Research
Analysis of Electoral Dispute Resolution

Based on the analysis of disputes in three general elections of Georgia
(the parliamentary elections in 2016, the local self-government elections
in 2017 and the presidential election in 2018), including run-offs

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Introduction

Pursuant to the Constitution of Georgia, "People are the source of state authority. People exercise power through their representatives, as well as through referendums and other forms of direct democracy; every citizen of Georgia who has attained the age of 18 shall have the right to participate in referendums and elections of the bodies of the state, autonomous republics and local self-governments. The free expression of the will of a voter shall be guaranteed."

These norms declared by the Constitution of Georgia legitimize authority. The essence of a democratic state is for each individual citizen to be involved in governance, which can only be achieved if citizens are provided with freedom of choice.

Elections should ensure free and equal reflection of people's will in formation of authorities. Elections are a necessary requirement of democracy while at the same time there are certain risks and threats associated with the election process, which may hinder formation of effective democracy in the state.

As elections are highly important, states have the obligation before the international community and the modern civilised world "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." [1]

Election process in Georgia is characterised by a multitude of disputes. Analysis of electoral dispute resolution as well as reports of observer organisations and statements of electoral subjects clearly illustrate that the electoral process takes place in a tense and polarised environment, against the background of distrust among election stakeholders.

Under such circumstances, prevention of electoral disputes as well as transparent, timely and effective resolution of disputes that may arise, based on the principle of legality, is important.

Electoral disputes are often criticised in Georgia by international observer organisations as well as local civil society and political parties. Purpose of the present research is to analyse these challenges.

Due to the significance of election process, the Election Code of Georgia is an organic law. However, despite its hierarchical importance, on the account of frequent changes and ongoing dynamic processes, interpretation of individual norms or the need of their correct application is still an issue. In this respect, it is important to analyse the practice of the election administration and the judiciary in dealing with electoral disputes, which will promote correct perception of individual norms and illustrate possible shortcomings that may arise in terms of applying these norms or introducing them in practice.

Right to vote has long been viewed as the basic functional element of democratic system and development of a country, as well as one of the most important rights among the rights inherent to a democratic society. Right of an individual citizen to participate in the process of formation of a political will is manifested not only by participation in elections but also by effectiveness of procedural mechanisms that allow an individual to influence the outcome, including by exercising the fundamental right to seek judicial relief.

[1] Protocol No.1 to the European Convention on Human Rights, Art.3

We must also note that the right to appeal is not an absolute right and it can only be achieved by correct application of procedural norms. When an individual cannot use the existing procedural norms effectively, s/he may be denied judicial relief. The administrative law that the organic law of Georgia "the Election Code of Georgia" falls under establishes the institute of an active plaintiff, meaning that the plaintiff has an obligation to carry out particular actions and legal activity to resist the outcome that in the plaintiff's view will result in an unfavourable decision.

The present research analyses over 1,000 disputes handled by the election administration and nearly 140 decisions (rulings) made by common courts in the course of general elections in 2016, 2017 and 2018 (including in the run-offs). By thematic grouping of these disputes, the research attempts to illustrate the practice of electoral dispute resolution. It also studies OSCE international observation mission reports and reports and recommendations of local observer organisations.

The process of analysis was greatly facilitated by meetings with four local observer organisations[2] and the election administration, reports and statistical information prepared by the legal department of the Central Election Commission (CEC), as well as a working meeting held by the election administration with civil society in June, under the "Let's Discuss Together" format, focusing on electoral disputes.

The right to file complaints and appeals

Some of the criticism in the OSCE observation mission reports is related to the right to file complaints and appeals. OSCE mostly focuses on two issues, indicating that: a) the legal framework for electoral dispute resolution is complex, including in terms of determining who is permitted to lodge complaints and appeals, and b) the law places unreasonable restrictions on the right to file complaints and appeals, which according to the OSCE observation mission reports, "is at odds with international commitments and standards"[3].

Applicable procedure

According to Article 1 of the organic law of Georgia "the Election Code of Georgia" (hereinafter, the Election Code), relations connected with preparation and conduct of referenda, plebiscites, and elections of the President of Georgia, the Parliament of Georgia, Tbilisi Mayor, a local self-government representative body – Sakrebulo, rights and guarantees of election participants, the procedure for the establishment of the Election administration of Georgia and its powers and the procedure for resolution of disputes are regulated by the Election Code.

The Election Code of Georgia imperatively stipulates the time limits and the rules for identifying and appealing violations of individual electoral procedures. The law also prohibits extension of the time limits prescribed. Based on the analysis of electoral disputes

[2] International Society for Fair Elections and Democracy, Georgian Young Lawyers' Association, Transparency International – Georgia, Centre for Democracy and Development

[3] ODIHR Election Observation Mission Final Report, 29 Feb 2019, https://www.osce.org/ka/odihr/elections/georgia/414827?download=true

handled by courts, in 140 cases selected for research 30% of appeals were denied on grounds that the appeals had been lodged in violation of time limits and/or procedural norms. 20% of disputes handled by the election administration were denied for the same reason.

It is especially notable that according to Article 5.1 of the Election Code, during elections, all the terms under this Law, including the terms for judicial recourse and for delivery of a court judgment, shall be counted in calendar days (including weekends and holidays as defined by the labour legislation of Georgia), and according to paragraphs 2 and 5 of Article 77, unlike the General Administrative Code (GAC) and the Code of Administrative Offences of Georgia (CAO), the countdown to appeal any decision including an act adopted by the election administration or a court decision begins after the decision is made, as opposed to after the decision communicated. Decisions can be appealed within no more than two days and in some cases, they can only be appealed within one day. Here we should consider Article 8.10 of the Election Code, which determines working hours for the election administration and stipulates that an election commission accepts, issues, and registers electoral documents until 18:00 of the working day.

Paragraphs 10 and 10^1 of Article 77 of the Election Code prohibit any extension of the time frame for appeal and dispute resolution as determined in this article, unless otherwise defined by the Election Code; an application/complaint will be dismissed if the time limit and procedure for submitting it has been violated.

Within the limited time frame, naturally the problem of activating resources in the most organised manner arises, which the subjects entitled to appeal are not able to deal with successfully. As a result, significant majority of disputes are brought before the court in violation of prescribed timeframe and they are consequently found inadmissible.

The number of disputes filed in violation of procedural norms is quite large, which based on the requirements of the very same norms, sets these disputes up for failure.

Article 72 of the Election Code prescribes the rule for registering an application/complaint, the information that the application/complaint must include and if it is admitted, duties and obligations of respective PEC chairperson. Article 73 of the Code prescribes the timeframe for preparing, submitting and resolving applications/complaints concerning a violation of polling and counting procedure.

Pursuant to Article 73.1 of the Code, an application/complaint about a violation of polling procedure in an electoral precinct should be drawn up immediately upon identifying any violation of this Law, as defined by Article 72 of this Law, from 7:00 until a ballot box is opened on a polling day.

Under Article 73.2, an application/complaint about violations that occurred during the procedure of counting votes or summarising polling results and requesting a revision or annulment of polling results should be drawn up within the period from opening a ballot box until drafting a summary protocol of polling results as defined by Article 72 of this Law.

Under Article 77.8 of the Election Code, an application/appeal/complaint should be considered to be lodged with an electoral commission/court from the moment it is registered with the respective election commission/court.

Under Article 74.5 of the Election Code, applications/complaints lodged in violation of the procedures prescribed by Articles 72 and 73 and by paragraphs 3 and 4 of this Article will be found inadmissible by relevant election commission.

The Election Code of Georgia does not contain a norm that would relieve a plaintiff of the legal obligation to identify the violation within the applicable timeframe and according to the rule prescribed by the law. Article 17.2 of CAO, which stipulates that when an appeal seeks recognition of an administrative legal act as null and void, its invalidation or revocation, the burden of proof rests with the administrative body that issued this act, unless otherwise prescribed by law, does not apply in this case.

Failure to identify a fact, an infringement, and a violation in the electoral dispute strips the plaintiff of the ability to attribute evidentiary value to these facts.

