

# Electoral dispute resolution

Developed in line  
with the Council of Europe URSO  
Methodology for Electoral Co-operation

Toolkit for strengthening  
electoral jurisprudence



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Division of Elections and Civil Society (DG Democracy)  
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Cover and layout: Documents and Publications  
Production Department (SPDP) Council of Europe.

Appendix VI has not not been copy-edited  
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# European Commission for Democracy through Law

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The European Commission for Democracy through Law – better known as the Venice Commission because it meets in Venice – is the Council of Europe’s advisory body on constitutional matters.

The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure the dissemination and consolidation of a common constitutional heritage, playing a unique role in conflict management, and provides “emergency constitutional aid” to states in transition.

The Commission has 62 member states: the 47 Council of Europe member states and 15 other countries (Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA). Argentina, Japan, Saint Siege and Uruguay are observers, and Belarus has the status of an associate member state. The South African Republic and the Palestinian National Authority have a special co-operation status. The European Commission and OSCE ODIHR participate in the plenary sessions of the commission.

Its individual members are university professors of public and international law, supreme and constitutional court judges, members of national parliaments and a number of civil servants. They are appointed for four years by the member states, but act in their individual capacity. Mr Gianni Buquicchio from Italy has been President of the Commission since December 2009.

The commission works in three areas:

- ▶ democratic institutions and fundamental rights;
- ▶ constitutional justice and ordinary justice;
- ▶ elections, referendums and political parties.

The commission shares the standards and best practices adopted within the countries of the Council of Europe beyond its borders, notably with neighbouring countries.

Its permanent secretariat is located in Strasbourg, France, at the headquarters of the Council of Europe. Its plenary sessions are held in Venice, Italy, at the Scuola Grande di San Giovanni Evangelista, four times a year (March, June, October and December).

## Division of Elections and Civil Society (Directorate General Democracy)

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The Division of Elections and Civil Society (Directorate General Democracy) at the Council of Europe provides advice and technical assistance to the member states on various aspects of elections, such as capacity building of electoral stakeholders and raising voter awareness.

In the field of capacity building, the Division of Elections and Civil Society works closely with election commissions to ensure that election commissioners are familiar with national election regulations and that they observe voters' rights when performing their duties. The division also works to enhance the capacities of other relevant electoral stakeholders, such as the bodies in charge of oversight of campaign and political party financing (for example, the State Audit Office of Georgia) or media coverage of election campaigns (such as the Audiovisual Council of the Republic of Moldova).

In this field, special attention is paid to enhancing the capacities of non-governmental organisations (NGOs) in charge of domestic observation of elections (more than 5 000 domestic observers were trained ahead of the 2014 early presidential elections in Ukraine, for example). Furthermore, in order to guarantee access to information for domestic observers, an e-learning course with a certification based on two handbooks on report writing techniques and international standards in elections has been put at their disposal.

The division also contributes to raising awareness of the importance of participating in elections as voters and candidates. It assists national election administrations in developing voter education and information campaigns, with a special focus on women, first-time voters and persons belonging to national minorities (such as awareness-raising campaigns for first-time voters in Albania).

In addition, the technical assistance work has been carried out with a view to updating the Council of Europe Recommendation Rec(2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting. At the 1289th Session of the Ministers' Deputies on 14 June 2017 the Committee of Ministers adopted a new recommendation on standards for e-voting. The new Recommendation CM/Rec(2017)5, which follows the previous Rec(2004)11, was developed to ensure that electronic voting complies with the principles of democratic elections, and is the only international standard on e-voting in existence to date.

Council of Europe Electoral Laboratory (Eleclab) concentrates on the division's research and thematic work in order to innovate and produce useful and relevant guidelines in various areas of electoral matters ranging from primo voters, to better representation of women to modern strategic planning. Since 2019 the division bases its assistance and support activities in line with URSO methodology for electoral co-operation – Useful, Relevant, Sustainable and Owned. "The URSO toolkit for strategic and co-operation planning" is available online. Its primary audience are national electoral stakeholders who are continuously engaged in electoral reforms, in particular, central electoral commissions.

# Contents

<b>EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW</b>	<b>3</b>
<b>DIVISION OF ELECTIONS AND CIVIL SOCIETY (DIRECTORATE GENERAL DEMOCRACY)</b>	<b>4</b>
<b>PURPOSE OF THE TOOLKIT</b>	<b>7</b>
Electoral dispute resolution: toolkit for strengthening electoral jurisprudence	7
<b>INTRODUCTION</b>	<b>8</b>
How to use this toolkit	8
<b>ELECTORAL DISPUTE RESOLUTION AND THE RULE OF LAW</b>	<b>11</b>
Introduction	11
1.1. International instruments	11
1.2. Key elements in electoral dispute resolution	12
1.3. The fundamental principle: effective examination	13
Concluding remarks	14
<b>CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH A PARTICULAR EMPHASIS ON ELECTORAL DISPUTE RESOLUTION</b>	<b>15</b>
Introduction	15
Conclusion	25
<b>PRACTICES FOR STRENGTHENING ELECTORAL JURISPRUDENCE</b>	<b>29</b>
3.1. The Georgian approach to electoral dispute resolution	30
3.2. Bosnia and Herzegovina's approach to electoral dispute resolution	36
Bibliography	50
<b>RESEARCH ON ELECTORAL DISPUTE RESOLUTION IN GEORGIA</b>	<b>51</b>
Introduction	51
Applicable procedure	52
Indirect (procedural) barriers to filing complaints and appeals	54
Direct (legislative) obstacles to filing appeals	55
Reasons for restricting the right to file complaints and appeals	56
Legitimacy of restrictions placed on the right to file complaints and appeals	57
<b>RESEARCH CASE STUDY ON ELECTORAL DISPUTE RESOLUTION IN UKRAINE</b>	<b>71</b>
Introduction	71
I. Research on national court practice in Ukraine: background and summary of findings and recommendations	71
II. Training course for judges on electoral dispute resolution: from development to implementation	82
<b>EUROPEAN COURT OF HUMAN RIGHTS GUIDE TO ARTICLE 3 OF PROTOCOL 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS</b>	<b>84</b>
I. General principles	84
II. Active aspect: the right to vote	87
III. Passive aspect: the right to stand for election	91
IV. Processing of election results	99
V. Electoral disputes	99
List of cited cases	102

<b>ASPECTS OF ELECTION INTERFERENCE BY MEANS OF COMPUTER SYSTEMS COVERED BY THE BUDAPEST CONVENTION</b>	<b>107</b>
Introduction	107
Relevant provisions of the Convention on Cybercrime (ETS No.185)	107
T-CY statement	109
<b>PROTECTION OF ELECTORAL RIGHTS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS</b>	<b>110</b>
European Court of Human Rights	110
European Convention on Human Rights	110
Elections of the legislature	110
Peculiarities of the wording of Article 3 of Protocol No. 1	110
Difficulties of application	111
Scope of application	111
Non-applicability of Article 3 of Protocol No. 1	112
Limitation of rights in electoral matters	112
Acceptability of the limitation of electoral rights	113
Examples of restrictions on an active electoral right	113
Examples of restrictions on the passive electoral right	114
Electoral rights are political rights	116
Discriminatory restrictions in the elections other than those of the legislature	117
Article 8 of the Convention	118
Article 10 of the Convention	118
Article 11 of the Convention	119
Case studies on electoral rights	119
Speaking notes: election standards in the international legal instruments	121
Case law of the European Court of Human Rights	123
General comment adopted by the Human Rights Committee	124
Under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights	124
Presentation: protection of electoral rights in the case law of the European Court of Human Rights	125
Presentation: election standards in the international legal instruments	135
<b>TRAINING COURSE ON ELECTION LAW AND ELECTORAL DISPUTE RESOLUTION</b>	<b>139</b>
High School of Justice	139
Links to the Session I	148

## Purpose of the toolkit

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### **ELECTORAL DISPUTE RESOLUTION: TOOLKIT FOR STRENGTHENING ELECTORAL JURISPRUDENCE**

This toolkit contributes to strengthening the electoral jurisprudence and improving the quality of decisions of election management bodies and courts on electoral matters. The toolkit serves as a methodological guideline for electoral stakeholders: election officials, domestic observers, party proxies, judges and legal professionals.



## Introduction

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One of the main postulates of a democratic society is the peaceful, periodic transition of office through free and fair elections, which are perceived as legitimate by the public. A democratic approach to a process of governance demands a functioning election process, which, in turn, depends upon an adequate institutional rule of law framework, transparent regulations, court rules and procedures and, more importantly, fully trained, competent judges and personnel with integrity.

For the effectiveness of an election process the absolute compliance with the following five pillars are required: (i) preparatory activities; (ii) campaigning and information dissemination; (iii) voting; (iv) counting; and (v) dispute resolution.

The process of dispute resolution is the superlative moment of the election process. The legitimacy of the election process depends in part on the objectivity and impartiality of dispute resolution mechanisms. It is only when citizens view the election process as legitimate, transparent and responsible does the willingness of the electorate to participate increase.

One of the ongoing challenges for emerging and established democracies is to master the election process and ensure that any dispute challenging “election results” is resolved in a timely, fair and effective manner.

This toolkit provides an overview of existing practices on dispute resolution based on analysis and research conducted in Georgia, Ukraine and Bosnia and Herzegovina.

### HOW TO USE THIS TOOLKIT

This toolkit was prepared jointly by the Council of Europe Venice Commission and the Division of Elections and Civil Society (DG Democracy).

The first part of this toolkit describes developed international instruments, particularly the importance of Article 3 of the First Additional Protocol to the European Convention on Human Rights, the most important standards developed by the Venice Commission Code of Good Practice in Electoral Matters, which has proved to be a fundamental source for the European Court of Human Rights, and the OSCE 1990 Copenhagen and the 1991 Moscow documents. The first part concludes with particular emphasis on electoral dispute resolution based on the practices of the case law of the European Court of Human Rights.

The second part of this toolkit emphasises the principal tools for enhancing the capacity of electoral stakeholders in electoral dispute resolution in line with European electoral *acquis*, as well as developed practices presented by countries under consideration and sample training materials.

## **PART I**



## Chapter I

# Electoral dispute resolution and the rule of law

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*Professor Eirik Holmøyvik, University of Bergen and substitute member of the Venice Commission for Norway*

### INTRODUCTION

In Article 3 of the First Additional Protocol to the European Convention on Human Rights, the member states of the Council of Europe “undertake 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 legislature.” Like other provisions in the European Convention on Human Rights, this provision has a double face: On the one hand, it establishes free elections as a justiciable individual right. On the other hand, it imposes on the member states of the Council of Europe a positive duty to regulate elections by law in order to guarantee that elections are free, respect the secrecy of the ballot and ensure the free expression of the people’s will. A democratic election involves voters and candidates exercising rights according to rules and procedures predefined by law in order to produce an election result that mirrors the people’s opinion. Electoral dispute resolution (EDR) is not just an essential element of a successful electoral process. It is fundamentally a question of ensuring the supremacy of and compliance with the law, both of which are key elements in the rule of law.<sup>1</sup>

### 1.1 INTERNATIONAL INSTRUMENTS

The important principles for electoral dispute resolution follow directly and indirectly from international legal instruments: from legally binding treaties, international case law and other best-practice standards for elections.

Globally, the International Covenant on Civil and Political Rights guarantees free elections, and the right to vote and to stand for election, as well as fundamental rights that are prerequisites for free elections, in particular freedom of expression, freedom of association and effective judicial remedy before an independent and impartial tribunal. For the Council of Europe member states, these rights are also guaranteed by the European Convention on Human Rights and in particular its First Additional Protocol. In Europe, the rights enshrined in the Convention have been interpreted and developed in the case law of the European Court of Human Rights. In particular for electoral dispute resolution, the text of the First Additional Protocol offers little guidance, while an increasingly rich case law provides important standards for all member states to follow. The European Convention on Human Rights is arguably the most important international standard for democratic elections for two reasons. First, individual complaints can be brought before the European Court of Human Rights, which can adopt decisions that are binding for the member states. Second, the Convention as interpreted and developed by the Court’s case law is directly applicable by national courts and election authorities in the Council of Europe member states. In addition to the legally binding texts and case law, international standards and best-practice documents provide guidance. The advantage of these formally non-binding documents over international conventions is that they provide more detailed guidelines for national authorities and practitioners. In Europe, the most important standards are the Venice Commission Code of Good Practice in Electoral Matters, which has proved to be an important source for the European Court of Human Rights, and the OSCE 1990 Copenhagen and the 1991 Moscow documents.

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1. See CDL-AD(2016)007, Rule of Law Checklist, II.A.1 and 2.

## 1.2 KEY ELEMENTS IN ELECTORAL DISPUTE RESOLUTION

From these international instruments, as well as Venice Commission opinions, and a comparative overview of the legal framework of the Council of Europe member states, we can distinguish a number of elements required for a successful electoral dispute resolution system.

### 1.2.1. Grounds for complaints

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In principle, all violations of electoral law, as well as inactions or insufficient enforcement and the existence of electoral law that undermines the right to free elections, the right to vote, and the right to stand for election, should be accepted as grounds for complaint. Disputes may arise at any point in the electoral cycle. Therefore, accepted grounds for complaint should cover the entire election cycle, from registration and de-registration of voters and candidates, the election campaign, decisions by the election authorities, public administration and any relevant stakeholder impacting the electoral process, election-day procedures, as well as the election result and the verification of and issuing of a mandate for the persons elected. In addition to the election process in the narrow sense, electoral disputes can also relate to fundamental rights essential for democratic elections, such as restrictions on the freedom of expression, the freedom of association and restrictions on liberty and movement.

### 1.2.2. Standing

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A system of electoral dispute resolution would not be effective if it did not allow all relevant stakeholders to file complaints. All voters and candidates in a constituency must be entitled to lodge complaints. A reasonable quorum may be required for lodging an appeal, in particular on the election result. The right to lodge complaints can also be limited to the phases by which the voters or candidates are directly affected, such as refusal of registration. However, election complaints can be a valuable source of information for improving the electoral system, and care should therefore be taken when imposing restrictions on the right to lodge complaints.

### 1.2.3. Competent bodies

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The member states of the Council of Europe differ considerably in the organisation of election authorities and their judicial systems. There is no single best method for organising electoral dispute resolution bodies, but some principles should be observed. The appeal body can be either an election commission or a court. However, decisions on the validity of the election result, which some countries leave to the parliament, should for reasons of independence and impartiality always be appealable to a judicial body. It is important that the law provides clear and consistent complaints and appeals procedures to avoid excessive complexity, which is a recurrent problem in the Council of Europe member states. Legislation should clearly set out the jurisdiction for the competent bodies and prevent overlapping or conflicting jurisdictions, in particular between election commissions and courts.

### 1.2.4. Time limits

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Time is of the essence in electoral disputes. The exercise of the right to vote and the right to stand as candidate depend on deadlines for registration and restrictions may prevent the very exercise of these rights. Long-term uncertainty concerning the election result may undermine confidence in the electoral system and political institutions. As a result, international standards recommend short time limits for lodging and deciding appeals. The Venice Commission's Code of Good Practice in Electoral Matters recommends time limits from three to five days respectively for lodging and for deciding appeals. However, time limits for deciding complaints, in particular complex issues such as the election result, should not be so short that they effectively deny the claimant a thorough review of the complaint.

### 1.2.5. Decision-making power

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The effectiveness of the electoral dispute resolution system ultimately relies on the decision-making power of the competent appeals body. International standards require the appeal body to have authority over such matters as the right to vote, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections. In order to guarantee electoral integrity, electoral law must empower appeal

bodies to cancel elections, partly or completely. However, cancelling the election is a serious decision which should only be made for serious violations which threaten the very objective of the election: an election result that expresses the free opinion of the people. In terms of regulation, the key criterion for cancelling elections is whether irregularities, be they active violations or inactions, may have affected the election result. The appeal body should moreover have the power to cancel the election and order new elections in one constituency or polling station, or the election as a whole, depending on which level the irregularities may have affected the outcome. Given the seriousness of cancelling election results, such decisions should only be made according to clearly defined criteria in the law, and preferably by an apex court or the constitutional.

### 1.3. THE FUNDAMENTAL PRINCIPLE: EFFECTIVE EXAMINATION

While states have a large margin of appreciation in organising their domestic electoral dispute resolution systems, all Council of Europe member states are required to provide an effective examination of electoral disputes. The European Court of Human Rights holds that “a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections.”<sup>2</sup> Regardless of domestic application, any electoral dispute resolution system in Council of Europe member states must meet the effective examination test developed by the European Court of Human Rights. For example, grounds for complaints cannot be construed so narrowly that they prevent an arguable claim of election irregularities. Similarly, rules of standing cannot be construed so narrowly that they exclude stakeholders affected by a decision. Time limits for lodging appeals cannot be too short so they are unreasonably difficult to meet, and time limits for adjudicating appeals cannot be so long that errors cannot normally be remedied before the election is over. The decision-making power of the competent appeals body cannot be limited in such a way that it prevents an effective examination of that claim. Effective examination of election complaints also means procedural guarantees, such as independent and impartial appeals bodies, a transparent procedure for resolving electoral disputes, reasoned and public decisions, and the right to a hearing involving both parties with the right to submit evidence. Finally, in addition to an adequate legal framework, guarantees and procedures, effective examination of electoral disputes also requires that national electoral dispute resolution bodies have the necessary will, resources and authority to meet this standard not only on paper, but also in practice.

In the end, effective examination is the overall standard for assessing an electoral dispute resolution system. Taking this consideration into account, the following are the steps to take for any electoral process that possibly involves electoral dispute resolution. This list is not exclusive and varies from system to system.

1. Challenges to district or constituency delineation.
2. Disputes about the electoral system (mandates and lists, thresholds, minority representation, gender balance).
3. Registration of voters (refusal of registration or errors included).
4. Registration of candidates and political parties (refusal of registration included) and their nomination.
5. Campaign finance issues.
6. Planning for the election, such as the location of polling stations.
7. Campaign issues, such as restriction on assembly, association and expression.
8. Campaign issues regarding media issues and access to information.
9. Disputes about voting-day operations, including the need to issue quick decisions.
10. Requests for recounts and for repeat elections.
11. Challenges to election results and their announcement.

If we reflect on what effective examination really means, it is a very simple concept: the electoral dispute resolution system should be organised so that all relevant stakeholders can seek judicial remedy for breaches of electoral law or fundamental rights. In other words, regardless of the method retained, the electoral dispute resolution system should ensure the supremacy of and compliance with the law. Because the rule of law also applies to elections.

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2. See *Namat Aliyev v. Azerbaijan*, No. 18705/06, paragraph 81.

## CONCLUDING REMARKS

Despite the importance of electoral dispute resolution systems for holding free elections, flaws in electoral dispute resolution is a recurrent issue in reports issued by international election observers as well as in the electoral law opinions of the Venice Commission and the Office for Democratic Institutions and Human Rights of the OSCE.<sup>3</sup> Among international monitoring bodies and national electoral management bodies, there appears to be a growing interest in and understanding of the importance of good electoral dispute resolution systems. An example is the 16th edition of the European Conference of Electoral Management Bodies (EMBs), held in Bratislava in Slovakia in 2019, where electoral dispute resolution was the topic.<sup>4</sup> In 2020, the Venice Commission will also adopt a comparative report on electoral dispute resolution with the goal of addressing common problems and tendencies in the effective settlement of electoral disputes.

This toolkit provides a set of legal standards and good practices for legislators, election authorities, and other practitioners who work with electoral dispute resolution. It provides a comprehensive overview of European Court of Human Rights case law on electoral matters in general and electoral dispute resolution in particular. It also provides examples and experiences from Bosnia and Herzegovina, Ukraine and Georgia. Since the international standards are of a rather general nature, examples of national best practices, and failures, can provide valuable guidance in implementing and maintaining a system of effective examination of electoral disputes, and to which this toolkit hopefully can be helpful.

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3. For a summary, see CDL-PI(2017)007, Compilation of Venice Commission Opinions and Reports Concerning Electoral Dispute Resolution.

4. See the conclusions at [www.coe.int/en/web/electoral-management-bodies-conference/conclusions](http://www.coe.int/en/web/electoral-management-bodies-conference/conclusions).

## Chapter 2

# Case law of the European Court of Human Rights with a particular emphasis on electoral dispute resolution

*Inna Shyrokova, Lawyer at the Registry of the European Court of Human Rights*

### INTRODUCTION

The right to free elections is enshrined in Article 3 of Protocol No. 1 to the Convention, which reads as follows: “The High Contracting Parties undertake 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”.

It might be interesting to note that the initial draft of that provision contained a reference to the respect for “political liberties”. However, this reference was later omitted, because: (a) insofar as it related to such rights as freedom of opinion, freedom of assembly and freedom of association, those rights were already provided in the Convention itself (namely, Articles 10 and 11); and (b) insofar as it related to other rights, the phrase “political liberty” was found to be too imprecise in the legal text.<sup>5</sup>

Protocol No. 1 to the Convention was opened for signature in 1952 and entered into force in 1954. As of today, almost all the member states of the Council of Europe have ratified it, with two exceptions (Monaco and Switzerland). By the beginning of 2019, the European Court of Human Rights (“the Court”) delivered 95 judgments in respect of complaints under Article 3 of Protocol No. 1.<sup>6</sup>

The Court has consistently held in its case law that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.<sup>7</sup>

### Scope

#### 1. General interpretation principles

The Court adopts autonomous interpretation of the concepts used in the Convention and its protocols. As a result, the Convention’s definition of terms might differ from that in domestic legal provisions.<sup>8</sup>

In interpreting the provisions of the Convention and its protocols, the Court takes into account the ordinary meaning of the language used in its context as well as its object and purpose.<sup>9</sup>

The object and purpose of the Convention, which is an instrument for the protection of human rights, requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory, but practical and effective.<sup>10</sup>

5. *Travaux préparatoires* on Article 3 of Protocol No. 1 – Information document prepared by the Registry, Strasbourg, 5 September 1986, Cour (86) 36.

6. Armenia (1), Austria (1), Azerbaijan (23), Bulgaria (5), Cyprus (1), Georgia (2), Greece (3), Hungary (3), Italy (17), Latvia (3), Lithuania (1), Republic of Moldova (2), Romania (6), Russian Federation (6), Serbia (1), Turkey (11), Ukraine (2) and United Kingdom (7).

7. See, for example, *Karácsony and Others v. Hungary* [GC], Nos. 42461/13 and 44357/13, § 141, 17 May 2016, and *Uspaskich v. Lithuania*, No. 14737/08, § 87, 20 December 2016.

8. See, *mutatis mutandis*, *Mihalache v. Romania* [GC], No. 54012/10, § 91, 8 July 2019.

9. See *Cumhuriyet Halk Partisi v. Turkey* (dec.), No. 48818/17, § 38, 21 November 2017.

10. See, among many other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, Reports 1998I, and *Lykourazos v. Greece*, No. 33554/03, § 56, ECHR 2006VIII.



### Specific cases

In *Podkolzina v. Latvia* (No. 46726/99, 9 April 2002) the Court stated that the right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would only be illusory if one could be arbitrarily deprived of it at any moment.

In a similar vein, in *Namat Aliyev v. Azerbaijan* (No. 18705/06, 8 April 2010) the Court held that the individual rights to vote and to stand for election guaranteed by Article 3 of Protocol No. 1 would be illusory without the existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights (see also “Role of a domestic system<sup>3</sup>”).

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## 2. Types of elections covered by Article 3 of Protocol No. 1

The Court has observed that the text of Article 3 of Protocol No. 1 clearly suggests that its ambit is limited to elections – held at reasonable intervals – determining the choice of the legislature, and its wording is a strong indication of the limits of an expansive, purposive interpretation of its applicability. In other words, the object and purpose of the provision have to be ascertained by reference to the wording used in the provision. In the light of these considerations and its settled case law on the applicability of Article 3 of Protocol No. 1, the Court has concluded that that provision does not apply to referendums.

Interpreting the word “legislature” used in this provision in accordance with the above-mentioned principles, the Court has held that it does not necessarily mean the national parliament. It has to be interpreted in the light of the constitutional structure of the state in question.

The Court has also concluded that Article 3 of Protocol No. 1 is not applicable to municipal and regional elections in Poland,<sup>11</sup> local elections in Russia<sup>12</sup> and Moldova,<sup>13</sup> and presidential elections in North Macedonia<sup>14</sup> and Ukraine.<sup>15</sup>

### Specific cases

In *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987, Series A No. 113), the Court held that the Flemish Council in Belgium had sufficient competence and powers to make it, alongside the French Community Council and the Walloon Regional Council, a constituent part of the Belgian “legislature”.

In *Vito Sante Santoro v. Italy* (No. 36681/97, ECHR 2004VI), likewise, the Court held that the Constitution of Italy vested the regional councils with competence and powers wide enough to make them a constituent part of the legislature in addition to the parliament.

## 3. Rights, obligations and limitations

### a. Unique wording implying individual rights and positive obligations

The provisions of the Convention and its protocols guarantee rights and freedoms. Article 3 of Protocol No. 1 is phrased differently – in terms of the obligation of the high contracting parties to hold elections under conditions which will ensure the free expression of the opinion of the people rather than in terms of a particular

11. See *Mółka v. Poland* (dec.), No. 56550/00, 11 April 2006.

12. See *Cherepkov v. Russia* (dec.), No. 51501/99, 25 January 2000, and *Krasnov and Skuratov v. Russia* (dec.), Nos. 17864/04 and 21396/04, 14 December 2004.

13. See *Valentin Gorizdra v. Moldova* (dec.), No. 53180/99, 2 July 2002.

14. See *Ljube Boškoski v. the former Yugoslav Republic of Macedonia* (dec.), No. 11676/04, 2 September 2004.

15. See *Krivobokov v. Ukraine* (dec.), No. 38707/04, 19 February 2013.

right or freedom. However, having regard to the *travaux préparatoires* of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has held that it also implies individual rights, including the right to vote and the right to stand for election.<sup>16</sup>

It is considered that the unique phrasing was intended to give greater solemnity to the contracting states' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference.<sup>17</sup>

### b. Concept of implied limitations

Unlike Articles 8-11 of the Convention,<sup>18</sup> Article 3 of Protocol No. 1 does not specify the "legitimate aims" of restrictions on the rights guaranteed by it. However, those rights are not absolute, and the Court has developed in its case law the concept of "implied limitations" under Article 3 of Protocol No. 1. According to this concept, the contracting states are free to rely on any aim to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case.

#### Specific case

In *Campagnano v. Italy* (No. 77955/01, ECHR 2006IV), the Court held that the suspension of the applicant's electoral rights pending the civil bankruptcy proceedings against her had no purpose other than to belittle persons who have been declared bankrupt, reprimanding them simply for having been declared insolvent, irrespective of whether they have committed an offence. Accordingly, the Court considered that this restriction did not pursue a legitimate aim.

Generally speaking, while assessing restrictions on electoral rights, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people.<sup>19</sup> The Court also has to satisfy itself that the limitations do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.<sup>20</sup>

The contracting parties enjoy considerable latitude in establishing rules governing parliamentary elections and the composition of the parliament, and the relevant criteria could vary according to the historical and political factors peculiar to each state. However, their margin of appreciation is not all-embracing, and it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with.<sup>21</sup>

### c. Aspects of the electoral process

Article 3 of Protocol No. 1 was not conceived as a code on electoral matters, designed to regulate all aspects of the electoral process. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which allows for each contracting state to mould into its own democratic vision.<sup>22</sup>

That being so, the Court has confirmed on many occasions that the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, enshrine within themselves the right to vote in terms of the opportunity to cast a vote in universal, equal, free, secret and direct elections held at regular intervals.

In this setting, free elections, which are to be seen as both an individual right and a positive obligation of the state, comprise a number of guarantees starting from the right of the voters to form an opinion freely, and extending to careful regulation of the process in which the results of voting are ascertained, processed and recorded.<sup>23</sup>

16. See Mathieu-Mohin and Clerfayt, cited above, §§ 46-51.

17. *Ibid.*, § 50.

18. Article 8 – Right to respect for private and family life; Article 9 – Freedom of thought, conscience and religion; Article 10 – Freedom of expression; and Article 11 – Freedom of assembly and association. These articles allow restrictions of the rights and freedoms guaranteed therein, in particular, in the interests of public safety and for the protection of public order.

19. See *Yumak and Sadak v. Turkey* [GC], No. 10226/03, § 109, ECHR-2008.

20. See Mathieu-Mohin and Clerfayt (cited above, § 52).

21. See *Tănase v. Moldova* [GC], No. 7/08, §§ 158 and 161, ECHR-2010, with further references.

22. See *Ždanoka v. Latvia* [GC], No. 58278/00, § 103, ECHR 2006IV.

23. See *Davydov and Others v. Russia*, No. 75947/11, § 285, 30 May 2017.

### Specific cases

In *The Communist Party of Russia and Others v. Russia* (No. 29400/05, 19 June 2012), the applicants complained that the media coverage of the elections had been biased. The government argued that that complaint fell outside the Court's competence, since Article 3 of Protocol No. 1 did not establish any specific electoral system, and, in particular, did not guarantee all parties and candidates equal access to the media.

The Court emphasised that free elections were inconceivable without the free circulation of political opinions and information. It noted that Article 3 of Protocol No. 1 would not attain its goal (to establish and maintain the foundations of an effective and meaningful democracy governed by the rule of law) if candidates could not disseminate their ideas during the electoral campaign.

The Court underlined the important role of the state as "ultimate guarantor of pluralism" and stated that in performing that role the state was under an obligation to adopt positive measures to "organise" democratic elections "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". Therefore, the Court held that as a matter of principle it was competent to examine complaints about the allegedly unequal media coverage of elections under Article 3 of Protocol No. 1.

## 4. Subsidiarity

The Court is not required under Article 3 of Protocol No. 1 to verify whether every particular alleged irregularity amounted to a breach of domestic electoral law. It is not in a position to assume a fact-finding role by attempting to determine whether all or some of these alleged irregularities have taken place and, if so, whether they amounted to irregularities capable of thwarting the free expression of the people's opinion. Owing to the subsidiary nature of its role, the Court needs to be wary of assuming the function of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Its task is nevertheless to satisfy itself, from a more general standpoint, that the respondent state has complied with its obligation to hold elections under free and fair conditions and has ensured that individual electoral rights were exercised effectively.<sup>24</sup>

In cases where it is alleged that the breach of the domestic legal rules was such that it seriously undermined the legitimacy of the election as a whole, Article 3 of Protocol No. 1 requires it to assess whether such a breach has taken place and has resulted in a failure to hold free and fair elections. In doing so, the Court may have regard to whether an assessment in this respect has been made by the domestic courts; if it has been made, the Court may review whether or not the domestic courts' finding was arbitrary.<sup>25</sup>

### Specific cases

In *Antonenko v. Russia* (dec., No. 42482/02, 23 May 2006), the applicant complained that the registration of his candidacy had been cancelled late on the eve of voting day and that some polling stations had opened without any information on his disqualification being available to voters. He did not contest the grounds for his disqualification as such. The Court concluded that the applicant had not shown how, if at all, his right to stand for election had been infringed. The application was rejected as being manifestly ill-founded.

## 5. Different level of scrutiny depending on the aspects of the right to free election

The level of the Court's scrutiny will depend on the particular aspect of the right to free elections. Thus, tighter scrutiny should be reserved for any departures from the principle of universal suffrage. A broader margin of appreciation can be afforded to states where the measures prevent candidates from standing for election, but such interference should not be disproportionate.

A still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation. Due regard must be had to the fact that this is a complex process, with many persons involved at several levels. A mere mistake or irregularity at this stage would not, per se, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration were complied with. The concept of free elections would be put at risk only if there was evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, for instance through gross distortion of the voters' intent; and where such complaints received no effective examination

<sup>24</sup> Davydov and Others, cited above, § 276, with further references.

<sup>25</sup> See *Kovach v. Ukraine*, No. 39424/02, § 55, ECHR 2008, and *Karimov v. Azerbaijan*, No. 12535/06, § 43, 25 September 2014.

at the domestic level. Moreover, the Court should be cautious about conferring unrestricted standing to challenge this stage of elections on individual participants in the electoral process. This is especially so where the domestic legislation contains reasonable restrictions on individual voters' ability to challenge the results in their respective constituencies, such as the requirement for a quorum of voters.<sup>26</sup>

## Electoral dispute resolution (EDR)

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### 1. Role of a domestic system for electoral dispute resolution

The existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections. Such a system ensures an effective exercise of individual rights to vote and to stand for election, maintains general confidence in the state's administration of the electoral process and constitutes an important device at the state's disposal in achieving the fulfilment of its positive duty under Article 3 of Protocol No. 1 to hold democratic elections. Indeed, the state's solemn undertaking under Article 3 of Protocol No. 1 and the individual rights guaranteed by that provision would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections are not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter.<sup>27</sup>

### 2. General requirements

The Court has developed in its case law a number of general principles regarding the effectiveness of a domestic system for electoral dispute resolution. Many of them are outlined below. This list should not, however, be regarded as exhaustive.

#### a. Existence of procedural safeguards against arbitrariness

The decision-making process must be surrounded by minimum safeguards against arbitrariness.<sup>28</sup> One such safeguard is procedural fairness.

#### Specific case

In the case of *Podkolzina* (cited above), the applicant complained about the removal of her name from the list of parliamentary election candidates because of insufficient knowledge of Latvian. The list in question had been registered with the Central Electoral Commission (CEC) after all the documents required by the legislation on parliamentary elections had been supplied to it, including a copy of the certificate attesting to the fact that the applicant knew the state's official language – Latvian – issued by the Standing Committee for Language Certification, an administrative institution answerable to the Ministry of Justice. A week after the registration of the list, an examiner belonging to the language examination service of the State Language Centre came to the applicant's workplace to check how well she knew Latvian. The examiner drew up a report to the effect that the applicant did not have an adequate command of the official language and the CEC struck the applicant's name off the list of candidates. The Court found that the purpose of the legislation on parliamentary elections barring citizens without an advanced degree of proficiency in the national language from standing for election was to ensure the proper functioning of the Latvian institutional system. It added that it was not for the Court to determine the choice of the working language of a national parliament, as that choice was dictated by historical and political considerations and, in principle, was exclusively for the state concerned to determine. The Court noted that the applicant held a valid language certificate in due form that had been issued by a standing committee following an examination. Although the authorities had not contested the validity of that document, the applicant had nonetheless been required to sit a further language examination, in the company of eight other candidates of the 21 who had been required to furnish a certificate of proficiency in the national language. The assessment had been left to the sole discretion of a single official, whose discretionary powers the Court considered to be excessive. The Court considered that, in the absence of any objective guarantees, the procedure followed in the applicant's case was incompatible with the procedural requirements of fairness and legal certainty for determining eligibility for election. That conclusion was, in the Court's

26. See *Davydov and Others*, cited above, §§ 286-87, with further references.

27. See *Namat Aliyev v. Azerbaijan*, No. 18705/06, § 81, 8 April 2010.

28. See, for example, *Podkolzina v. Latvia*, No. 46726/99, § 35, 9 April 2002, *Kovach*, cited above, §§ 55 et seq., *Namat Aliyev*, also cited above, § 72, 8 April 2010, and *Davydov and Others*, cited above, §§ 273 and 336.

view, supported by the fact that when examining the applicant's application for judicial review the Riga Regional Court had only had regard to the certificate issued as a result of the impugned examination and had accepted those results as incontrovertible. The Court accordingly held that there had been a violation of Article 3 of Protocol No. 1.

