obtained from the Central Election Commission, has highlighted a number of shortcomings related to the imposition of disciplinary liability on members of election commissions.

It has been established that the DECs didn't properly substantiate the ordinances on imposing or refusing to impose disciplinary liability of members of PECs. In addition, the DECs didn't apply the rules of exercising discretionary powers correctly at the time of selecting a measure of disciplinary liability in order to select an adequate measure of liability, and common courts interpret the legislative norms related to imposition of disciplinary liability incorrectly and regard this issue as part of the discretionary powers of DECs.

[105] Decision no. 3/7541-16 of the Tbilisi City Court of October 16, 2016.

[106] Ruling no. 3B/1919-16 of the Tbilisi Court of Appeals of October 19, 2016.

[107] Organic Law of Georgia – Election Code of Georgia, Article 28, Paragraph 1.

[108] Ibid., Article 28, Paragraph 2.