Courts attribute a particular procedural significance to abidance by the timeframe and procedures prescribed for filing an application/complaint. In almost all such cases courts have indicated that failure to identify a violation detected in the course of the election in a timely manner strips the party of the ability to demand invalidation of summary acts of the election citing these facts. Courts take into account the fact that elections constitute a single interconnected cycle and violation of any of the cycles will result in falling of all subsequent cycles like dominoes. Therefore, all violations that are detected warrant immediate response. Courts cannot question legitimacy of elections after the entire cycle of elections is over and a subject failed to use its procedural opportunities at all or rationally.

Some plaintiffs believe that the deadline was missed due to culpable actions of an administrative body; in particular, the election administration was late in providing summary protocols, causing them to miss the deadline for appealing the illegal acts.

Clearly, the Election Code is based on the principle that only active plaintiffs that understand, have studied and perceive the principal provisions of the Election Code can succeed in electoral disputes.

Analysis of disputes indicates that after missing the deadline plaintiffs often cite illegitimacy of the election process and claim the following: it is the obligation of the CEC, the supreme election administration, to control legitimacy and even though their complaint does not exist, even in absence of an application/complaint the CEC is obligated to examine and identify any and all violations on its own initiative and if confirmed, it should invalidate relevant summary protocols.

In the process of evaluation of claims, naturally courts cannot refuse application of the principle established by the GAC and they find that based on the principle of jurisdiction, higher administrative body clearly has the power to invalidate administrative legal acts adopted by a subordinate body on its own initiative. However, if this is the case, it should be kept in mind that invalidation of an act depends on the initiative of an administrative body, on its actual will. The law grants a higher administrative body the freedom of the competence to make a decision, i.e. it grants the opportunity, the right, as opposed to an obligation to intervene with the relationship to be regulated by law. The obligation of an administrative body to intervene arises only when there is an administrative complaint, which often is not filed in compliance with the procedural rules.

Regarding the limited timeframe, we must also note one difficulty that arises with respect to the burden of proof. The issue is related to the limited timeframe in which the parties are

unable to obtain and submit evidence. An administrative court that does not entirely abandon the principle of inquisition in the dispute resolution also lacks the opportunity to obtain, examine and request evidence on its own initiative. The two days for adjudicating and resolving a court dispute (one day in case of an appeal) is insufficient for court to fully operationalize the powers provided under Article 19 of the CAO and is forced to rely on the evidence obtained and examined by the parties. At the same time, there is no procedural opportunity to extend the timeframe for adjudicating court disputes, since the time limit prescribed by the Election Code concerns the process of adjudicating and deciding court disputes.

In that respect, it is interesting to consider procedural norms of many European countries where resolving court disputes are not technically tied to the final protocol summarising election results. Electoral disputes continue beyond elections and usually, court's summary judgments serve the purpose of preventing election violations in the future.

Indirect (procedural) barriers to filing complaints and appeals

Subjects and their representatives, who can file complaints and appeals

Article 78 of the Election Code places certain limitations on the right to appeal to court depending on different stages of the election process. Article 78.1[1] places similar limitations on the right to file a complaint with the election administration.[4] Article 77 of the Code limits the right to file a complaint or appeal a decision concerning violation of electoral legislation or procedures for anyone except for individuals directly provided in the law, indicating that an application/appeal and/or complaint filed by an unauthorised individual (in court or with the election administration) should be dismissed.

The Election Code does not leave any room for interpretation by the election administration or court. It imperatively prohibits adjudication of complaints and appeals about violation of election procedures filed by anyone but those authorised by law.

With respect to the difficulty of regulating the right to file complaints and appeals we must note that electoral dispute resolution is quite decentralised. It requires direct interest of the complainant in the disputed action or act, as evidenced by the complainant's registration (at the district, at the precinct or at the CEC) or status. To explain further, even among subjects who are permitted to file complaint or an appeal, the law distinguishes a subject from its representative.

For example, a party representative at the CEC or a member of the CEC are authorised[5] to file a complaint about setting up an election district, while they may not file a complaint about setting up an election precinct. Under the Election Code, only a party representative at the DEC or a member of the DEC can file such complaint.

As an example, let us examine paragraphs 20 and 21 of Article 78 of the Election Code of Georgia: in the case of appealing a PEC summary protocol, an organisation with observer status has the right to file a complaint with the court concerning the respective decree of

[4] Therefore, in the text of this research, for purposes of Article 78, an application, a complaint to be lodged with the administration and an appeal to be lodged in court have the same meaning.

[5] The amendment to para.3 of Article 78 of the Election Code will come into force after recognition of authority of parliament elected in the next parliamentary elections.

higher DEC, while an organisation with observer status may not file a complaint with the court concerning a DEC decree on declaring voting results valid or invalid in an electoral precinct. Instead, such complaint can be filed by an observer of the organisation with observer status at relevant PEC.

Similarly, a party is authorised to file a complaint concerning a voters' list but unauthorised to appeal a decree of the election commission chairperson about a party list. Only the party itself is authorised to do so.

Even though there may be some rationale behind such grouping of complainants, the fact is that complicated and excessively detailed regulation often becomes the reason for filing complaints with errors. Parties and organisations with observer status make mistakes in determining who should sign the complaint, or due to organisational or logistical reasons are unable to file a complaint on behalf of a particular representative. As a result, the electoral administration often finds complaints inadmissible, on grounds that they have been filed by unauthorised individuals.[6]

In some cases DECs themselves fail to identify authorised complainants. As a result, they adjudicate complaints filed by unauthorised individuals or mistakenly find complaints filed by authorised individuals to be inadmissible.[7]

Notably, by the time the election administration or court finds the complaint inadmissible on grounds that it has been filed by an unauthorised person, the deadline for filing a complaint is passed and the complainant misses the opportunity to correct the error. As a result, such complaints are left unexamined.

The place of adjudicating appeals

Such procedural misunderstandings are seen regarding the rule for appealing DEC decisions, regulated by Article 77 of the Election Code. This is also directly related to de facto limitation of the right to file complaints and appeals.

The Election Code strictly defines one category of DEC decisions that can only be appealed in district/city courts[8] and another category of DEC decisions that can only be appealed with the CEC.[9] This regulation is quite logical and the principle that a dispute related to election outcomes at a particular precinct should be resolved locally and there must be an opportunity to appeal decisions that fall within the district purview in a higher administrative body is not called into question. However, analysis of complaints illustrates that subjects authorised to file an appeal as well as for the electoral administration it is often problematic to clearly and accurately distinguish between DEC decisions can be appealed with the CEC and ones that can be appealed in court. In a number of instances this has put the right to appeal at risk only due to procedural inaccuracies.

Stipulation of the Code about the place of adjudicating appeals lacks flexibility and it doesn't allow courts or the electoral administration to do anything but to leave an appeal

[6] https://sachivrebi.cec.gov.ge/info.php?id=8108
[7] https://sachivrebi.cec.gov.ge/info.php?id=6131
[8] Under para.2, Article 77 of the Election Code, decision of a DEC about decision of PEC/head of PEC may be appealed to the relevant district/city court.
[9] Under para.4, Article 77 of the Election Code, decision of a DEC can be appealed with the CEC.

unexamined if wrong place for appealing (jurisdiction) has been chosen.[10] Appeals that are not examined on jurisdictional grounds are quite frequent.[11] In some cases DECs themselves up the jurisdiction and indicate incorrect place of appealing in their decrees.[12]

Such practice is quite different from the spirit of the General Administrative Code, as according to Article 80 of the Code, when an appeal/application is filed with an unauthorised body, the administrative body has an obligation to refer the application to an authorised administrative body, and if the appeal falls under the court jurisdiction, the administrative body should provide a reasoned response to the plaintiff and the deadline for filing a an application, as prescribed by the law, will stop running the moment the original application is filed.

Clearly, the Election Code regulations on the right to file an appeal are excessively complicated and rigid, which often creates barriers for subjects authorised to file an appeal, who are seeking effective judicial recourse.

Direct (legislative) obstacles to filing appeals

Refusal to issue a protocol of administrative offence

When speaking about the right to appeal, we should also address the practice recently introduced in the election process. If a complaint filed with the electoral administration over an administrative offence seeks issuance of a protocol of administrative offence and the electoral administration rejects it, the decision may not be appealed in court.