### **b. Respect of those safeguards in practice**

Any safeguard written into a legislative act is meaningless if it merely remains on paper, as it does when the competent domestic authorities, charged with conducting the electoral procedures, systematically fail to abide by those safeguards in situations for which they are designed. It is a fundamental corollary of the rule of law that rights prescribed in legislative acts must be effective and practical, and not theoretical and illusory.<sup>29</sup>

#### **Specific case**

In *Tahirov v. Azerbaijan* (No. 31953/11, 11 June 2015), the applicant complained about the refusal of his request for registration as a parliamentary election candidate. As required by the Electoral Code, he collected more than 450 voter signatures in support of his candidacy and submitted them to the Constituency Electoral Commission (ConEC). He was informed that the validity of his supporting signatures had been examined and that the ConEC had held a hearing on whether to register him as a candidate. The next day his candidacy was refused. According to an expert working group established by the commission, a number of signatures were invalid, allegedly because several signatures had been executed by the same person or because the information on the relevant voters' addresses was incomplete.

The applicant lodged a complaint with the ConEC arguing in particular that, following the requirements of the Electoral Code, he should have been invited to participate in the examination process of the signatures. Enclosed with his complaint, the applicant notably submitted written statements by 91 voters, whose signatures had been declared invalid, affirming the authenticity of their signatures. The ConEC conducted another examination of the signatures by members of its own working group. They concluded that 178 out of 600 signatures submitted by him were invalid and that the remaining 422 valid signatures was below the minimum required by law. The ConEC therefore dismissed the applicant's complaint and upheld the ConEC decision. Both the Baku Court of Appeal and the Supreme Court dismissed the applicant's appeal as unsubstantiated, without examining his arguments in detail.

The Court observed that none of the procedural guarantees against the arbitrariness provided for by the Electoral Code – such as the nominee's right to be present during the examination of signature sheets or to receive the examination report 24 hours before the relevant electoral commission's meeting – had been respected.

The applicant had been deprived of the opportunity to challenge the findings of the working groups throughout the process. Furthermore, neither the ConEC nor the domestic courts had addressed any of the well-founded arguments put forward by the applicant or provided proper reasoning in their judgments.

The Court therefore found a violation of Article 3 of Protocol No. 1.

### **c. Legal certainty**

In addition to the requirement of procedural fairness, the electoral dispute resolution procedures must be characterised by legal certainty.<sup>30</sup>

#### **Specific case**

In *The Russian Conservative Party of Entrepreneurs and Others v. Russia* (Nos. 55066/00 and 55638/00, 11 January 2007), the applicant party alleged, in particular, a violation of its right to stand for election.

The applicant party nominated 151 candidates for the State Duma elections and the CEC confirmed receipt of the party's list and that it had paid its electoral deposit. Subsequently the CEC, however, refused registration of the applicant party's list of candidates, having found that certain people on the list had provided incorrect information about their income and property. As a result, all candidates on the list were disqualified. Disagreeing with the CEC's interpretation, the applicant party successfully challenged its decision before the domestic courts. On 22 November 1999 the applicant party obtained a final judgment to the

<sup>29</sup> See *Tahirov v. Azerbaijan*, No. 31953/11, § 67, 11 June 2015.

<sup>30</sup> See, for example, *Orujov v. Azerbaijan*, No. 4508/06, § 42, 26 July 2011, with further case-law references.

effect. It was immediately enforced and, that same day, the CEC registered the applicant party and allowed it to carry on its electoral campaign. Nevertheless, on 26 November 1999 a deputy prosecutor general lodged an application for supervisory review, requesting the Supreme Court to reopen the proceedings and to accept the CEC's original approach. The Presidium of the Supreme Court subsequently quashed the earlier judgments by way of supervisory-review proceedings and upheld the CEC's position. The CEC annulled its earlier decisions, refused the registration of the applicant party's list and ordered its name to be removed from the ballot papers. The applicant party appealed unsuccessfully.

The Court noted that the final and enforceable judgment of 22 November 1999, which had cleared the way for the applicant party to stand in the elections, was quashed by means of supervisory-review proceedings on an application by a state official who was not a party to the proceedings. The purpose of his application was precisely to obtain a fresh determination of the issue that had been already settled. The government did not point to any circumstances of a substantial and compelling character that could have justified that departure from the principle of legal certainty in the applicants' case. As a result of the re-examination, the applicant party was prevented from standing for election. It followed that, by using the supervisory-review procedure to set aside the judgment of 22 November 1999, the domestic authorities violated the principle of legal certainty in the procedure for determining the applicant party's eligibility to stand in the elections.

#### **d. Transparency and independence of decision-taking bodies**

It is important for the authorities in charge of electoral administration to function in a transparent manner and to maintain impartiality and independence from political manipulation.<sup>31</sup>

##### **Specific case**

In *Georgian Labour Party v. Georgia* (No. 9103/04, ECHR 2008), one of the complaints was about the composition of the electoral commissions at the time of the repeat parliamentary election. Pursuant to provisional legal provisions, five members of the 15-member boards of the electoral commissions at every level, as well as their chairmen, were either directly or indirectly appointed by the President of Georgia. In addition, at least one member of those electoral commissions was a representative of the President's National Movement party, since the latter had won the earlier local elections in Tbilisi. Pro-presidential forces thus had a relative majority vis-à-vis the representatives of other political parties in electoral commissions at every level.

The Court noted that, although there could be no ideal or uniform system to guarantee checks and balances between the different state powers within a body of electoral administration, a proportion of seven members out of the 15-member electoral commissions, including the chairmen who had the casting votes and were appointed by the President of Georgia and his party, was particularly high in comparison to other legal orders in Europe.

Furthermore, the Court observed that so long as the presidential party – the National Movement – was simultaneously running in the repeat parliamentary election, it was not implausible that other candidate parties, including the applicant party, might have been placed in an unfavourable position by the presidential majority in the electoral administration. The Court noted that the applicant party did not submit any evidence that the presidential majority in the electoral commissions had misappropriated the votes cast in its favour or otherwise limited its rights and legitimate interests during the repeat parliamentary election. The Court held that it could not find a violation of Article 3 of Protocol No. 1 solely on the basis of the allegation, no matter how plausible it was that the system had created possibilities for electoral fraud; instead, the applicant party should have submitted evidence of specific incidents of alleged violations.

The Court concluded that the contested composition of electoral commissions at all levels had indeed lacked sufficient checks and balances against the president's power and that those commissions could hardly enjoy independence from outside political pressure. However, in the absence of any proof of particular acts of abuse of power or electoral fraud committed within the electoral commissions to the applicant party's detriment, no breach of the latter's right to stand for election was established.

<sup>31</sup>. See *Georgian Labour Party v. Georgia*, No. 9103/04, § 101, ECHR 2008.

### **e. Sufficient reasoning of decisions and indication of a genuine effort to address the substance of arguable claims**

The authorities must make a genuine effort to address the substance of arguable individual complaints concerning electoral irregularities and the relevant decisions must be sufficiently reasoned.<sup>32</sup>

#### **Specific case**

In the case of *Namat Aliyev* (cited above), the applicant complained that, in the electoral constituency where he stood as a candidate, there had been a number of serious irregularities which had made it impossible to determine the true opinion of voters and thus had infringed his right to stand as a candidate in free elections. He argued that the domestic authorities, including the electoral commissions and courts, had failed to duly examine his complaints.

In complaints to the ConEC and the CEC, the applicant alleged various irregularities (including unlawful interference, undue influence, ballot-box stuffing, harassment of observers, inaccuracies in the electoral rolls and discrepancies in electoral protocols). He submitted to the CEC originals of affidavits by election observers, together with audio tapes and other evidence. The ConEC rejected the applicant's complaint as unsubstantiated without further elaboration, while the CEC did not reply to the applicant but issued a final protocol approving the overall election results nationwide. The applicant appealed to the court of appeal, but it dismissed his claims as unsubstantiated, after ruling that the photocopies of the affidavits he had produced were inadmissible in evidence as domestic (civil procedural) law required production of either the originals copies. A further appeal to the Supreme Court was also dismissed. Although the applicant explained that the original affidavits were with the CEC, the Supreme Court noted that he had failed to establish that he had lodged a complaint with the CEC at all.

The Court observed that the irregularities alleged by the applicant were serious as, if confirmed, they were capable of thwarting the democratic process. It noted that, in dismissing the applicant's complaint the ConEC appeared to have relied exclusively on the statements of local electoral officials – who, not surprisingly, had denied any wrongdoing – without explaining why their statements were considered more reliable than the much more detailed and fact-specific evidence the applicant had presented.

The Court acknowledged that, owing to the complexity of the electoral process and associated time restraints necessitating streamlining of various election-related procedures, the relevant domestic authorities might be required to examine election-related appeals within comparatively short time limits in order to avoid delaying the electoral process. For the same practical reasons, the states may find it inexpedient to require these authorities to abide by a set of very strict procedural safeguards or to deliver very detailed decisions. Nevertheless, these considerations may not serve to undermine the effectiveness of the appeal procedure, and it must be ensured that a genuine effort is made to address the substance of arguable individual complaints concerning electoral irregularities and that the relevant decisions are sufficiently reasoned. In the case at hand, however, the conduct of the electoral commissions and courts and their respective decisions revealed an appearance of a lack of any genuine concern for the protection of the applicant's right to stand for election.

#### **Specific case**

In *Namat Aliyev* (cited and summarised above), the domestic courts relied on extremely formalistic reasons to avoid examining the substance of the applicant's complaints, finding that he had not submitted duly certified copies of the relevant observers' affidavits and that he had not attached to his cassation appeal documentary proof that he had indeed applied to the CEC.

The Court noted that it was not its task to assess whether, from the standpoint of the domestic law, the domestic courts had been correct to apply so strictly the civil procedure rules on admissibility of written evidence to a case giving rise to election-related issues that normally fell within the realm of public law. In the circumstances of this case, however, the Court found that such a rigid and overly formalistic approach was not justified under the Convention.

<sup>32</sup>. See *Namat Aliyev*, cited above, §§ 76-93.

## f. Prevention of excessive formalism

The Court has held, with reference to the Venice Commission's Code of Good Practices in Electoral Matters, that examination of election-related appeals should be devoid of excessive formalism, in particular where the admissibility of appeals is concerned.<sup>33</sup>

## g. Prevention of undue delays

The timely registration of candidates is crucial in order for them to be known to voters and to be able to convey their political message during the electoral campaign period in an effort to gain votes and get elected. The free choice of the electorate depends on, *inter alia*, having information concerning all eligible candidates, and receiving it in a timely manner in order to form an opinion and express it on election day. Accordingly, major delays in the resolution of disputes regarding registration of candidates may seriously undermine their electoral campaigns and even curtail their individual electoral rights to such an extent as to significantly impair their effectiveness.<sup>34</sup>

### Specific case

In *Abdalov and Others v. Azerbaijan* (Nos. 28508/11, 37602/11 and 43776/11, 11 July 2019), the applicants complained that, owing to arbitrary decisions initially refusing to register them as candidates and the subsequent delayed registrations following a number of appeals, they had been unable to participate in the parliamentary elections under equal conditions vis-à-vis other candidates, because they had been left with a very short time to conduct their respective electoral campaigns. The first applicant had only one full day to campaign, the second applicant had only three full days, and the third applicant had practically no time for campaigning.

The domestic law provided for a maximum three-day period for electoral appeals and a maximum three-day period for the electoral commissions and courts to examine the appeals. At the electoral commission level, the three-day period for examination could be extended for an indefinite duration. With three levels of appeal against an electoral commission decision, the electoral appeal proceedings in cases concerning refusals to register candidates could theoretically take up to 18 days (and sometimes longer). Since the decision on refusal to register could be delivered as late as on the eve of the official start of the electoral campaign period, the examination of appeals against such decision could take place after the start of the campaign period, as happened in the applicants' cases.

The Court noted that the proceedings had been subject to a number of delays attributable to the electoral commissions and the courts, which on several occasions had delivered their respective decisions in a belated manner, sometimes in breach of the three-day limit prescribed by law. The applicants had been registered so late and so close to election day that they had not had a reasonable amount of time to conduct effective electoral campaigns. The late registration had been due to a lack of safeguards against arbitrariness in the candidate registration procedures and to delays in the examination of their appeals by the electoral authorities and courts. In such circumstances, the applicants' individual electoral rights had been curtailed to such an extent as to significantly impair their effectiveness.

## h. Concern for the integrity of the electoral process

### Specific case

In *Kerimova v. Azerbaijan* (No. 20799/06, 30 September 2010), the applicant, who had stood as an opposition candidate in the November 2005 parliamentary elections, complained about arbitrary invalidation of election results in her constituency and ineffectiveness of judicial review.

She received the largest number of votes in her constituency, having obtained 5 566 votes as compared to the 3 922 votes cast in respect of a candidate from the ruling political party, who came second. Following the official tabulation of the results the next day, she featured in the electoral protocol as "the elected candidate". On 8 November 2005 the CEC invalidated the election results in the applicant's constituency after finding that the protocols had been tampered with making it impossible to determine the will of the voters. The applicant appealed, arguing that the changes in the protocols had in effect reduced the number of votes recorded in her favour and had increased those cast in favour of the candidate immediately

33. See *Namat Aliyev*, cited above, §§ 86-93.

34. See *Abdalov and Others v. Azerbaijan*, Nos. 28508/11, 37602/11 and 43776/11, §§ 89-104, 11 July 2019.



after her and that she remained the winner despite the changes. Her appeals were unsuccessful. In the meantime, two election officials were convicted of having falsified the election results in the applicant's constituency, for the benefit of other candidates.

The Court observed that, even despite the fact that the irregularities had been made in an attempt to inflate the number of votes for the applicant's opponents, the election results had still showed the applicant as a clear winner. Yet in their decision to invalidate the results, the election authorities had not given any reasons to explain why the alleged breaches had altered the outcome of the elections. Furthermore, the Electoral Code prohibited the invalidation of election results at any level on the basis of a finding of irregularities committed for the benefit of candidates who lost the election. However, neither the electoral authorities, nor the domestic courts had endeavoured to determine in whose favour the alleged irregularities had worked. Despite the fact that the applicant had repeatedly raised these points in her appeals, the domestic courts had failed to adequately address them.

As a result, the authorities' inadequate approach brought about a situation where the election process in the entire electoral constituency was single-handedly sabotaged by two electoral officials who had abused their position by making changes to a number of election protocols. By arbitrarily invalidating the election results because of those officials' actions, the national authorities essentially helped them to obstruct the election. Consequently, the decision to invalidate the election was unsubstantiated and was in apparent breach of the procedure established by the domestic electoral law. This decision arbitrarily infringed the applicant's electoral rights by depriving her of the benefit of election to parliament. It also showed a lack of concern for the integrity and effectiveness of the electoral process which could not be considered compatible with the spirit of the right to free elections.

In fulfilling their duties, electoral authorities and courts must demonstrate concern for integrity of the electoral process.<sup>35</sup>

#### **i. Enforceability of final judicial decisions**

Failure to abide by final decisions given in response to electoral appeals undoubtedly undermines the effectiveness of a domestic system for electoral dispute resolution.<sup>36</sup>

##### **Specific case**

In *Petkov and Others v. Bulgaria* (Nos. 77568/01, 178/02 and 505/02, 11 June 2009), the applicants complained about the failure of the electoral authorities to abide by final court judgments and reinstate them on a list of candidates for parliamentary elections.

All three applicants were registered as candidates in the parliamentary elections to be held on 17 June 2001. Some two and a half months prior to the election, new legislation came into force which contained a provision allowing parties or coalitions to withdraw nominations of individuals who had allegedly collaborated with the former state security agencies. The applicants were struck off the lists of candidates on account of such allegations just 10 days before the elections took place. The decisions to strike them off the lists were subsequently declared null and void by the Supreme Administrative Court. However, the electoral authorities did not restore their names to the lists and as a result they could not run for parliament.

The Court noted that it was not its task to decide whether or not it had been contrary to the Convention to allow political parties to withdraw their candidates on account of their links with the former state security agencies. Nor was it required to determine the correctness of the Supreme Administrative Court's rulings. Its task was confined to assessing whether the electoral authorities' failure to give effect to the final and binding judgments of the Supreme Administrative Court had violated their rights to stand for election.

The reason the electoral authorities had not complied with the judgment was either that they considered that the Supreme Administrative Court had given erroneous rulings or that they believed that the judgments had not become final. However, the Court held that, in a democratic society abiding by the rule of law, it was not open to the electoral authorities to cite their disapproval of findings made in a final judgment as a reason for not complying with it. It was not only contrary to domestic law not to give effect to those judgments, but it also deprived the procedural guarantees available to the applicants of any useful effect and was, in the Court's view, arbitrary.

<sup>35</sup> See *Kerimova v. Azerbaijan*, No. 20799/06, § 53, 30 September 2010.

<sup>36</sup> See *Petkov and Others v. Bulgaria*, Nos. 77568/01, 178/02 and 505/02, § 63, 11 June 2009.

The Court took account of the difficulties the electoral authorities faced on account of the fact that two of the Supreme Administrative Court's judgments had been given only a couple of days before the elections. However, those difficulties had been largely attributable to the authorities themselves. Firstly, the new electoral law had been adopted just over two months before the elections took place, at odds with the Council of Europe's recommendation on the stability of electoral law. Furthermore, instead of requiring political parties to verify links with former state security agencies before nominating their candidates, the parties were allowed to do so afterwards. Finally, the practical arrangements for the withdrawal of candidates had been clarified only 12 days before the elections took place. All this resulted in serious practical difficulties and led to legal challenges that had to be adjudicated and acted upon under extreme time constraints.

The Court therefore found a violation of Article 3 of Protocol No. 1.

## CONCLUSION

Article 3 of Protocol No. 1 enshrines a principle that is characteristic of an effective political democracy and is accordingly of prime importance in the Convention system. It is primarily concerned with the state's positive duty to hold democratic elections of the legislature at reasonable intervals. Although, unlike other Convention rights, it is not framed as conferring a right as such, the Court has read into this provision both the right to vote and the right to stand for elections. These rights may be restricted provided that such restrictions are not arbitrary and do not undermine the free expression of the opinion of the people.

The state's solemn undertaking under Article 3 of Protocol No. 1 and the individual rights guaranteed by that provision would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections are not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter.

In order for a domestic system for resolving electoral disputes to be effective, it must provide for certain minimum procedural safeguards against arbitrariness and ensure that those safeguards are respected in practice. This implies, in particular, compliance with the requirements of procedural fairness and legal certainty, as well as the necessity for sufficient reasoning of decisions taken and prevention of undue delays in the decision-taking process. More generally, domestic authorities are required to make a genuine effort to address the substance of arguable individual complaints concerning electoral irregularities and demonstrate concern for integrity of the electoral process. Furthermore, it is important for the authorities in charge to function in a transparent manner and to maintain impartiality and independence from political manipulation. Lastly, final judicial decisions must be enforced.



## **Part II**



## Chapter 3

# Practices for strengthening electoral jurisprudence

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**T**his chapter identifies the principal tools for enhancing the capacity of electoral stakeholders in electoral dispute resolution in line with European electoral *acquis*. The following paragraph provides a brief description of the proposed tools and reference to good practices in the countries concerned, particularly to respective chapters and appendices.

- ▶ **Research and analysis** of national courts' and Election Management Bodies (EMBs') practice in electoral dispute resolution (after each electoral process) in light of European electoral *acquis* and the case law of the European Court on Human Rights allows for the identification of a positive or negative trend in the changes in national electoral practice, as well as legislative gaps or ambiguities. The results of such research analysis might be further used by national legislatures for the improvement of the electoral legal framework, as well as by courts and EMBs for the development of common understanding and interpretation of existing electoral legislation. It further might ensure and contribute to the principle of legal certainty. The research and analysis might also be considered when tailoring the guidelines/manuals for competent bodies on electoral dispute resolution. Examples of such practices can be found in Sections 3.1 and 3.2, as well as Appendices I and II.
- ▶ **Development of guidelines/manuals** for competent bodies on electoral dispute resolution (EDR) should provide clear rules and procedures for how, and in what form and according to which standards, electoral matters need to be organised as well as the path their solutions should follow. Reasonable and tight deadlines and time limits should be established for the adjudicative bodies that deal with these cases. The format and formal requirements should be clear and specified in the election law or in implementing regulations that are developed by election authorities. Development of such guidelines might be particularly useful in those countries that have complex and dispersed electoral legislation. Examples of such practices can be found in Section 3.1.
- ▶ **The development of samples/templates** for election-related complaints and appeals should be officially approved and made widely available (on the internet, particularly, on the websites of respective competent authorities, and also simply in print form) and should be a good basis for ensuring that complaints are well drafted and comprehensive in their statement of facts, allegations and legal basis. The more clearly presented the information in complaints when filed, the fewer obligations to conduct independent fact-finding adjudicative bodies will have, and more easily will they be able to assess or resolve matters in a more concise manner. Implementing regulations should explain the requirements for the nature and sufficiency of evidence. Nevertheless, a fair opportunity should be provided for a complainant to revise and supplement their assertions if found to be inadequate initially by the complaints' authority. The object of the complaint must be afforded a reasonable opportunity to provide a response to the allegations of the complaint. The law should stipulate a clear definition about who can bring complaints and who is entitled to seek administrative or judicial remedy. That may include specifying that only parties or candidates are entitled to bring complaints regarding some issues, or that complainants must have personal knowledge of the facts and/or a personal stake in the outcome (such as a citizen who is denied a rightful place on the voter registry or personally knows of someone who should not be on the list). Examples of such practices can be found in Section 3.1.
- ▶ It is advisable that **European electoral *acquis*** be translated into the national language(s) of respective member states, be made public and be disseminated in electronic and/or paper form among the relevant electoral stakeholders. The aim is to improve and raise awareness among all involved parties of the need to contribute to preventing electoral violations and the need to improve electoral practice during elections and during the intra-election period. It means that every effort must be made to avoid a lack of knowledge, as any ignorance of information will contribute to negative electoral outcomes.

**Development and conduct of training on electoral dispute resolution for judges.** This training allows the acquisition of new skills, increase better performance of judges, increase their productivity and leadership. It needs to be mentioned that the training materials must specifically focus on international electoral standards, including the Venice Commission Code of Good Practice in Electoral Matters, the specifics of national electoral legislation (substantial and procedural) and the Court's case law on electoral matters. EDR training is primarily important for the judiciary and EMBs; however, it might also be useful for different legal practitioners. Examples of such practices can be found in Sections 3.1 and 3.2 and in Appendices I and II.

- ▶ **Introduction and use of online technologies** may significantly improve the transparency and timeliness of electoral dispute resolution. One may consider the introduction of such technologies with regard to different aspects of electoral dispute resolution; for example, for the submission of a complaint, during the process of its consideration and for the purpose of effective and timely organised communication with the complainant. All related documents that are relevant to this process must be available online, provided that personal data protection rules are duly observed. Examples of such practices can be found in Sections 3.1 and 3.2 and in Appendices I and II.
- ▶ **Interagency co-operation** may be established among competent authorities involved in the organisation and conduct of electoral processes (EMBs, the judiciary, law-enforcement authorities, media regulators, etc.). This co-operation is important both during the electoral process and the intra-election period, as it will ensure a holistic approach to election management and administration as well as adjudication on the electoral process. Such interagency co-operation should aim at developing and improving ways to ensure free and fair elections, to prevent electoral violations and to uniformly apply the electoral legislation. As a result of such co-operation, legislative gaps and inconsistencies may be defined; further legislative amendments may be developed and adopted.

## 3.1. THE GEORGIAN APPROACH TO ELECTORAL DISPUTE RESOLUTION

### INTRODUCTION

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The Election Administration (EA) of Georgia identifies genuine elections as a unity of numerous interlinked electoral aspects which independently operate in harmony and balance each other through promoting the overall integrity of the whole electoral process.

Electoral dispute resolution (EDR) is one of the integral aspects of the whole electoral process and it is being constantly improved by the EA. The EDR process in Georgia takes place within the three-level EA, where decisions by an election commission can be appealed to the respective higher-level commission. After the EA system, disputes may go to the district/city court where the Court of Appeals is the final instance.

The EA of Georgia strives to ensure that its EDR creates a free and fair environment for all electoral stakeholders by giving them unrestricted and easy access to effective remedy on electoral matters. The Central Election Commission (CEC) of Georgia regularly analyses the challenges and achievements in each aspect of the electoral process, including EDR. One of the main guiding tools for the CEC to determine the major challenges and shortcomings within the electoral process are the reports of international and local observer organisations as well as public opinion polls conducted prior and after each election.

The Election Code of Georgia is very complex and loaded with very detailed procedures; however, it responds to the existing political culture of the country. The CEC, after each election, drafts the legislative proposal for the Parliament of Georgia envisaging all the procedural shortcomings revealed during the election. These proposals include corrections to procedural issues covering all aspects of elections. Step by step, the EA has achieved substantive improvements in terms of simplifying some procedures, correcting legislative gaps and defining new necessary regulations. However, some of the required changes can lead to political decisions, which need to be made by other electoral stakeholders.

The main and the most powerful tool at the disposal of the EA of Georgia to advance the EDR process is the promotion of educational programmes and training, which lead to awareness raising and capacity building of electoral stakeholders. Promoting educational projects and drawing up the guiding documents that lead to the improved quality of the submitted complaints remains a main instrument for the CEC to support the effectiveness of EDR. The CEC and its training centre have devised a wide variety of training modules for different election stakeholders. The EA goes beyond the internal system and ensures the training of all electoral stakeholders involved in EDR. The most recent training conducted for the Election Administration

representatives and for the representatives of other state entities has involved District Election Commission (DEC) chairpersons, deputy chairpersons and secretaries; the training also extends to the representatives of the executive and local self-governing bodies, observers, representatives of political parties and election subjects and media representatives, among others.

In response to the identified challenges, the CEC habitually initiates new projects and tries to include other electoral stakeholders in the process of addressing the existing weaknesses. Establishment of wide platforms where the main electoral stakeholders sit together and bring to the table the most important electoral issues very frequently leads to joint solutions of existing problems. In this respect, the CEC of Georgia initiated and established its very own platform of discussions under the slogan “Discuss Together”. By inviting local observer groups and international organisations, the most urgent and pending challenges that need to be addressed are being discussed during the joint meetings.

Similar to the process of identifying challenges, the main tool for measuring the achieved successes is the external evaluation received in response to the services provided by the EA. By tracking the voters’ attitudes towards the EA, their positive evaluations and increased trust have been revealed over the past several years. These tendencies are very well reflected in public opinion polls and the statements of international and local observer organisations.

Some of the practices showcased below are initiatives of the EA, which have been recognised as positive developments for the EDR process in Georgia.

### **3.1.1. Guidelines, instructions and educational materials**

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#### **a. Standardised form for submitting complaints and instructions for submitting/discussing complaints**

The quality of the submitted complaints is directly linked to the number of complaints to be dismissed from its discussion of merits. Admitting that accurately submitted complaints are in the interest of the EA and aiming to simplify the appeal process, the CEC of Georgia developed the recommendatory form for application/complaint. The form is published on the CEC official webpage and is accessible to all electoral stakeholders. The recommendatory form has been created in line with the legislative requirements and assists election stakeholders with submitting a complaint with all formal requirements envisaged in it. It allows the appellant to indicate all required details in the complaint and ensures that the EA can discuss the case on its merits (Appendix 3).

#### **b. Instructions for submitting an application/complaint to the Election Administration of Georgia**

Despite the comprehensive election legislation, which is very detailed, the CEC adopted the decree on “Instructions for submitting an application/complaint to the Election Administration of Georgia”. This instruction more precisely regulates the process of composing the application/complaint, submitting and discussing it with the EA. In line with the Election Code of Georgia, it provides additional regulations for the smooth implementation of the process. The instructions regulate the procedures for discussing the complaint, taking it to appeal at the upper-level commission/court and drawing up the protocol for administrative violations. The instruction guides the EDR process to comply with the Election Code of Georgia and fills other minor gaps that may occur in the process.

#### **c. Uniform practice for imposing disciplinary liability on precinct election commission members**

A uniform practice/approach to similar cases in electoral disputes plays a vital role in the effectiveness of the whole EDR process. With the support of donor organisations and with the involvement of non-governmental organisations, the CEC’s legal department has drawn up the recommendatory document “Uniform practice for imposing disciplinary liability measures on election commissions”.

The document reflects the rules for composing a complaint requesting the disciplinary liability for commission members as well as the rules for discussing such complaints and envisages recommendatory measures of disciplinary liability to be imposed in accordance with the gravity of the violations. The document assists the DEC in applying uniform practice while discussing the cases and has a very important role in promoting uniform practice in EDR.



#### **d. Guideline for electoral disputes**

The effectiveness of the EDR process is ensured only if all the process's stakeholders are well informed about their rights and obligations at every stage of the polling process. For this purpose, the CEC of Georgia, with the support of the International Foundation for Electoral Systems (IFES) and with the involvement of civil society organisations, developed the guidelines for electoral disputes. Since 2011, the guidelines have supported the effective work of all election stakeholders, including election commission members, and clarifies the EDR procedures provided for by the Election Code of Georgia.

The guidelines for electoral disputes fall into three parts and explain in detail the procedures for submitting/discussing an application/complaint at all levels of the EA as well as making decisions and appealing the decisions of the commission/commission chairperson.

The guidelines cover the following.

- ▶ Instructions on submitting and discussing an application/complaint to the election commission on polling day. The first part of the guidelines comprehensively describes the rights of persons who may submit a complaint from the opening of the polling station until drawing up the summary protocol of election results; regulations about observing the registration of complaints, procedures for registering the complaint at election precincts, procedures for correcting errors, issues related to the responsive measures to the application/complaint; procedures for appealing the summary protocol of election precincts.
- ▶ Procedures to be followed by District Election Commissions in the process of discussing complaints. The second part of the guidelines precisely describes all the processes related to the submission and registration and the discussing and appealing against complaints at DEC; revealing and correcting shortcomings, inviting the party of electoral dispute to commission sessions; the procedures form for composing an administration violation protocol and appealing against it.
- ▶ Procedures to be followed during the discussion of complaints at the CEC. The third part of the guidelines deals with processes related to the submission and registration and the discussing and appealing against complaints at the CEC; the rules for summoning party at the sessions; the same part of the guidelines includes information about appointing the session and publishing information about the court ruling on involving the third party in electoral dispute. The guidelines are being updated in line with the amendments introduced to the election code and are always available at the CEC website. During each election, the guidelines are distributed to DEC members and are used in the training of DEC members, election subject representatives and observers.

#### **e. Administrative proceedings related to the discussion of electoral disputes at DEC**

The CEC has published an additional assisting document for DEC members about the rules of administrative proceedings related to the discussion of electoral disputes. The document is based on the Election Code of Georgia, the General Administrative Code of Georgia, the code of administrative violations of Georgia, the CEC decree on "the instructions for submitting an application/complaint to the EA" and on the basis of the DEC regulations and other normative acts. The assisting document covers issues such as: starting the administrative proceeding, detailed explanation of the procedures starting from the submission of the complaint until the rules for appealing decisions, namely procedures on registering the complaints, revealing the shortcomings, grounds for dismissing the complaint from discussing it on merits, procedures for organising the commission session for discussing the application/complaints and preparing the decision on administrative violations.

During the pre-election period, the CEC and the training centre use this document for the DEC members' training.

#### **f. Guidelines on the use of administrative recourses**

Raising awareness about the negative consequences of the misuse of administrative resources during election campaigns and informing a wide range of electoral stakeholders about the unfair environment this tendency creates in elections is a very effective way of preventing future cases of the misuse of administrative resources. For this purpose, the CEC has drawn up guidelines on the abuse of administrative resources. This document explains the concept of the use of administrative resources and defines its types. It covers the main principles and main grounds for its prohibitions. The document generalises the issues regulated by the election legislation on the prohibition of the misuse of administrative resources during elections. Prior to each election, the CEC of Georgia initiates training for the representatives of election subjects, DEC, observer organisations and media representatives and provides training for lawyers of executive authority and local self-governing bodies. The training modules include issues on the misuse of administrative resources, the prohibition of the use of

budgetary funds in election campaigning and engagement of public servants in pre-election activities. The training aims to prevent cases of the misuse of administrative resources in election activities by informing all electoral stakeholders and raising their awareness. It also promotes a uniform understanding of the norms envisaged in legislation. All measures work together to support the conduct of election campaigns in a free and fair environment.

### 3.1.2. Examples

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#### Appeals registry

The transparency of every electoral process is very highly valued by the Election Administration of Georgia. The EDR process is not an exception. For free access to the content of electoral disputes, the CEC runs an online registry of complaints, which is accessible on the CEC (<http://sachivrebi.cec.gov.ge/>).

The appeals registry was introduced in 2010 and it gives all interested stakeholders free and easy access to all ongoing and past electoral disputes. The registry has significantly promoted transparency of the whole EDR process in Georgia. Comprehensive information about the complaints submitted to the CEC and DEC is updated daily on the website during the election period. The registry gives access to scanned copies of all documents related to a particular case, namely, the electronic photocopies of the submitted documents, as well as materials obtained by the commission during the investigation and commission decisions. The appeals registry allows all interested persons to process information related to the dispute, see the decisions made by the commission/commission chairperson and to search the court decision on the particular dispute. The appeals registry system is being constantly improved to ensure that complete information is uploaded online in a timely manner. The CEC and DEC staff who work in the appeals registry receive periodical training on improvements.

The appeals registry gives access to:

- a. information about applications/complaints submitted to the CEC;
- b. information about court processing held during the election period and with the participation of the CEC;
- c. complaints submitted to the DEC and the related information.

After the relevant election commission receives the complaint, it takes only a day to upload information to the appeals registry. Information in the registry is free of charge and can be referred by indicating relevant web address by any interested person. The rule for administering the appeals registry and uploading information on the website is regulated by the CEC decree on "instructions for submitting and discussing an application/complaint to the EA". Information in the appeals registry is uploaded only during the election period and is maintained for five years. The OSCE ODIHR in its final report on 2018 presidential elections stated:

The online register of complaints maintained by the CEC enhanced the transparency of the complaint resolution process. While complaints and appeals, including those requesting administrative sanctions, were generally handled by the election administration and courts in a transparent manner within legal deadlines, in some cases decisions lacked sufficient legal reasoning.

#### Applying technical means for summoning parties to the election commission during the discussion of electoral disputes and drawing up of relevant acts

According to the Election Code of Georgia, dispute parties can be summoned to the election commission in writing or by telephone (including cell phones, short text messages) e-mail, fax or other electronic means. Using technology substantially simplifies this process and allows dispute parties to be informed promptly about the appointed discussion of the case. The CEC drew up and approved the act on summoning parties through technical means, which should be attached to the complaint presented to the commission session (Appendix 2).

#### Using the CEC website to publish information about court rulings on appointing the court hearing and announcing the involvement of third parties in electoral disputes

Apart from the plaintiff and the defendant, electoral disputes may also involve third parties in the court proceedings. The third party, unlike the plaintiff and the defendant, is a participator to the proceedings who has neither instituted a lawsuit nor has been named as a defendant in the process but may also have a vested

interest in a court decision. Thus, a third party may also have a legal interest in the subject of the dispute. Given that, in electoral disputes where the timeframe for discussing the cases is much tighter and considering that the number of involved third parties may be quite large, a problem with informing all involved third parties may occur.

For promptly informing the third parties, the Election Code of Georgia was amended,<sup>37</sup> and the CEC of Georgia adopted a relevant decree which regulates in detail the procedures for publishing the information about the appointment of the court hearing and the court decision on the involvement of the third party on the CEC website.

According to this procedure, the court sends to the CEC the decision about the appointing of a court hearing and the involvement of the third party in the dispute and the CEC publishes this information on the specially designed banner on its official website: "Court Ruling on Scheduling the Court Hearing and Engaging Third Parties."

The information placed on the CEC website comprehensively informs interested parties about the appointment of the court hearing and about the court ruling on involving third parties.

The above-mentioned mechanism effectively supports informing the third parties involved in the electoral disputes and ensures the timely discussion of such cases, which itself represents an important aspect in electoral disputes (Annex 3).

## **Analysing legal acts issued by DEC/DEC chairpersons**

The CEC of Georgia constantly works on improving the quality of legal rulings by the EA. After the 2017 local elections, the CEC initiated and implemented an internal audit of the EDR process. The CEC legal department carried out a substantial amount of work and studied all DEC decisions in detail and revealed weaknesses in legal writing. The shortcomings discovered in the study results were systematised and the CEC developed targeted training for DEC representatives aimed at eliminating improper practices and promoting a uniform approach to dispute resolution. Since then, the audit of the DEC legal acts is conducted after each election and this practice very effectively supports the establishment of the uniform practice in DEC rulings and substantially improves the process.

### **3.1.3. Platforms for co-operation**

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#### **1. Memorandum on the misuse of administrative resources**

In the process of identifying challenges to free and fair elections and designing new ways for addressing these challenges, the CEC of Georgia tries to avoid being a single player in the field and promotes an open-door policy with other electoral stakeholders, such as civil society organisations and international donor organisations, which are also mandated to bring their positive influence to the electoral process. The CEC has established and is also a member of various platforms of co-operation for discussing diverse issues related to elections. Some of the best practices of collaboration in the EDR process include the following.

- Creating a level playing field for all election subjects is a vital aspect of fair elections. It is also very important to draw a dividing line between the state and political parties. The CEC of Georgia in co-operation with the Interagency Task Force, local observer organisations and political parties sign a memorandum of understanding on the misuse of administrative resources. The memorandum aims at promoting transparent election campaigns and a fair environment in the pre-election period. Prior to each election, the memorandum is signed and the International Foundation for Electoral Systems (IFES) supports the process. By clarifying the vague Articles 45, 48, 49 of the Election Code of Georgia, the memorandum of understanding aims to promote uniform approaches to the use of administrative resources.

- Signatory parties of the MoU agree on a uniform understanding of the specific articles of the Election Code and agree to be guided by the definitions provided for by the memorandum regarding pre-election activities and during the administrative and court proceedings. To some extent, the abuse of administrative resources used to be an established practice and such cases used to be accompanied by public tolerance. In recent elections, the initiated policies of awareness raising, training, constant legal responses, imposed liabilities and a uniform approach, the established co-operation of electoral stakeholders and signed MoUs on this issue have resulted in a significantly reduced tendency to abuse administrative resources.

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37. Paragraph 33 was added to paragraph 32 of Article 77 of the election code of Georgia, <https://matsne.gov.ge/ka/document/view/4271111?publication=0>.

## 2. Interagency Task Force for Free and Fair Elections

As another supportive platform for discussing election-related matter, the Interagency Task Force for Free and Fair Elections (IATF) has been established in Georgia. The IATF is intended to serve as an institutional mechanism to prevent and respond to violations of electoral legislation in Georgia by public officials. The IATF comes under the auspices of the Ministry of Justice of Georgia during the election period and representatives of the CEC, political parties and local observer organisations along with other electoral stakeholders are invited to participate in its sessions. The IATF issues non-binding recommendations aiming to prevent the misuse of administrative resources, including through social media, to prevent violence and to encourage public officials to respect the legal framework. The IATF is active during each election and terminates its work after the publication of the official final election results by the CEC of Georgia. The composition of the commission is defined by order of the Ministry of Justice. Qualified election subjects and political unions are the members of the commission and participate in its activities with a deliberative vote. The commission issues recommendations to public officials, administrative bodies and the CEC of Georgia. The IATF is an important platform for discussing and responding to concrete cases/violations with involvement of all interested stakeholders.

## 3. Working meetings and seminars for judges

One of the very important programmes supported by the IFES refers to the conduct of working meetings with judges of common courts. Before each election, workshops/seminars are conducted with the participation of judges discussing administrative cases. At the workshop, participants discuss amendments to the election legislation, issues related to the uniform application of election legislation, challenges related to the use of administrative resources and international best practices. Starting from 2012, workshops have been conducted in co-operation with various international donor organisations including the United National Development Programme (UNDP), the European Union (EU), the German Agency for International Cooperation (GIZ), the Foundation for Electoral Systems (IFES) and the Venice Commission of the Council of Europe. The High Council of Justice of Georgia and the Supreme Court of Georgia are also involved in the process of organising the workshop for judges. The main goal of the seminars is to share information on the practical issues related to electoral dispute resolution and sharing international experience. Workshops play an important role in the process of establishing uniform practice and promote the effectiveness of the EDR process.

## Conclusion

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Over the years, the EA has achieved tangible progress in terms of improving various aspects of elections, including EDR. While examining the EDR statistics, the CEC analyses not only the number of the complaints but also their sources and the content. The comprehensive registry of appeals gives the EA the opportunity to conduct complex analysis of the complaints, respond relevantly to the main trends and reveal the most vulnerable aspects of EDR. During recent years, the statistical analysis of the disputes and the content of the complaints show a decreasing number of complaints requesting annulments and recounts of PEC results. Analysis also shows that DEC's have a better quality of legal writing and rulings and the EA has fewer cases appealed against it in the courts.

This progress is reported not only in the results of analysis but also in the statements of the OSCE Office for Democratic Institutions and Human Rights (OSCE ODIHR) observation missions also underline the achieved progress in terms of EDR. During the most recent general elections conducted in 2018, the OSCE ODIHR stated that "The legal framework provides an adequate basis for the conduct of democratic elections ... Overall, complaints and appeals were handled by the election administration and courts in an open and transparent manner within legal deadlines". Despite the steps taken forward in terms of promoting transparency and a uniform approach, the challenges in various aspects of elections still remain and there is a room for further improvement. To continue this progress, the joint efforts made by all electoral stakeholders are becoming increasingly important. Creating a fair election environment requires commitments from all involved parties. The systematic improvement and overall integrity of election processes can be achieved only by taking a uniform approach and through the common will of all electoral stakeholders to jointly design effective responses to the challenges.

## 3.2. BOSNIA AND HERZEGOVINA'S APPROACH TO ELECTORAL DISPUTE RESOLUTION

Dr Irena Hadziabdic

### Introduction

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An overview of issues concerning the electoral dispute resolution (EDR) system in Bosnia and Herzegovina will be presented in this chapter.

Protection of the electoral right entails the:

entitlement of voters and other entities in the electoral process to request competent institutions, primarily the election management bodies, regular courts, but also the constitutional courts, to protect their right, if violated or if the voter is prevented from exercising it.<sup>38</sup>

The Council of Europe standards recommend that there should be "some form of judicial supervision in place, making the higher commissions the first appeal level and the competent court the second."<sup>39</sup>

The Election Law in Bosnia and Herzegovina prescribes a clear hierarchical procedure for EDR in accordance with the recommendations from the Venice Commission<sup>40</sup> and the OSCE ODIHR.<sup>41</sup> Such a system in Bosnia and Herzegovina was established in 2006. Prior to this system, there was an Election Council for complaints and appeals as the only instance for protection of electoral rights. The law on changes and amendments to the Election Law from 2006 led to significant changes because the Election Council for complaints and appeals was abolished, its competences transferred to election commissions and the role of the Bosnia and Herzegovina Court became the final instance in the EDR system.<sup>42</sup>

Protection of the electoral right in Bosnia and Herzegovina is secured by election commissions and the Appellate Division of the Court of Bosnia and Herzegovina.<sup>43</sup> The election commissions are: the Central Election Commission of Bosnia and Herzegovina (the CEC); and the local election commissions (the LECs).<sup>44</sup> The European Court of Human Rights has affirmed that access to a remedy is not limited to the courts but applies to administrative proceedings.<sup>45</sup>

The primary regulatory instrument for protection of the electoral right in Bosnia and Herzegovina is the Election Law,<sup>46</sup> as a *lex specialis*, which defines the special procedures for elections. In addition, the Law on Administrative Procedure<sup>47</sup> has a subsidiary role for issues that are not regulated by the special procedure in the Election Law of Bosnia and Herzegovina.

The CEC has adopted the instruction on the procedure of adjudicating complaints and appeals submitted to the election commissions<sup>48</sup> (hereinafter: "the instruction") as a sub-regulation act that regulates all important issues referring to the protection of the electoral right.

The EDR system in Bosnia and Herzegovina is most often characterised by three-instance, and sometimes two-instance, proceedings and by very short deadlines for filing complaints/appeals. A special challenge is the evidence-gathering procedure during which all necessary data, notifications and information are collected in a very short period. Short deadlines applied in Bosnia and Herzegovina enable certain violations to be removed quickly and efficiently in order not to disturb the whole election process. The election process in Bosnia and

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38. Mirjana Pajvančić, "Passive voting right, Elections in national and international law", Institute for comparative law, Goragraf, Beograd, 2012, page 67.

39. Venice Commission, Compilation of Venice Commission opinions and reports concerning election dispute resolution, Strasbourg 2017, CDL-PI (2017) 007, page 4.

40. Venice Commission, Report on electoral law and electoral administration in Europe, CDL-AD (2006), Strasbourg 2006, paragraph 171: "Moreover the Electoral Law should provide that appeals review by the election commission follow a single hierarchical line, from lower to higher commissions".

41. Denis Petit, OSCE ODIHR (2000), "Resolving Election Disputes in the OSCE Area: Towards a Standard EDR Monitoring System", Warsaw, page 10: "provide for at least one appeal procedure to ensure that higher court or electoral body review all cases".

42. Law on changes and amendments to the Election Law, Official Gazette Bosnia and Herzegovina, number 24/06

43. [www.sudbih.gov.ba](http://www.sudbih.gov.ba).

44. LECs are municipal/city election commissions and election commission of the Brčko District of Bosnia and Herzegovina.

45. European Court of Human Rights, Judgments, *Oztruk v. Germany*, Application 8544/79, February 21, 198.

46. Election Law of Bosnia and Herzegovina, Official Gazette Bosnia and Herzegovina, nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 17/14, available at: [www.izbori.ba/Default.aspx?CategoryId=170&Lang=6&Mod=0](http://www.izbori.ba/Default.aspx?CategoryId=170&Lang=6&Mod=0).

47. Law on Administrative Procedure, Official Gazette Bosnia and Herzegovina, Nos. 29/02, 12/04, 88/07, 93/09, 41/13, 53/16.

48. Instruction on procedure of adjudicating complaints and appeals submitted to the election commissions "Official Gazette" br. 37/14.

Herzegovina refers to the period<sup>49</sup> from announcement of the elections until confirmation of the results and their final publication in the Official Gazettes. During all the important phases of the election period (the election announcement, voter registration, the registration of political subjects and candidates, the period of the election campaign, the voting and counting of votes, the determination and confirmation of the results and the mandate allocation) challenges and complaints/appeals arise, and according to the accepted democratic standards<sup>50</sup> it is very important to establish a system with “reasonable but tight deadlines and time limits”.<sup>51</sup> The Committee of Ministers of the Council of Europe in one of its interim resolutions stated: “Excessive delays in the administration of justice constitute an important danger, in particular for the respect for the rule of law”.<sup>52</sup>

According to international standards,<sup>53</sup> the time limits for lodging and deciding appeals must be short (three to five days for each). The deadlines for the protection of electoral rights in Bosnia and Herzegovina are 24 hours for filing complaints and 48 hours for filing appeals. Election Commissions must adjudicate on complaints and appeals within 48 hours, and the Court of Bosnia and Herzegovina within three days.

Taking into consideration short deadlines set forth by the Election Law of Bosnia and Herzegovina, the OSCE/ODIHR has in its final report on General Elections 2018 in Bosnia and Herzegovina made a remark<sup>54</sup> that precisely determined deadlines are significantly shorter than it is recommended in the Venice Commission’s Code of Good Practice in Electoral Matters.<sup>55</sup>

A comparative overview of the protection of electoral rights in surrounding countries (Croatia, Serbia, North Macedonia and Montenegro) shows that procedures are similar in two-instance proceedings, with very short deadlines. The protection of the electoral right in the first instance is implemented by the election commissions (the LEC and the State Election Commission), and in the second instance by the Constitutional Court (in Croatia and Montenegro) and Administrative Court (in Serbia and North Macedonia).<sup>56</sup>

Many countries have short time limits. “In a number of countries, the time limit is less than three days: in Georgia, Hungary, Lithuania and Portugal there is only one day to introduce the claim...”<sup>57</sup>

### 3.2.1. Complaint and appeal

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The complaint and appeal procedure in Bosnia and Herzegovina is clearly regulated by the law and generally conforms to international standards. The mechanisms for complaints and appeals are established and timely adjudication is ensured. However, there are a couple of flaws in the EDR system.

The international guarantee of a remedy implies that the state has the primary duty to protect human rights and freedoms first within its own legal system.<sup>58</sup> In Bosnia and Herzegovina, any voter (with Bosnia and Herzegovina citizenship and who is 18 years old) and any political entity<sup>59</sup> (political party, independent candidate, coalition, list of independent candidates certified for participation in the elections) is entitled to file a complaint/appeal if their right has been violated. The procedure is undertaken against a political entity or person employed by the election administration.

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49. Central Election Commission announces elections in Bosnia and Herzegovina at the beginning of May and then so called “election period” starts. Elections are held every first Sunday in October, and final results have to be confirmed and announced 30 days after the Election Day.

50. Venice Commission, Code of Good practice in Electoral matters, Paragraph 95, “the time limits or appeals must be very short and that appeal body must make its ruling as quickly as possible. Time limits must however be long enough to make and appeal possible to guarantee the right of defence and reflected decision.”

51. IFES, Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections, GUARDE, USA, 2011, page 101.

52. Committee of Ministers of the Council of Europe, Res DH (97) 336, Length of civil proceedings in Italy, Supplementary measured of a general character, adopted in 1997.

53. Venice Commission, Compilation of Venice commission opinions and reports concerning election dispute resolution, Strasbourg, 2017, CDL-PI (2017) 007, page 4.

54. OSCE ODIHR Final report on General Elections 2018, Warsaw, 25 January 2019, page 19.

55. Paragraph II.3.3.g of the Venice Commission’s Code of Good Practice in Electoral Matters recommends that “Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance)”.

56. Vlado Rogić and Mr Bojana Primorac, Three-instance procedures in the electoral disputes resolution system set forth by the Election Law of Bosnia and Herzegovina, pages 73-74, in publication “Elections in Bosnia and Herzegovina”, Year 1, Number 1, Sarajevo, Printing house Fojnica DD Fojnica, September 2017.

57. Venice Commission, Compilation of Venice commission opinions and reports concerning election dispute resolution, Strasbourg 2017, CDL-PI (2017) 007, page 19.

58. Venice Commission, Report on the effectiveness of national remedies in respect of excessive length of proceedings, CDL-AD(2006) 036 rev., Strasbourg, 2007, page 9.

59. Article 6.2 paragraph 1 of the Election Law of Bosnia and Herzegovina.

Election commissions may, upon receiving information concerning the violations, initiate a procedure *ex officio*.<sup>60</sup> While by law election commissions may act on possible irregularities *ex officio*, in practice they have done so in a few cases upon receiving notifications of irregularities, which was the cause of the OSCE/ODIHR remarks<sup>61</sup> recommending election commissions should be proactive in reviewing possible irregularities *ex officio*, including upon notifications received from observers.<sup>62</sup>

The main difference between complaint and appeal is that a complaint is filed against an action and an appeal is filed against a decision. A complaint should be filed within 48 hours, and during an election period that deadline reduces to 24 hours from when the violation occurred.

Filing appeals and complaints does not require any cost and it is “free of unnecessary obstacles”, which is in accordance with international recommendations.<sup>63</sup> In order to facilitate the protection and fulfilment of rights more efficiently, the Bosnia and Herzegovina CEC has created a form, which is an integral part of the sub-regulation and which is available on the Bosnia and Herzegovina CEC website.<sup>64</sup> This also conforms to international standards: “The procedures must be simple, and providing voters with the special appeal forms, helps to make it so.”<sup>65</sup>

1. Name: Central Election Commission of Bosnia and Herzegovina / Election commission	
2. Name and surname, i.e. name of the complainant and number of telefax that is registered for official communication with the Central Election Commission	
3. Date and hour of filing complaint	
4. Date, hour and place where the violation occurred	
5. Who committed the violation?	
6. Short description of the alleged violation	
7. Provisions of the Election Law of Bosnia and Herzegovina that are being violated in complainant’s opinion:	
8. Attachment – evidence that supports the complaint	
9. Place, date, hour and signature of the complainant (voter, authorised representative of political entity)	10. Signature of authorised officer for receiving complaints and stamp
M.P	M.P

The form for filing complaints contains the name of the complainant, a short description of the violation, evidence that supports the complaint, a signature (it can be signed only by the president or an authorised representative of a political party or an authorised representative of a coalition with statutory authorisation), and the number of a telefax to which the decision about the complaint will be sent.

The appeal contains the number and name of the decision that the appeal refers to, statements in which part the decision is disputed, the reasons for appeal and the signature of the appellant. During the election period, communication between the election commissions and parties involved in the procedure is made through telefax or in person. Besides this, communication between the Bosnia and Herzegovina Central Election Commission and the parties to the procedure is also done through the web page of the Central Election Commission of Bosnia and Herzegovina, which has the role of a bulletin board, and e-mail with the voters residing abroad.<sup>66</sup>

A political entity is obliged to write down the number of the telefax, which is registered with the CEC of Bosnia and Herzegovina, for official communication. It has to be available 24 hours a day and cannot be used by any other political entity during the election period. The efficient and transparent administration of complaints/appeals is fundamental. The institutions dealing with EDR face huge challenges. All received appeals are registered through an established document management system. During the election period, when a large number of appeals can be expected, the Bosnia and Herzegovina CEC increases the number of people on duty, as well as the number of lawyers from the whole of the Bosnia and Herzegovina CEC Secretariat, who help the legal department to meet the short deadlines for EDR.

60. Ibid., Article 6.2, paragraph 2.

61. OSCE ODIHR Final report on General Elections 2018, Warsaw, 25 January 2019, page 19.

62. Ibid., page 28.

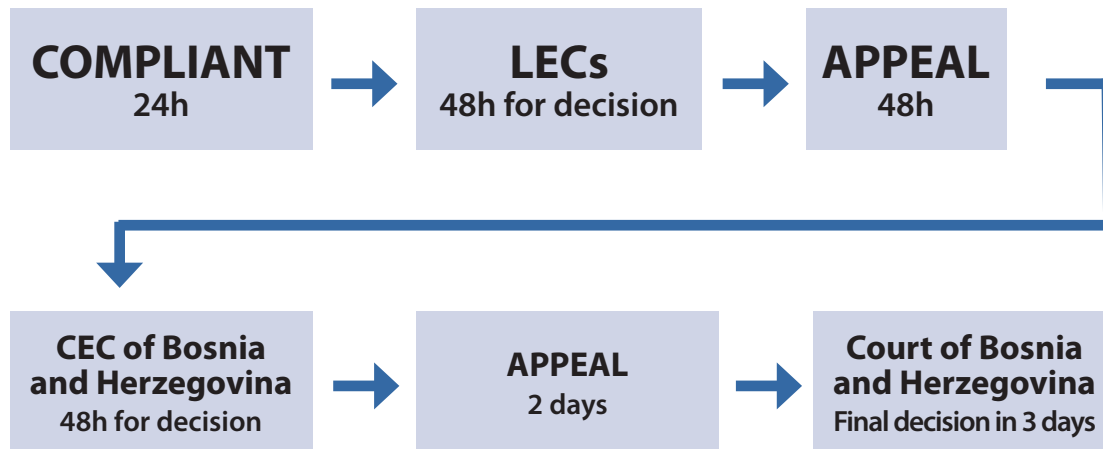
63. Denis Petit, OSCE ODIHR, Resolving Election Disputes in the OSCE Area: Towards a Standard EDR Monitoring System, Warsaw, 2000, page 11.

64. Official Gazette Bosnia and Herzegovina, number 37/14; available at: [www.izbori.ba/Opci\\_izbori\\_2018/Default.aspx?CategoryID=254&Lang=3](http://www.izbori.ba/Opci_izbori_2018/Default.aspx?CategoryID=254&Lang=3).

65. Venice Commission, Compilation of Venice commission opinions and reports concerning election dispute resolution, Strasbourg, 2017, CDL-PI (2017)007, page 22.

66. Article 3 of the Instruction.

# ADJUDICATING PROCEDURE



## 3.2.2. The Election Commissions' (LECs and the Bosnia and Herzegovina CEC) proceedings

The management of complaints and appeals is a critical part of democratic elections. It is essential to stress the importance of an independent electoral administration.<sup>67</sup> In its report on electoral law and electoral administration in Europe, the Venice Commission stated that it should be clear which bodies act as first-instance fact-finding bodies and which bodies act as appellate review bodies.<sup>68</sup> Municipal/city election commissions (LECs) in Bosnia and Herzegovina adopt decisions in the first instance, except in cases where the violation is exclusively under the first instance of the CEC. The violations that appear every election mostly relate to the process of polling station committee (PSC) appointments, election campaign violations, influencing of voters and violations related to work of the PSCs on the Election Day.

The current legislation precisely defines irregularities that are not under the competence of the LECs because of their importance. The irregularities are subject to the resolution process with the Bosnia and Herzegovina CEC in the first instance. These are as follows:

- ▶ preventing journalists from carrying out their duties, in accordance with the rights of their profession and the election rules;<sup>69</sup>
- ▶ using language that could provoke or incite someone to violence or spread hatred, or publishing or using pictures, symbols, audio and video recordings, SMS messages, internet communications or any other materials that could have such an effect;<sup>70</sup>
- ▶ using national and international means of communication intended to influence voters during the pre-election media blackout i.e. 24 hours prior to the opening of the polling stations until the closing of the polling stations;<sup>71</sup>
- ▶ violations by political entities via electronic media.<sup>72</sup>

The LECs receive a large number of complaints to their telephone helplines. The most frequently reported violations include delays in the opening of polling stations, the late arrival of polling station committee members, the available number of ballots at the polling station not manually counted before its opening, observers not being allowed to enter a polling station, or campaign material being placed within 50 metres of the polling station.

67. Venice Commission, Report on measures to improve the democratic nature of elections in Council of Europe member States, CDL-AD(2012)2005, Strasbourg, 2012, page 3.

68. Venice Commission, Report on electoral law and electoral administration in Europe, CDL-AD (2006)018, Strasbourg, 2006, page 37.

69. Article 7.3, paragraph 1, item 3, of the Election Law of Bosnia and Herzegovina.

70. Ibid., Article 7.3, paragraph 1, item 7.

71. Ibid., Article 7.4, paragraph 1, item 3.

72. Ibid., Chapter 16.



The members of LECs resolve all these complaints through contact with the president and members of the polling station committee. All measures are undertaken to remove violations, and the election process should continue as soon as possible in accordance with the Election Law.

The observers are entitled to enter their remarks in the register on the work of the PSC, which is available at each polling station.

The complaints procedure has three steps:

1. filing a complaint within 24 hours of a violation occurring;
2. submitting a complaint to all parties involved in order to obtain their response to the complaint within 24 hours;
3. adjudicating the complaint.

**STEP 1** *Each written complaint has to be filed to the authorised LEC in a defined form within 24 hours (during the election period) of the violation occurring.*

All evidence that is necessary for the appropriate determination of the facts (such as original election documents, forms, records or statements from different witnesses) must be collected within a very short deadline, which can be challenging – very often complainants change their statements or withdraw their statements completely.

If the president or an authorised representative of the political entity withdraws the complaint, it shall be determined that no such complaint was submitted.<sup>73</sup>

If the LECs does not launch a procedure, or if they do not make a decision on complaints in the cases where they have the first-instance competence and within the deadlines prescribed by the Election Law of Bosnia and Herzegovina, the CEC will, after receiving this information, launch and finalise the procedure, that is, make a decision on the complaint. If a complaint was filed by an unauthorised person or was not submitted in time, it will be rejected.

Very often it cannot be determined who filed the complaint; the complaint was filed after the deadline of 24 hours following the violation or the evidence that should support the complaint is missing. However, LECs s may launch procedures *ex officio*.<sup>74</sup>

Analysis of the legal practice in Bosnia and Herzegovina shows that a large number of complaints and appeals are rejected due to procedural reasons: for not being submitted on time (example 1; see below); for being submitted by unauthorised persons; or for not submitting relevant evidence (example 2; see below). Very often complaints/appeals do not contain or are not supported by concrete evidence and largely contain statements that cannot be accepted because they are usually just alleged and therefore irrelevant.

**STEP 2** *If the complaint is filed in a timely manner and submitted by an authorised person, statements from complaint will be checked and:*

- ▶ delivered to all parties mentioned in the complaint;
- ▶ all parties will be obliged to make their statements on citations from the complaint within 24 hours;
- ▶ the hearing of parties may be scheduled.

The complaint is obligatorily sent to all parties involved in order to obtain their response to the complaints. The opposite party named in the complaint must have the right to make a statement about all the important facts in written form. The applicant's right to a hearing involving both parties is protected, which conforms to international standards.<sup>75</sup>

**STEP 3** *As part of their decision, LECs may order the following measures to be taken:*<sup>76</sup>

- ▶ measures to correct violations;
- ▶ adding or deleting names from the Central Voter Register;
- ▶ removing the person working as a member of a polling station committee or in the voter registration centre;

73. Article 5, Paragraph 3, of the Instruction.

74. Article 6.2, Paragraph 2, of the Election Law of Bosnia and Herzegovina.

75. Venice Commission, Compilation of Venice commission opinions and reports concerning election dispute resolution, Strasbourg 2017, CDL-PI(2017)007, page 4.

76. Article 6.5 of the Election Law of Bosnia and Herzegovina.

- ▶ ordering a certain person or a party to cease the activities that violate the law;
- ▶ imposing fines.<sup>77</sup>

In accordance with transparency principles, these proceedings must be carried out in public sessions.

### Example 1. Untimely appeals during the election period

The Council of the Appellate Division of the Court of Bosnia and Herzegovina determined that the decision of the Bosnia and Herzegovina CEC was delivered to the appellant on 28 October 2016, which is confirmed by the fax report. The appeal was rejected as untimely as the deadline for filing an appeal is two days, and it was obvious that the appellant had failed to meet the deadline. The deadline for filing an appeal expired on 30 October 2016, because the days of 29 and 30 October 2016 (a Saturday and Sunday) were working days for the Bosnia and Herzegovina CEC and were included in the deadline for filing appeals. Since appeals are being filed by fax machines that are working 24 hours a day, the fact that the last day of the deadline was Sunday should not have prevented the appellant from sending it to the CEC on time.

The provision of Article 6.9, paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina states that appeals against decisions of the Bosnia and Herzegovina CEC can be submitted to the Appellate Division of the Court of Bosnia and Herzegovina through the CEC no later than two days following the receipt of the decision. Furthermore, it is precisely defined that the election commission keeps the records of all complaints and appeals. It places a stamp on every received complaint or appeal indicating the time (date and hour) when the document was submitted.

### Example 2. Complaint referring to damage of campaign posters

Considering a complaint made by the political entity regarding damage made to a billboard, the LEC found that the complaint was not submitted on the proper form and asked the political entity to submit it within the deadline of 24 hours on an appropriate form with enough evidence to support the complaint. The political entity submitted the complaint on an appropriate form within the deadline, but the LEC determined that it was incomplete: the alleged offender was not mentioned nor was any evidence offered to identify the alleged offender and the LEC decided to dismiss the complaint. Subsequently, the political entity submitted an appeal to the CEC. The LEC submitted an explanation that the appeal was submitted in a timely manner and was allowed and verified by an authorised person. The Bosnia and Herzegovina CEC determined that the appeal was ungrounded and that the LEC had come to an accurate and legal conclusion in this case. The Court of Bosnia and Herzegovina rejected an appeal stating that the appellant did not identify the alleged offender, an obligation prescribed by the law, so it was not possible to process the request. In this case, where there was no evidence to identify the offender – or to prove which political party was under suspicion of violating the rules of conduct during an election campaign – the conditions for making decisions based on the merits were not fulfilled. This appeal was rejected as ungrounded.

An unsatisfied party may file an appeal against decisions made by the LEC within 48 hours to the CEC, which is the second-instance body in these cases. During the process of decision making, the CEC may reject an appeal as ungrounded, may accept it and annul the first-instance decision completely or partially or change it.

When the CEC issues a sanction, it takes into consideration aggravating and mitigating factors: the frequency of the committed violation, earlier fines or the attitude of the violator towards the committed violation, etc. The CEC may order the LECs, the voter registration centre or the polling station committee to undertake measures to correct violations (for example, to remove campaign material, replace the member of the polling station committee, etc.) and may impose the following penalties:

- ▶ fines not exceeding KM 10 000;<sup>78</sup>
- ▶ removal of a candidate from a candidates list when it is determined that the candidate was personally responsible for the violation;
- ▶ de-certification of the political entity;
- ▶ prohibiting an individual from working in a polling station, at the voter registration centre or for the LEC.

77. Fines are precisely defined in the Election Law of Bosnia and Herzegovina and for the election administration are between 200 and 1 000 Convertible Marks (KM) (Article 19.8) for people working in the election administration, and for political subjects from KM 1 000 to 10 000 (Article 19.9). 1 Euro equals KM 1.954

78. Convertible Marks (KM), 1 Euro equals KM 1.954

If the LEC or the CEC find that a criminal act has been committed concerning the electoral process, it shall report the act to the competent public prosecutor. When submitting the report, the election commission shall undertake the necessary measures to preserve the evidence of the alleged criminal act. Electoral offences that require criminal procedure are subject to the Criminal Codes.

The CEC receives a lot of appeals during all phases of the election process. In 2012, for the municipal elections, during all phases of the election process, there were 159 appeals filed with the Appellate Division of the Bosnia and Herzegovina Court; for the general elections of 2014 there were 67; and the general elections of 2018 saw the highest number, 1 073 appeals.

The CEC receives the highest number of appeals during the procedure to appoint LECs (example 3; see below), during voter registration (example 4) and during the registration of political subjects and candidates for the elections (examples 5 and 6). The most severe sanctions (removing names of candidates from the list) were imposed for hate speech (example 7).

### **Example 3. A person running for the office at any level of authority cannot be appointed member of the election commission**

It is indisputable that N.K. was on the candidates' list of a political entity at the local elections of 2012 for the level of municipal assembly, and that the list was verified by the Bosnia and Herzegovina CEC. The political entities cannot change candidates' lists until the end of the term after the verification is completed. The reason for this is that if the term of an elected candidate ends in accordance with the Election Law of Bosnia and Herzegovina, it will be allocated to the next candidate on the list, in order to ensure continuity in the work of the body. Therefore, a statement made by the appellant that he is not a candidate at the elections anymore and that he has been deprived of the opportunity to be elected as a municipal councillor is irrelevant.

### **Example 4. Voter registration**

The CEC is responsible for the accuracy, the updating and the integrity of the voter register. The CEC also concludes and verifies the excerpts of the Central Voters' Register and the latter are used at the elections. Article 1.7 of the Election Law states that no person who is serving a sentence imposed by domestic courts or who has failed to comply with an order to appear before a domestic court for serious violations of humanitarian law, where the International Criminal Tribunal for the Former Yugoslavia has reviewed the file prior to arrest and found that it meets international legal standards, may be recorded in the Central Voters Register or stand as a candidate or hold any appointed, elective or other public office in the territory of Bosnia and Herzegovina. The Penal and Reformatory Institution informed the Bosnia and Herzegovina CEC that the basic court had imposed a jail sentence of four years for a war crime against the civil population, and that this person had been serving a jail term in this institution since 10 October 2015. Therefore, the CEC made the decision that this person would not be registered in the Central Voters' Register until the jail term was served because of serious violations of humanitarian rights, and that the right to be registered would be acquired after the jail term had ended. The Court of Bosnia and Herzegovina found the appeal ungrounded and rejected it.

### **Example 5. An application to stand for the elections must be signed by the president of the political party**

The CEC rejected submission of the candidates' list of a political party as submitted by an unauthorised person, because in line with the Election Law of Bosnia and Herzegovina<sup>79</sup> the application to stand for the elections (as well as the application of each candidate on the candidates' list) must be signed by the president of a political party. In this case the application was signed by the deputy president of the party. The political party appealed stating that the party's congress has elected the deputy president to be the new president of the party, and that it has submitted the request for registration of new authorised person to the Court, but it has not been finalised yet. The Court of Bosnia and Herzegovina concluded that the CEC's decision is legal and correct, and the appeal was rejected as ungrounded stating that the CEC is not competent to determine correctness of the decisions made by political party's congress, and that the party submitted the documents showing different authorised person.

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<sup>79</sup>. Article 4.19, paragraph 5

## Example 6. Rejection of a candidates' list of a political entity for a certain electoral unit

The Bosnia and Herzegovina CEC took an accurate decision that the deadline for submitting candidates' lists ended on 9 July 2018. Taking into consideration the fact that the appellant did not even submit the candidates' list for electoral unit 406 within the prescribed deadline, the motion of a technical error cannot be accepted as neither can the possible correction of moving the candidates on the list for the electoral unit 405 to the candidates' list for electoral unit 406, since the candidates' list was not submitted for the electoral unit 406 and thus cannot be corrected. Therefore, the Court of Bosnia and Herzegovina made the decision to reject this appeal.