In 2016, the Georgian Young Lawyers' Association appealed the CEC refusal[13] to issue a protocol of administrative offence with Tbilisi City Court but the Collegium of Administrative Offences found the complaint inadmissible.[14]

Relying on Article 272 of the Code of Administrative Offences, the court explained that when a refusal to issue a protocol of an administrative offence is appealed, the court is not authorised to examine validity of the decision. Had the CEC granted the complaint and issued a protocol of administrative offence about the incident, the court would have been authorised to examine the issue. The court found that the appeal didn't fall under its jurisdiction and therefore, it was inadmissible.

The Georgian Young Lawyers' Association filed a private complaint with the Appellate Court over the decision of Tbilisi City Court, demanding that the admissibility decision be invalidated and the case be remanded to Tbilisi City Court. The Administrative Chamber of the Appellate Court fully upheld arguments of Tbilisi City Court about inadmissibility and rejected the private complaint.[15]

[10] Under para.3, Article 77 of the Election Code, if a DEC decision is appealed to the CEC based on the appeal of a PEC decision, the appeal will not be considered.
[11] https://sachivrebi.cec.gov.ge/info.php?id=8236
[12] https://sachivrebi.cec.gov.ge/info.php?id=7329; https://sachivrebi.cec.gov.ge/info.php?id=7754
[13] https://sachivrebi.cec.gov.ge/info.php?id=5253
[14] Decision N3/6002-16 of Tbilisi City Court Collegium of Administrative Cases, dated August 14, 2016. https://sachivrebi.cec.gov.ge/info.php?id=3790
[15] Decision N3b/1508-16 of Tbilisi Appellate Court's Chamber of Administrative Cases, dated August 18, 2016.

As evidenced above, refusals of the electoral administration to issue a protocol of administrative offence and impose a sanction may not be appealed. According to the OSCE Office of Democratic Institutions and Human Rights, such practice amounts to violation of international obligations and according to local observer organisations it limits their right to judicial recourse. Therefore, they demand that the legislation directly provide for an opportunity to challenge such decisions of the administration and to seek judicial relief.

International legal instruments often contain provisions saying that adjudication of electoral disputes in an administrative body is insufficient as the mechanism of judicial review is required.[16] The Inter-American Commission on Human Rights made such decision and found that restriction of the right to appeal a decision of the electoral administration in court amounted to a violation of the right to judicial remedy.[17]

Additionally, judicial review will increase the standard of considering and examining administrative complaints, as well as the quality of reasoning of the electoral administration decisions. Existing practice of the electoral administration is inconsistent and often it does not envisage oral hearing in the complaints process. Additionally, it excessively relies on written statements of respondents. Under the existing regulations, the electoral administration is not bound by a specific timeframe prescribed by the Election Code for handling administrative complaints. Additionally, majority of complaints are subject to DEC jurisdiction, which certainly allows using a higher standard in administrative proceedings. This will bolster trust toward the decisions.

Voter's right to file complaints and appeals

When speaking about limitations of the right to appeal, we must note that voters are not allowed to file complaints and appeals at any stage of the election process.

The only case when an individual citizen can appeal a decision of the electoral administration is when his (her) request to be included on the voter list has been denied. However, the moment a citizen is included on the voter list and s/he becomes a voter, s/he loses the right file a complaint/appeal with the electoral administration or in court, leaving him/her without means of redress.

The restriction is at odds with the OSCE Copenhagen Document 1990, which establishes the right to appeal (Article 5.10).[18] Additionally, Article 3.3. of the Venice Commission Code of Good Practice[19] determines that individual citizens should be able to demand revision of election results based on violation of election procedures. According to paragraph 99 of the Code of Good Practice, standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. However, it is also noted that certain limitations can be imposed for appeals by voters on the results of elections.

[16] UN Human Rights Committee General Comment no.32; UN Human Rights Committee Concluding Observation on Nicaragua CCPR/C/NIC/CO/3 (Dec,12 2018).
[17] International judicial remedies in elections, John Harding Young, 2016, American Bar Association, ISBN:978-1-63425-774-9.
[18] https://www.osce.org/odihr/elections/14304?download=true
[19] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e

The Venice Commission Code of Good Practice distinguishes between the voter's right to appeal to an administrative body or court a) for redress and b) for challenging results of elections based on legislative and procedural violations. The Venice Commission allows imposition of certain limitations for the latter; however, restricting a voter's right to seek redress is unacceptable.

For instance, on the polling day some voters may not be let inside a polling station because they are already inked, meaning that they were at the polling station earlier to express their choice. From theoretical point of view, a voter may also be denied his (her) right to replace a spoiled ballot or a voter may not be issued a ballot because there is a signature along his (her) name on the voter list. In such cases, voters have to rely on observer organisations or political party representatives for redress because their complaints will be left unexamined. It is more logical for a voter who is a victim of vote buying to be able to appeal to court against the perpetrator; however voters do not enjoy such right in Georgia.

Reasons for restricting the right to file complaints and appeals

Considering how limited the right to appeal is under the Georgian election legislation, while those who can file complaints and appeals face additional barriers due to complexity of the dispute resolution system, and given that nearly one in four complaint was left unexamined due to a range of formal grounds, as well as the fact that refusal of the electoral administration to issue a protocol of administrative offence may not be appealed in court and voters have no right to seek redress or to challenge election results, it is safe to say that the spirit of the law is directed toward creating artificial barriers and limiting the number of complaints/appeals in the election process.

Legitimacy of restrictions placed on the right file complaints and appeals

Article 2 of the International Covenant on Civil and Political Rights[20] recognises the right to an effective judicial remedy for violations of civil and political rights of an individual. Several other international legal instruments also recognise the right of citizens to judicial remedy, including the UN General Assembly Resolution #60/147[21], OSCE Office of Democratic Institutions and Human Rights "Guidelines for reviewing a legal framework for elections"[22].

In its decisions the European Court of Human Rights has stated that voter rights are protected under Article 3 of Protocol 1 of the European Convention of Human Rights. Even though these rights are important, they are not absolute. The signatories have a broad margin of appreciation is terms of imposing restrictions and prerequisites that do not principally violate requirements of the Convention. However, eventually it is up to the Court to decide whether the restrictions imposed by the State comply with requirements of Protocol no. 1 of the Convention.[23]

[20] https://matsne.gov.ge/ka/document/view/1398335?publication=0
[21] http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf
[22] https://www.osce.org/odihr/elections/17579?download=true
[23] Sadak and Others v Turkey, Nos.25144/94, ECtHR decision

Therefore, we cannot say that there is a single international standard about individuals entitled to appeal in the election process but rather, its regulation varies by country [24].

For instance, German and Dutch legislation allows any voter to appeal results of parliamentary elections. Similarly, in Finland any voter can appeal election results at his/her respective precinct or district, based on procedural violations. In Greece voters can file a complaint over violation of Polling Day procedures.

At the same time, in 2010, the Venice Commission criticised Norwegian electoral legislation exactly because it limited voters' right to appeal. The Norwegian legislation granted standing in election appeals widely and the recommendation is no longer included in the OSCE observation mission report 2017.[25]

In local elections in UK, voters' right to appeal based on violations of election process is slightly limited. In particular, a collective appeal of at least 4 voters is required for the dispute to be valid. Croatia imposed a similar restriction by requiring a quorum of at least 100 voters.

In Spain and in Austria, voters may not contest election results. Moreover, in Austria the only type of complaint that can be lodged prior to announcement of election results is a complaint related to voter list. Similar restrictions on voters' right to contest elections results exist in France.

In Denmark and in Norway election results may not be appealed in court, they can only be appealed with the electoral administration and a newly elected parliament, which is also at odds with international legal obligations and best international practice. However, OSCE observation mission reports haven't criticised the restriction, as election stakeholders in these countries have been satisfied with fairness of appeal procedures.[26]

In some U.S. states supreme courts have reiterated that under the common law there is no right to contest an election. The right to contest an election exists only under the constitutional and statutory provisions and therefore, the procedure prescribed by statute must be strictly followed.[27]

In Pierre-Bloch v. France the ECtHR found that passive suffrage is a political right, not a civil one and therefore, it is not protected under Article 6 of the Convention (right to a fair trial)[28].