## Example 7. Hate speech in the election campaign

Prior to the local election of 2008, the CEC adopted a decision on removing the name of the candidate from the list of political party candidates and issued a fine amounting to KM 10 000 for violation of the rules of conduct during the election campaign and hate speech. The CEC specified that video recordings and parts of a broadcast on a private TV, whose owner is at the same time candidate in the election, pose a clear risk of inciting someone to hate and causing fear because war crime criminals are glorified and intolerance encouraged. The Court of Bosnia and Herzegovina denied an appeal from the candidate against the decision made by the CEC. Subsequently, the candidate filed an appeal to the Constitutional Court of Bosnia and Herzegovina against the decision made by the CEC and the decision made by the Court of Bosnia and Herzegovina. The Constitutional Court of Bosnia and Herzegovina had to determine whether there was justified balance between the needs of the public and the interests of the individual and noted that Article 6.7 generally defines that the CEC may impose a fine not exceeding KM 10 000; and that it is explicitly prescribed that the candidate of a political subject may be fined for the same violation by as much as between KM 1 000 and 5 000. The Constitutional Court concluded that the appellant was right to point to the fact that he was fined an amount higher than prescribed by the law. The Constitutional Court of Bosnia and Herzegovina concluded that the disputed decisions violated the right to property stipulated by Article II/3 k of the Bosnia and Herzegovina Constitution and Article 1 of Protocol 1 of the European Convention and partially adopted the appeal in the part referring to the sanction. The CEC issued the conclusion on 28 September 2010 on reimbursing a portion of the fine to the appellant.

### 2.1.3. The court's proceedings (Court of Bosnia and Herzegovina and Constitutional Court)

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#### I. The Appellate Division of the Bosnia and Herzegovina Court

Appeals against all first-instance decisions made by the Bosnia and Herzegovina CEC must be filed within two days. An appeal can be submitted to the Appellate Division of the Court of Bosnia and Herzegovina no later than two days after a decision from the CEC is received.<sup>80</sup>

An appeal shall be submitted through the CEC of Bosnia and Herzegovina. The Appellate Division of the Court of Bosnia and Herzegovina is obliged to decide on an appeal within three days from the day of the receipt of the appeal. In the decision-making process judges should be independent and be able to act without restriction, improper influence, inducements, pressure, threats or interferences.<sup>81</sup>

Decisions by the CEC are final and valid after expiration of the deadline for filing appeals has passed, or after submission of the decision made by the Appellate Division of the Court of Bosnia and Herzegovina stating that it is either dismissed or rejected. Decisions by the Court of Bosnia and Herzegovina regarding appeals against decisions by the CEC because of violation of election rights are final and binding.

A large number of appeals are adjudicated in three instances. Despite short deadlines, three-instance adjudication of appeals requires time and the process lasts longer because it includes three authorised bodies, which leads to significant costs and a burden on the bodies who make the decisions, even where simple disputes are concerned. The CEC recommended in its annual report that protection of the electoral right by way of a three-instance procedure should only be applied to special cases of the most severe violations of the Election Law, while for minor violations two-instance protection would be sufficient (for example, when dealing with damage to campaign materials).<sup>82</sup> During the elections, the Bosnia and Herzegovina Court is the final instance for the most severe violations in cases involving polling station committees on election day that

80. Article 6.9 of the Election Law of Bosnia and Herzegovina.

81. Venice Commission, Report on the independence of the judicial system: Part I: The independence of judges, CDL-AD(2010)004, Strasbourg, 2010, page 12.

82. CEC Bosnia and Herzegovina Report on Municipal elections 2012, page 176.

lead to requests for recounting (example 8; see below), to a request for elections to be annulled and repeated (example 9) and to the sanctioning of polling station committees (examples 10 and 11).

The CEC orders a recount if it is established that the law was violated and the violation affected the allocation of mandates. A recount is an exception, in accordance with legally based and clearly justified reasons.<sup>83</sup> In addition, the election process is a continuous process, which consists of the parts such as determination of results, and the confirmation of the results can only follow after recount and completed appeal process. It means that both parts together are important in the process of summing up election results, which has to be ended 30 days after the election day at the latest. CEC reports show that this is the most sensitive phase of the election process. For example, for the general election in 2010, 139 complaints referring to violations at the polling stations were filed,<sup>84</sup> and most referred to the professional competence of the Polling Station Committee members. Analysis of the election process showed irregularities in the work of polling station committees at 57 polling stations, and the CEC received 87 requests for a recount of ballots. The number of requests for a recount of ballots at the latest general election, in 2018, was 82, and the CEC recounted ballots at 90 polling stations.<sup>85</sup> Immediately after the submission of protocols with results from polling stations at the general election in 2018 the CEC issued a general order to LECs to recount ballots at all polling stations where results were not properly determined, which was visible from their mathematical illogicalities, and ballots were recounted at 773 polling stations in accordance with this order.<sup>86</sup> When we take into consideration that a recount was carried out at 863 polling stations in total at the level of the CEC and LECs (out of approximately 5 300 polling stations in Bosnia and Herzegovina), this represents very thorough checking since remarks on violations were entered in only 360 Poll Books on work of the polling station committees.

The Election Law of Bosnia and Herzegovina precisely defines that the CEC shall annul elections in an electoral unit or at an individual polling station should it establish that irregularities occurred during the voting or counting of ballots that may affect the election results.<sup>87</sup> Similar rules applied in most of the countries, where there is an option to annul results in a single polling station (Albania, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, France, Germany, Hungary, Korea, Latvia, the Netherlands, Portugal and Romania<sup>88</sup>).

In the CEC's practice there were several occasions when elections at certain polling stations or the whole electoral unit were annulled. However, it did not prevent the CEC to meet the legal deadline of 30 days for announcing the final results and to establish partial results of the elections for all other polling stations. The results were subsequently established for the municipalities where elections were annulled and additional decisions were made.<sup>89</sup> Upon making decision on elections to be annulled, it is very difficult to respect very short deadlines for the protection of the electoral right during the election period. However, the CEC concluded that it is much more important to determine all facts stated in the appeal. The European Court of Human Rights has the same opinion and it points out that existence of a domestic legal system for effective analysis of complaints and appeals in issues referring to electoral rights is one of the most important guarantees of free and fair elections. In the case of *Namat Aliyev v. Azerbaijan*,<sup>90</sup> the CEC ignored complaints that remained unsolved, which was confirmed in the OSCE ODIHR report that determined that the CEC had forwarded complaints to the election commissions of the electoral units without investigating them. Such a strict and formalistic approach was not

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83. Article 5.30 of the Election Law of Bosnia and Herzegovina: in order to take into consideration a request for a recount of ballots in accordance with Article 5.30, paragraph 4, the following conditions have to be fulfilled: the request is in writing and signed by an observer, a group of 50 or more voters who voted at the same polling station, Municipal Election Commission or president of the political party; the request states with specificity the facts which justify a recount, including the specific articles of this law which were disregarded or violated; the request states with specificity the approximate number of ballots believed to have been affected; the request states how the results would have been affected by the violation of this law; the request has to be presented to the Central Election Commission of Bosnia and Herzegovina within three days of the date the Central Election Commission of Bosnia and Herzegovina announced the election results.

84. The CEC Report on general elections 2010, page 73.

85. The CEC Report on general elections 2018, page 89.

86. *Ibid.*, page 89.

87. Article 2.10 of the Election Law of Bosnia and Herzegovina.

88. Venice Commission, Report on the Cancellation of election results, CDL-AD(2009)054, Strasbourg, 2009, page 6.

89. On 26 October 2004, the Election Commission of Bosnia and Herzegovina made a decision to annul elections conducted at all 59 regular polling stations in the electoral unit of Zvornik. Repeat elections were held on Sunday 7 November 2004 because of irregularities that could have influenced the election results. The irregularities related to a large number of identical signatures on the voters' register.

In the general election of 2010, elections were annulled at five polling stations in Čapljina for cantonal assembly.

In the local elections of 2012, elections were annulled at some regular polling stations in the electoral units of Istočni Drvar, Istočni Mostar and Vukosavlje.

In the municipal elections of 2016, elections in the municipality of Stolac were annulled and repeated after three months.

90. Court Judgement in *Namat Aliyev v. Azerbaijan*, Application: 18705/06, 8 October 2010.

justified and a lack of honest care for the protection of the rights of persons submitting complaints concerning elections was noted in the behaviour of the commission and courts. The cancellation of election results is not necessary if the violation of election law is small scale and does not influence the election results.<sup>91</sup> At the same time, in its report<sup>92</sup> the Venice Commission considers any manipulation or error that undermines the integrity of elections as free, fair and competitive to be an electoral irregularity.

Applying principles of *ex officio* rules is not obligatory in all systems. For example, the practice in Serbia is totally different from the practice in Bosnia and Herzegovina. According to the legal approach of the Supreme Court of Serbia, the Republican Election Commission is not authorised to annul elections *ex officio* at certain polling stations without complaints.<sup>93</sup> Appeal bodies should have the authority to annul elections as underlined in the Code of Good Practice of Electoral Matters.<sup>94</sup> Counting of votes is a critical stage and a credible vote count based on the number of checks is vital for credible elections.<sup>95</sup>

### **Example 8. Ungrounded request for recount of ballots**

The complainant did not take into account all the conditions that need to be met in accordance with Article 5.30 of the Election Law of Bosnia and Herzegovina for the CEC to consider the request. According to Article 6.2, paragraph 1, of the Election Law of Bosnia and Herzegovina, a complainant is supposed to file a complaint with the election commission within 24 hours of the violation occurring, which he did not do. The complainant had the opportunity to file a complaint to the CEC about a decision made by the local election commission. It is noted that the CEC did not receive any complaints from the complainant referring to irregularities at the polling stations. Also, observers could act in the same way, but no objections were filed. Statements made by the complainant were only annotations and assumptions. The request did not contain all the necessary elements in accordance with Article 5.30 and no violation was noted that could have influenced the allocation of mandates and for which the CEC would have been obliged to order a recount of ballots in accordance with its provision. Therefore, this request was rejected.

### **Example 9. Annuling elections and repeated elections**

The Bosnia and Herzegovina CEC made a decision on 28 October 2010 to annul elections that were held on 3 October 2010 at five polling stations in one electoral unit (for the level of cantonal assembly). The same decision announced repeat elections for that canton at the mentioned polling stations on 7 October 2010. The appellant (political party) in the appeal stated that irregularities that were determined at five polling stations may have influenced other government levels as well (the Parliament of the Federation of Bosnia and Herzegovina and the House of Representatives of the Parliament of Bosnia and Herzegovina), and not only at the cantonal level. Therefore, they suggested that elections were repeated for all levels of legislative authority, since the CEC determined that elections were not conducted in accordance with the provisions of the Election Law of Bosnia and Herzegovina. During examination of the documents, the CEC determined that there were irregularities at the mentioned polling stations and it ordered an expert analysis by a graphologist who concluded that “there is a lot of similarity in the signatures of voters, i.e. in their handwriting, and it is evident that there are 1 015 suspicious signatures made by the same person/s”. The Bosnia and Herzegovina Court concluded that the CEC made a detailed analysis and determined that the difference of 1 015 votes could influence neither the election results nor the allocation of mandates for the levels of the state and entity parliaments, while it could have influenced the results for the canton. Besides that, appellant did not provide evidence to prove his statements, so his statements were defined as partial and the appeal was rejected.

### **Example 10. Sanctioning of irregular work by a Polling Station Committee member**

The Central Election Commission fined a member of the polling station committee and pronounced the sanction of illegibility to work with the election management bodies due to incorrect record of results for the local election of 2012. Responsibility of appellant is assumed on the fact that he/she participated in the procedure

91. Joint opinion on the Election Code of Bulgaria CDL-AD (2011) 013, Venice Commission, Compilation of Venice Commission opinions and reports concerning election dispute resolution, Strasbourg, 2017, CDL-PL(2007) 007, page 15.

92. Venice Commission, Report on the identification of electoral irregularities by statistical methods, CDL-AD (2018)09, Strasbourg, 2018, page 6.

93. Judgment of the Supreme Court in Belgrade, Už.36/07 from 28 January 2007: “Referring to the procedure launched *ex officio*, deadlines for its start are not prescribed per rule, so annulling elections by the Republican Election Commission *ex officio* would be inappropriate in the election procedure where all actions are connected with deadlines strictly prescribed by the Law on election of members of the parliament.” (Legal apprehension and excerpts from verdicts of the Supreme and Administrative Court), page 128.

94. II.3.3.e, Code of good practice in election matter and explanatory report, paragraph 101.

95. Venice Commission, Report on figure-based management of possible election fraud CDL-AD (2010) 043. Strasbourg, 2010, page 18.

of counting of the ballots and filling in the forms, as well as the fact that accuracy of the data recorded in the forms was confirmed by the appellant's signature. Responsibility of the appellant also lies with Article 22, paragraph 1 of the Rulebook on the conduct of elections in Bosnia and Herzegovina, which states that the president manages the work of the polling station committee and is responsible for the legacy of work at the polling station together with members of the polling station committee. The polling station committee, whose member was the complainant, determined wrongly that the number of invalid ballots was 24 instead of 32 and that the number of valid votes was 313 instead of 305. The Appellate Division of the Court of Bosnia and Herzegovina decided that she was a member of the PSC and that she was, together with the president, responsible for the legitimacy of the work, and decided that that fine was appropriate for the violation.

### **Example 11. Sanctioning of irregular work of the president of a polling station committee**

The person submitting the appeal was performing the function of president of a polling station committee, therefore being responsible for the legacy of the work at the polling station and for the proper filling in of all forms, and ensuring that all these actions are done in accordance with the provisions of the Election Law of Bosnia and Herzegovina, without any influence. It was noted in the appeal that the mistake was of a technical nature and as a consequence of tiredness (the number of votes for a candidate had been wrongly entered; none instead of three), which was determined after a detailed consideration of the submitted requests for recount, which was deemed a reasonable request. Votes were recounted for this polling station and an analysis of the original forms from this polling station was carried out. The Election Law of Bosnia and Herzegovina provides that members of polling station committees may be fined between KM 300 and 3 000 if forms are filled in contrary to Article 5.25. The sanction pronounced was illegibility to work in the election management bodies and a pecuniary fine in the amount of KM 400. The Court of Bosnia and Herzegovina confirmed the CEC decision on the sanction for the PSC president and rejected the appeal.

There are no extraordinary legal remedies in the procedure of protection of electoral rights in Bosnia and Herzegovina. Actually, in accordance with the Appellate Division of the Bosnia and Herzegovina Court,<sup>96</sup> extraordinary legal remedies prescribed by the Law on Administrative Procedure, as well as the law on administrative disputes of Bosnia and Herzegovina, are not allowed at all. The EDR system is regulated by Chapter 6 of the Election Law of Bosnia and Herzegovina, and by the instruction, as a special sub-regulation act. This regulation act prescribes only regular legal remedies: complaints and appeals, and court procedure regarding electoral appeals is prescribed by the law on administrative disputes in Bosnia and Herzegovina.<sup>97</sup> Article 76 of that law prescribes that an appeal may be lodged before the Appellate Division of the Bosnia and Herzegovina Court against a decision that violates the Election Law, made by the CEC, and Article 82 regulates that the decision of the Appellate Division of the Bosnia and Herzegovina Court following an appeal alleging the violation of the electoral right shall be final and binding.

Taking into consideration all above-mentioned provisions it is clear that extraordinary legal remedies against a final, binding and valid decision of the Appellate Division of Bosnia and Herzegovina Court are not allowed, not even those prescribed by the Law on Administrative Procedure. This is in accordance with Article 2 of the Law on Administrative Procedure of Bosnia and Herzegovina, which stipulates that individual procedural issues related to a certain administrative area may only exceptionally, by a separate law, be regulated differently than by this law, if this is necessary for acting differently as per these issues, provided that they do not contradict the principles of this law. One of these principles is the right to file an appeal,<sup>98</sup> prescribed by the Law on Administrative Procedure as a regular legal remedy, while extraordinary legal remedies are not included in these principles.

The law on administrative disputes<sup>99</sup> regulates these extraordinary legal remedies in administrative disputes: a request for a reopening of proceedings, a request for protection of legality and a request for a review of a court judgment.

The Bosnia and Herzegovina Court makes decisions regarding appeal procedures, and not regarding the procedure of determining the legitimacy of the final administrative act in an administrative dispute.

96. Decision from the Court of Bosnia and Herzegovina, number: S1 3 lž 024372 17 lž 2 from 13 February 2017.

97. Ibid., Articles 76 to 82.

98. Article 15 of the law on administrative procedure of Bosnia and Herzegovina.

99. Ibid., Article 40.

## II. Practice of the Constitutional Court of Bosnia and Herzegovina

However, there is a possibility to file an appeal to the Constitutional Court of Bosnia and Herzegovina. Appellants address the Constitutional Court in cases of a violation of the rights determined by the constitution or of those defined by the European Convention on Human Rights, most frequently the right to free elections,<sup>100</sup> the right to effective legal remedy,<sup>101</sup> the right to a fair trial<sup>102</sup> and the prohibition of discrimination.<sup>103</sup>

In accordance with Article VI/3 b of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this constitution arising out of a judgment of any other court in Bosnia and Herzegovina. The Constitutional Court of Bosnia and Herzegovina may consider appeals only if all legal remedies according to the law are tried and if the appeal is submitted within 60 days of the appellant receiving a decision on the last legal remedy pursued. Regardless of the result of an appeal, it does not have a timely influence on the election process, because the results of elections must be confirmed and announced at the latest 30 days after election day, which makes an election final and its results unquestionable. Taking into consideration the nature of the case – whether the procedure regarding an appeal to the Constitutional Court of Bosnia and Herzegovina is related to election rights – this court would have to act in accordance with emergency procedure.<sup>104</sup>

However, the problem is that, in practice, there are many decisions made after the verification of candidates' lists or the printing of ballots and there is no way to return a procedure to a previous stage and fulfil the rights of appellants. Consequently, long procedures at the Constitutional Court of Bosnia and Herzegovina is a special challenge for the dynamics of the election process and in some cases that procedure can last for a couple of years. Such a situation happened in 2001 following the parliamentary elections in Bulgaria when an applicant<sup>105</sup> had turned to the European Court of Human Rights because his name had been removed from the candidacy list. The Court concluded that the election management body in Bulgaria "had an obligation to respect the Supreme Court's judgment by allowing the applicant to stand for Parliament, thus affirming the inviolability of the appeals process".<sup>106</sup> "The Election Law must guarantee the resolution of disputes within period of time suited to the electoral process... The proper and timely implementation of the decisions taken by the courts and electoral bodies is critical to the effectiveness of the electoral dispute resolution system."<sup>107</sup>

The Constitutional Court does not re-examine the decisions of courts in Bosnia and Herzegovina in terms of facts and applying material law, except for the decisions that clearly violated appellant's constitutional rights.

Since 2003 in Bosnia and Herzegovina, 44 appeals have been submitted to the Constitutional Court, out of which only four were evaluated as justified and one as partially justified. Appellants still submit appeals if a recount of ballots does not occur or because of a violation of the right of the candidate to a fair trial because of candidacy rejection. Decisions of the Constitutional Court are final and binding.

### Examples

#### Decision of the Constitutional Court of Bosnia and Herzegovina, AP 3089/06 from 9 January 2007

The appellant submitted an appeal to the Constitutional Court of Bosnia and Herzegovina against a decision of the Bosnia and Herzegovina Court and a decision of the CEC (on his request for a recount of ballots), and his appeal was rejected as ungrounded. The appellant considered that these decisions and the wrongful application of Article 5.30, paragraph 4, of the Election Law of Bosnia and Herzegovina violated his right to free elections provided for by Article 3 of Protocol 1 of the European Convention on Human Rights. The Constitutional Court of Bosnia and Herzegovina concluded that the Bosnia and Herzegovina Court and the CEC gave clear and unmistakable reasons in their decisions as to why the statements of the appellant could not lead to a different decision on a legal issue. The CEC determined through an insight into the main counting centre that there were no irregularities, and that data in all forms from the polling stations were entered correctly and accurately. Results were announced after a review of the data from the original forms from all the polling stations, while controllers were authorised to make and

100. Article 3, Protocol 1, of the European Convention on Human Rights.

101. *Ibid.*, Article 13.

102. *Ibid.*, Article 6.

103. *Ibid.*, Article 14.

104. Rules of the Constitutional Court of Bosnia and Herzegovina "Official Gazette Bosnia and Herzegovina", number 94/14.

105. Court Judgment, *Petkov and others v. Bulgaria*, Applications 77568/01, 178/02 and 505/02, 11 June 2009, item 66.

106. Katherine Ellena, Chad Vickery and Lisa Reppell, IFES: "Elections on trial, The Effective Management of Election Disputes and Violations", May 2018, page 33.

107. Denis Petit, OSCE ODIHR, *Resolving Election Disputes in the OSCE Area: Towards a Standard EDR Monitoring System*, Warsaw, 2000, page 7.



verify corrections to the forms if the correct data were entered in the wrong field or if a polling station committee made an error in counting. In this case there was no reason to order a recount of the ballots *ex officio*. Article 5.30 foresees this possibility only if the results after a recount could influence the number of an appellant's votes and nothing pointed to the arbitrary implementation of Article 5.30, which could question the appellant's right to free elections.

#### **Decision of the Constitutional Court of Bosnia and Herzegovina number 3593/08 from 20 November 2008**

The appellant submitted a request for a temporary measure, which would temporarily have stopped the process of the implementation of election results in one municipality until a final decision on appeal had been made. He pointed out that decisions made by the Court of Bosnia and Herzegovina and the CEC violated his right to a fair trial and the right to effective legal remedy, stating that after the announcement of the preliminary results his candidate for mayor had successfully won, but after an announcement of the determined results that candidate suddenly appeared in the second place. In his opinion, there was reasonable doubt in electoral process violations at certain polling stations in terms of having election material wrongly handled. He also expressed his suspicion in regularity of the elections because of a large number of invalid ballots. In accordance with practice of the European Court, political rights and obligations such as rights to candidacy at the elections are not civil rights, and disputes emerging out of the election process fall outside of the civil framework. Therefore, the Constitutional Court concluded that in this procedure, which had the characteristics of a dispute emerging from an election process, a decision was not made on the appellant's civil rights and obligations, but on his political rights, so guarantees from Article II/3 e of the Constitution of Bosnia and Herzegovina and Article 6, paragraph 1, of the Convention were not applicable to this case procedure and the Constitutional Court concluded that an appeal of *ratione materiae* was incompatible with the Bosnia and Herzegovina Constitution, as was the appellant's right to effective legal remedy. In this case, there was no "right protected by the Convention". The Constitutional Court of Bosnia and Herzegovina rejected this request.

#### **Decision of the Constitutional Court of Bosnia and Herzegovina number AP 2679/06 from 29 September 2006**

The Constitutional Court had an interesting case in 2006 regarding a complaint from an appellant (a political party) that its candidate was deprived of the right to be verified for the elections. The candidate did not have an identity card but only a passport. During the procedure of checking the candidates, the CEC sent a request to the appellant to remove irregularity by either replacing the candidate or by providing additional documents on candidate. The appellant reacted by submitting a complaint and submitted the following evidence: the candidate had been registered as a permanent resident in the electoral unit since 1997, possessed a verified photocopy of a passport issued in December 2003 and a verified photocopy of an identity card issued on 30 May 2006 (obtained during the procedure of issuing a new identity card to replace one that had been stolen during a business trip). Thinking that the complaint was illegitimate, the CEC refused it without making a statement on the attached evidence, which indicated that the candidate was registered in the central public records. The Constitutional Court of Bosnia and Herzegovina determined that the Election Law of Bosnia and Herzegovina does not foresee that the central voter register is managed and made on the basis of identity cards, but on the basis of data from official records, and the term "official records" is much broader than the term "records of identity cards". The Constitutional Court of Bosnia and Herzegovina decided that the CEC and the Court of Bosnia and Herzegovina could not conclude that the fact that the disputed candidate did not have an identity card on 4 May 2006 (the day the elections were announced) indicated that she was not supposed to be and that she could not be on the central voter register, especially because she had submitted a certificate of registered permanent residence to that electoral unit. The Constitutional Court concluded that the appellant's right to a fair trial from Article II/3 e of the Bosnia and Herzegovina Constitution and Article 6, paragraph 1, of the Convention was violated.

## **CONCLUSION**

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The EDR system in Bosnia and Herzegovina generally conforms to international standards, but there are certain faults. The Election Law of Bosnia and Herzegovina regulates and defines the power and responsibility of the various hierarchic bodies (the LECs, the CEC and the Bosnia and Herzegovina Court) to avoid a conflict of jurisdiction. Rules and procedures in the Election Law and the sub-regulation define how each complaint/appeal must be handled.

During the last general elections in Bosnia and Herzegovina the OSCE/ODIHR noted "...that dispute resolution process, as currently implemented, does not fully provide effective legal redress. Many complaints were deemed

inadmissible on the grounds that they were not filed within 24 hours from the violation, also when violation was of continuing nature. While by law election commissions may act on possible irregularities *ex officio*, in practice they did so in a few cases upon receiving notifications on irregularities. Moreover, the competences of the CEC and the LECs on complaints were apparently not clear to them, and some were cases referred from the CEC to the LECs and vice versa.<sup>108</sup> Therefore, the special jurisdiction of the CEC and LECs should be defined more precisely and in more detail.

Election commissions must be independent and unbiased in their work, meaning that all activities are implemented in an impartial and independent way, without political influence and interference. The percentage of the CEC's decisions confirmed by the Appellate Division of the Court of BiH (99.63)<sup>109</sup> in 2018 confirms its independent work.

Any voter or political entity (political party, independent candidate, coalition) is entitled to file a complaint or appeal. The Election Law of Bosnia and Herzegovina allows election results to be disputed by even larger groups. Apart from 50 or more voters who voted at the same polling station and political entities, the complaint can also be filed by observers, which also conforms to international recommendations.<sup>110</sup>

The procedure is simple and the complainant is provided a special complaint form to eliminate formalism. In conformity with the international standards the process in Bosnia and Herzegovina provides complainant with the right to file a complaint, the right to present evidence in support of the complaint, the right to a fair hearing that involves both parties, the right to an effective remedy, and right to appeal decision to a higher body.

Time limits for lodging a complaint and an appeal are very short (24 hours for a complaint and 48 hours or two days for an appeal). That is the reason why international standards recommend that such short deadlines should be revised.<sup>111</sup> The CEC has the authority to annul elections if violations influence the distribution of seats, which conforms to international standards.<sup>112</sup> It is possible to annul entire elections or results for one or more constituencies and polling stations. If this happens, new elections are called. Such decisions were taken in Bosnia and Herzegovina for the elections in 2004, 2010, 2012 and 2016. The fact that elections were annulled at some polling stations or some electoral units did not prevent the CEC from confirming and announcing the final results for all other electoral units in which there were no disputable situations.

Transparency in the adjudication of election rights is required under international standards. In accordance with the principle of transparency, the procedure for making decisions must be done in public sessions. It is important to establish a good system in order to make decisions and court practice visible and available to the public. Reasoned decisions are important to ensure that cases are not dismissed in an arbitrary manner.<sup>113</sup> This transparency enables the prevention of manipulation by information that can delegitimise the process and decrease trust in the work of LECs and the CEC.

The Court of Bosnia and Herzegovina publicly announces all its decisions. Transparency and open justice can strengthen acceptance of the court's decisions. However, understanding the complete decision is quite often problematic for the average voter; it requires time and special knowledge and understanding of legal terminology. The Bosnia and Herzegovina Court prepares a court newsletter once a year that contains a summary of the most significant decisions. However, there are no summaries of all relevant decisions in the area of the protection of electoral right.

The Venice Commission recommended in an opinion one simple but possibly very effective measure for enhancing transparency: for the CEC to make its register of complaints, including CEC decisions on complaints, publicly accessible.<sup>114</sup>

The tools and techniques through which a dispute or violation is processed and tracked are crucial. In Bosnia and Herzegovina, there have been efforts to improve this in several election cycles, by making publicly available

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108. OSCE ODIHR Final report on General Elections 2018, Warsaw, 25.01.2019, page 19.

109. The Bosnia and Herzegovina CEC Report on 2018 General Elections, Sarajevo, May 2019, page 94.

110. Venice Commission's Code of Good Practice in Electoral Matters, page 30.

111. Code of good practice in Electoral matters: time limits for deciding appeal must be short: three to five days; and OSCE ODIHR Final report on General Elections 2018, Warsaw, 25 January 2019, page 28.

112. Venice Commission's Code of Good Practice in Electoral Matters, page 30.

113. Katherine Ellena, Chad Vickery and Lisa Reppell, IFES: Elections on trial, The Effective Management of Election Disputes and Violations, May 2018, page 31.

114. Venice Commission, Compilation of Venice commission opinions and reports concerning election dispute resolution, Strasbourg 2017, CDL-PI (2017) 007, page 23. In addition, the OSCE ODIHR made recommendation in its final report that in order to increase transparency and accountability of the Bosnia and Herzegovina CEC, courts should also publish information on complaints and appeals regarding elections in timely manner; in the OSCE ODIHR final report on general elections, 2018, Warsaw, 25 January 2019, page 20.

via an application all the relevant information on submitted complaints and appeals and the decisions made. However, the application was not available to the public, but was only available to LECs and the CEC. The main reason for not making data available to the public was because the application had not been updated. In fact, the LECs complain that they do not have the capacity to enter all the data on the complaints received in a timely manner, especially during the election campaign and during the days around election time when the number of complaints reaches its maximum.

Therefore, efforts are continuing to update this kind of information, and the application itself, and make it available to the public before the next municipal elections in 2020. Meeting international standards creates trust and a general perception of credibility in the election process.

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## Appendix I

# Research on electoral dispute resolution in Georgia

### *Nino Kadagidze and Shalva Tskhakaia*

This research has been prepared within the Council of Europe project “Reform of Electoral Practice in Georgia”. The authors alone are responsible for the opinions expressed herein and they do not necessarily reflect the official policy of the Council of Europe.

## 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 legitimise 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 a free and equal reflection of the people’s will in the 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 the formation of effective democracy in the state.

As elections are highly important, states have an 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.”<sup>115</sup>

The election process in Georgia is characterised by a multitude of disputes. Analysis of electoral dispute resolution as well as reports from observer organisations and statements from electoral subjects clearly illustrate that the electoral process takes place in a tense and polarised environment, against a 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. The purpose of this research is to analyse these challenges.

Due to the significance of the election process, the Election Code of Georgia is an organic law. However, despite its hierarchical importance, on account of frequent changes and ongoing dynamic processes, interpretation of individual norms or the need for 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 a correct perception of individual norms and illustrate the possible shortcomings that may arise in terms of applying these norms or introducing them in practice.

The right to vote has long been viewed as the basic functional element of a democratic system and the development of a country, as well as one of the most important rights among the rights inherent to a democratic society. The 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 the effectiveness of procedural mechanisms that allow an individual to influence the outcome, including by exercising the fundamental right to seek judicial relief.

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.

<sup>115</sup>. Protocol No. 1 to the European Convention on Human Rights, Article 3.

This 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 from local observer organisations.

The process of analysis was greatly facilitated by meetings with four local observer organisations<sup>116</sup> 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.

## 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. The 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”<sup>117</sup>.

### APPLICABLE PROCEDURE

According to Article 1 of the organic law of Georgia the Election Code of Georgia (hereinafter, the Election Code), relations connected with the preparation and conduct of referendums, plebiscites and elections for the President of Georgia, the Parliament of Georgia, the 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 stipulates the time limits and the rules for identifying and appealing against violations of individual electoral procedures. The law also prohibits extension of the time limits prescribed. Based on the analysis of electoral disputes 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. A fifth 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 Georgian labour legislation), 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 is 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 the 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<sup>1</sup> 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 such a limited time frame, the problem of activating resources in the most organised manner naturally arises, which the subjects entitled to appeal are not able to deal with successfully. As a result, a significant majority of disputes are brought before the court in violation of the prescribed time frame and 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, the duties and obligations of the respective

116. International Society for Fair Elections and Democracy, Georgian Young Lawyers' Association, Transparency International – Georgia, Centre for Democracy and Development.

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

PEC chairpersons. Article 73 of the code prescribes the time frame 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 07:00 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 the 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 time frame and according to the rule prescribed by the law. Article 17.2 of the 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, and does not apply in this case.

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

Courts attribute a particular procedural significance to abiding by the time frame 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 the 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 a domino-effect collapse of all subsequent cycles. Therefore, all violations that are detected warrant immediate response. Courts cannot question the legitimacy of elections after the entire cycle of elections is over and after a subject failed to use its procedural opportunities at all or rationally.

Some plaintiffs argue that deadlines are missed as a result of culpable actions by an administrative body; in particular, that an election administration was late in providing summary protocols, causing them to miss the deadline for appealing against 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 or all violations on its own initiative and, if confirmed, it should invalidate the relevant summary protocols.

In the process of evaluating claims, courts naturally cannot refuse an application on the principle established by the GAC and can find that, based on the principle of jurisdiction, a 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 competence to make a decision, i.e. it grants the opportunity or the right, as opposed to an obligation, to intervene. 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 time frame, we must also note one difficulty that arises is with respect to the burden of proof. The issue is related to the limited time frame 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 a court to fully operationalise the powers provided under Article 19 of the CAO and it is then forced to rely on the

evidence obtained and examined by the parties. At the same time, there is no procedural opportunity to extend the time frame 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 the procedural norms of many European countries where resolving court disputes is not technically tied to the final protocol summarising election results. Electoral disputes continue beyond elections and usually a court's summary judgments serve the purpose of preventing election violations in the future.

## INDIRECT (PROCEDURAL) BARRIERS TO FILING COMPLAINTS AND APPEALS

### The subjects and their representatives that can file complaints and appeals

Article 78 of the Election Code places certain limitations on the right to appeal to a court depending on the different stages of the election process. Article 78.1<sup>118</sup> places similar limitations on the right to file a complaint with the election administration.<sup>118</sup> Article 77 of the code limits the right to file a complaint or appeal against a decision concerning a violation of electoral legislation or procedures to those individuals directly provided for by 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 prohibits adjudication of complaints and appeals about violations 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 a complaint or an appeal, the law distinguishes a subject from its representative.

For example, a party representative of the CEC or a member of the CEC are authorised<sup>119</sup> 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 of the DEC or a member of the DEC can file such a 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 against a PEC summary protocol, an organisation with observer status has the right to file a complaint with the court concerning the respective decree of the 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 a complaint can be filed by an observer of the organisation with observer status the relevant PEC.

Similarly, a party is authorised to file a complaint concerning a voters' list but unauthorised to appeal against 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 a grouping of complainants, the fact is that complicated and excessively detailed regulation often becomes the reason for filing erroneous complaints. 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 the grounds that they have been filed by unauthorised individuals.<sup>120</sup>

In some cases, DEC's themselves fail to identify authorised complainants. As a result, they adjudicate on complaints filed by unauthorised individuals or mistakenly find complaints filed by authorised individuals to be inadmissible.<sup>121</sup>

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

118. 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.

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

120. <https://sachivrebi.cec.gov.ge/info.php?id=8108>.