The International Foundation for Electoral Systems (IFES) has elaborated seven international standards about electoral disputes[29], which it studies to examine effectiveness of complaints adjudication system in a particular country. These are the following standards:

1. Transparency of the right of redress for election complaints and disputes
2. A clearly defined regimen of election standards and procedures
3. An impartial and informal arbiter
4. A system that judicially expedites decisions

[24] International judicial remedies in elections, John Harding Young, 2016, American Bar Association, ISBN:978-1-63425-774-9.
[25] https://www.osce.org/odihr/elections/norway/360336?download=true
[26] https://www.osce.org/odihr/elections/denmark/419231?download=true
[27] Taylor v Roche, 271, S.C. 505,509,248, S.E 2d 580,582 (1978).
[28] Pierre-Bloch v. France 20/1996/732/938, ECtHR decision
[29] https://www.ifes.org/sites/default/files/guarde_final_publication_0.pdf

5. Established burdens of proof and standards of evidence
6. Availability of meaningful and effective remedies
7. Effective education of stakeholders

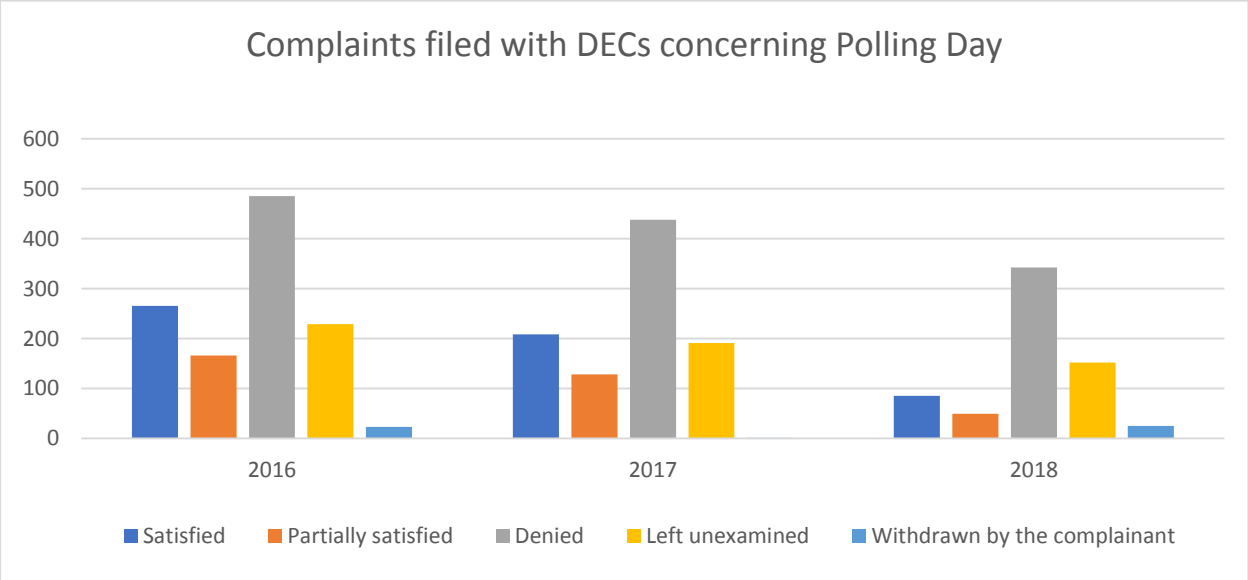
In order to determine whether the limitation imposed by the State on voters violates the European Convention, the ECtHR applies the following principles: a) does the limitation curtail voter's rights to such extent as to adversely affect their ability to effectively exercise the freedom of choice guaranteed by the Convention, b) is the limitation imposed in pursuit of a legitimate aim and c) are the means employed proportionate[30].

OSCE follows a higher international standard for election processes and it mostly relies on the Venice Commission Code of Good Practice when drafting observation reports. However, in order for a limitation imposed by the state to be found illegitimate, more detailed analysis of characteristics of the process and proof of violation of international legal norms is required.

Complaints statistics

In our case, to assess legitimacy of restriction of voter's right to file a complaint, we should analyse filing and determination of complaints.

Complaint statistics illustrate that number of complaints is quite high, which suggests accessibility of recourse.



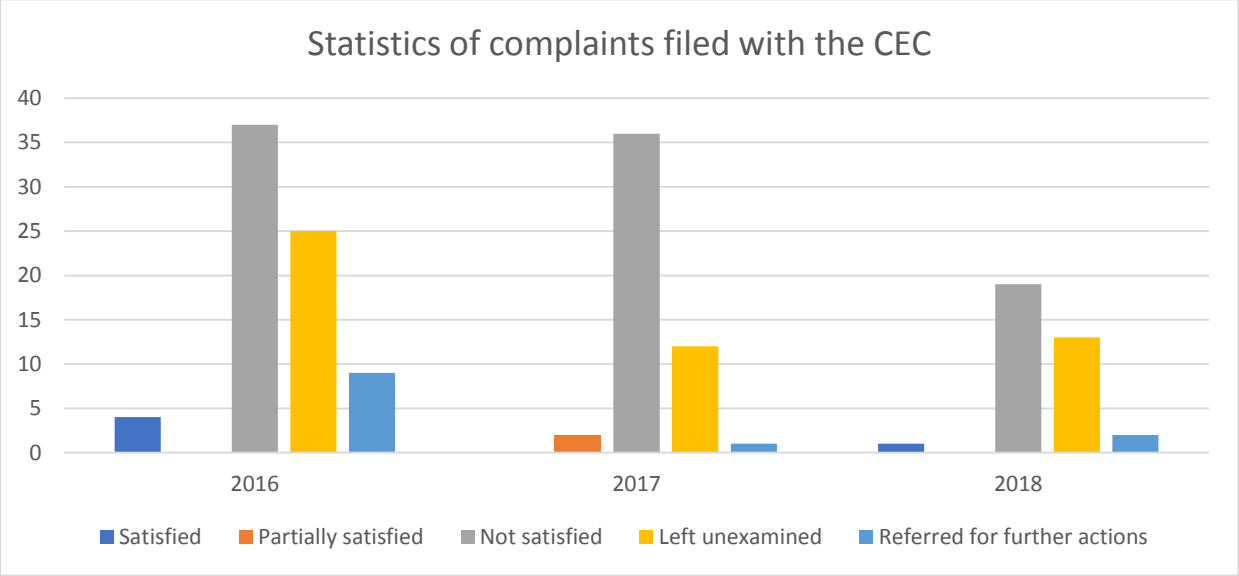
In the first round of the 2016 parliamentary elections, total number of complaints filed with DECs concerning Polling Day was 1,168. In 2017 local self-government elections, the number of such complaints was reduced to 966, and in the first round of the 2018 presidential elections, their number was 653.

It is important to keep in mind that these numbers do not include complaints filed at polling precincts, immediately resolved at local level. This leads us to believe that in reality, the number of complaints about violations of Polling Day procedures is much higher.

[30] Krasnov and Skutarov v Russia, nos. 17864/04 and 21396/04, ECtHR decision

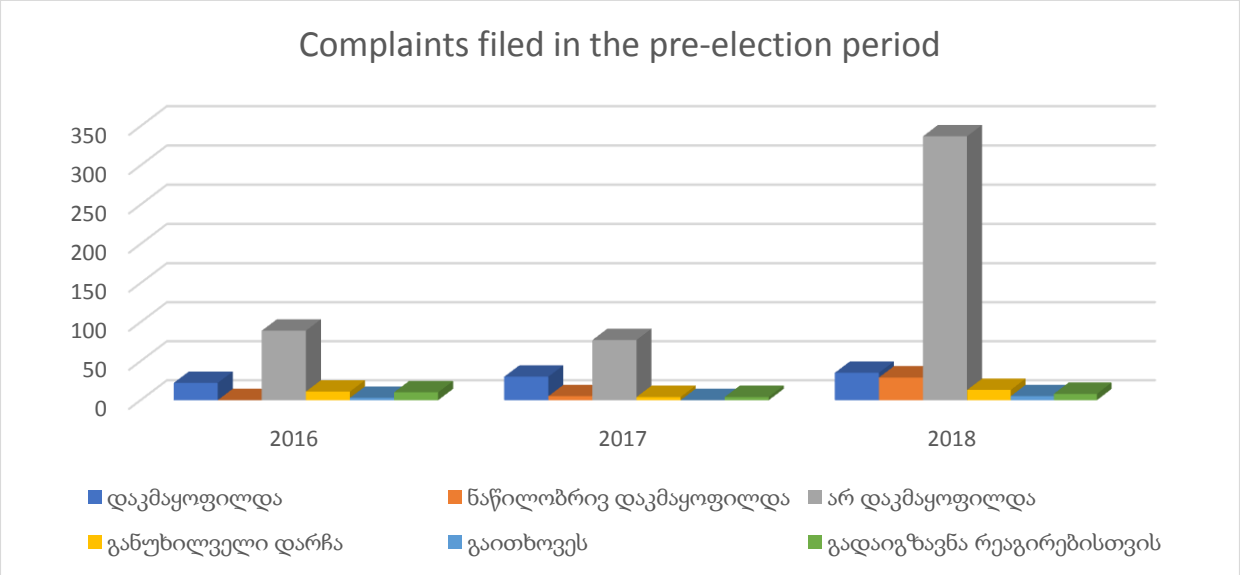
A high number of complaints were left unexamined and a significant number of complaints were satisfied fully or partially, most of which are decisions on determination of disciplinary liability measure.