121. <https://sachivrebi.cec.gov.ge/info.php?id=6131>.

## The place for adjudicating appeals

Such procedural misunderstandings are encountered when appealing against DEC decisions, regulated by Article 77 of the Election Code. This is also directly related to the *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<sup>122</sup> and another category of DEC decisions that can only be appealed with the CEC.<sup>123</sup> This regulation is quite logical and the principle that a dispute related to election outcomes at a particular precinct should be resolved locally and that 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 for the 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 that 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 solely because of procedural inaccuracies.

The stipulation in the code about the place for adjudicating appeals lacks flexibility and it does not allow courts or the electoral administration to do anything but to leave an appeal unexamined if the wrong place for an appeal (jurisdiction) has been chosen.<sup>124</sup> Appeals that are not examined on jurisdictional grounds are quite frequent.<sup>125</sup> In some cases, DEC's themselves are confused with determining respective jurisdiction and indicate incorrect place for appealing of decisions in their decrees.<sup>126</sup>

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 an application, as prescribed by the law, will stop 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 those subjects authorised to file an appeal and 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 the 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 against a CEC refusal<sup>127</sup> to issue a protocol of administrative offence with Tbilisi City Court, but the Collegium of Administrative Offences found the complaint inadmissible.<sup>128</sup>

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 did not 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 the arguments of Tbilisi City Court about inadmissibility and rejected the private complaint.<sup>129</sup>

122. Under paragraph 2 of Article 77 of the Election Code, a decision from a DEC about a decision of a PEC/head of PEC may be appealed to the relevant district/city court.

123. Under paragraph 4 of Article 77 of the Election Code, decision of a DEC can be appealed with the CEC.

124. Under paragraph 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, the appeal will not be considered.

125. <https://sachivrebi.cec.gov.ge/info.php?id=8236>.

126. <https://sachivrebi.cec.gov.ge/info.php?id=7329>; <https://sachivrebi.cec.gov.ge/info.php?id=7754>.

127. <https://sachivrebi.cec.gov.ge/info.php?id=5253>.

128. Decision N3/6002-16 of Tbilisi City Court Collegium of Administrative Cases, dated 14 August 2016. <https://sachivrebi.cec.gov.ge/info.php?id=3790>.

129. Decision N3b/1508-16 of Tbilisi Appellate Court's Chamber of Administrative Cases, dated 18 August 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 ODIHR, such a practice amounts to a 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.<sup>130</sup> The Inter-American Commission on Human Rights made such a 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.<sup>131</sup>

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. The existing practice of the electoral administration is inconsistent and often it does not envisage an oral hearing in the complaints process. Additionally, it excessively relies on written statements from respondents. Under the existing regulations, the electoral administration is not bound by a specific time frame prescribed by the Election Code for handling administrative complaints. Additionally, the majority of complaints are subject to DEC jurisdiction, which certainly allows using a higher standard in administrative proceedings. This will bolster trust in the decisions.

## Voters' right to file complaints and appeals

When speaking about the 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 time when an individual citizen can appeal a decision of the electoral administration is when his or 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 to 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).<sup>132</sup> Additionally, Article 3.3. of the Venice Commission Code of Good Practice<sup>133</sup> 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 must also be noted that certain limitations can be imposed on appeals by voters against the results of elections.

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

For instance, on 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 a theoretical point of view, a voter may also be denied his or her right to replace a spoiled ballot or a voter may not be issued with a ballot because there is a signature alongside his or 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 a court against the perpetrator; however, voters do not enjoy such a 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 the complexity of the dispute resolution system, and given that nearly one in four complaints were left unexamined because of 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

130. UN Human Rights Committee General Comment No. 32; UN Human Rights Committee Concluding Observation on Nicaragua CCPR/C/NIC/CO/3 (12 December 2018).

131. International judicial remedies in elections, John Harding Young, 2016, American Bar Association, ISBN: 978-1-63425-774-9.

132. [www.osce.org/odihr/elections/14304?download=true](http://www.osce.org/odihr/elections/14304?download=true).

133. [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e).

that the spirit of the law is directed towards creating artificial barriers and limiting the number of complaints/appeals in the election process.

## LEGITIMACY OF RESTRICTIONS PLACED ON THE RIGHT TO FILE COMPLAINTS AND APPEALS

Article 2 of the International Covenant on Civil and Political Rights<sup>134</sup> 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<sup>135</sup> and the OSCE ODIHR Guidelines for reviewing a legal framework for elections.<sup>136</sup>

In its decisions the European Court of Human Rights has stated that voter rights are protected under Article 3 of Protocol No. 1 of the European Convention on Human Rights. Even though these rights are important, they are not absolute. The signatories have a broad margin of appreciation in 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 the requirements of Protocol No. 1 of the Convention.<sup>137</sup>

Therefore, we cannot say that there is a single international standard on the right of individuals entitled to appeal in the election process but, rather, its regulation varies by country.<sup>138</sup>

For instance, German and Dutch legislation allows any voter to appeal against results of parliamentary elections. Similarly, in Finland, any voter can appeal against the election results at his or her respective precinct or district, based on procedural violations. In Greece, voters can file a complaint over a 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. Later Norwegian legislation extended legal standing to a larger scale of voters and respectively, the recommendation is no longer included in the OSCE observation mission report 2017.<sup>139</sup>

In local elections in the UK, voters' right to appeal based on violations of the election process is slightly limited. In particular, a collective appeal of at least four 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 the announcement of election results is a complaint related to the voter list. Similar restrictions on voters' right to contest election results exist in France.

In Denmark and in Norway election results may not be appealed in court, but 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, the OSCE observation mission reports have not criticised the restriction, as election stakeholders in these countries have been satisfied with the fairness of appeal procedures.<sup>140</sup>

In some US states, supreme courts have reiterated that under 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.<sup>141</sup>

In *Pierre-Bloch v. France*, the Court 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)<sup>142</sup>.

The International Foundation for Electoral Systems (IFES) has drawn up seven international standards about electoral disputes,<sup>143</sup> which examine the effectiveness of a complaints adjudication system in a particular country. They are:

1. Transparency of the right of redress for election complaints and disputes.

134. <https://matsne.gov.ge/ka/document/view/1398335?publication=0>.

135. [http://legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_ph\\_e.pdf](http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf).

136. [www.osce.org/odihr/elections/17579?download=true](http://www.osce.org/odihr/elections/17579?download=true).

137. *Sadak and Others v. Turkey*, Nos. 25144/94, European Court of Human Rights decision.

138. *International judicial remedies in elections*, John Harding Young, 2016, American Bar Association, ISBN: 978-1-63425-774-9.

139. [www.osce.org/odihr/elections/norway/360336?download=true](http://www.osce.org/odihr/elections/norway/360336?download=true).

140. [www.osce.org/odihr/elections/denmark/419231?download=true](http://www.osce.org/odihr/elections/denmark/419231?download=true).

141. *Taylor v. Roche*, 271, S.C. 505,509,248, S.E 2d 580,582 (1978).

142. *Pierre-Bloch v. France*, 20/1996/732/938, Court decision.

143. [www.ifes.org/sites/default/files/guarde\\_final\\_publication\\_0.pdf](http://www.ifes.org/sites/default/files/guarde_final_publication_0.pdf).

2. A clearly defined regimen of election standards and procedures.
3. An impartial and informal arbiter.
4. A system that judicially expedites decisions.
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 Court applies the following principles:

- a. Does the limitation curtail a voter's rights to such an 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?
- c. Are the means employed proportionate?<sup>144</sup>

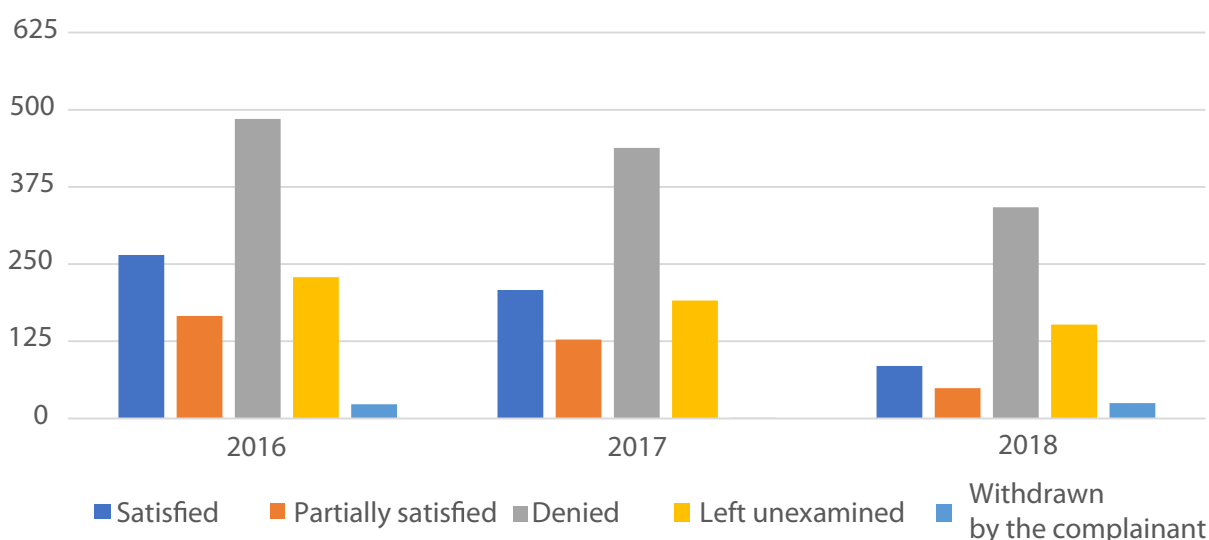
The OSCE follows a higher international standard for election processes and it mostly relies on the Venice Commission Code of Good Practice when drafting observation reports. However, in order for a limitation imposed by the state to be found illegitimate, more detailed analysis of the characteristics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

## Complaints statistics

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

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

### Complaints filed with DEC concerning polling day



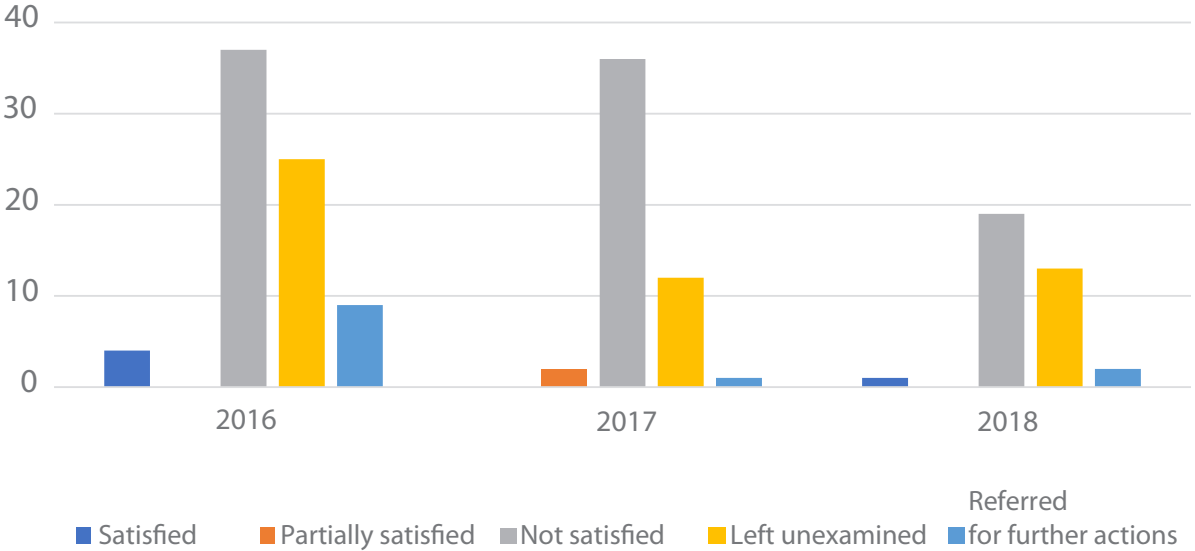
In the first round of the 2016 parliamentary elections, the total number of complaints filed with DEC concerning polling day was 1 168. In the 2017 local self-government elections, the number of such complaints was reduced to 966, and in the first round of the 2018 presidential elections, their number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

It is important to keep in mind that these numbers do not include complaints filed at polling precincts and 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.

<sup>144</sup> *Krasnov and Skutarov v. Russia*, Nos. 17864/04 and 21396/04, Court decision.

A high number of complaints were left unexamined and a significant number of complaints were satisfied fully or partially, most of which were decisions on the determination of a disciplinary liability measure. Statistics on the number of complaints handled by the CEC is also similar:

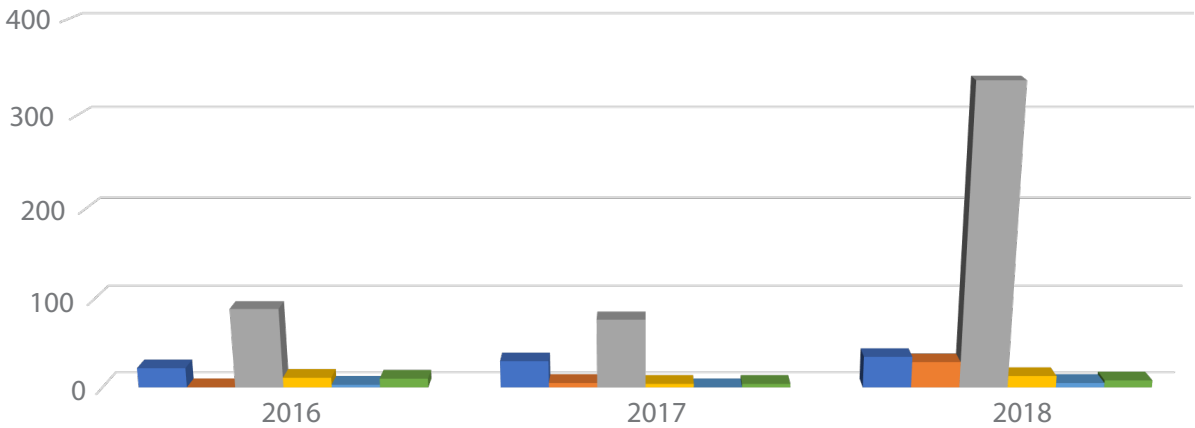
### Statistics on complaints filed with the CEC



The number of complaints filed with the CEC has been decreasing annually. However, the 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 a decreasing number of complaints:75

### Complaints filed in the pre election period



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 the imposition of a disciplinary liability measure on election administration officers,<sup>145</sup> disqualification of a candidate,<sup>146</sup> restoration of disqualified candidates,<sup>147</sup> a recount of invalid ballots at a polling precinct<sup>148</sup> and a recount of results at a precinct.<sup>149</sup>

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

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

Out of the four observer organisations, two did not 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 a remedy, observers or representatives of observer organisations can file a complaint on his or her behalf. At meetings, observer organisations mentioned the online portal for elections in Georgia,<sup>150</sup> which can be used by voters to identify and report violations of electoral procedure on an online elections map, and observer organisations can lodge an official complaint with the election administration after verifying such reports.

Unlike in 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 less chance 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 on 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 a risk of sabotaging the election process by the granting of the right to appeal to voters. The risk is real, as indicated by the analysis of electoral disputes, because in some cases complainants prolong baseless and potentially unsuccessful disputes in order to postpone the 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.

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 a 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 the 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 the legitimacy of election results into question. Often a complaint is drawn up not about a violation of a particular right but about the restriction of right that has not yet occurred. For instance, a recent spike in complaints against the PEC during the pre-election period, due to the absence of commission members at the precinct,<sup>151</sup> especially when the entire PEC is distributing voter invitation cards, raises questions in terms of spending complainant's as well as the electoral administration's time and resources in vain.

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

145. <https://sachivrebi.cec.gov.ge/info.php?id=8671>.

146. <https://sachivrebi.cec.gov.ge/info.php?id=5778>.

147. <https://sachivrebi.cec.gov.ge/info.php?id=3853>.

148. <https://sachivrebi.cec.gov.ge/info.php?id=6346>.

149. <https://sachivrebi.cec.gov.ge/info.php?id=6552>.

150. [www.electionportal.ge/](http://www.electionportal.ge/).

151. <https://sachivrebi.cec.gov.ge/info.php?id=7203>; <https://sachivrebi.cec.gov.ge/info.php?id=7231>.

## The obligation to file a one-time complaint

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Legal analysis of paragraphs 2 and 3 of Article 77 of the Election Code of Georgia makes it clear that the Election Code has not abandoned the institute of administrative complaint inherent to administrative proceedings, since 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 a one-time complaint with an administrative body. Due to the 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 the election process. The code clearly defines the rule of filing a complaint to 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 the 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 (CEC) and its office; b) the Supreme Election Commission and its office; c) district election commissions (DEC); and d) precinct election commissions (PEC).

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 the legitimacy of actions and decisions of lower-level commissions, and within the judicial control courts check the 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 paragraph 1 of 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.

Under paragraph 2 of the same article, decisions of the PEC/head of PEC may be appealed to the relevant DEC within two days of decisions being 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 of the decision being 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 paragraph 4 of the same article, decisions of the DEC/DEC head officers may be appealed to the CEC within one calendar day of the decisions being 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 of 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. The Court of Appeals should deliver its decision within one calendar day of the appeal being filed. The decision of the Court of Appeals is final and may not be subject to appeal.

Notably, the time frame 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 time frame 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 has been possible to harmonise the time frame for adjudication of disputes with international

practice. For instance, according to paragraph 95 of the Venice Commission's "Code of Good Practice", a time limit of three to five days is recommended as reasonable for adjudicating disputes. Adding at least one 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 DEC and PEC) should be first appealed to a higher administrative body. After that, they can be appealed to court. That is, a PEC summary protocol will be subject to judicial control after a higher administrative body – the DEC examines its validity within the external control and makes a decision. Essentially, the single system of control provided in paragraph 2 of Article 77 of the Election Code is a three-step system for PEC summary protocols considering the fact that the DEC is the first and a mandatory step for adjudicating the dispute, the 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 (sub-paragraph "e" of Article 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 annual 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 paragraph 4 of Article 77 of the code and 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 four subjects (the DEC, the CEC, the first-instance court and the appellate court) and, in another case, verified by three subjects (the DEC, the first-instance court and the appellate court), which is unacceptable and does not serve the objectives of the law.

Court decisions have reiterated that paragraph 4 of 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 time frames for appealing prescribed by paragraph 4 of Article 77 of the code, which means that with respect to DEC acts, the CEC is the first and mandatory step for dispute resolution, the first-instance court is the second and the appellate court is the third step.

Pursuant to paragraph 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, a court appeal will be found inadmissible. Even though the CEC creates a higher hierarchy in the election administration, appealing to the CEC over actions (decisions) of a DEC essentially strips the claimant of the practical opportunity to apply to court because, as noted earlier, in view of the time frame for appealing, the appeal will be filed in court in violation of the applicable time frame.

What happens when an 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? In other words, is there the possibility to activate renewed procedural institute of proceedings 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 renewing proceedings 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 and individual actions related to elections, due to their constitutional significance, warrant an 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 Georgian labour legislation). The time limit for appealing based on the Election Code is not related to the 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 the deadline for appealing. We should also consider the constitutional time frame 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 against election commission decisions and violations of Georgian election legislation.

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

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

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

In this case the issue concerns the 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 a summarisation of election results. The structure of the Election Code should be considered and, with respect to interpretation of the norm, it is of principal importance that the prohibition of summarisation of election results is provided in Chapter 8 of the organic law of Georgia, the Election Code of Georgia, which regulates the polling process, the counting of votes, the rules and procedures for adjudicating applications/complaints related to the counting of votes and summarisation of polling results, and 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 paragraph 1 of Article 76, the CEC should, based on protocols received from DEC and PECs, and no later than the 19th day after polling, summarise at its meetings the results of the 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 the assertion of the norm applicable to all appeals against the CEC.

With respect to interpretation of the norm, we must consider paragraph 1, sub-section "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 and referendums/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 paragraph 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 towards invalidation of DEC and PEC summary protocols of polling results and will be reflected in 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 the summarisation of results.

## **Ballot recount**

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



In the process of adjudication of such disputes, courts consider the 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 starting from the opening of a ballot box until the drafting of 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 logbook. In this case, court practice is developed in two different directions 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, courts often refuse to request and recount invalid ballots because the number of disputed ballots will not have any effect on the final election results.

A significant majority of such decisions state that even if it is confirmed the ballots have been wrongly categorised as invalid their small number 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 an 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 that will raise additional questions about the vote-counting process at the precinct.<sup>152</sup>

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 October 2015): “in a democratic and rule of law-based state there is no aim or interest, including the aim to protect human rights, which would arm the state with the legitimate right to violate the right to liberty of certain individuals”.

Naturally, this observation of the Constitutional Court does not concern the problem directly, however the context is clearly important, as behind every invalid ballot there is a will of a voter and his or her right to vote. Although recounts of ballots have increased in recent times, doing so does not constitute an insurmountable technical difficulty and in order to protect each right, courts may adopt a consistent approach and check the validity of each claim by examining the evidence.

Analysis of Court case law suggests that in the process of adjudicating electoral disputes, the matter of Court oversight depends on which particular aspect of elections is in question. The technical aspects of counting and drawing up protocols are subject to less scrutiny. According to the Court, the concept of elections is put at risk when there is evidence of procedural violations that hinder the 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 Convention guarantees the right to a fair trial; however, it does not provide any rules about the 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 the inability to

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152. A ballot found without an envelope during a vote count at a precinct will be considered invalid. However, during a recount of ballots after the summarisation of results, it may be impossible to determine why such a ballot was considered invalid and it may be categorised as a valid ballot.

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**

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Pursuant to paragraph 8 of 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 contain the 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 logbook.

The claimant cannot confirm violation of the foregoing norms by election commission members if there is no evidence that the claimant requested the protocol, no relevant complaint has been filed with the PEC or DEC and no obligatory claim has been filed in court within the same time frame, which, if such a fact were to exist, would have made redress possible and would have confirmed the illegitimacy of the election administration's actions. Here we are not going to focus on the burden of proof, as indicated by the court in all similar disputes, but instead we will focus on paragraph 3 of Article 102 of the Civil Procedure Code of Georgia that stipulates that circumstances that should be confirmed by a 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.

The 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 the filling out a summary protocol, in order to correct it the 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 of 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 the 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 were corrected.

In this way, Article 70.4 clearly defines the procedure that should be followed in order to make corrections to 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 to the protocol is terminated. After the procedure is completed, a PEC is prohibited from making any corrections to 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 8 October 2016 Parliamentary Elections of Georgia, dated 27 July 2016.

Chapter III of Part III of these guidelines contains procedures “for setting up polling stations and counting votes”, according to which at the end of polling a 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), verifies if the number of ballots issued and the number of spoiled ballots equal 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 in 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 a balance.

The interpretation of the courts focuses 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 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 the summary protocol is amended after PEC decisions have already been sent to the relevant DEC and the amendments are based on statements of PEC members.

Interestingly, courts provide the following reasoning: they refer to paragraph “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 the appropriate 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 the 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, whose representatives attended the counting of ballot papers at an electoral precinct, and ensure, upon request, the attendance of their representatives at the recounting process.

Based on the foregoing norm, courts find that because a DEC has the authority to verify the validity of actions and decisions of PECs based on an application/complaint as well as on its own initiative, which entails verification of the registration of election participants and verification of the accuracy of counting of election ballots, in the process of implementation of these powers a DEC can make the following types of decisions:

1. to make changes to the summary protocol of polling results based on the results of verification;
2. to order a recount;
3. to invalidate polling results at the election precinct if the two types of verification noted above do not allow the establishment of a legitimate outcome.

Since, based on the Election Code, a DEC has the power to make changes to the PEC summary protocol of polling results according to the results of verification, it is believed that based on a 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 the statement of a representative of a lower-level administrative body may not be viewed as standard administrative proceedings that will be trusted by election stakeholders.

A similar possibility is provided by the GAC by allowing a higher administrative body to amend the 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 a procedural point of view as the existing norm limits a court's ability to interpret the norm broadly and always poses the risk that judicial control of summary protocols will become a formality and the possibility of examining the content of the basis of a claim will be limited, which will damage not only the 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, the passport of a citizen of Georgia, or a refugee certificate for internally displaced persons 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 "d" 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 or what he or 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 or she goes into the polling booth and places the ballot paper(s) into a special envelope, to show them that he or 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

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1. Even though from 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, the 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 that Articles 77 and 78 of the Election Code are simplified 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 by at least one day.
5. Courts should actively exercise their right to examine evidence and make decisions based on an 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 in the adjudication of complaints.
7. The election administration should focus on improving the qualifications of DEC members in complaints adjudication, which should entail both training and preparation as well as increasing their status and interest.

- 
- a) In case of submitting an application/complaint to an electoral precinct, specify the name and number of the electoral precinct and the DEC.
- b) In case of submitting an application/complaint to any election commission within the electoral district, specify the name and number of the DEC.

## Application/Complaint

(underline one)

Applicant/Complainant -----  
First name, last name, address according to the place of registration, and contact telephone number  
 -----  
Fax, Email (if available)

Violation: Polling procedure

Counting of votes/summarizing the polling results

Type of violation -----  
hour, minute

No "-----" Electoral precinct

Essence of the violation: -----  
 -----  
 -----

Witness (if any) -----  
First name, last name, address according to the place of registration

In case of identifying the person responsible for the violation, the data that was possible to be established about the person: -----  
 -----

Explanatory statement of the violator (where available) -----  
 -----

(Other additional information) -----  
 -----

Derived from the all above mentioned, I ask you. -----  
 -----  
 -----

Reasonable period of time necessary to provide arguments in case of hearing of the application/com- plaint -----  
 ----- minutes

Date: day, month, year -----

Time of drawing up the application/complaint -----  
(Time of drawing up (hour, minute))

Applicant/complainant: -----  
signature

**Report on summoning the party through technical means**

The City of ----- „---“ „-----“ 20--.

Person drawing up the report -----

(First name, last name and position)

I have drawn up the report on the following: -----

-----  
-----

(Identity of a person to be summoned, name and number of the technical means with and to which the party was contacted, and the result)

-----  
-----

(Time and place of review of the complaint)

-----  
-----

(Title of the complaint, due to which the person has been summoned)

-----  
-----  
-----

In case of failure to appear, the content of article 77.25, 31 of the Organic Law of Georgia – the Election Code of Georgia is explained to the party.

In view of the above mentioned this report has been drawn up, the validity of which is certified by our signature:

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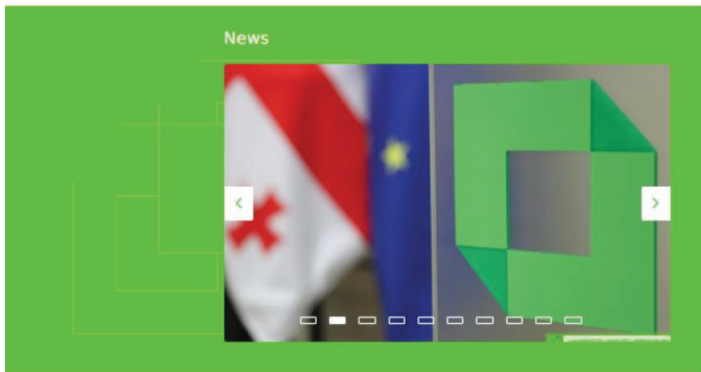
(Signature of the person drawing up the report)

-----

(Signature of the DEC chairperson/Head of Department of the CEC)

Time of drawing up the report -----

day/month/year



**News Archive**

**Preliminary Results of October 27 Sakrebulo By-elections**  
28 October, 2019

All procedures of October 27 Sakrebulo By-elections are complete. Elections at all seven election precincts were conducted in a peaceful environment in line with the election legislation. During the day, observer organizations and authorized representatives of election subjects had the opportunity to observe the voting, as well as vote ...

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**Elections 2019**




**RESULTS 2019**

**Election Map**



**Voters List**




The Schedule of Electoral Activities



Gender Balance



**Appeals Registry**



ELECTIONAL SYSTEMS DEVELOPMENT, REFORMS AND TRAINING CENTRE

**COURT RULING ON APPOINTING COURT HEARING AND INVOLVING THIRD PARTIES**



**Statement of Claim Forms**



**INFORMATION FOR ETHNIC MINORITIES**  
სტრუქტურული ადგილის  
ფორმალური სახის  
Etniki azıqlar üçün məlumat

**TALK to VOTERS**

## Appendix II

# Research case study on electoral dispute resolution in Ukraine

**T**his research was carried out by the Council of Europe expert Mr Sergii Kalchenko and published in Ukrainian in 2016. In case of discrepancy between the English and the Ukrainian texts of the research, the Ukrainian version shall prevail. Any ideas, opinion and statements contained in the research do not necessarily reflect the official position of the Council of Europe.

The information on the development and introduction of the training course on electoral dispute resolution for judges in Ukraine was summarised and provided by Ms Inna Zubar, project manager for the Council of Europe project “Strengthening the transparency, inclusiveness and integrity of electoral practice in Ukraine”.

### INTRODUCTION

The Constitution of Ukraine in its Article 71 foresees that “elections to the state and local self-government bodies shall be free and shall be organised on the basis of universal, equal and direct suffrage by secret ballot. Voters shall be guaranteed the free expression of their will”. Considering that Ukraine has ratified major human rights instruments, both international and regional, their fundamental principles are enshrined in the Ukrainian electoral legislation.

However, electoral legislation in Ukraine is covered by numerous laws. Elections are regulated by the Law on Elections of the President of Ukraine No. 474-XIV (1999), the Law on Elections of People’s Deputies of Ukraine No. 4061-VI (2011), the Law on Local Elections No. 595-VIII (2015), the Law on the Central Election Commission No. 1932-IV (2004), the Law on the State Voter Registry No. 698-V (2007) and the Law on Political Parties in Ukraine No. 2365-III (2001). Electoral dispute resolution is regulated by the respective electoral law on Presidential, Parliamentary or Local elections and by the Code of Administrative Proceedings of Ukraine No. 2747-IV (2005). Electoral violations are punishable by the Code of Ukraine on Administrative Offences No. 8073-X (1984) and Criminal Code No. 2341-III (2001).

Electoral dispute resolution is entrusted to either an election commission or an administrative court. The electoral legislation provides for the types of electoral disputes that could be filed with an election commission depending on the level of such a commission (precinct election commission, district election commission, territorial election commission or central election commission). Once an electoral dispute is filed before a court while under consideration by an election commission, the election commission shall cease consideration of the dispute. The Supreme Court is the last-instance court for election matters (before 2018, it was the High Administrative Court of Ukraine).

### I. RESEARCH ON NATIONAL COURT PRACTICE IN UKRAINE: BACKGROUND AND SUMMARY OF FINDINGS AND RECOMMENDATIONS

After the 2014 early presidential and parliamentary elections and the 2015 local elections in Ukraine, the High Administrative Court of Ukraine addressed the Council of Europe with a request to commission an analysis of how national court practice complies with international election standards and the Strasbourg Court’s case law. In 2016, the requested analysis was conducted by the Council of Europe expert<sup>153</sup> in co-operation with the High Administrative Court of Ukraine. The analysis contained findings and conclusions, as well as recommendations related to the legal framework and national court practice. More than 220 decisions on electoral cases rendered in 2014 and 2015 by national administrative courts of appeal instance, including by the High Administrative Court of Ukraine, were analysed in conjunction with the Court’s case law (24 decisions), and documents from the Venice Commission and other Council of Europe institutions (eight documents, including

<sup>153</sup> The analysis was conducted with the support of the Council of Europe project “Reform of the electoral practice in Ukraine”, implemented within the framework of the Council of Europe Action Plan for Ukraine 2015-2017.



the Venice Commission Code of Good Practice in Electoral Matters and other guidelines/reports, as well as some recommendations from the Committee of Ministers of the Council of Europe). The research also revealed certain inconsistencies and ambiguities in electoral legislation that have led to the non-uniform application of the law by national courts, as well as some gaps in administrative procedural legislation and legislation on enforcement of courts' decisions. The research formed a solid basis for the development and introduction of a training course for judges on electoral dispute resolution.<sup>154</sup> Here are some of its findings and recommendations.

## 1. The substantive aspects of the case law

### 1.1. Administration of the election process

In our estimation, in comparison with the 2012 parliamentary elections, during the preparation of the 2014 elections, the number of cases related to the draw of candidates for a precinct election commission (hereinafter the PEC) and decisions of a district election commission (hereinafter the DEC) on the formation of PECs, which were considered by the administrative courts, decreased. This indicates, among other things, the balance and validity of the relevant rules for the drawing of lots established by the central election commission (hereinafter the CEC) resolution of 25 April 2013 No. 88. At the same time, as the judicial practice shows, some conflicts were caused by the irresponsible attitude to the work of the members of the EC (Election Commission) and the neglect of the requirements of the law by election participants. Unlike the provisions of Article 27, paragraph 6, of the Law on the Elections of People's Deputies, Article 23, paragraph 3, of the Law on the Elections of President, and Article 22, paragraph 10, of the Law on Local Elections, which provide for the inclusion in the relevant EC of "personally handwritten statements" proposed for the composition of DECs, territorial election commissions (hereinafter the TECs), about the consent to participate in the work of the commission on behalf of the respective subject of submission, the provisions of Article 28, paragraph 7, of the Law on Elections of People's Deputies, and Article 24, paragraph 6, of the Law on Elections of the President, do not provide for such a mandatory requirement on a PEC nominee's statement as "handwritten". In addition to other factors, this may be one of the reasons why lower-level commissions sometimes receive submissions to lower-level commissions on the same nominees from different submissions. The current electoral legislation regarding the formation of PECs does not provide at least a minimum level of accountability for the election participants themselves: political parties, their local organisations, candidates and those citizens who agree to work for PECs. The electoral laws provide for the use of the resources of the information and analytical system named "Elections". However, it seems that the practical use of this system is carried out in a much larger array of procedures than those specified in the relevant laws. Moreover, the ability to use this system by commissions is indicated in the relevant decisions of the CEC. Among other things, this also applies to the preparation of the draw and the processing of information for making decisions on the formation of PECs. However, when cases are being considered by courts, the use of the information and analytical system is sometimes recognised as mandatory, although the relevant requirements are not provided for by the relevant election laws.

The Law on Local Elections does not provide guarantees of equal opportunities for election participants – local party organisations and candidates – regarding the right to hold a quota of leadership positions in the respective TECs and PECs. In addition, in our view, this state of the law risks the abuse of excessively broad discretionary powers by higher-level ECs and creates a favourable ground for political corruption.

#### Propositions

In view of the information above, it is necessary to propose to amend the provisions of Article 28, paragraph 7, of the Law on Elections of People's Deputies, Article 24, paragraph 6, of the Law on Elections of President, and provide, in particular, mandatory handwriting (drafting) applications for consent to participate in a PEC. Such a step, of course, does not completely eliminate the possibility of multiple submissions of the same nominations from different entities, but can significantly reduce the number of such situations. We believe that Articles 22 and 23 of the Law on Local Elections should be supplemented by provisions similar to those provided for in Article 27, paragraph 9 and Article 28, paragraph 10, of the Law on the Election of Deputies, and in Article 23, paragraph 8 and Article 24, paragraph 11 of the Law on Elections of President regarding the proportional share of each category of senior positions in the EC at different levels.