Statistics of complaints handled by the CEC is similar:



Number of complaints filed with the CEC has been decreasing annually. However, percentage of complaints not satisfied or left unexamined is higher compared to DECs.

The number of pre-election complaints in the 2018 presidential election is clearly at odds with the trend of decreasing number of complaints:



Satisfied	Partially satisfied
Not satisfied	Left unexamined
Withdrawn	Referred for further action

While the number of complaints in the pre-election period in 2016 and 2017 was 135 and 120, respectively, in 2018 their number reached 427. This may be due to active monitoring

of PEC performance during the pre-election period and active monitoring on campaigning and use of public resources, both by monitoring organisations and political parties.

Based on reports of monitoring organisations it is safe to conclude that there are no artificial barriers to registering complaints with the electoral administration. The procedure of filing a complaint at both district and precinct level is quite accessible and simple.

The proportion of complaints satisfied suggests that a well-drafted and well-reasoned complaint can be successful both in the electoral administration and in court. Complaints that were satisfied sought imposition of disciplinary liability measure on election administration officers,[31] disqualification of a candidate,[32] restoration of disqualified candidates,[33] recount of invalid ballots at a polling precinct,[34] as well as recount of results at a precinct.[35]

Legitimacy of the restrictions placed on voters right to file complaints and appeals

In the last three general elections, there haven't been any attempts by voters to file a complaint/appeal. As an exception, individual citizens may file complaints about formation of voter list but no such complaints have been filed in court over the recent years.

Out of the four observer organisations, two didn't agree with the OSCE observation mission recommendation about allowing citizens to appeal. They do not find the restriction to be problematic, saying that if a voter wishes to obtain remedy, observers or representatives of observer organisations can file a complaint on his/her behalf. At the meetings observer organisations mentioned the online portal for elections in Georgia,[36] which can be used by voters to report and pin violations of electoral procedure on the online elections map, and observer organisations can lodge an official complaint with the election administration after verifying such reports.

Unlike many other countries, in Georgia civil society organisations can file complaints and appeals. This is due to the fact that an electoral dispute can only be won by a well-prepared, knowledgeable and active complainant, while individual voters have fewer chances of succeeding in an electoral dispute. Therefore, the legislator has entrusted civil society organisations with observer status with the right to file complaints and appeals.

Apart from the argument that voters do not face any problems in reality and their right to freedom of choice guaranteed by the European Convention of Human Rights is not curtailed by limiting the right to appeal, it is interesting to know if the limitation has a legitimate goal.

Notably, the electoral administration and some observer organisations interviewed see the risk of sabotaging election process by granting the right to appeal to voters. The risk is real, as indicated by the analysis of electoral disputes because in some cases, complainants drag on their baseless and potentially unsuccessful disputes in order to postpone summarisation of election results. An election stakeholder may cause a total collapse of the election process by having tens of thousands of activists file complaints.

[31] https://sachivrebi.cec.gov.ge/info.php?id=8671
[32] https://sachivrebi.cec.gov.ge/info.php?id=5778
[33] https://sachivrebi.cec.gov.ge/info.php?id=3853
[34] https://sachivrebi.cec.gov.ge/info.php?id=6346
[35] https://sachivrebi.cec.gov.ge/info.php?id=6552
[36] http://www.electionsportal.ge/

To analyse proportionality of the measure, we need to determine if there are any other legitimate means available to accomplish the same goal, or if a less restrictive measure can be used to grant standing in election appeals as widely as possible and at the same time, avoid any risks of blocking of the election process. The legislator should carry out this analysis every time the election reform is implemented and if such possibility arises, it should immediately grant standing in election appeals as widely as possible.

In the process of research we made an observation that could be important for analysing proportionality of the limitation: it seems that the spirit of the legislator to limit the number of complaints as much as possible is confronted by the spirit of subjects entitled to appeal, write and register as many complaints as possible. It is safe to say that the number of complaints is used as a criterion for evaluating how active and competent a subject is, while political parties are passing the number of complaints off as grounds for calling legitimacy of election results into question. Often a complaint is drawn up not about a violation of a particular right but about restriction of right that hasn't yet occurred. For instance, a recent spike in complaints against PEC during the pre-election period, due to absence of commission members at the precinct,[37] especially when the entire PEC is distributing voter invitation cards, calls reasonableness of spending complainant's as well as the electoral administration's time and resources.

Clearly, the problem of allowing voters to appeal resembles a vicious circle where solving one problem requires solving another and vice versa. Approach toward complaints should be changed both by the legislator and the subjects entitled to appeal.

The obligation to file one-time complaint

Legal analysis of paragraphs 2 and 3 of Article 77 of the Election Code of Georgia makes it clear that the Election Code did not abandon the institute of administrative complaint inherent to administrative proceedings as in electoral disputes an administrative complaint is a prerequisite for admissibility of a court appeal.

In administrative proceedings an administrative complaint has the function of admissibility of a court appeal. A stakeholder may seek judicial redress after using the opportunity of filing one-time complaint with an administrative body. Due to strictly defined constitutional time limits of the election process, the foregoing principle is regulated in detail in the Election Code according to the legal order related to the sequence of contesting different stages of election process. The Code clearly defines the rule of filing a complaint in the hierarchy of the election administration and as evidenced by the analysis of electoral disputes, adherence to this rule, which creates an opportunity to appeal to a court, is still problematic.

First we need to focus on the structure of the election administration of Georgia and subordination of its units. Under Article 7.2 of the Election Code of Georgia, the election administration of Georgia is composed of: a) the Central Election Commission and its office; b) the Supreme Election Commission and its office; c) district election commissions; d) precinct election commissions.

[37] https://sachivrebi.cec.gov.ge/info.php?id=7203; https://sachivrebi.cec.gov.ge/info.php?id=7231

Under Article 7.3, the CEC is the supreme body of the election administration of Georgia that, within its powers, manages and controls election commissions at all levels, and ensures uniform application of the electoral legislation nationwide.

Collective analysis of Article 14 (powers of the CEC), Article 21 (powers of DECs) and Article 26 (powers of PECs) suggests that PECs are the first (lower) level of the election administration of Georgia and they are subordinated to higher bodies – DECs and the CEC; further, DECs are the second (intermediate) level of the election administration and they are subordinated to a higher body, the CEC; the CEC is the third (and the highest) level of the election administration.

Analysis of Article 77 (term and procedure for appeal) of the Election Code suggests that the legislator created two mechanisms of control for the election administration– internal and external. Within internal control, higher level commissions check legitimacy of actions and decisions of lower level commissions, and within the judicial control courts check legal validity of administrative acts and actions of election administration bodies, based on a subject's court appeal.

Notably, mechanisms of internal and judicial control work according to a particular order, through certain sequential logical steps; detailed regulation of judicial control is provided in Article 77 of the Election Code.

According to para.1, Article 77 of the Election Code, violation of the electoral legislation of Georgia may be appealed to the respective election commission. The decision of an election commission may be appealed only to a higher election commission or to the court under the procedure and within the time frames as defined in this Law, unless otherwise provided for hereby.

Under paragraph 2 of the same article, decisions of PEC/head of PEC may be appealed to the relevant DEC within two days after decisions are made. The DEC should examine the appeal within two days. The decision of the DEC may be appealed to the relevant district/city court within two days. The district/city court should examine the appeal within two days. The decision of the district/city court may be appealed to the Court of Appeals within one day after the decision is made. The Court of Appeals should examine the appeal within one day. The decision of the Court of Appeals is final and may not be appealed.

Decisions of head of PEC may be appealed to the relevant DEC within two days after the decision is made. The DEC should examine the appeal within two days. The decision of the DEC may be appealed to the relevant district/city court within two days. The district/city court decision may be appealed to the Court of Appeals within one day after the decision is made. The Court of Appeals should examine the appeal within one day. The decision of the Court of Appeals is final and may not be appealed.

Under para.4 of the same article, decisions of DEC/DEC head officers may be appealed to the CEC within one calendar day after decisions are made. The CEC should examine the appeal within one calendar day. The decision of the CEC may be appealed to the Tbilisi City Court within one calendar day after its delivery. The Tbilisi City Court should examine the appeal within two calendar days. The decision of the Tbilisi City Court may be appealed to the Court of Appeals within one calendar day after the decision is delivered. The Court of Appeals should deliver its decision within one calendar day after filing the appeal. The decision of the Court of Appeals is final and may not subject to appeal.

Notably, the timeframe for examining an appeal as prescribed by the Election Code is quite tight and often it only allows examination of an appeal for the sake of form. Even though limiting the timeframe for adjudication of electoral disputes is an acceptable practice worldwide, the two-day and one-day periods prescribed by the Election Code are too tight. Earlier it was justified by a constitutional provision that established a concrete time limit from Polling Day to the final announcement of results. After this provision was removed from the Constitution, it is possible to harmonize the timeframe for adjudication of disputes with international practice. For instance, according to paragraph 95 of the Venice Commission "Code of Good Practice", a time limit of three to five days is recommended as reasonable for adjudicating disputes. Adding at least 1 day to the time limits at every level will be important both for the election administrations and for courts.

Administrative acts adopted by the first and the second levels of the election administration (by DECs and PECs) should be first appealed to a higher administrative body. After that, they can be appealed to court. I.e., a PEC summary protocol will be subject to judicial control after a higher administrative body – DEC examines its validity within the external control and makes a concrete decision. Essentially, the single system of control provided in para.2, Article 77 of the Election Code is a three-step system for PEC summary protocols in consideration of the fact that DEC is the first and the mandatory step for adjudicating the dispute, first instance court is the second step and the appellate court is the third and the final step.

This raises a question about what dispute resolution rules should apply when a DEC examines PEC actions on its own initiative (subparagraph "e", art.21 of the Election Code: "A DEC should: based on an application/complaint (if the application/complaint is filed under the procedure and within the time frame determined by this Law) or on its own initiative, verify the legality of actions and decisions made by PECs and their officials (including the accuracy of registration of election participants, counting of ballot papers, etc.), and if violations are determined, make respective decisions (including changing of data in the PEC summary protocol of polling results after the verification or annul polling results in an electoral precinct).

Based on a systemic analysis of the foregoing norms, courts find that verification of validity of a summary protocol by a DEC, based on an application/complaint or on its own initiative is identical in terms of an outcome and it is not subject to different regulations when a dispute is continued; it does not provide an opportunity to use para.4, Article 77 of the Code; it does not change the three-level system of dispute adjudication; otherwise, this would lead to a situation where in one case, validity of a precinct summary protocol is verified by 4 subjects (DEC, CEC, first instance court, appellate court) and in another case, it is verified by three subjects (DEC, first instance court, appellate court), which is unacceptable and does not serve the objectives of the law.

Court decisions reiterated that para.4, Article 77 of the Election Code of Georgia regulates cases where the second level of the election administration (DEC) does not verify validity of an act issued by a lower-level election commission but rather, it decides an issue that falls within its purview – for instance, under subparagraph "b" of Article 21 of the Code, a DEC establishes and specifies by its decree the boundaries of electoral precincts and under subparagraph "d" of Article 21, it determines by decree the text of ballot papers for the election of local self-government bodies to be held in the electoral district. Additionally, under paragraph "h" of Article 21, a DEC grants by decree the status of a democratic

observer of elections/referenda/plebiscites to local non-entrepreneurial (non-commercial) legal entities referred to in the Code, and under subparagraph "f" of Article 21, it draws up a summary protocol of polling results of the DEC, etc. In all of these and similar cases, an administrative act issued by a DEC is subject to the rules and the timeframes for appealing prescribed by paragraph 4 of Article 77 of the Code, which means that with respects to DEC acts, the CEC is the first and mandatory step for dispute resolution, first instance court is the second and the appellate court is the third step.

Pursuant to para.3 of Article 77 of the Election Code, if a DEC decision is appealed to the CEC based on the appeal of a PEC decision, an application/complaint should not be examined.

To summarise, there is only one principle based on which PEC decisions (actions) are verified by DEC, a higher administrative body, and without appealing to the DEC first, the claimant may not file in court. Similarly, DEC actions are verified by the DEC, a higher administrative body, and without appealing to the CEC first, court appeal will be found inadmissible. Even though the CEC creates higher hierarchy in the election administration, appealing to the CEC over actions (decisions) of a DEC essentially strips the claimant of practical possibility to apply to court because, as noted earlier, in view of the timeframe for appealing, the appeal will be filed in court in violation of the applicable timeframe.

What happens when applicable time limit is violated but a subject learns about circumstances that, had the subject known about them earlier, would have resulted in a favourable decision for the subject, i.e. is there a possibility to activate the procedural institute of proceedings renewal in light of newly discovered circumstances?

As stated earlier, in the process of appealing, adjudicating and deciding electoral disputes, application of time limits prescribed by the Civil Procedure Code or Administrative Procedure Code is not allowed. The time limit for appealing in the Election Code is prohibitive and missing the deadline will proportionately reflect on the individual's rights and will result in refusal to consider the appeal. The court practice illustrates that courts rule out the possibility of proceedings renewal and find that introducing the civil/procedural institute of proceedings in electoral disputes runs against requirements of the noted Article, allows delaying the electoral dispute and is at odds with the order established by the organic law. The election process, individual actions related to elections, due to their constitutional significance, warrant immediate response, which leads to the requirement of Article 5 of the Election Code outlined above. According to this Article, all terms under the Code should be counted in calendar days (including weekends and holidays as defined by the labour legislation of Georgia). The time limit for appealing based on the Election Code is not related to passing of the act to the party, just like submitting a complaint or an appeal to the post office department does not result in suspension of running of the deadline for appealing. We should also consider the constitutional timeframe related to the issue of recognition of authority of constitutional bodies. In this way, the organic law of Georgia "the Election Code of Georgia" prescribes the time limits and rules for appealing election commission decisions and violations of election legislation of Georgia.

Since such strict regulations exist for electoral disputes, courts rule out application of norms provided in the Civil Procedure Code of Georgia and renewal of proceedings is not allowed.

Based on the analysis of cases for this research, we found that many complainants drag on their artificial, potentially unsuccessful disputes to create a barrier and hinder summarisation of final election results by the CEC.

Para.5 of Article 76 of the organic law of Georgia "the Election Code of Georgia" prohibits the CEC from summarising election results until election disputes pending in the courts of common jurisdiction are resolved, without giving full consideration to the court decisions.

In this case the issue concerns correct interpretation of the norm and in particular, whether the article cited above covers all possible disputes that may arise from the Election Code, which naturally is not reduced only to summarisation of election results. Structure of the Election Code should be considered and with respect to interpretation of the norm it is of principal importance that the prohibition about summarisation of election results is provided in Chapter 8 of the organic law of Georgia "the Election Code of Georgia", which regulates polling process, counting of votes, rules and procedures for adjudicating applications/complaints related to counting of votes and summarisation of polling results, establishes the rule for summarising polling results and issuing summary protocols.

Article 76 of the Election Code, which is often cited, sets out the procedures for summarisation of election results at the CEC. Pursuant to para.1 of Article 76, the CEC should, based on protocols received from DECs and PECs, and no later than the 19th day after polling, summarise at its meetings the results of elections for the Parliament of Georgia, the President of Georgia, the Mayor of Tbilisi and the Sakrebulo of Tbilisi and prepare a summary protocol on those results.