<sup>154</sup>. It should be taken into account that the research refers to the provisions of the national electoral legislation that were valid at the time of the research.

## 1.2. Exercise of active suffrage by citizens

Citizens of Ukraine exercise their constitutional right to elect state and local self-government bodies through inclusion in the voters' lists at the corresponding polling station. Given certain objective (occupation of part of the territory of Ukraine and military operations in the east of the country, which led to an internal migration of the population and the redeployment of a significant number of military personnel, internal labour migration and the existing procedure for registering a residence, etc.) and subjective (untimely updating of the information in the voters' registry and mistakenly entering information into this register) factors during the preparation of elections, conflicts constantly arise, for the solution of which citizens turn to the administration court. As a result, cases of irregularities in the voters' lists constitute a significant array of case-law practice.

It is also considered as necessary to point out the absence of cases of appeal against irregularities in the voters' lists at special polling stations. In our opinion, this is due to the specifics of the institutions in which such polling stations are formed and the categories of voters that should be included in the respective lists at such polling stations. Therefore, it seems justified to focus on the analysis of the array of court decisions concerning the issue of active suffrage by ordinary citizens only at ordinary polling stations.

### Cases related to the 2015 Local Elections

Pursuant to the provisions of Article 33, paragraphs 1 and 2, of the Law on Local Elections, changes and corrections may be made to the corrected voters' list by 6 p.m. on the last Saturday before election day. No such changes shall be made to the corrected voters' list on the election day. It should be noted that such time limits do not correspond to the time limits within which the administrative courts shall render a decision in electoral cases on correction of the voters' lists, and this will be discussed further later. At the same time, according to the provisions of Article 35, paragraph 3, of the Law on Elections of President, no changes shall be made to the corrected voters' lists on election day. It should be noted that only Article 42, paragraph 2, of the Law on Elections of People's Deputies provides for the changes to the corrected voters' lists on election day, which is carried out solely on the basis of a court decision. Such a situation is unacceptable, since voting for different types of elections in Ukraine can be traditionally conducted simultaneously, and PECs use a single copy of the corrected voters' list to ensure the voting process. The General Court Practice on Voters' Lists states that it is due practice for the courts when the courts partially satisfy the claim, namely, whereas they refuse to satisfy the claim on inclusion of the claimant into the voters' list at local elections and satisfy such claims with regard to presidential elections. However, it is worth noting that in such cases only the issuance of a ballot paper to a voter for specific type of elections could be considered, as there is only one voters' list at a polling station, and, therefore, it is impossible to simultaneously "include" and "not include" a person in this list.

### Propositions

The provisions of the Law on Local Elections regarding the determination of the deadline for changes and corrections to the voters' lists at ordinary polling stations should be consistent with the relevant rules of the Laws on Elections of People's Deputies and on Elections of President. We believe that the issue of granting internally displaced persons the right to vote at local elections is subject to thorough consideration. It should be noted that under the rules of Article 21, paragraph 1, of the Law on Local Elections, the PEC composition at local elections may include citizens of Ukraine who have the right to vote in those local elections. Therefore, this category of citizens is restricted not only in the right to vote at local elections, but also in the right to participate in the work of the EC. In our opinion, the achievements of reputable European institutions may be taken into account. In particular, the Code of Good Practice in Electoral Matters, approved by the Venice Commission in 2002, separately addresses the aspect of the participation of individuals in local and regional elections. Therefore, it is stated that if the stipulated period of residence does not exceed several months, the requirement of a priori residence does not contravene the principle of universal suffrage. The prescription of a longer term is only acceptable for the protection of national minorities. Registration of a voter not at his or her principal place of residence may be foreseen, provided that such a voter is predominantly resident in that place, which may be supported by the payment of local taxes. It is clear that in this case it is prohibited to register the voter at the main residential place.

## 1.3. The exercise by citizens of the right to be elected in the elections of the President of Ukraine, the Elections of People's Deputies of Ukraine and local elections

The analysis of the issue of passive suffrage was conducted in accordance with the specific subject matter of the cases that were considered by the administrative courts during the 2014 and 2015 electoral campaigns.

## Cases concerning the nomination of candidates

In the matter under consideration, the Parliament of Ukraine failed to demonstrate consistency in the careful and comprehensive consideration of established and generally recognised European standards on the nomination of candidates in the elections, enshrined, in particular, in the documents of the Venice Commission. As noted in the report on the nomination of candidates by political parties approved by the Venice Commission in June 2015, certain conditions must be taken into account if legislative interference is recognised as necessary. In particular, the introduction of gender quotas should be enforced with legal sanctions for non-compliance with the law. These could include financial penalties or refusal to register a candidate list. Referring to the Ukrainian realities, we recognise that by applying the “gender” quota in the Law on Local Elections, parliament has interfered with the process of selecting candidates. However, effective monitoring of compliance with the requirement of this law by local party organisations was not ensured, and no proportionate sanctions were imposed for evading this requirement.

### Propositions

The higher execution authorities of the country have generally declared the desire for full-scale integration of Ukraine into the pan-European value system. This, in turn, involves a systematic consideration of those principles and requirements that are considered to be generally accepted European standards in a particular field of public relations. Therefore, in pursuing the sincere goal of following such standards when it comes to nominating candidates for election through the launching of appropriate “gender” quotas, legislators should not limit themselves to formally setting rules that, under certain conditions, can be interpreted in such a way as to completely offset the content of those rules. Effective legal mechanisms should be envisaged to monitor compliance with the relevant requirements and a system of proportionate sanctions should be established for failure to comply with the law. In particular, given the positions of the Venice Commission, such sanctions could be a refusal to register the list of candidates for elections.

## Cases of refusal to accept candidates’ registration documents

We fully share the legal positions set out in the decisions of the High Administrative Court of Ukraine. Undoubtedly, the exercise of the electoral rights of citizens shall take place according to legislative procedures and time limits. However, human rights and freedoms and their guarantees determine the content and orientation of the activities of the state. The state is responsible before a person for its activities. The assertion and protection of human rights and freedoms is the main duty of the state. As the Venice Commission noted in the Rule of Law Checklist, adopted in March 2016, the concept of rule of law requires a system of foreseeable and predictable law enforcement, in which everyone has the right to be treated with dignity, equality and discretion, and in accordance with the law. Therefore, we agree that under the circumstances investigated and established by the administrative courts, the CEC should have acted prudently, recognising that depriving parties concerned of the opportunity to submit candidates for registration through the application of the provisions of the Law on Elections of People’s Deputies on the deadline for filing such documents could be treated as excessive formalism that is extremely negatively assessed by the European Court.

### Propositions

We recognise that, in principle, the relevant election laws cannot provide for legal regulation of the actions of authorised subjects in situations similar to those established by the courts in the cases examined above. Actually, there is no public need for this. At the same time, in our opinion, those legal positions that are formulated in the decisions of the High Administrative Court of Ukraine, examined above, should be taken into account by other administrative courts in the resolution of similar and other cases.

## Cases for refusal of registration of candidates

The analysis of the national administrative court practice during preparations for the 2014 early Elections of People’s Deputies of Ukraine and the 2015 regular local elections, which relate to the refusal to register candidates for the respective elections, gives grounds to conclude that there are significant gaps in the electoral laws. At the same time, there are grounds for claiming serious problems in the law-enforcement practice of the EC, which had little manifestation in the misinterpretation and application of the rules of the law. In addition, certain shortcomings in the legislation have led to unequal approaches taken by administrative courts in resolving cases in this category of subject matter.

## Cases related to the elections of the Deputies of Ukraine in 2014

We fully support the findings of the High Administrative Court of Ukraine in its judgment of 26 October 2014 in Case No. 875/81/14. Considering that the law governing respective relationship is unclear or imperfect, it cannot be interpreted in a manner that implies restriction or deprivation of rights.

### Propositions

In order to prevent situations of unlawful restriction of electoral rights of citizens, the legislator should establish clear rules for determining the period of residence in Ukraine. In addition, the mechanism of correction of errors and inaccuracies in the documents submitted for registration of candidates for People's Deputies of Ukraine should be improved qualitatively.

## Cases related to the local elections 2015

In our view, as regards the exercise of passive suffrage, administrative courts in general provide effective protection of the rights and interests of local organisations of political parties and citizens.

### Propositions

We also note in general the need for a qualitative improvement of the Law on Local Elections regarding the rules for correcting errors and inaccuracies in the documents submitted for candidate registration.

## Cases concerning the abolition of the registration of candidates

Considering the legal position formulated in the decision of the Constitutional Court of Ukraine of 6 July 1999 in case No. 1-25 / 99 (the case of combining the posts of a People's Deputy of Ukraine and a Mayor), we consider that the provisions of Article 35, paragraph 4, of the Law on Local Elections, which impose the restrictions on simultaneous balloting in different local elections, contradict the Constitution of Ukraine. Moreover, the application of these provisions during the ordinary 2015 Local Elections has led to different interpretations and application of this law by administrative courts.

### Propositions

In carrying out the steps towards the reform of the electoral legislation in the future, the Parliament of Ukraine must strictly adhere to the legal positions of the Constitutional Court of Ukraine, which disclose the content of the provisions of the Basic Law of the State. It is unacceptable that, when adopting new laws, the Verkhovna Rada of Ukraine actually produces norms of deliberately unconstitutional content. In particular, the provisions of Article 35, paragraph 4, of the Law on Local Elections should be abandoned.

## 1.4. Campaigning – Cases concerning violations of the procedure of conducting election campaigning and hidden campaigning

When considering cases concerning claims for violations in the pre-election campaign, it must be proved that the contested actions were directly performed by the respective election participant or that there was his or her intention targeted at violation of the requirements of the legislation by other persons. Otherwise, there will be a failure to comply with the constitutional requirement on the individuality of legal liability. We believe that cases of "hidden" campaigning should be carried out with a thorough examination of the "signs of political advertising" (provisions of Article 74, paragraph 7, of the Law on Elections of People's Deputies and Article 60, paragraph 7, of the Law on Local Elections), and not by applying a formal assessment of whether certain activities fall within the scope of "election campaigning", including political advertising as a form of campaigning. The aforementioned conclusion applies equally to cases concerning the involvement of officials of the state authorities in election campaigning. In our view, case-law research indicates that there is a lack of legal capacity to combat "bad faith campaigning", including the use of slogans by voters regarding the alleged support from "high-rated" political forces. In particular, this criticism applies to the Laws on Elections of People's Deputies and Elections of President. We share the position of the courts regarding the competence of the administrative court to decide cases related to the conclusion of contracts for the placement of campaign materials. In this respect, the parties do not enjoy full freedom of contract. The relevant media are not free to enter into such a contract, select a contractor and determine the terms of the contract if such media have previously provided airtime or print space to another subject of the election process to disseminate election campaign material. In this case, the election law imposes on the media certain obligations of public-law content. Thus, in our view,

relations in connection with the conclusion of such contracts are public and legal in nature, and, therefore, the consideration of disputes in this category falls within the competence of the administrative courts.

### **Propositions**

The mechanisms of legal regulation of election campaigning in all types (national and local) of elections should be unified, because regardless of the type of elections, the purpose of this stage of the election process is the same. All election laws should provide for effective and efficient mechanisms to prevent bad faith campaigning and the application of legal sanctions for such acts. The legislation on advertising regarding this issue is also unsatisfactory. The election laws should be supplemented by provisions prohibiting the placement in any election campaign material of statements, images and mentioning of the names of or statements from those persons whose participation in the campaign is prohibited or restricted.

### **Cases regarding the prohibition of providing inaccurate information about election process subjects and the exercise of the right of reply**

In our opinion, the resolution of the Plenum of the Supreme Court of Ukraine No. 1 and the resolution of the Plenum of the High Administrative Court of Ukraine No. 15 formulate clear and unambiguous recommendations for the consideration of cases in this category. Careful consideration of the recommendations of these regulations helps the election participants first of all to determine specific directions of their legal response to violations during the election process. At the same time, we believe that the legal positions presented in these documents are consistent with generally recognised European standards in the field of electoral dispute resolution. In particular, as noted in the Code of Good Practice in Electoral Matters, approved by the Venice Commission in 2002, it is essential that the procedure for appealing and, in particular, the powers of the various bodies involved in the process be clearly defined by law in order to “avoid positive or negative conflict”. Neither the applicants, nor the authorities shall have the right to choose the authority competent to hear the case. Therefore, in our opinion, the recommendations of the above-mentioned resolutions of the Plenum of the Supreme Court of Ukraine No. 1 and the Plenum of the High Administrative Court of Ukraine No. 15 are aimed specifically at eliminating possible conflict of jurisdiction of the general and specialised courts. Adherence to and practical implementation of the relevant recommendations in these matters does not, in our view, require any amendments to the current legislation.

### **Propositions**

It should be noted that the laws of some states provide for a special procedure and time limits for the courts to decide cases regarding dissemination of false information during the election process. At the same time, the shortened terms of the case consideration are aimed at “guaranteeing the proper conduct of election campaigning by preventing the violation of the personal rights of candidates which may affect the election results”, which was noted by the European Court. According to the Court and its decision as of 9 April 2007 in Case No. 51744/99 (Case of *Kwicien v. Poland*), the relevant rules pursue the legitimate aim of ensuring the fairness of the electoral process. As such, these mechanisms cannot be called into question as to their compliance with the European Convention on Human Rights. Therefore, nothing prevents the legislator from establishing a special procedure and shortened time limits for consideration of such cases within civil proceedings. The provisions of Article 74, paragraph 6, of the Law on Election of People’s Deputies need to be amended. We believe that this provision may be set out in a wording similar to Article 60, paragraph 3, of the Law on Local Elections.

### **Cases related to the material encouragement of voters**

The analysis of the provisions of the election laws and the Criminal Code testifies to the extremely unsatisfactory state of the existing mechanism of legal regulation of the relations on counteraction and the fight against material encouragement of voters. The results of the research identified the risks of a possible “conflict of jurisdiction” between administrative courts considering electoral cases and general courts dealing with criminal proceedings. This situation is contrary to the established European standards in this area of relations that has been explored above. Given the specific nature of criminal liability to be applied to the committing of the most socially dangerous acts and the specific sanctions provided for in Article 160 of the Criminal Code, this situation also carries the risk of arbitrary violations of fundamental human rights. The laws on Elections of People’s Deputies and Elections of the President also contain some inconsistencies and ambiguities, in particular on the aspect of the subjects of “vote buying” and “indirect vote buying”, of which there has been little in the way of jurisprudence.

### Propositions

The provisions of the election laws and the Criminal Code should be first and foremost coherent in principle, particularly, regarding acts which are considered to be violations that entail criminal liability. The terminology, including the concepts of “vote buying” and “indirect vote buying”, used in electoral laws and the Criminal Code should be harmonised. At the same time, separate electoral laws must be consistent with each other on the precise definition of the concepts of “vote buying”, “indirect vote buying”, the subjects committing these violations and the “recipients” of financial incentives. In our view, the current Criminal Code should be supplemented by provisions that provide for liability for vote buying of EC members, including those who provide certain benefits to the members of the commissions as well as the EC members themselves.

## 1.5. Counting of votes and tabulation of election results

In the case of ballot errors identified on election day, which may distort the true will of the voters, the results of voting and elections shall not be considered as reflecting the true will of the voters. We are aware that the Law on Local Elections provides for a practical opportunity to detect such errors before election day. However, the current practice shows that there are numerous instances of such violations, which require action from the legislators. In addition, such violations may be detected by the election participants themselves, but such violations result in a distortion of the will of voters who, unlike local party organisations and candidates, are not entitled to attend the meetings of the respective ECs. Therefore, the real “victims” of such violations are first and foremost the voters. The Law on Local Elections should set out the legal consequences of an EC’s non-compliance with court decisions regarding the registration of candidates. In the law-applying activities of the courts, a comprehensive list of grounds for considering the question of whether a vote at a polling station is invalid and the procedure for considering such a question by the relevant EC should be strictly considered.

### Propositions

We believe that the Law on Local Elections should foresee that in the case of voting by ballots containing errors that may distort the true will of voters, the results of the voting cannot be declared legal. The list of such errors, in our opinion, should include the incorrect spelling, for example, of the surname, first name, patronymic and party affiliation and also the nominating subject. We also propose to supplement the Law on Local Elections with provisions on the invalidation of elections in case of a failure by the relevant TEC to implement a court decision regarding the registration of the candidate (or candidates) in the elections.

## 1.6. Application of the case law of the European Court of Human Rights: substantive aspects

During the consideration of cases related to the Elections of People’s Deputies of Ukraine, the administrative courts shall, without doubt, apply the case law of the European Court of Human Rights on the violation of Article 3 of Protocol No. 1 to the European Convention on Human Rights. In particular, when examining the circumstances of interfering with the right to vote and to be elected as a member of parliament, which is essentially a right to stand in parliamentary elections, one must take into account the three-test system recognised by the European Court. At the same time, the possibility, expediency and even necessity of taking into account the relevant legal positions and approaches of the European Court in the event of interference with “unconventional” law, in our view, are conditioned by the common nature and common content of the right to vote and to be elected, to the legislature and to other representative bodies. We believe that the practice of law enforcement in democratic, rule of law states requires a unified approach to determining the range of possible restrictions on citizens’ suffrage in matters arising from elections that are not covered by the provisions of this Convention. Therefore, in our view, the application by the administrative courts of the case law of the European Court of Human Rights in the consideration of cases related to local elections, the application of the eligibility criteria for interference with the right to be elected in these elections and when reviewing the contested decisions of the respective TECs is not simply a positive phenomenon in general. We believe that this certifies an effective implementation of the European Convention on Human Rights and enrichment of the national legal system with the case law of the European Court.

At the same time, given the application by the administrative courts of the legal positions of the European Court in the settlement of cases concerning the exercise of “unconventional” rights, including the right to stand in local elections, in our view court decisions lacked, to a certain extent, legal arguments for the reasons for referencing the “tools” applied by the European Court of Human Rights during consideration of the cases of violations of the European Convention on Human Rights. Therefore, such an approach can “undermine/hollow out” the content and importance of the work of the European Court. It is important to note that during the

electoral process “non-election” rights are exercised that are also enshrined and protected by the European Convention on Human Rights. Moreover, within the meaning of Articles 10 and 11 of this Convention, such rights may be exercised during the electoral processes of both national and local elections.

## 2. Procedural aspects of the case law

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### 2.1. Criteria for assessing the lawfulness of a defendant’s decision, action or inaction

In our view, the interpretation adopted by the CEC’s Decree No. 362 as of 23 September 2015 should also have been checked for compliance with the other provisions of Article 2, paragraph 3, of the Code of Administrative Proceedings of Ukraine. In particular, the nomination of candidates for local elections lasted from 21 to 30 September 2015. Therefore, the CEC’s impugned act was adopted after the beginning of this stage of the electoral process and actually had a retroactive effect. This constitutes a violation of Article 58, paragraph 1, of the Constitution of Ukraine and contravenes the principle of legal certainty as a constituent component of the rule of law.

Pursuant to Article 2, paragraph 2, of the Law on the Central Election Commission, this body builds its activity on the principles of the rule of law, legality, independence, objectivity, competence, professionalism, collegiality of consideration and resolution of issues, validity of decisions taken, openness and publicity. Therefore, in our opinion, the above-mentioned CEC regulatory act does not meet the criterion laid down in Article 2, paragraph 2, of the Code of Administrative Proceedings, since it was not adopted in the manner stipulated by the Constitution of Ukraine and the Law on the Central Elections Commission. We consider that this interpretation also violates the provisions of Article 2, paragraph 3, of the Code of Administrative Proceedings, since the contested act was not adopted within a reasonable time. Thus, an analysis of the array of relevant CEC normative acts related to the preparation and holding of local elections during August 2015 shows that a large part of them regulates the procedures that should be implemented one and a half or two months after the adoption of these acts. As an example, one might mention the CEC Resolutions No. 159 of 10 August, No. 164 of 10 August, No. 166 of 10 August, No. 177 of 11 August, No. 182 of 25 August and No. 183 of 25 August. Therefore, nothing prevented the CEC from adopting the aforementioned interpretation well before the start of the nomination process. In addition, we consider that the adoption of the aforementioned interpretation violates the requirements of Article 2, paragraph 3, item 5, of the Code of Administrative Proceedings. Even if it is hypothetical to assume that the CEC’s decision of 23 September would have been declared illegal and overturned, then, the decision of the administrative court of appeal could have come into force no earlier than 30 September, i.e. on the last day of nomination of candidates. As a result, the court’s decision would no longer have any bearing on the course of the election process. Unfortunately, the above circumstances did not provide a legal assessment by the administrative courts.

#### Propositions

When considering election-related cases regarding complaints against the decisions, actions or inaction of the authorities, administrative courts shall review such decisions, actions or inaction in the compliance with all the criteria set out in Article 2, paragraph 3, of the Code of Administrative Proceedings (CAP). The results of such a review must be fully reflected in court decisions.

### 2.2. Parties to the case

When considering the subjectivity of the parties in electoral disputes and the grounds for bringing an action, the administrative courts have largely followed the provisions of Articles 172 to 176 of the CAP and the related recommendations of the Resolution of the Plenum of the High Administrative Court of Ukraine No. 15. Although, we have noted decisions in cases initiated by a *de facto* improper claimant. Determining the proper subject of the relevant electoral process is especially relevant in the case of simultaneous preparation and holding of different types of elections. It should be noted that local election law does not provide full protection of the rights and interests of those local party organisations that have a guaranteed right to submit their nominations to the EC composition, but do not nominate their candidates. As a result, such local branches of parties do not acquire the status of a subject of the electoral process, which creates certain prerequisites for the difficulty in applying by such branches to the administrative courts in case of violation of their rights and interests in connection with the formation of the EC. Therefore, in our opinion, the legislator should pay attention to the normative determination of the right of such party organisations to apply to a court.

### 2.3. Securing an administrative complaint

In our view, when considering the institute of an administrative complaint, we should take into account the requirements of Article 13 of the European Convention on Human Rights, according to which everyone whose rights and freedoms are recognised in this Convention are entitled to an effective remedy in a national body, even if such a violation was committed by persons exercising their official authority. The content of this article of the Convention is disclosed in the European Court decisions. In particular, the case *Doran v. Ireland* as of 31 July 2003 (Application No. 50389/99) states that for the purposes of Article 13 of the European Convention the term “effective remedy” provides for the prevention of infringement or termination of violation, as well as the establishment of a mechanism for restoration of the infringed right. In its decision of 11 January 2007 in *Salah Sheekh v. The Netherlands* (Application No. 1948/04), the Court emphasised that an effective remedy is to prevent the implementation of measures which are contrary to the Convention, or an event whose consequences will be irreversible. Therefore, in our view, the requirements of Article 13 of the European Convention on Human Rights should be taken into account by the administrative courts while deciding on the securing of an administrative complaint, the purpose of which is to prevent the adverse effects set out in Article 117, paragraph 1, of the CAP. Therefore, we believe that in the presence of signs of such consequences and in order to comply with the requirements of Article 13 of the European Convention on Human Rights, courts are empowered to make a decision to secure an administrative complaint not only after the CEC or a TEC has determined the election results, but also at the stage of the vote counting at a polling station and establishment of voting results in the electoral district.

#### Propositions

We believe that in order to ensure the most effective judicial protection of the rights, freedoms and interests of constituents and other persons, to ensure the preconditions for the full restoration of the violated right, it is appropriate to amend paragraph 15 of the Decree of the Plenum of the High Administrative Court of Ukraine No. 15 and to formulate appropriate recommendations in a manner that will provide for the possibility of securing an administrative complaint in these cases, and not just at the stage when the election results are published.

### 2.4. Timeline for consideration of appeals

Research into the national court practice in electoral disputes revealed a rather negative phenomenon, namely the consideration of appeals by administrative courts of appeal and decision making before the expiry of the term of appeal provided for in Article 177, paragraph 7, of the Code of Administrative Proceedings.

At the same time, examples should be given where the need to complete an appeal by a court of appeal before the deadline for appeal is determined by the provisions of the electoral law.

In our view, when appeals are pending before the end of terms for appeal, those involved in the case and others are in fact limited in their ability to exercise their rights, which are enshrined in the Code of Administrative Proceedings, including the opportunity to join an appeal or to supplement or change an appeal. Moreover, in many cases the objectivity of the cases examined and the specific timing of the disputed legal relationships do not appear to have justified the case law of the administrative courts of appeal. At the same time, we believe that in order to best protect the violated right of citizens to be included in the voters' list via administrative courts and to exercise their constitutional right to vote in local elections, consideration of appeals before the lapse of an appeal term is not only acceptable but the only possible way to protect and to restore the violated right of voters.

In terms of non-compliance with the deadlines for consideration of appeals, particular attention is paid to the cases when decisions of local administrative courts, adopted before the election day, were reviewed by the courts of appeal after the election day.

#### Propositions

We believe that appeals in election-related cases should only be considered after the appeal term has expired. At the same time, it should be emphasised that the relevant rules of different electoral laws should be unified with each other and consistent with the provisions of the CAP in order to ensure full compliance with court decisions in cases of correction of voters' lists. One way to reconcile this could be to set a shorter time frame for appeals against the decisions of the courts of first instance in this category of cases.



Undoubtedly, the situation of non-compliance with the requirements for the timely submission of case files by the court of first instance to the administrative court of appeal is extremely negative. In fact, the violation of the legal rights of citizens has resulted from the inaction of state authorities – local general courts, which, according to the CAP, consider relevant cases as local administrative courts. Therefore, the state represented by these bodies failed to ensure compliance, including with relevant international obligations. Particularly negative consequences have occurred in cases where, after election day, appeals against the decisions of local administrative courts adopted before election day were considered.

#### **Propositions**

We believe that administrative courts of appeal should use all available legal mechanisms to respond to violations of the time limits of the case file, which are established by the provisions of the CAP, including through the adoption of separate decisions.

### **2.5. Method of protection of the infringed right and procedure of elimination of consequences of infringement**

In our opinion, the examples of the slightly different legal positions of the courts regarding the choice of the remedy for the infringed right and the procedure for eliminating the consequences of the infringement should positively note the general tendency to form the same positions of the courts in different appellate districts. It is particularly important to give a positive assessment of this phenomenon in a comparative aspect, taking into account the relevant case law, respectively, during the period 2010-2012 and 2014-2015.

#### **Propositions**

We consider that in choosing the mode of defence of the infringed right and the remedy for the infringement, the administrative court must take into account and apply Article 13 of the European Convention on Human Rights on the right to an effective remedy. The content of this article of the Convention is disclosed in the relevant decisions of the European Court of Human Rights. For example, if the court finds the decision of the respective EC unlawful in refusing to register the candidate and confirming by the court that the person has duly submitted documents in full compliance with the requirements of the electoral law, the most effective way to protect the violated right and the procedure for eliminating the consequences of the violation is to impose on the defendant the duty to make the decision to register a candidate for the relevant election.

### **2.6. Enforcement of court decisions in election-related cases**

Considering the frequent instances of cases where the commissions ignore the findings of the courts on taking certain decisions or taking certain actions, we will indicate the court's power to oblige the defendant to report to the court on the execution of its decision. Article 267, paragraph 1, of the CAP provides that the court that rendered the decision has the right to oblige the subject of power, for whom a favourable decision was not made, to submit a report on its execution within the period established by the court. In this respect, the conclusions of Recommendation CM/Rec(2003)16 of the Committee of Ministers to member States on the implementation of administrative and judicial decisions in the field of administrative law of 9 September 2003 should be taken into account. The document stipulates that member states should "ensure that administrative decisions are enforced by administrative bodies within a reasonable time". Moreover, in order to fully implement such decisions, administrative bodies must take "all necessary measures in accordance with the law". We believe that such a duty of the state also stipulates the duty of the court, as a state body, to use the full range of judicial remedies available to ensure the enforcement of the judgment within a specified period. Therefore, we share the recommendation of paragraph 17 of the Decree of the Plenum of the High Administrative Court of Ukraine No. 15, according to which the court may set a deadline for submitting to the relevant authority the report on the execution of the court order, determining in the court decision itself the method, term and procedure for its implementation, to ensure that the decision of the court is enforced on the respective entities. At one time, experts were concerned that the practice might reveal "insufficient provisions" of the Law on Enforcement Proceedings to "effectively enforce court decisions in administrative cases", and suggested that enforcement of administrative court decisions "would require special procedures in enforcement proceedings". It should be noted that in accordance with the provisions of Article 118, paragraph 5, of the CAP, the implementation of decisions on the provision of an administrative complaint is carried out immediately. Enforcement of prohibition orders to perform certain actions shall be carried out in the manner

prescribed by law for the enforcement of court decisions. However, neither the CAP, nor the Law of Ukraine on Enforcement Proceedings of 2 June 2016 No. 1404-VIII (hereinafter, the Law on Enforcement Proceedings) provide for any specifics regarding the enforcement of a court order banning certain actions in this category of cases. The compulsory enforcement of such resolutions shall be carried out in accordance with the general rules established by the Law on Enforcement Proceedings, including within the time limits specified in this law. In the context of the rapidity of the electoral process, this can lead to negative consequences, which will be impossible to eliminate or where such elimination will require considerable effort. Turning to the issue of enforcement of court rulings made on the merits of electoral disputes, it should be noted that neither the CAP nor the Law on Enforcement Proceedings provides for any specifics regarding the enforcement of such decisions. In our view, in order to ensure prompt and proper enforcement of court decisions, there is a need to amend the CAP and this law accordingly.

### **Propositions**

In our view, changes to the law in force can help to ensure that judgments in electoral cases are properly and timely enforced. However, first of all, we emphasise the need for more careful consideration and more active application by the administrative courts of the recommendation formulated in paragraph 17 of the Decree of the Plenum of the High Administrative Court of Ukraine No. 15, concerning the court's power to set a deadline for submitting a report on the execution of a power of attorney by the relevant entity about the determination of the method, term and procedure of its execution and the imposing of duties on ensuring the enforcement of the court decision on the respective subjects of power. We believe that, even if the current election law is maintained, the relevant prescriptions of the judgments will "discipline" individual defendants to a great extent. At the same time, we propose to supplement paragraph 2 of Article 258 of the CAP with the following wording:

Enforcement letters on court decisions in the cases defined by Articles 172 to 176 of this code are issued by the courts of first instance on the day of appeal of the persons in favour of whom such decisions are made. If by the results of the review of the cases specified in Articles 172 to 176 of this code, the court of appeal shall leave the substantive requirements of the claim unchanged, adopt a new judgment on the substance of the claims or change the court decision, then the writ of execution shall be issued by the court of appeal on the day of appeal with the statement of the person in favour of whom the decision was made, provided that the person's application for the issuance of the writ of execution was received by the time the administrative case was returned to the court of first instance.

In our view, the relevant provisions of the Law on Enforcement Proceedings also need to be amended as regards the immediate notification on opening the proceedings in such category of cases. In particular, we propose to provide in this law that a copy of an order on opening the enforcement proceedings issued in compliance with the court order forbidding to take certain actions and rendered to secure an administrative claim, or the copy of a writ of execution of a court decision, rendered in the cases specified by Articles 172 to 177 of the CAP, shall be served on the day when such court order or writ of execution is issued. If a court order, which forbids to take certain actions and is rendered to secure an administrative claim, or a writ of execution of a court decision rendered in cases specified by Articles 172 to 177 of the CAP, is issued after 17:00, the copy of the order on opening the enforcement proceedings shall be served not later than 10:00 of the next calendar day. In our opinion, election laws should provide for the power of the chair of the respective EC to make certain decisions, including whether to register or refuse to register a candidate for election. In the event that the chair of the commission fails to comply with the court's decision which imposes on the chair the duty to take a decision or to act in a certain manner, the current legislation of Ukraine provides for much more practical opportunities as regards both the enforcement of the court's decision and bringing all those liable to accountability in contrast to the enforcement of judgments by collegial bodies.

As a positive experience, we consider it necessary to cite the example of the Electoral Code of Georgia, adopted on 27 December 2011. According to the provisions of this code, it is the CEC Chair and the heads of the respective DEC's who are empowered to make the decision on registration of candidates or refusal of registration.

## **2.7. Application of the case law of the European Court of Human Rights: procedural aspects**

In our view, the legal mechanisms of Article 6 of the European Convention on Human Rights, in particular for the reasonable hearing of a case, are not formally binding on administrative cases in this category when a dispute arises over a violation of rights of a political nature. However, we do not consider that this circumstance

in any way impedes the administrative courts in their law-enforcement activities from taking into account and using the approaches and positions provided for by the guarantees of fair trial in accordance with Article 6 of the Convention. However, as in the case of the extension of the guarantees of Article 3 of Protocol No. 1 to the Convention in respect of elections that are not elections to the legislature previously examined, the appropriateness of the application of the relevant guarantees of Article 6 of the European Convention on Human Rights in the resolution of cases should be separately justified with regard to cases related to the exercise of political rights. Given the mere reference to this Convention and the relevant case law of the European Court, without a proper explanation of this approach by the courts, we consider that the significance of the Convention and the role of the case law of the Court are undermined.

## CONCLUSION

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In our opinion, the research into the national court practice on election matters in the period 2014-2015 gives grounds to conclude that, as a whole, the system of administrative courts ensures the fulfilment of the functions assigned to it by the constitution and laws of Ukraine, as well as ensuring that Ukraine follows its obligations under international treaties. The results presented in this paper confirm that administrative courts generally perform the task of effectively reviewing cases, protecting the constitutional and other rights and interests of constituents, restoring violated rights and eliminating the consequences of violations. The particular problems identified in this study are mainly interpreted and enforced, in our opinion, by defects in the current legislation, unjustified by frequent changes in the legal regulation of the respective relations, and the lack of a unified approach by the legislator to regulating such electoral procedures during electoral campaigns of different types.

## II. TRAINING COURSE FOR JUDGES ON ELECTORAL DISPUTE RESOLUTION: FROM DEVELOPMENT TO IMPLEMENTATION

The National School of Judges of Ukraine (NSJU) is a public institution with special status that provides training to highly qualified staff within the judiciary and carries out research activities. According to the current legislation, the NSJU performs the following functions:

- ▶ providing initial training to candidates for the position of judge;
- ▶ providing in-service training to judges who are (i) newly appointed; (ii) permanent judges; (iii) appointed to administrative positions in courts;
- ▶ providing in-service training to judges to improve their professional skills;
- ▶ delivering training courses as determined by a disciplinary body to improve the professional skills of judges suspended from the administration of justice;
- ▶ providing training of court staff to improve their professional skills;
- ▶ conducting research into the improvement of the judicial system, the status of judges and court proceedings;
- ▶ studying the international experience of organisation of the functioning courts;
- ▶ providing research methodology support for the operation of courts of general jurisdiction, the High Qualification Commission of Judges of Ukraine and the High Council of Justice.