It should be noted that paragraph 5 of Article 76 is not provided in the general part of the Election Code but rather, as stated earlier, it is provided in a special part of the organic law, which, based on a systemic analysis of the Code, does not allow to assert that the norm is applicable to all appeals against the CEC.

With respect to interpretation of the norm, we must consider paragraph 1"k" of Article 14 of the organic law of Georgia "the Election Code of Georgia" focusing on DEC and PEC summary protocols of polling results and stipulating that the CEC should, based on DEC and PEC summary protocols of polling results and giving consideration to the final decision of the court about violations of the electoral legislation of Georgia, determine the results of elections for the Parliament of Georgia (under party lists), elections for the President of Georgia, elections for the Tbilisi Sakrebulo, elections for the Mayor of Tbilisi, referenda/plebiscites, for which a CEC summary protocol of elections results shall be drawn up.

Based on the collective and systemic analysis of these norms, it is safe to conclude that para.5 of Article 75 of the Election Code of Georgia prohibits summarisation and announcement of election results before resolution of electoral disputes, which are related to polling procedures, directed toward invalidation of DEC and PEC summary protocols of polling results and will be reflected on the CEC summary protocol in terms of outcome. Consequently, all complaints that are not related to the polling process and to validity of a summary protocol will not be an obstacle to summarisation of results.

Ballot recount

Based on the analysis of appeals filed in court we found that majority seeks ballot recount due to suspicions that votes cast in favour of a certain subject were categorised as invalid ballots.

In the process of adjudication of such disputes, overall courts consider quality and credibility of evidence and how the evidence was obtained.

Pursuant to Article 73.2 of the Election Code of Georgia, an application/complaint about violations that occurred during the procedure of counting votes or summarising polling results and requesting revision or annulment of polling results should be drawn up within the period from opening a ballot box until drafting a summary protocol of polling results as defined by Article 72 of the Code.

In the context of requirements of the said article, we must note that when a claimant fails to present their claims as set forth by law and indicates later, based on their subjective opinions that their ballots were categorised as invalid ballots, naturally, the court will not find that the standard of credibility of evidence has been adhered to because suspicions are reasonable if they are based on facts. When there is no evidence and/or no objective link between the evidence, the appeal becomes ill-founded.

It is a different situation when a representative or relevant authorised individual registers a violation in the log-book. In this case, court practice is divided into two parts: to verify authenticity of fact, in some cases courts request invalid ballots and by opening and verifying these ballots, the fact of categorising the ballots as invalid is confirmed or denied.

However, often courts refuse to request and recount invalid ballots stating that due to a significant difference between votes received by subjects participating in elections, the number disputed ballots will not have any effect on the final election results.

Significant majority of such decisions state that even if it is confirmed the ballots have been wrongly categorised as invalid, due to their small number, this fact may not serve as grounds for declaring the summary protocol null and void. Usually, court decisions are based on the following position: polling results may be invalidated or recounted if there is a gross violation of the Election Code. Notably, the Election Code does not provide a legal definition of “gross violation”; however courts have found that based on a systemic interpretation of the norm, according to the legislator, the term “gross violation” means a systemic and far-reaching violation that negatively affects the election process, polling or election results. Dozens of invalid ballots will not change the outcome of election or have any essential impact on the number of votes distributed.

Notably, the election administration is not very enthusiastic about decisions to recount ballots because the way applicable procedure is regulated, even if there are no violations, there may still be a discrepancy which will raise additional questions about vote counting process at the precinct[38].

The issue is naturally debatable because a principal right is at stake, the right of every individual to participate in governance by casting a vote in elections. In that respect, we should probably consider the following interpretation made by the Constitution of Georgia in one of its cases (case 1/4/593,24.10.2015): In democratic and Rule of Law based state there is no aim, interest, including the aim to protect human rights, which would arm the state with the legitimate right to violate right to liberty of certain individuals.

[38] A ballot found without an envelope during vote count at a precinct will be considered invalid, however during recount of ballots after summarization of results it is impossible to determine why such ballot was considered invalid and it may categorised as a valid ballot.

Naturally, this observation of the Constitutional Court does not concern the foregoing problem directly, however the context is clearly important, as behind every invalid ballot there is a will of a concrete voter and his/her right to vote. Recount of ballots in recent election period, even though their number has grown, is not an insurmountable technical difficulty and in order to protect each right, courts may adopt a consistent approach and check validity of each claim by examining evidence.

Analysis of the ECtHR case law suggests that in the process of adjudicating electoral disputes, the matter of ECtHR oversight depends on which particular aspect of elections is in question. Technical aspects of counting and drawing up protocols are subject to less scrutiny. According to the ECtHR, the concept of elections is put at risk when there is evidence of procedural violations that hinder free expression of people's will.

Analysis of decisions made by common courts indicates that in terms of adjudication and resolution, disputes concerning exertion of influence on voters' will are the most problematic. Plaintiffs in these disputes demand invalidation of PEC or DEC summary protocols. The standard of proof continues to be a problem.

Article 6 of the ECHR guarantees the right to a fair trial; however it doesn't provide any rules about admissibility of evidence. Overall the process of evaluation of legal proceedings considers only the quality and credibility of evidence and how it was obtained. During adjudication of electoral disputes, usually video recordings made by a party are presented and when their credibility is questioned, a need to corroborate them with other evidence arises. However, such evidence cannot be obtained due to the time limits or inability to obtain them legally. Witnesses either do not corroborate or do not exist or their statements are contradictory and often lack credibility. Witnesses that confirm the impugned fact are usually supporters (activists) of the subject that has appealed to court seeking invalidation of election results. In this case, their interest is clear, which rules out the possibility of making a decision and questioning legitimacy of the entire election process based on their statements. As the form of obtaining evidence creates suspicions about its credibility and authenticity, it is impossible to adhere to the high standard related to the necessity to base court decision on reliable and authentic evidence. How authentic evidence should be obtained is a separate matter. It is likely that a clearer legitimate intervention is needed in this area, as it is not disputed that legitimate intervention is necessary and unavoidable if high public interest is involved and neutralisation of existing or anticipated risks is important.

Polling Day summary protocol

Pursuant to para.8, Article 71 of the Election Code of Georgia, a PEC is responsible for posting a copy of a summary protocol of polling results for public review. A PEC should, if requested, immediately give a copy of the protocol (attached with dissenting opinions of commission members) to representatives of a party/electoral bloc/initiative group of voters or to a PEC member appointed by a party and to observers from an observer organisation. The copy of a protocol should be certified by the PEC seal and signatures of the PEC chairperson and secretary (these protocols should have the same legal force as PEC summary protocols for polling results). Any representative/observer should confirm the receipt of a protocol by signing in the PEC log-book.

The claimant cannot confirm violation of the foregoing norms by election commission members, there is no evidence that the claimant requested the protocol, no relevant complaint has been filed with PEC or DEC, and no obligatory claim has been filed in court within the same timeframe, which if such fact were to exist, would have made redress possible and would have confirmed illegitimacy of the election administration's actions. Here we are not going to focus on the burden of proof, as indicated by court in all similar disputes but instead, we will focus on para.3, Article 102 of the Civil Procedure Code of Georgia stipulating that circumstances that should be confirmed by certain type of evidence pursuant to the law may not be confirmed by any other type of evidence. Under such circumstances, only a statement of a party may not be considered the type of evidence that will enable evaluation of legitimacy of the election administration's actions.

Second most frequent complaints are those seeking invalidation of summary protocols due to corrections made in these protocols, changing the actual data.

Under Article 70.2 of the Election Code, a summary protocol is an individual administrative/legal act that confirms polling and election results, which naturally indicates its significance as an administrative act.

Article 70.4 of the Election Code prescribes the rule for correcting a summary protocol. According to this article, if any mistake is made during filling out a summary protocol, in order to correct it, an inscription 'corrected' should immediately be put alongside the respective data in the summary protocol. An election commission should draw up a protocol of correction specifying the corrected data entered into a summary protocol and the date and time of drawing up the protocol. All members of an election commission attending the session should sign the protocol of correction. The protocol should be certified with the commission seal, registered in the election commission registration book, and attached to the summary protocol in which data were corrected.

According to the foregoing norm, an inscription "corrected" should "immediately" be put alongside the respective data in the summary protocol and the protocol of correction should be certified with the commission seal and attached to the summary protocol in which the data was corrected.