The NSJU has its main office in Kyiv and five regional offices (in Lviv, Odesa, Dnipro, Chernivtsi and Kharkiv), which are involved in the organisation and conduct of national and regional events, particularly training for judges.

Considering the findings and recommendations of the research into national court practice in electoral cases and well in advance of the next nationwide elections, the NSJU in close co-operation with the Council of Europe<sup>155</sup> has launched a training course for judges on electoral dispute resolution.

The process of developing the training course lasted approximately one year and included several stages:

- ▶ forming an expert working group under the auspices of the NSJU for the development of a training course;
- ▶ conducting several meetings of the expert working group;
- ▶ piloting a training course and further improvement of the training course based on the feedback received;

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155. The training course was developed and introduced with the support of the Council of Europe projects "Supporting the transparency, inclusiveness and integrity of electoral practice in Ukraine" and "Supporting constitutional and legal reforms, constitutional justice and assisting the Verkhovna Rada in conducting reforms aimed at enhancing its efficiency", implemented within the framework of the Council of Europe Action Plan for Ukraine 2018-2021.

- ▶ conducting training of trainers for judges from district administrative courts and administrative courts of appeal in the regions.

The training course was developed by the working group of eight people: five Ukrainian judges from different Ukrainian courts, one NSJU staff member and two representatives of the Council of Europe Secretariat. Three Council of Europe experts, as well as a lawyer from the Strasbourg Court Registry, also contributed to the development and finalisation of the training course.

It needs to be mentioned that the training materials specifically focused on international electoral standards, including the Venice Commission's Code of Good Practice in Electoral Matters, the specifics of national electoral legislation (substantial and procedural) and the Court's case law on electoral matters. In addition to the training materials, the Ukrainian translation of the guide to the Court's case law on Article 3 of Protocol 1<sup>156</sup> were disseminated among the participants in the pilot training, the training of trainers and the regional training sessions for judges.

The participation of the Court Registry lawyer was also ensured throughout the development of the training course, the pilot training and the training of trainers course for the purpose of due presentation and training in the Court's case law on electoral matters.

In February and March 2019, on the eve of early presidential elections in Ukraine, 167 judges representing 30 administrative courts from 22 regions passed the training course on electoral dispute resolution in light of the European electoral standards and the Court's case law.

The training schedule was as follows.

<b>Time</b>	<b>Topic</b>
09:30 – 10:00	Registration of participants
10:00 – 10:10	Welcome
10:10 – 10:40	Introduction of participants, defining expectations and goals of the training
10:40 – 11:30	International standards and principle of democratic electoral
11:30 – 11:45	Break
11:45 – 13:00	Overview of the national electoral legislation. Categories of electoral disputes during electoral process
13:00 – 14:00	Lunch
14:00 – 14:10	Warm-up activity
14:10 – 15:45	Peculiarities in the consideration of election and referendum disputes according to the Code of Administrative Proceedings of Ukraine
15:45 – 16:00	Break
16:00 – 17:00	The Court's case law in electoral matters

156. [www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=#](http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=#).

## Appendix III

# European Court of Human Rights guide to Article 3 of Protocol 1 to the European Convention on Human Rights

This guide is part of the series of guides on the Convention published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular guide analyses and sums up the case law on Article 3 of Protocol No. 1 to the European Convention on Human Rights (hereafter “the Convention”) until 30 April 2019. Readers will find herein the key principles in this area and the relevant precedents.

The case law cited has been selected from among the leading major, and/or recent judgments and decisions.

The Court’s judgments and decisions serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the states of the engagements undertaken by them as contracting parties (*Ireland v. the United Kingdom*, § 154, 18 January 1978, Series A No. 25, and, more recently, *Jeronovičs v. Latvia* [GC], No. 44898/10, § 109, ECHR 2016).

The mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention states (*Konstantin Markin v. Russia* [GC], § 89, No. 30078/06, ECHR 2012). Indeed, the Court has emphasised the Convention’s role as a “constitutional instrument of European public order” in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], No. 45036/98, § 156, ECHR 2005-VI).

This guide contains references to keywords for each cited article of the Convention and its additional protocols. The legal issues dealt with in each case are summarised in a list of keywords, chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its protocols.

The HUDOC database of the Court’s case law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court’s reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the HUDOC user manual.

## I. GENERAL PRINCIPLES

### A. Meaning and scope

#### Article 3 of Protocol No. 1 – Right to free elections

“The High Contracting Parties undertake 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.”

#### Hudoc keywords

Right to free elections (P1-3) – Periodic elections (P1-3) – Elections by secret ballot (P1-3) – Free expression of opinion of people (P1-3) – Choice of the legislature (P1-3) – Vote (P1-3) – Stand for election (P1-3)

1. "According to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by 'an effective political democracy'. Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system" (*Mathieu-Mohin and Clerfayt v. Belgium*, § 47).

2. Article 3 of Protocol No. 1 concerns only the choice of the legislature. This expression is not, however, confined to the national parliament. The constitutional structure of the state in question has to be examined (*Timke v. Germany*, Commission decision). Generally speaking, the scope of Article 3 of Protocol No. 1 does not cover local elections, whether municipal (*Xuereb v. Malta*; *Salleras Llinares v. Spain*) or regional (*Malarde v. France*). The Court has found that the power to make regulations and by-laws, which is conferred on the local authorities in many countries, is to be distinguished from legislative power, which is referred to in Article 3 of Protocol No. 1, even though legislative power may not be restricted to the national parliament alone (*Mółka v. Poland* (dec.)).

3. The Court has clarified the interpretation to be given to the notion of "elections", thus determining the scope of Article 3 of Protocol No. 1 (*Cumhuriyet Halk Partisi v. Turkey* (dec.), §§ 33-34 and 37-38).

4. The Court has explained that in principle a referendum does not fall within the scope of Article 3 of Protocol No. 1 (*ibid.*, §§ 33 and 38; *Moochan and Gillon v. the United Kingdom* (dec.), § 40). However, it takes account of the diversity of electoral systems in the various states. It has thus not excluded the possibility that a democratic process described as a "referendum" by a contracting state could potentially fall within the ambit of Article 3 of Protocol No. 1. In order to do so the process would need to take place "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" (*ibid.*, § 42).

5. The Court has held that the inability to receive the results of opinion polls on voting intentions over a period of two weeks prior to an election did not affect voters sufficiently "directly" for them to claim to be "victims" of a violation of Article 3 of Protocol No. 1, within the meaning of Article 34 of the Convention (*Dimitras and Others v. Greece* (dec.), §§ 30-32).

6. As regards presidential elections, the Court has taken the view that the powers of the head of state cannot as such be construed as a form of "legislature" within the meaning of Article 3 of Protocol No. 1. It does not exclude, however, the possibility of applying Article 3 of Protocol No. 1 to presidential elections. Should it be established that the office of the head of state in question had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a "legislature" within the meaning of Article 3 of Protocol No. 1 (*Boškovski v. the former Yugoslav Republic of Macedonia* (dec.); *Brito Da Silva Guerra and Sousa Magno v. Portugal* (dec.)). This possibility has never been used, however, and has not even been mentioned in subsequent cases (*Paksas v. Lithuania* [GC]; *Anchugov and Gladkov v. Russia*, §§ 55-56).

7. The Court has, on a number of occasions, taken the view that the European Parliament forms part of the "legislature" within the meaning of Article 3 of Protocol No. 1 (*Matthews v. the United Kingdom* [GC], §§ 45-54; *Occetto v. Italy* (dec.), § 42).

8. As to the actual features of elections, the text of Article 3 of Protocol No. 1 provides only that they should be free and by secret ballot, as the European Commission of Human Rights ("the Commission") and then the Court have constantly reiterated (*X. v. the United Kingdom*, Commission decision of 6 October 1976). The provision further makes it clear that elections must be held at reasonable intervals. The states have a broad margin of appreciation in such matters. The case law nevertheless provides the following guidelines:

The Commission finds that the question [of] whether elections are held at reasonable intervals must be determined by reference to the purpose of parliamentary elections. That purpose is to ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people. Parliament must in principle be in a position to develop and execute its legislative intentions – including longer term legislative plans. Too short an interval between elections may impede political planning for the implementation of the will of the electorate; too long an interval can lead to the petrification of political groupings in Parliament which may no longer bear any resemblance to the prevailing will of the electorate. (*Timke v. Germany*, Commission decision)

9. The case law has continued to develop the requirement of universal suffrage, which is now the benchmark principle (*X. v. Germany*, Commission decision; *Hirst v. the United Kingdom (No. 2)* [GC], §§ 59 and 62; *Mathieu-Mohin and Clerfayt v. Belgium*, § 51). However, while Article 3 of Protocol No. 1 includes the principle of equality of treatment of all citizens in the exercise of their right to vote, it does not follow, however, that all votes must necessarily carry equal weight as regards the outcome of the election. Thus, no electoral system can eliminate "wasted votes" (*ibid.*, § 54; *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.)).

10. However, the vote of each elector must have be able to affect the composition of the legislature, otherwise the right to vote, the electoral process and, ultimately, the democratic order itself, would be devoid of substance (*Riza and Others v. Bulgaria*, § 148). States thus enjoy a broad margin of appreciation in the organisation of the ballot. An electoral boundary review giving rise to constituencies of unequal population does not breach Article 3 of Protocol No. 1 provided that the free will of the people is accurately reflected (*Bompard v. France* (dec.)). Lastly, the choice of electoral system by which the free expression of the opinion of the people in the choice of the legislature is ensured – whether it be based on proportional representation, the “first-past-the-post” system or some other arrangement – is a matter in which the state enjoys a wide margin of appreciation (*Matthews v. the United Kingdom* [GC], § 64).

## B. Principles of interpretation

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11. Article 3 of Protocol No. 1 differs from the other substantive provisions of the Convention and the protocols as it is phrased in terms of the obligation of the high contracting party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work in respect of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, comprising the right to vote (the “active” aspect) and to stand for election (the “passive” aspect) (*Mathieu-Mohin and Clerfayt v. Belgium*, §§ 48-51; *Ždanoka v. Latvia* [GC], § 102).

12. The rights in question are not absolute. There is room for “implied limitations”, and the contracting states must be given a wide margin of appreciation in this sphere. The concept of “implied limitations” under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 is not limited by a specific list of “legitimate aims” such as those enumerated in Articles 8 to 11, the contracting states are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a given case.

13. The concept of “implied limitations” also means that the Court does not apply the traditional tests of “necessity” or “pressing social need” that are used in the context of Articles 8 to 11. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In addition, it underlines the need to assess any electoral legislation in the light of the political evolution of the country concerned, which means that unacceptable features in one system may be justified in another (*Mathieu-Mohin and Clerfayt v. Belgium*, § 52; *Ždanoka v. Latvia* [GC], §§ 103-104 and 115).

14. Stricter requirements may be imposed on eligibility to stand for election to parliament (the “passive” aspect) than is the case for eligibility to vote (the “active” aspect). In fact, while the test relating to the “active” aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a group of persons from the right to vote, the Court’s test in relation to the “passive” aspect has been limited largely to verification of the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate (*Ždanoka v. Latvia* [GC], § 115; *Melnitchenko v. Ukraine*, § 57).

15. As to the question of who is entitled to rely on an alleged violation of the “passive” aspect of the right, the Court has admitted that, where electoral law or national authorities restrict the right of candidates individually to stand for election on a party’s list, the party concerned may, in that capacity, claim to be a victim of such a violation independently of its candidates (*Georgian Labour Party v. Georgia*, §§ 72-74; *Riza and Others v. Bulgaria*, § 142).

16. In addition, when it subjects a country’s electoral system to its examination – whether it concerns the active or the passive aspect – the Court takes account of the diversity of the states’ historical contexts. Those different contexts may thus lead the Court to accepting divergences in electoral rules from one country to another but also to explaining any evolution in the level of requirement depending on the period under consideration.

17. Lastly, Article 3 of Protocol No. 1 covers the post-election period, including the counting of votes and the recording and transmission of the results. The state thus has a positive obligation to ensure careful regulation of the process in which the results of voting are ascertained, processed and recorded (*Davydov and Others v. Russia*, §§ 284-285).

## II. ACTIVE ASPECT: THE RIGHT TO VOTE

18. The “active” aspect is subject to limitations. Here, as in any other area under Article 3 of Protocol No. 1, the member states enjoy a certain margin of appreciation that varies depending on the context. It is, for example, possible to fix a minimum age to ensure that individuals taking part in the electoral process are sufficiently mature (*Hirst v. the United Kingdom (No. 2)* [GC], § 62).

19. However, the supervision exercised consists in a relatively comprehensive review of proportionality. The margin of appreciation afforded to states cannot have the effect of prohibiting certain individuals or groups from taking part in the political life of the country, especially through the appointment of members of the legislature (*Aziz v. Cyprus*, § 28; *Tănase v. Moldova* [GC], § 158). In the case of *Aziz v. Cyprus*, the Court ruled on the inability of members of the Turkish-Cypriot community to vote in legislative elections. It took the view that, on account of the abnormal situation existing in Cyprus since 1963 and the legislative vacuum, the applicant, as a member of the Turkish-Cypriot community living in the Republic of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives. The very essence of the applicant’s right to vote was thus impaired. The Court also found a clear inequality of treatment in the enjoyment of the right in question, between the members of the Turkish-Cypriot community and those of the Greek-Cypriot community. There had accordingly been a violation of Article 3 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention.

20. It should also be noted that complaints concerning elections not falling under Article 3 of Protocol No. 1 may, if appropriate, be raised under other articles of the Convention. Thus, in the case of *Móltka v. Poland*, the applicant was unable to vote in elections to municipal councils, district councils and regional assemblies. The polling station was not accessible to individuals in wheelchairs and it was not permitted to take ballot papers outside the premises. The Court took the view that it could not be excluded that the authorities’ failure to provide appropriate access to the polling station for the applicant, who wished to lead an active life, might have aroused feelings of humiliation and distress capable of impinging on his personal autonomy, and thereby on the quality of his private life. The Court thus accepted the idea that, in such circumstances, Article 8 was engaged.

### A. Loss of civic rights

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21. When an individual or group has been deprived of the right to vote, the Court is particularly attentive. Deprivation of the right to vote must then pursue a legitimate aim but also pass a more stringent proportionality test. The Court has thus had occasion to examine a number of cases in which the deprivation of voting rights was part of a criminal investigation. The case of *Labita v. Italy* [GC] concerned the automatic temporary loss of civic rights imposed on an individual suspected of belonging to the mafia. The Court agreed that the measure pursued a legitimate aim. However, taking into account the fact that the measure had only been applied after the applicant’s acquittal, it found that it had been disproportionate as there was no actual basis on which to suspect him of belonging to the mafia. In the case of *Vito Sante Santoro v. Italy*, the applicant had also been deprived of his right to vote for a limited period on account of his placement under police surveillance. However, more than nine months had passed between the order placing him under surveillance and the deletion of his name from the electoral roll. As a result, the applicant had been prevented from voting in two elections, which would not have been the case if the measure had been applied immediately. The government had not provided any reason to justify that time lapse. The Court thus found that there had been a violation of Article 3 of Protocol No. 1.

22. The question of the loss of civic rights does not only arise in a criminal context. The case of *Albanese v. Italy* concerned the suspension of the applicant’s electoral rights for the duration of bankruptcy proceedings against him. The Court pointed out that bankruptcy proceedings came within the ambit of civil rather than criminal law and therefore did not imply any deceit or fraud on the part of the bankrupt person. The aim of the restrictions on the person’s electoral rights was therefore essentially punitive. The measure thus served no purpose other than to belittle persons who had been declared bankrupt, reprimanding them simply for having been declared insolvent irrespective of whether they had committed an offence. It did not therefore pursue a legitimate aim for the purposes of Article 3 of Protocol No. 1.

23. The Court also examined the loss of voting rights on account of placement under partial guardianship. In the case of *Alajos Kiss v. Hungary*, it took the view that such a measure could pursue a legitimate aim, namely to ensure that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs. However, the voting ban in question had been imposed as an automatic blanket restriction, regardless of the protected person’s actual faculties and without



any distinction being made between full and partial guardianship. The Court further considered that the treatment as a single class of those with intellectual or mental disabilities was a questionable classification, and the curtailment of their rights must be subject to strict scrutiny. It therefore concluded that an indiscriminate removal of voting rights, without an individualised judicial evaluation, could not be considered proportionate to the aim pursued.

## B. Specific case of prisoners

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24. Prisoners in general continue to enjoy all the fundamental rights and freedoms secured by the Convention, except for the right to liberty where lawful detention falls expressly within the scope of Article 5 of the Convention (*Hirst v. the United Kingdom (No. 2)* [GC], § 69). The rights guaranteed by Article 3 of Protocol No. 1 are no exception. There is no question, therefore, that a prisoner should forfeit his rights under the Convention merely because of his status as a person detained following conviction. That does not preclude the taking of steps to protect society against activities intended to destroy the Convention rights and freedoms.

25. Article 3 of Protocol No. 1 does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatens to undermine the rule of law or democratic foundations. The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned (*Hirst v. the United Kingdom (No. 2)* [GC], § 71).

26. To deprive a prisoner of his political rights may thus meet the legitimate aims of preventing crime and enhancing civic responsibility, together with respect for the rule of law and ensuring the proper functioning and preservation of the democratic regime. However, such a measure cannot be imposed automatically or it would not meet the proportionality requirement.

27. The states may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction. Accordingly, the application of a voting ban in the absence of a specific judicial decision will not in itself entail a violation of Article 3 of Protocol No. 1 (*Scoppola v. Italy (No. 3)* [GC], § 102).

28. In the case of *Hirst v. the United Kingdom (No. 2)* [GC], the Court found a violation of Article 3 of Protocol No. 1 because the voting ban in question had been a blanket ban applied automatically to anyone serving a custodial sentence. It affected 48 000 prisoners, which was a high number, and concerned all sorts of prison sentences, ranging from one day to life, and for various types of offences from the most minor to the most serious. In addition, there was no direct link between the offence committed by an individual and the withdrawal of his voting rights. The Court also found a violation of Article 3 of Protocol No. 1 in the case of *Söyler v. Turkey*, where restrictions imposed on the voting rights of convicted persons had an even broader scope and impact because they even applied to those who were not, or no longer, serving time in prison. In the case of *Frodl v. Austria*, the deprivation of voting rights did not systematically affect all prisoners, but only those who had been sentenced to prison for more than a year for an offence committed voluntarily. Nevertheless, there was no link between the automatic imposition of the measure and the conduct of the individual or the circumstances of the case. The Court thus found that the voting ban was not proportionate to the aims pursued.

29. In the case of *Scoppola v. Italy (No. 3)* [GC], however, the Court examined a voting ban which applied only to persons convicted of certain well-determined offences or to a custodial sentence exceeding a statutory threshold. The legislature had been careful to adjust the duration of this measure according to the specific features of each case. It had also adjusted the duration of the ban depending on the sentence imposed and therefore, indirectly, on the gravity of the sentence. Many of the convicted prisoners had retained the ability to vote in legislative elections. In addition, this system had been complemented by the possibility for convicts affected by a permanent ban to recover their voting rights. The Italian system was not therefore marked by excessive rigidity. The Court thus held that there had been no violation of Article 3 of Protocol No. 1.

30. It must nevertheless be noted that for a violation of Article 3 of Protocol No. 1 to be found, prisoners must show that they have actually been prevented from voting. It is not sufficient for them to rely on their state of detention alone, because events such as early release or admission to a psychiatric institution, etc., may take place before the date of the elections in question. Such applications are thus declared inadmissible as manifestly ill-founded (*Dunn and Others v. the United Kingdom (dec.)*).

31. Moreover, the Court has never found it appropriate to indicate to states the necessary measures to be taken in order to put an end to violations caused by a prisoner voting ban. At best it has set out a timetable (*Greens and M.T. v. the United Kingdom*, § 120). However, states cannot rely on the complexity of making changes to the law that led to the violation. In the case of *Anchugov and Gladkov v. Russia*, the Court took note of the argument that the prohibition had been imposed by a provision of the constitution that could not be amended by parliament and could only be revised by adopting a new constitution, thus implying a particularly complex procedure. However, it pointed out that it was essentially for the authorities to choose, under the supervision of the Council of Europe's Committee of Ministers, the means to be used to bring the legislation into conformity with the Convention. It is open to governments to explore all possible avenues to ensure compliance with Article 3 of Protocol No. 1, including by a form of political process or by interpreting the constitution in conformity with the Convention (§ 111).

32. Lastly, in the case of *Moohan and Gillon v. the United Kingdom* (dec.), convicted prisoners had complained of being unable to vote in the Scottish independence referendum held in 2014. Finding that Article 3 of Protocol No. 1 was inapplicable to such a consultation, the Court dismissed their applications as inadmissible.

## C. Residence and condition of access to voting rights

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### 1. Right of citizens residing abroad to vote

33. In a series of cases beginning in 1961, the Commission declared inadmissible, as manifestly ill-founded, complaints about restrictions on voting rights based on a residence criterion (see the Commission decisions: *X. and Others v. Belgium*; *X. v. the United Kingdom* (11 December 1976); *X. v. the United Kingdom* (28 February 1979); *X. v. the United Kingdom* (13 May 1982); *Polacco and Garofalo v. Italy*; *Luksch v. Germany*).

34. The Court subsequently reiterated the compatibility with Article 3 of Protocol No. 1 of the residence criterion. Such a restriction can be justified for a number of reasons:

- first, the presumption that non-resident citizens are less directly or less continuously concerned by their country's day-to-day problems and have less knowledge of them;
- second, the fact that candidates standing for election to parliament cannot so easily present the election issues to citizens living abroad, who will also have less influence on the selection of candidates or on the drafting of their manifestos;
- third, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies thus elected; and,
- fourth, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections concerning issues that, while fundamental, primarily affect those living in the country.

35. Even if the person concerned has not severed all ties with his or her country of origin and some of the above-mentioned factors perhaps do not apply to that person, the law cannot always take account of every individual case but must lay down a general rule (*Hilbe v. Liechtenstein* (dec.); *Doyle v. the United Kingdom* (dec.); *Shindler v. the United Kingdom*, § 105).

36. The Court thus considered ill-founded the applications of nationals who had left their country of origin (*Hilbe v. Liechtenstein* (dec.)). In two cases it particularly took account of the fact that non-residents could vote in national elections for the first 15 years following their emigration and that their right was, in any event, restored if and when they returned to live in their country of origin, thus finding that the measure was not disproportionate (*Doyle v. the United Kingdom* (dec.); *Shindler v. the United Kingdom*, § 108). The Court also found it pertinent that parliament had sought, more than once, to weigh up the competing interests, and had debated in detail the question of the voting rights of non-residents; the evolution of opinions in parliament was reflected in the amendments to the cut-off period since some non-resident citizens had first been allowed to vote (*ibid.*, § 117).

37. In the case of *Shindler v. the United Kingdom* the Court noted that there was a growing awareness at European level of the problems posed by migration in terms of political participation in the countries of origin and residence. However, none of the material examined formed a basis for concluding that, as the law currently stood, states were under an obligation to grant non-residents unrestricted access to the franchise. While there was a clear trend in the law and practice of the member states to allow non-residents to vote, and a significant majority of states were in favour of an unrestricted right of access, this was not sufficient to establish the existence of any common approach or consensus in favour of unrestricted voting rights for

non-residents. The Court thus concluded that, although the matter might need to be kept under review, the margin of appreciation enjoyed by the state in this area remained a wide one (§§ 109-115).

## 2. Particular case of certain territories

38. In the case of *Py v. France*, the Court referred back to the idea of a sufficiently strong tie between the potential voter and the territory concerned. A French national from mainland France and living in Nouméa was refused the right to vote in elections to the Congress of New Caledonia on the ground that he could not prove at least 10 years of residence in the territory. The Court took the view that cut-off points as to length of residence addressed the concern that ballots should reflect the will of the population “concerned” and that their results should not be affected by mass voting by recent arrivals in the territory who did not have strong ties with it. Furthermore, the restriction on the right to vote was the direct and necessary consequence of establishing New Caledonian citizenship. The applicant was not affected by the acts of political institutions in New Caledonia to the same extent as resident citizens. Consequently, the residence condition was justified and pursued a legitimate aim. The history and status of New Caledonia – a transitional phase prior to the acquisition of full sovereignty and part of a process of self-determination – could be regarded as constituting “local requirements” warranting a restriction as important as the 10-year residence requirement, a condition that had also been instrumental in alleviating the bloody conflict.

39. The case of *Sevinger v. the Netherlands* concerned the inability of the residents of the island of Aruba, which enjoyed a certain autonomy, to vote in elections to the Dutch Parliament. They were able, however, to vote in elections to the Parliament of Aruba, which was entitled to send special delegates to the Dutch Parliament. The Court took the view that Dutch nationals residing in Aruba were thus able to influence decisions taken by the Lower House of the Dutch Parliament and that they were not affected by the acts of that parliament to the same extent as Dutch nationals residing in the Netherlands. It also rejected the complaint under Article 14 taken together with Article 3 of Protocol No. 1. It found that it was only those Dutch nationals residing in Aruba who were entitled to vote for members of the Parliament of Aruba and that therefore their situation was not relevantly similar to that of other Dutch nationals.

40. As regards the geographical and territorial organisation of the ballot within the relevant state, the Court acknowledged that the obligation to seek the deletion of one’s name from one electoral roll and its addition to another pursued legitimate aims: to ensure the compilation of electoral rolls in satisfactory conditions of time and supervision, to enable the proper organisation of ballot-related operations and to avoid fraud. It took the view that the obligation to comply with those formalities within the statutory deadline fell within the exercise of the state’s broad margin of appreciation in such matters (*Benkaddour v. France*).

## 3. Organisation of elections abroad for non-resident nationals

41. Article 3 of Protocol No. 1 does not oblige states to introduce a system that ensures the exercise of the right to vote for their non-resident citizens. In the case of *Sitaropoulos and Giakoumopoulos v. Greece* [GC], the applicants complained that, in the absence of regulation on that point, they could not exercise their voting right in the country where they lived as expatriates (France) even though the constitution of their country of origin (Greece) provided for that possibility. The Court found that there had been no violation of Article 3 of Protocol No. 1 as the disruption to the applicants’ financial, family and professional lives that would have been caused had they had to travel to Greece would not have been disproportionate to the point of impairing the very essence of their voting rights.

42. However, where national law does provide for such a system, specific obligations may arise as a result, in particular the obligation to hold fresh elections in the foreign country if necessary. In the case of *Riza and Others v. Bulgaria*, the Court stated that it did not overlook the fact that the organisation of fresh elections in another sovereign country, even in only a limited number of polling stations, might face major diplomatic or organisational obstacles and entail additional costs. It found, however, that the holding of fresh elections, in a polling station where there had been serious anomalies in the voting process on the part of the electoral board on the day of the election, would have reconciled the legitimate aim behind the annulment of the election results, namely the preservation of the legality of the electoral process, with the rights of the voters and the candidates standing for election to parliament.

43. The case of *Oran v. Turkey* concerned the inability for Turkish voters living abroad to vote for independent non-party candidates in polling stations set up in customs posts. Votes cast in those conditions could only be for political parties. That limitation was justified by the fact that it was impossible to assign expatriated voters to a constituency. The Court found that the limitation had to be assessed taking account of generally agreed

restrictions on the exercise of voting rights by expatriates and, in particular, the legitimate concern the legislature might have to limit the influence of citizens resident abroad in elections on issues that primarily affect persons living in the country. It also emphasised the role played by political parties, the only bodies that could come to power and have the capacity to influence the whole national regime. Furthermore, the limitation also pursued two further legitimate aims: enhancing democratic pluralism while preventing the excessive and dysfunctional fragmentation of candidatures, thereby strengthening the expression of the opinion of the people in the choice of the legislature. Consequently, the restriction met the legislature's legitimate concern to ensure the political stability of the country and of the government that would be responsible for leading it after the elections. There had not therefore been a violation of Article 3 of Protocol No. 1.

### III. PASSIVE ASPECT: THE RIGHT TO STAND FOR ELECTION

44. Like the "active" aspect, the "passive" aspect, namely the right to stand as a candidate for election, has been developed in the case law. The Court has thus stated that the right to stand for election is "inherent in the concept of a truly democratic regime" (*Podkolzina v. Latvia*, § 35). However, it has been more cautious in its assessment of restrictions under this aspect of Article 3 of Protocol No. 1 than when it has been called upon to examine restrictions on the right to vote: the proportionality test is more limited. States thus enjoy a broader margin of appreciation in respect of the "passive" aspect (*Etxebarria and Others v. Spain*, § 50; *Davydov and Others v. Russia*, § 286).

45. However, the prohibition of discrimination, under Article 14 of the Convention, is equally applicable. In this context, even though the margin of appreciation usually afforded to states as regards the right to stand for election is a broad one, where a difference in treatment is based on race, colour or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], § 44).

46. In the case of *Sejdić and Finci v. Bosnia and Herzegovina* [GC], the Court examined an exclusion rule to the effect that only persons declaring affiliation with a "constituent people" were entitled to run for the House of Peoples (second chamber of the state parliament). Potential candidates who refused to declare such an affiliation could not therefore stand. The Court noted that this exclusion rule pursued at least one aim that was broadly compatible with the general objectives of the Convention, namely the restoration of peace. When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and ethnic cleansing. The nature of the conflict was such that the approval of the "constituent peoples" (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society. However, there had been significant positive developments in Bosnia and Herzegovina since the Dayton Agreement. In addition, by ratifying the Convention and the protocols thereto without reservations, the respondent state had voluntarily agreed to meet the relevant standards. The Court thus concluded that the applicants' continued ineligibility (being of Roma or Jewish origin) to stand for election lacked an objective and reasonable justification and had therefore breached Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1.

47. In the case of *Zornić v. Bosnia and Herzegovina* the Court found, for the same reasons, a violation of Article 3 of Protocol No. 1 as regards the applicant's ineligibility, for the same reason, to stand for election to the House of Peoples and to the Presidency. Observing that there had been excessive delay in executing its judgment in *Sejdić and Finci v. Bosnia and Herzegovina* [GC] and that the violation complained of was the direct result of that delay, the Court made a ruling under Article 46 of the Convention. It found that, 18 years after the tragic conflict in Bosnia and Herzegovina, the time had come to adopt a political system capable of affording all citizens of that country the right to stand for election to the House of Peoples and to the Presidency without any distinction as to ethnic origin (*Zornić v. Bosnia and Herzegovina*, § 43).

48. In the case of *Tănase v. Moldova* [GC] the Court ruled on the question of dual nationality, albeit under Article 3 of Protocol No. 1 alone. It found that there was a consensus that where multiple nationalities were permitted, the holding of more than one nationality should not be a ground for ineligibility to sit as an MP, even where the population is ethnically diverse and the number of MPs with multiple nationalities may be high.

## A. Inability to stand for election and the democratic order

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49. As regards limitations on the right to stand for election, the protection of the democratic order is one of the aims compatible with the principle of the rule of law and the general objectives of the Convention.

50. However, in order to be compatible with the Convention, the rejection of a candidature must in the first place be legal: in particular it must be prescribed by law. In the case of *Dicle and Sadak v. Turkey*, the applicants, MPs from a political party that had been dissolved, had been sentenced to long prison sentences for membership of an illegal organisation. They were given a retrial after a judgment of the European Court of Human Rights. However, their candidatures for the parliamentary elections were rejected on the ground that they had not served their sentences in full. In its examination under Article 6 § 2 of the Convention, the Court noted that it was clear from the national decisions that, following the decision to hold a retrial, the case had to be heard as if the applicants were standing trial for the first time. It concluded that the maintaining of the initial conviction on the applicants' criminal record and the subsequent refusal of their candidature was not prescribed by law and that there had thus been a violation of Article 3 of Protocol No. 1.

51. In the case of *Etxebarria and Others v. Spain* the applicants' candidatures had been annulled on the grounds that they were pursuing the activities of the three political parties that had been declared illegal and dissolved on account of their support for violence and for the activities of the ETA, a terrorist organisation. The Court found that the national authorities had had considerable evidence enabling them to conclude that the electoral groupings in question wished to continue the activities of the political parties concerned. The Supreme Court had based its reasoning on elements external to the manifestos of the disputed groupings and the authorities had taken decisions to bar individual candidates. After an examination in adversarial proceedings, during which the groupings had been able to submit observations, the domestic courts had found an unequivocal link with the political parties that had been declared illegal. Lastly, the political context in Spain, namely the presence in the government bodies of certain autonomous communities, and in particular in the Basque country, of political parties calling for independence, proved that the impugned measure was not part of a policy to ban any expression of separatist views. The Court thus found that the restriction had been proportionate to the legitimate aim pursued.

52. However, while it is less stringent than when it concerns the active aspect of Article 3 of Protocol No. 1, the Court's scrutiny – of the passive aspect – is not absent. In particular, the proportionality test, although relatively flexible, is a real one. The Court has, in particular, found a number of violations of Article 3 of Protocol No. 1 on account of the disproportionate nature of sanctions imposed on MPs after their parties had been dissolved for undermining territorial integrity and the unity of the state, or to preserve the secular nature of the political system.

53. It is noteworthy that cases concerning the banning of political parties on account of the incompatibility of their manifestos with democratic principles are usually examined under Article 11 (freedom of assembly and association) of the Convention. Article 3 of Protocol No. 1 is then regarded only as secondary and as not raising a separate issue (*Refah Partisi (the Welfare Party) and Others v. Turkey* [GC]; *Linkov v. the Czech Republic*; *Parti nationaliste basque – Organisation régionale d'Iparralde v. France*).

## B. Importance of historical context

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54. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, the eligibility criteria vary in accordance with the historical and political factors specific to each state. The multiplicity of situations provided for in the constitutions and electoral legislation of numerous member states of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying Article 3 of Protocol No. 1, any electoral legislation must be assessed in the light of the political evolution of the country concerned (*Mathieu-Mohin and Clerfayt v. Belgium*, § 54; *Podkolzina v. Latvia*, § 33; *Ždanoka v. Latvia* [GC], § 106).

55. In the case of *Ždanoka v. Latvia* [GC] the applicant had been a member of a party that had attempted to bring about a *coup d'état* in 1991. Her candidature for elections was subsequently rejected a number of times on account of her activities in the party in question, continued after the attempted *coup d'état*. The Court took the view that the applicant's former position in that party, coupled with her stance during the events of 1991, still warranted her exclusion from standing as a candidate to the national parliament. While such a measure might scarcely be considered acceptable, for example, in a country that had an established framework of democratic institutions going back many decades or centuries, it might nonetheless be considered acceptable in Latvia in view of the historical and political context that had led to its adoption and given the threat

to the new democratic order. The Court nevertheless found that the Latvian parliament had a duty to keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion was all the more justified in view of the greater stability that Latvia now enjoyed, *inter alia*, by reason of its full European integration. Hence, any failure by the Latvian legislature to take active steps in that connection might result in a different finding by the Court (§§ 132-135).