In this way, Article 70.4 clearly defines the procedure that should be followed in order to make corrections in the administrative act. Further, the stipulation that the protocol of correction should be certified with the commission seal and registered in the logbook clearly indicates that a summary protocol can be corrected before it is referred to the district election commission. Under Article 71.12 of the Election Code, after the completion of all polling procedures, the registration book of a PEC should be closed, signed by the PEC chairperson and secretary, and endorsed by a PEC seal, while under Article 71.13 of the Election Code, a PEC seal should be sealed in a separate package and the package should be signed by the PEC chairperson, its secretary, and other PEC members.

Collective analysis of the foregoing norms suggests that the moment the seal and the documentation is already sealed and sent to the higher administrative body, the power of the precinct election commission to make corrections in the protocol is terminated. After the procedure is completed, a PEC is prohibited from making any corrections in the protocol.

We should also focus on the guidelines adopted by the Central Election Commission of

Georgia as there are a number of contradictory interpretations with respect to its use. For instance, let us consider Decree no.52/2016 of the Central Election Commission of Georgia on "Approval of guidelines for PEC members for the October 8, 2016 Parliamentary Elections of Georgia", dated July 27, 2016.

Chapter III of Part III of these guidelines contain procedures "for setting up polling stations and counting votes", according to which at the end of polling PEC chairperson goes to each registrar of voters who, upon instructions of the chairperson (in consideration of the information in statements drawn up by the registrars of voters before the end of polling, if any) verify if the number of ballots issued – number of spoiled ballots equals to the number of voter signatures.

If there is a discrepancy, the registrar of voters should count again and check the numbers. If there is a discrepancy again, the registrar should draw up a statement (indicating the reason) to be attached to summary protocol/protocols. The information provided in statements of registrars of voters (if any) should be taken into account when drafting summary protocol(s) of polling.

In practice, the last provision is understood the following way: if there are more ballots than signatures, signatures are added in summary protocols based on statements, according to the amount provided in the statements, in order to achieve the balance.

Courts provide the following interpretation: they focus on the fact that the bylaw contains the following provisions: the discrepancy should be identified and recorded before the end of polling and there should be a corresponding statement drawn up by registrars of voters. Only when these prerequisites exist, when due to these reasons the number of ballots issued minus the number of spoiled ballots does not equal to the number of voter signatures, the information provided in statements of registrars should be taken into account when drafting the summary protocol of polling.

In terms of practice, this gets more complicated as summary protocol is amended after PEC decisions have already been sent to relevant DEC and the amendments are based on statements of PEC members.

Interestingly, courts provide the following reasoning: they refer to para. "e" of Article 21 of the Election Code of Georgia, stipulating that a DEC should, based on an application/complaint (if the application/complaint is filed under the procedure and within the time frame determined by this Law) or on its own initiative, verify the legality of actions and decisions made by PECs and their officials (including the accuracy of registration of election participants, counting of ballot papers, etc.), and if violations are determined, make respective decisions (including changing of data in the PEC summary protocol of polling results after the verification or annul polling results in an electoral precinct). If the violation results in the replacement of an elected person in a single-seat district or in the replacement of any candidate running in the second round of elections, or in the replacement of persons elected in a multi-seat district (when holding elections for local self-government bodies), or in the change of a decision to declare elections held or to declare failure of elections (according to a majoritarian electoral district and during elections of local self-government bodies), and if such a verification is not sufficient for the DEC to establish the legality of the results, the DEC should make a decision to declare polling results in the respective electoral precinct void and apply to the CEC for setting the date for a repeat vote. If the DEC decides to recount votes, it should notify all electoral subjects and observer organisations,

representatives of which attended the counting of ballot papers at an electoral precinct, and ensure, upon request, the attendance of their representatives at the re-counting process.

Based on the foregoing norm, courts find that because a DEC has the authority to verify validity of actions and decisions of PECs based on an application/complaint as well as on its own initiative, which entails verification of registration of election participants, verification of accuracy of counting of election ballots, in the process of implementation of these powers a DEC can make the following types of decisions: 1. Make changes in the summary protocol of polling results based on the results of verification; 2. Order a recount; 3. Invalidate polling results at the election precinct if the two types of verification noted above do not allow establishment of legitimate outcome.

Since based on the Election Code a DEC has the power to make changes in the PEC summary protocol of polling results according to the results of verification, it is believed that based on combination of data from statements of PEC members including registrars, from protocols of correction and from the Polling Day log-books, it is possible to amend the data provided in the summary protocol. However, amending a summary protocol based on a statement of a representative of a lower-level administrative body may not be viewed as the standard of administrative proceedings that will be trusted by election stakeholders.

Similar possibility is provided by the GAC by allowing a higher administrative body to amend a decision of a lower administrative body. In this way, in terms of reasoning the decisions are in compliance with the general principles of administrative law and essentially, it is difficult not to prove legitimacy of the approach, however, Article 21 of the Election Code needs to be improved from procedural point of view as the existing norm limits court's possibility to interpret the norm broadly and always poses the risk that judicial control on summary protocols will become a formality, the possibility of examining contents of the basis of the claim will be limited, which will damage not only credibility of judicial decisions but the principle of transparency of the entire election process.

There is also a high number of disputes initiated on grounds that the sum of the number of votes received and the number of invalid ballots is less than the number of signatures of voters that participated in the election.

Pursuant to Article 63.19 of the Election Code, a PEC should issue a ballot paper(s) and special envelopes based on a list of voters against a Georgian citizen's identity card, passport of a citizen of Georgia, refugee certificate for IDPs from the occupied territories of Georgia (together with the identity card of a citizen of Georgia). Pursuant to Article 63.21, voters should be given two types of ballot papers during elections for the Parliament of Georgia – one for majoritarian and the other for proportional elections. Pursuant to subparagraphs "c" and "c" of Article 65.2 of the Election Code, after endorsing a ballot paper(s), a voter should enter a secret polling booth and fill out the ballot paper(s) as defined by this Law. After filling out the ballot paper(s), the voter should fold it (them) so that it is impossible to see who/what he/she voted for; a voter should take the folded ballot paper(s) to a desk standing separately, independently take a special envelope and put the ballot paper(s) therein. Only a voter has the right to put a ballot paper(s) in a special envelope. An election commission member may not open the filled out ballot paper(s) or otherwise violate the secrecy of voting. Pursuant to Article 65.5 of the Election Code, members of a PEC and persons authorised to be present at a polling place may require a voter, before he/she goes into the polling booth and places the ballot paper(s) into a special

envelope, to show them that he/she has the exact number of ballot papers and special envelopes in hand as defined by this Law. A voter should comply with this requirement.

In terms of reasoning, the court cites the following motive: before the ballot (ballots) is inserted in a special envelope, the authority to verify the number of ballots and special envelopes rests with the PEC members and individuals authorised to be present at a polling place. However, according to the Election Code such verification is not a necessity. Therefore, it is impossible to determine whether all voters inserted ballots provided to them by the commission inside the envelope. Detection of inaccuracy in this process depends on chance. In this way, the sum of the number of votes received and the number of invalid ballots does not allow determination of the actual number of voters that participated in elections. In light of this, if the sum of votes received by electoral subjects and the number of invalid ballots is less than the number of voter signatures, this is not viewed as the basis for invalidating the summary protocol and recounting votes.

Findings and recommendations

1. Even though in a long-term perspective, as soon as appropriate circumstances come about, voters should be granted the right to file complaints and appeal decisions in order to be able to seek effective remedy, current limitation is not an inadequate limitation of the right to vote and it has a legitimate goal.

2. Persons entitled to appeal face additional obstacles due to complexity of regulations and therefore, it is recommended to simplify Articles 77 and 78 of the Election Code with the aim of removing any additional barriers.

3. Decisions of the election administration should be subject to judicial review as much as possible.

4. The time limits for adjudicating complaints, as set out by Article 77 of the Election Code, should be extended for all stages of adjudication with at least one day;

5. Courts should actively exercise their right to examine evidence and make decisions based on examination of evidence, including recounting of ballots (both invalid and valid), as needed.

6. Improving the standard of adjudication of complaints by the election administration and ensuring consistent practice will increase trust toward adjudication of complaints.

7. The election administration should focus on improving qualification of DECs in complaints adjudication, which should entail both training and preparation as well as increasing their status and interest.