56. The Court subsequently emphasised once again the importance of the passage of time and the need to reassess legislation concerning lustration laws. In *Ādamsons v. Latvia*, the applicant, a former prime minister, had had his candidature refused on the ground that he had been a KGB “official”. The Court confirmed its findings on the country’s historical context. It added, however, that over the years a mere general suspicion about a group of individuals was no longer sufficient and that the authorities had to justify such a measure on the basis of additional arguments and evidence. The law applied in this case concerned former KGB “officials”. In view of the diversity of duties that had existed in that service, the scope was too broad. In those circumstances, it was no longer sufficient merely to find that the person concerned belonged to a particular group. The group in question having been defined too generally, any restriction on the electoral rights of its members should have followed an individualised approach, taking into account their actual conduct. The need for such a case-by-case approach had become increasingly important with the passage of time. The applicant had never been accused of being directly or indirectly involved in the misdeeds of the totalitarian regime, or in any act capable of showing opposition or hostility to the restoration of Latvia’s independence and democratic order. Moreover, he had only very belatedly been officially recognised as ineligible, after 10 years of an outstanding military and political career in the restored Latvia. Only the most compelling reasons could justify the applicant’s ineligibility in those circumstances. In addition, the 10-year time frame during which former KGB officials could be subjected to the restrictions provided for in other legislative instruments had been extended by 10 additional years, without any reasons having been given by parliament or the government. The Court thus found that this prolongation had been manifestly arbitrary in respect of the applicant.

## C. Organisation of elections

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57. The practical organisation of elections is a complex subject, requiring as it does the introduction and occasionally the amendment of elaborate legislation. When called upon to examine this subject, the Court does not overlook the complexity or the features specific to each state. As a result, a broad margin of appreciation is also afforded to states in this connection.

58. The Court has taken the view, in particular, that the proper management of electoral rolls is a precondition for a free and fair ballot. The effectiveness of the right to stand for election is undoubtedly contingent upon the fair exercise of the right to vote. The mismanagement of an electoral roll could diminish the candidates’ chances of standing equally and fairly for election (*Georgian Labour Party v. Georgia*, §§ 82-83). In a case where the rules for the compilation of electoral rolls had been changed unexpectedly just one month before the election, the Court accepted that the new system of registration was not perfect but attached greater importance to the fact that the authorities had not spared any effort to make the new ballot fairer. In particular, the electoral authorities had had the challenge of remedying manifest shortcomings in the electoral rolls within very tight deadlines, in a “post-revolutionary” political situation, and it would thus have been an excessive and impracticable burden to expect an ideal solution from the authorities. It was up to the electors to verify that they were registered and to request any correction if necessary. The Court found that this fell within the state’s margin of appreciation (*ibid.*).

### 1. Guaranteeing serious candidatures: the deposit requirement

59. The electoral laws of a number of states provide for the payment of a deposit by candidates to discourage frivolous candidatures. Such measures enhance the responsibility of those standing for election and confine elections to serious candidates, while avoiding any unreasonable outlay of public funds. They may therefore pursue the legitimate aim of guaranteeing the right to effective, streamlined representation (*Sukhovetskyy v. Ukraine*, §§ 61-62).

60. The amount of the deposit must nevertheless remain proportionate, such that it strikes a balance between, on the one hand, deterring frivolous candidates, and, on the other, allowing the registration of serious candidates. The Court thus takes into account the amount of the sum involved, the electoral campaign services provided by the state and the other burdensome costs of organising elections which such deposits may help to allay.

61. For the proportionality test to be satisfied, the deposit required cannot be considered to have been excessive or to constitute an insurmountable administrative or financial barrier for a determined candidate wishing

to enter the electoral race, and even less an obstacle to the emergence of sufficiently representative political currents or an interference with the principle of pluralism (*Sukhovetskyy v. Ukraine*, §§ 72-73). The requirement to pay an election deposit, and provisions making reimbursement of the deposit and/or campaigning expenses conditional on the party's having obtained a certain percentage of votes, serve to promote sufficiently representative currents of thought and are justified and proportionate under Article 3 of Protocol No. 1, having regard to the wide margin of appreciation afforded to the contracting states in this matter (*Russian Conservative Party of Entrepreneurs and Others v. Russia*, § 94). This remains true even where the deposit cannot be refunded (*Sukhovetskyy v. Ukraine*).

However, the question of whether or not a deposit can be refunded may raise questions under Article 1 of Protocol No. 1. In the case of *Russian Conservative Party of Entrepreneurs and Others v. Russia*, the Court found that the domestic procedure whereby the entire list of a party had been annulled on account of incorrect information having been given by certain candidates had breached the principle of legal certainty. The applicant party had already paid the election deposit. In view of its finding under Article 3 of Protocol No. 1, the Court took the view that a refusal to return that sum breached Article 1 of Protocol No. 1.

## 2. Avoiding excessive fragmentation of the political landscape

62. Conditions concerning the number of signatures required for the presentation of a list of candidates do not constitute an impediment to the expression of the opinion of the people in the choice of the legislature (*Asensio Serqueda v. Spain*, Commission decision; *Federación nacionalista Canaria v. Spain* (dec.); *Brito Da Silva Guerra and Sousa Magno v. Portugal* (dec.); *Mihaela Mihai Neagu v. Romania* (dec.), § 31).

63. However, such measures must pursue a legitimate aim, such as that of a reasonable selection among the candidates in order to ensure their representative character and to exclude any improper candidatures, and must be proportionate to that aim. Thus, a threshold of 100 000 signatures, representing 0.55% of all citizens registered on the electoral rolls, was found to be compliant with Article 3 of Protocol No. 1 (*ibid.*).

64. Similarly, a requirement for such signatures to be accompanied by certificates showing that the signatories were registered on the electoral rolls must pursue the legitimate aim of ensuring that the signatories have voting rights and that each of them is supporting only one candidature. The Court found that it was not therefore disproportionate to reject a candidature which did not satisfy the formalities in question (*Brito Da Silva Guerra and Sousa Magno v. Portugal* (dec.)).

65. However, the imposition of a minimum number of signatures and their verification must comply with the rule of law and protect the integrity of the elections. In the case of *Tahirov v. Azerbaijan*, the safeguards provided by the electoral board, which had rejected the applicant's candidature, were not sufficient, in particular concerning the appointment of the experts who decided on the validity of the signatures. In addition, the applicant had not been able to attend the board's meetings or submit his arguments, none of which had been examined by the board. The rejection of the applicant's candidature on account of the alleged invalidity of the signatures he had provided was thus arbitrary. Based on a report by the OSCE, the Court noted the systemic nature of these shortcomings and the number of candidatures arbitrarily rejected on those grounds. It concluded that the government's unilateral declaration did not suffice to guarantee respect for human rights, rejected it and pursued its examination on the merits.

66. Such threshold criteria have also been accepted by the Court in connection with the allocation of seats according to the results of the elections. Electoral systems seek to fulfil objectives that are sometimes scarcely compatible with each other: on the one hand to reflect fairly faithfully the opinions of the people, and, on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. Article 3 of Protocol No. 1 thus does not imply that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of winning, and no electoral system can eliminate "wasted votes" (*Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.)).

67. The effects of an electoral threshold can differ from one country to another and the various systems can pursue different, sometimes even opposing, political aims. One system might concentrate more on a fair representation of the parties in parliament, while another one might aim to avoid a fragmentation of the party system and encourage the formation of a governing majority of one party in parliament. The Court has taken the view that none of these aims can be considered unreasonable in itself. Moreover, the role played by thresholds varies in accordance with the level at which they are set and the party system in each country. A low threshold excludes only very small groupings, which makes it more difficult to form stable majorities, whereas in cases where the party system is highly fragmented a high threshold deprives many voters of representation. This large variety of situations shows the diversity of the possible options. The Court cannot

therefore assess any particular threshold without taking into account the electoral system of which it forms a part (*Yumak and Sadak v. Turkey* [GC], §§ 131-132).

68. As regards, for example, the requirement to fulfil two alternative conditions – to obtain either at least 30% of valid votes cast in an individual island constituency, or at least 6% of valid votes cast in an entire autonomous community – the Court took the view that such a system, far from constituting a hindrance to electoral candidatures, granted a certain protection to smaller political formations (*Federación nacionalista Canaria v. Spain* (dec.)). Similarly, the Court concluded that the threshold of 5% of votes that had to be attained by a list of candidates in order to be considered elected and to participate in the allotment of seats was compliant with Article 3 of Protocol No. 1, in that it encouraged sufficiently representative currents of thought and helped to avoid an excessive fragmentation of parliament (*Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.)).

69. In the case of *Strack and Richter v. Germany* (dec.), the Court referred back to the Court's case law on electoral thresholds in the light of the Convention (§ 33). In addition, it addressed the threshold issue for the first time under the active aspect of Article 3 of Protocol No. 1 because the case had been referred to it by voters. The applicants complained about a threshold of 5% of the votes cast at national level for a political party to be able to claim one of the seats allocated to Germany in the European Parliament. In 2011 the German Constitutional Court had declared this legislative provision to be at odds with the Basic Law but had not invalidated the 2009 election results. The Strasbourg Court dismissed the application, finding that the interference was proportionate to the aim pursued (preservation of parliamentary stability) in the light of the broad margin of appreciation afforded to states in such matters. It noted that the European Union expressly permitted member states to fix electoral thresholds of up to 5% of the votes cast and that a considerable number of member states relied on this faculty.

70. The case of *Partei Die Friesen v. Germany* concerned the threshold of 5% of votes cast imposed by the *Land* of Lower Saxony to obtain seats in parliament. The applicant, a political party representing the interests of a minority group in that *Land*, alleged that the 5% threshold breached its right to participate in elections without discrimination and had requested to be exempted from the rule. The issue was thus the scope of the member states' obligations as regards the protection of minorities in the electoral context. The Court took the view that, even when interpreted in the light of the 1998 Framework Convention on the Protection of National Minorities – which laid emphasis on the participation of national minorities in public affairs – the European Convention did not call for a different treatment in favour of minority parties in this context. It found no violation of Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1.

71. In the case of *Yumak and Sadak v. Turkey* [GC], by contrast, the Court found that, in general, a 10% electoral threshold appeared excessive, and concurred with the organs of the Council of Europe, which had recommended that it be lowered. The threshold compelled political parties to make use of stratagems that did not contribute to the transparency of the electoral process. However, the Court was not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it was by correctives and other guarantees – such as the possibility of forming an electoral coalition with other political parties or the role of the Constitutional Court – which had limited its effects in practice, the 10% threshold had had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1.

72. The case of *Cernea v. Romania*\* concerned a ban on members of parties not already represented in parliament from standing as candidates in by-elections. The applicant alleged discrimination in relation to candidates belonging to parties already represented. The Court found that the aim pursued of preserving the structure of parliament and avoiding any fragmentation of the political groups within it could justify the limitation in question (§ 49). It found that the limitation of the applicant's right to stand for by-elections had remained within reasonable proportions, in particular because the by-election had been held for a single seat in parliament and the applicant had been able to stand in the preceding general election (§§ 50-51).

73. Finally, a sudden and unforeseeable change in the rules for calculating votes might infringe Article 3 of Protocol No. 1. The Court found a violation of that article as regards MPs deprived of their seats following an unpredictable departure by the Special Supreme Court from its settled case law concerning the calculation of the electoral quotient. In particular, it took account of the fact that the change in case law, after the elections, had changed the meaning and weight given to blank ballot papers and that it had therefore been liable to alter the will of the electorate as expressed in the ballot box. It had also created a disparity in the manner in which sitting MPs had been elected (*Paschalidis, Koutmeridis and Zaharakis v. Greece*).



## D. Other legitimate aims

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74. Article 3 of Protocol No. 1 does not contain a list of legitimate aims capable of justifying restrictions on the exercise of the rights that it guarantees. Nor does it refer to the “legitimate aims” listed exhaustively in Articles 8 to 11 of the Convention. As a result, the contracting parties are entitled to rely on other aims, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances (*Ždanoka v. Latvia* [GC], § 115).

75. The Court has thus made a distinction between loyalty towards the state and loyalty towards the government. While the need to ensure loyalty towards the state may constitute a legitimate aim justifying restrictions of electoral rights, that is not the case for loyalty towards the government (*Tănase v. Moldova* [GC], § 166). Similarly, the obligation to have sufficient knowledge of the official language may pursue a legitimate aim (*Podkolzina v. Latvia*). The Court has also found that the obligation imposed on candidates in a parliamentary election to submit accurate information on their employment and party membership served to enable voters to make an informed choice with regard to the candidate’s professional and political background and thus constituted a legitimate aim (*Krasnov and Skuratov v. Russia*). By contrast, a candidate’s ineligibility founded solely on an allegedly defective form of a document provided by him was not proportionate to the legitimate aim pursued (*ibid.*, §§ 65-66).

76. The Court also declared inadmissible an application complaining about an obligation for a very traditional Protestant party to open its lists of candidates to women. It found that the progression towards gender equality in the member states precluded the state from supporting the idea that the woman’s role was secondary to that of the man (*Staatkundig Gereformeerde Partij v. the Netherlands* (dec.)).

77. Moreover, in the case of *Melnitchenko v. Ukraine*, the applicant, a Ukrainian national who had refugee status in the USA, had had his candidature for election to the Ukrainian parliament refused on the ground that he had provided false information about his residence. In accordance with the legislation in force, he had given information from his internal passport, which he still possessed, showing that he lived in Ukraine. The Court agreed that it could be acceptable to impose a residence condition for the registration of candidatures. However, it noted that the applicant had complied with domestic law, which did not require continuous residence in the country. In addition, he was in a situation where he could either stay in Ukraine and face a threat of bodily harm, which would have made it impossible for him to exercise his political rights, or leave the country and no longer qualify to stand for election. The Court thus found there had been a violation of Article 3 of Protocol No. 1.

78. In the case of *Antonenko v. Russia* (dec.), a court had banned the applicant from standing in the parliamentary elections the day before the ballot on the grounds that there had been financial irregularities and that the election campaign had been unfair. The applicant did not complain about the actual annulment of his candidature, but about the fact that it had been decided shortly before the polling stations opened. The Court found that the timing in question was compliant with domestic law and had no consequence for a possible appeal, as no further appeal lay against the decision.

79. The Court has also accepted, on a number of occasions, that potential candidates may be excluded on account of the positions held by them. In the case of *Gitonas and Others v. Greece*, legislation precluded certain categories of holders of public office – including salaried public servants and members of staff of public-law entities and public undertakings – from standing for election and being elected in any constituency where they had performed their duties for more than three months in the three years preceding the elections: the disqualification would moreover stand notwithstanding a candidate’s prior resignation, unlike the position with certain other categories of public servant. The Court found that this measure served a dual purpose: to ensure that candidates of different political persuasions enjoyed equal means of influence and to protect the electorate from pressure from public officials. The following year, the Court reiterated that restrictions on the participation of specific categories of local government officers in forms of political activity pursued the legitimate aim of protecting the rights of others, council members and the electorate alike, to effective political democracy at the local level. Having regard to the fact that they only operated for as long as the applicants occupied politically restricted posts, the measures remained proportionate (*Ahmed and Others v. the United Kingdom*). In the case of *Briķe v. Latvia*, the Court added that as the ineligibility of civil servants constituted a proportionate response to the requirement that the civil service be independent, this was all the more true for the ineligibility of judges, the purpose of which was to secure to citizens the rights protected by Article 6 of the Convention. It thus concluded that there had been no impairment of the very essence of the guaranteed rights, as the judge could have resigned from her post in order to stand for election.

80. The case of *Dupré v. France* (dec.) concerned the election of two additional French representatives to the European Parliament in 2011, in the middle of the term, following the entry into force of the Lisbon Treaty. Among three possibilities the French Government had chosen to have the new MEPs appointed by the National Assembly, from among its members, thus preventing the applicant from standing as a candidate. The Court accepted that this form of appointment had pursued a legitimate aim, in view of the risk of low participation, a high cost for only two seats and organisational complexity (§ 25). On account of its limited impact, the Court found that the measure was not disproportionate to the legitimate aim pursued.

81. However, restrictions on the right to stand for election, even if they pursue a legitimate aim, must not have the result of rendering that right ineffective, either because the conditions are introduced too late or too suddenly, or because they are not clear enough. In the case of *Lykourazos v. Greece*, legislation making all professional activity incompatible with the duties of a member of parliament was applied immediately to the current legislature and MPs had to forfeit their seats even though that incompatibility had not been announced prior to their election. There were no grounds of pressing importance that could have justified the immediate application of the absolute disqualification. For the first time the Court relied on the principle of legitimate expectation and thus found a violation of Article 3 of Protocol No. 1. It applied that principle again in *Ekoglasnost v. Bulgaria*. While none of the three new conditions introduced in the electoral legislation raised a problem in itself, on account of their belated introduction the applicant had only had one month to comply. The Court took the view that the conditions of participation in elections imposed on political groups were part of the basic electoral rules. Those conditions should thus have the same stability in time as the other basic elements of the electoral system. The Court has also found that the provisions on the basis of which a former member of the clergy had had his candidature refused were too imprecise and therefore unforeseeable. Consequently, they gave the electoral bodies an excessive margin of appreciation and left too much room for arbitrariness in the application of that restriction (*Seyidzade v. Azerbaijan*).

## E. From the election campaign...

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82. In order for the rights guaranteed by Article 3 of Protocol No. 1 to be effective, their protection cannot remain confined to the candidature itself. The election campaign thus also falls within the scope of the provision.

83. Already in a number of cases concerning Article 10 of the Convention, the Court had emphasised the close relationship between the right to free elections and freedom of expression. It has found that these rights, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other: for example, freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature”. For this reason, it is particularly important in the period preceding an election for opinions and information of all kinds to be permitted to circulate freely (*Bowman v. the United Kingdom*, § 42).

84. As these rights are interdependent, numerous cases concerning election campaigns are examined under Article 10. The Court, for example, found a violation of Article 10 on account of a fine imposed on a television channel for broadcasting an advertisement for a small political party, in breach of legislation prohibiting any political advertising on television (*TV Vest AS and Rogaland Pensjonistparti v. Norway*). However, it found no issue under Article 10 in a case where a warning had been issued by an electoral commission to a female politician for describing a rival candidate as a “thief” in her absence on live television in the run-up to the election (*Vitrenko and Others v. Ukraine*).

85. However, cases concerning, in particular, the distribution of airtime during the pre-election campaigning period may raise issues under Article 3 of Protocol No. 1. In a case concerning the equality of airtime granted to the various candidates, the Court stated that, while Article 3 of Protocol No. 1 enshrined the principle of equal treatment of all citizens in the exercise of their electoral rights, it did not guarantee, as such, any right for a political party to be granted airtime on radio or television during the pre-election campaign. However, an issue may indeed arise in exceptional circumstances, for example, if in the run-up to an election one party were denied any kind of party political broadcast while other parties were granted slots for that purpose (*Partija “Jaunie Demokrāti” and Partija “Mūsu Zeme” v. Latvia* (dec.)).

86. In the case of *Communist Party of Russia and Others v. Russia*, the Court addressed the question of whether the state had a positive obligation under Article 3 of Protocol No. 1 to ensure that coverage by regulated media was objective and compatible with the spirit of “free elections”, even in the absence of direct evidence of deliberate manipulation. It found that the existing system of electoral remedies was sufficient to satisfy the state’s positive obligation of a procedural nature. As to the substantive aspect of the obligation and the allegation that the state should have ensured neutrality of the audiovisual media, it took the view that certain

steps had been taken to guarantee some visibility to opposition parties and candidates on TV and to secure the editorial independence and neutrality of the media. These arrangements had probably not secured *de facto* equality, but it could not be considered established that the state had failed to meet its positive obligations in this area to such an extent as to amount to a violation of Article 3 of Protocol No. 1.

87. In the case of *Oran v. Turkey*, the applicant had complained that, as an independent candidate, he had not been able to benefit from nationwide electoral broadcasting on Turkish radio and television, unlike political parties. The Court took the view that, unlike political parties, the applicant, as an independent candidate, had only to address the constituency in which he was standing. In addition, he had not been prevented from using all the other available methods of electioneering, which were accessible to all the unaffiliated independent candidates at the relevant time. The Court thus found that there had been no violation of Article 3 of Protocol No. 1.

## F. ...to the exercise of office

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89. From 1984 onwards the European Commission of Human Rights stated that it was not enough that an individual had the right to stand for election; he must also have a right to sit as a member once he has been elected by the people. To take the opposite view would render the right to stand for election meaningless (*M. v. the United Kingdom*, Commission decision). In that same case, however, it took the view that the inability for an elected MP to take up his seat on the grounds that he was already a member of a foreign legislature was a restriction compatible with Article 3 of Protocol No. 1.

90. In three cases against Turkey the Court examined the consequences for MPs of the dissolution of the political parties to which they belonged. In the case of *Sadak and Others v. Turkey (No. 2)*, a political party was dissolved for breaching the territorial integrity and unity of the state. The MPs belonging to that party automatically forfeited their seats. The Court took the view that interference with the freedom of expression of an opposition MP required particularly stringent scrutiny. The loss by the applicants of their seats in parliament was automatic and independent of their political activities in which they engaged on a personal basis. It had thus been an extremely severe measure and one that was disproportionate to any legitimate aim invoked.

91. In the case of *Kavakçı v. Turkey*, temporary limitations had been imposed on the applicant's political rights on account of the final dissolution of the party to which she belonged. The Court took the view that those measures had the purpose of preserving the secular character of the Turkish political regime and that, having regard to the importance of that principle for the democratic regime in Turkey, the measure pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. As to the proportionality of the sanction, however, the constitutional provisions concerning the dissolution of a political party, as then in force, had a very broad scope. All the acts and remarks of party members could be imputable to the party in finding it to be a centre of anti-constitutional activity and deciding on its dissolution. No distinction was made between the various degrees of involvement of members in the impugned activities. In addition, certain party members who were in a comparable situation to that of the applicant, especially the President and Vice-President, had not been penalised. Consequently, the Court found that the sanction was not proportionate and that there had been a violation of Article 3 of Protocol No. 1.

92. In another case concerning an MP from the same party who had also lost his seat, the Court again found a violation of Article 3 of Protocol No. 1 but noted with interest the adoption of a constitutional amendment reinforcing the status of MPs and probably having the effect of making the disqualification of MPs on such grounds less frequent (*Sobacı v. Turkey*).

93. In the case of *Lykourazos v. Greece*, the Court had found that the new professional incompatibility applicable to MPs had not been announced prior to the elections and had surprised both the applicant and those who had voted for him, during his term of office. It took the view that in assessing the applicant's election under the new Article of the Constitution which entered into force in 2003, without taking account of the fact that his election had taken place beforehand perfectly legally, the judge had stripped the applicant of his seat and deprived his voters of the candidate whom they had freely and democratically chosen to represent them for four years, in disregard of the principle of legitimate expectation. Similarly, in the case of *Paschalidis, Koutmeridis and Zaharakis v. Greece*, the Court had found that an unforeseeable departure from precedent, after the elections, concerning the calculation of the electoral quotient, with the effect of disqualifying a number of elected MPs, had entailed a violation of Article 3 of Protocol No. 1.

94. In the case of *Paunović and Milivojević v. Serbia*, the Court had occasion to rule on the practice of political parties of using undated resignation letters signed, before taking up office, by their members elected to

parliament; the party is thus able to remove those members from office at any time and against their will. The Court began by taking the view that, even though the resignation letter would be presented by the party, only parliament was entitled to withdraw a seat. It was therefore the state that deprived the MP of his or her seat by accepting the resignation. The application of an MP who had lost his seat was thus admissible *ratione personae*. The Court then found that the impugned practice was at odds with domestic law, which required such resignations to be submitted by the MP in person. There had thus been a violation of Article 3 of Protocol No. 1. The case of *Occhetto v. Italy* (dec.) concerned the relinquishment of a seat in the European Parliament. After signing a document relinquishing his seat, as a result of an agreement with the co-founder of the political movement to which he belonged, the applicant had changed his mind. However, the candidate next on the list had already taken up the seat in question. The Court found that, following an election, a candidate was entitled to take up a seat in a legislature, but had no obligation to do so. Any candidate could renounce, for political or personal reasons, the office to which he or she was elected, and the decision to register such a renouncement could not be regarded as contrary to the principle of universal suffrage. It added that the refusal to accept the withdrawal of the applicant's relinquishment had pursued the legitimate aims of legal certainty in the electoral process and the protection of the rights of others, in particular the rights of the candidate next on the list. The applicant's wish had been expressed in writing and in unequivocal terms, and he had stipulated that his relinquishment was final. Lastly, the domestic proceedings – in compliance with EU law – had enabled him to submit the arguments that he deemed useful for his defence. The Court thus found that there had been no violation of Article 3 of Protocol No. 1.

#### IV. PROCESSING OF ELECTION RESULTS

95. The post-election periods, including the counting of votes and the recording and transmission of the results, were considered in the *Davydov and Others v. Russia* case, which concerned alleged anomalies in federal legislative and municipal elections. The applicants had participated in these elections in various capacities: they were all registered on electoral rolls, and some had also stood for election to the legislative assembly (so the case concerned both the active and passive aspects of the right to free elections), and others were members of electoral commissions or observers.

96. Referring to the recommendations of the Venice Commission, the Court found that these post-election phases must be surrounded by precise procedural safeguards; the process must be transparent and open, and observers from all parties must be allowed to participate, including opposition representatives. It pointed out, however, that Article 3 of Protocol No. 1 was not conceived as a code on electoral matters designed to regulate all aspects of the electoral process. Thus, the Court's level of scrutiny in a given case depended on the aspect of the right to free elections. Tighter scrutiny should be reserved for any departures from the principle of universal suffrage, but a broader margin of appreciation could be afforded to states where the measures prevented candidates from standing for elections. A still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation. A mere mistake or irregularity at this technical stage would not, per se, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration were complied with. The concept of free elections would be put at risk only if (i) there is evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, for instance through gross distortion of the voters' intent; and (ii) where such complaints receive no effective examination at the domestic level (although the Court would accept reasonable restrictions on the individual voters' ability to challenge the results, such as a quorum of voters) (§§ 283-288).

97. In that case the Court found there had been a violation of Article 3 of Protocol No. 1 for the following reasons: the applicants had presented, both to the domestic authorities and to the Court, an arguable claim that the fairness of the elections had been seriously compromised by the procedure in which the votes had been recounted (§§ 310-311). Such irregularities could lead to gross distortion of the voters' intent in all the constituencies concerned. But the applicants had not had their complaints about the recount process effectively examined by the domestic authorities, i.e. the electoral commissions, the public prosecutor, the commission of inquiry or the courts (§§ 336-337).

#### V. ELECTORAL DISPUTES

98. Cases concerning electoral-related disputes have been numerous. This issue cannot, however, be examined under Article 6 of the Convention, which the Court has found inapplicable. It took the view that an applicant's right to stand for election to the French National Assembly and to keep his seat was a political one and not

a “civil” one within the meaning of Article 6 § 1, such that disputes relating to the arrangements for the exercise of that right lay outside the scope of Article 3 of Protocol No. 1 (*Pierre-Bloch v. France*, § 50). Nor was the criminal limb of Article 6 engaged as regards penalties imposed for non-compliance with electoral rules (*ibid.*, § 61). In the case of *Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia*, the applicant NGO had been an observer during parliamentary elections. Following a subsequent dispute as to the failure of the Central Election Commission to transmit various documents, the Court took the view that the outcome of the proceedings in question had not been decisive of the NGO’s civil rights and that it did not therefore fall within the scope of Article 6 § 1 of the Convention.

99. However, on several occasions, the lack of an effective remedy in the context of the electoral process has been examined under Article 13 of the Convention. The Court has indicated that in electoral matters only those remedies that are capable of ensuring the proper functioning of the democratic process may be regarded as effective (*Petkov and Others v. Bulgaria*). In the case of *Petkov and Others v. Bulgaria*, the applicants’ names had been struck out of the lists of candidates only 10 days before the election day, and on the basis of legislation passed less than three months earlier. Those strike-out decisions were subsequently declared null and void but, as the electoral authorities had not reinstated the applicants as candidates, they were unable to stand for election. The Court took the view that, since the remedy available in the context of the elections offered only pecuniary redress, it could not be regarded as effective under Article 13 of the Convention. In *Grosaru v. Romania*, the Court noted that the applicant, who was an unsuccessful candidate in legislative elections, had not been able to obtain any judicial review of the interpretation of the impugned electoral legislation and it found a violation of Article 13 taken together with Article 3 of Protocol No. 1. The Court also found a violation of Article 13 in conjunction with Article 3 of Protocol No. 1 in the case of *Paunović and Milivojević v. Serbia* concerning the lack of an effective possibility to challenge the illegal removal of an MP from his seat (§§ 68-72).

100. The existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections. Such a system ensures an effective exercise of individual rights to vote and to stand for election, maintains general confidence in the state’s administration of the electoral process and constitutes an important device at the state’s disposal in achieving the fulfilment of its positive obligation under Article 3 of Protocol No. 1 to hold democratic elections (*Uspaskich v. Lithuania*, § 93).

101. Where a remedy does exist, any deficiencies may be raised before the Court under Article 3 of Protocol No. 1. Such deficiencies may constitute a violation of that article when they call into question the integrity of the electoral process. The decision-making process concerning ineligibility or a dispute as to election results must be surrounded by certain minimum safeguards against arbitrariness (*Davydov and Others v. Russia*, § 288). In particular, the findings in question must be reached by a body that can provide minimum guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide: it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure must be such as to guarantee a fair, objective and sufficiently reasoned decision and prevent any abuse of power on the part of the relevant authority (*Podkolzina v. Latvia*, § 35; *Kovach v. Ukraine*, §§ 54-55; *Kerimova v. Azerbaijan*, §§ 44-45; and *Riza and Others v. Bulgaria*, § 144). Where it engages in such an examination, the Court confines itself, however, to ascertaining whether the decision rendered by the domestic body was arbitrary or manifestly unreasonable in nature (*ibid.*, § 144; *Kerimli and Alibeyli v. Azerbaijan*, §§ 38-42; *Davydov and Others v. Russia*, § 288).

102. Decisions to invalidate an election must reflect a genuine inability to establish the wishes of the electors (*Kovach v. Ukraine*). In the *Kerimova v. Azerbaijan* case the Court found that tampering by two election officials had not succeeded in altering the final result of the election, in which the applicant had been successful. The national authorities had, nevertheless, invalidated the results in breach of domestic electoral law and without taking into account the limited impact of the effects of the tampering. By doing so, the authorities had essentially helped the officials to obstruct the election. This decision had arbitrarily infringed the applicant’s electoral rights by depriving her of the benefit of election to parliament. It had also shown a lack of concern for the integrity and effectiveness of the electoral process that could not be considered compatible with the spirit of the right to free elections. The role of the courts is not to modify the expression of the people. Thus, in two cases (*I.Z. v. Greece*, Commission decision; and *Babenko v. Ukraine* (dec.)), the Convention organs examined complaints by unsuccessful candidates who alleged that the electoral processes had been unfair, but dismissed them for lack of any real damage with regard to the outcome of the election. In *Riza and Others v. Bulgaria* the results of 23 polling stations set up abroad had been invalidated on account of alleged anomalies, depriving an MP of his seat. The Court examined both the interference with the voting rights of 101 electors and the right to stand for election of the MP and the party he represented. It found that only purely formal grounds had been given

to invalidate the election in a number of polling stations. In addition, the circumstances relied on by the court to justify its decision were not provided for, in a sufficiently clear and foreseeable manner, in the domestic law, and it had not been shown that they would have altered the choice of the voters or distorted the result of the election. In addition, electoral law did not provide for the possibility of organising fresh elections in the polling stations where the ballot had been invalidated – contrary to the Venice Commission’s Code of Good Practice in Electoral Matters – which would have reconciled the legitimate aim pursued by the annulment of the election results, namely the preservation of the legality of the election process, with the subjective rights of the electors and the candidates in parliamentary elections. Consequently, the Court found that there had been a violation of Article 3 of Protocol No. 1. Decisions to invalidate a ballot must therefore be based on a genuine inability to establish the wishes of the electors.

103. Nevertheless, states must ensure that arguable complaints by individuals concerning election irregularities are effectively addressed and that domestic decisions are sufficiently reasoned.

104. Noting the existence of arguable complaints of serious electoral anomalies in the counting of votes, the Court found that the domestic remedy should provide sufficient guarantees against arbitrariness. Failure to ensure effective examination of such arguable complaints would constitute violations of Article 3 of Protocol No. 1 (*Davydov and Others v. Russia*, §§ 288 and 335). In that case, none of the bodies involved – the electoral commission, public prosecutor or the courts – had carried out a proper examination of the reasons underlying the applicants’ complaints.

105. Relying in particular on the Venice Commission’s Code of Good Practice in Electoral Matters, the Court has had occasion to find that national authorities had given excessively formalistic reasons to avoid examining the substance of electoral complaints. The fact that there was a wide difference in votes between candidates did not matter when it came to examining, independently, the extent of the irregularities, before determining their effects on the overall result of the election (*Namat Aliyev v. Azerbaijan*).

## LIST OF CITED CASES

The case law cited in this guide refers to judgments or decisions delivered by the Court and to decisions or reports of the European Commission of Human Rights (“the Commission”).

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

Chamber judgments that were not final within the meaning of Article 44 of the Convention when this update was published are marked with an asterisk (\*) in the list below. Article 44 § 2 of the Convention provides:

The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.

In cases where a request for referral is accepted by the Grand Chamber panel, it is the subsequent Grand Chamber judgment, not the Chamber judgment, that becomes final.

The hyperlinks to the cases cited in the electronic version of the guide are directed to the HUDOC database (<http://hudoc.echr.coe.int>), which provides access to the case law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note) and of the Commission (decisions and reports), and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than 30 non-official languages, and links to around 100 online case-law collections produced by third parties.

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*Communist Party of Russia and Others v. Russia*, No. 29400/05, 19 June 2012

*Cumhuriyet Halk Partisi v. Turkey*, No. 19920/13, ECHR 2016

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*Davydov and Others v. Russia*, No. 75947/11, ECHR 2017

*Dicle and Sadak v. Turkey*, No. 48621/07, 16 June 2015

*Dimitras and Others v. Greece* (dec.), Nos. 59573/10 and 65211/09, 4 July 2017

*Doyle v. the United Kingdom* (dec.), No. 30158/06, 6 February 2007

*Dunn and Others v. the United Kingdom* (dec.), Nos. 566/10 and 130 others, 13 May 2014

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*I.Z. v. Greece*, No. 18997/91, Commission decision of 28 February 1994, D.R. No. 76-A, p. 65

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*Kavakçı v. Turkey*, No. 71907/01, 5 April 2007

*Kerimli and Alibeyli v. Azerbaijan*, Nos. 18475/06 and 22444/06, 10 January 2012

*Kerimova v. Azerbaijan*, No. 20799/06, 30 September 2010

*Kovach v. Ukraine*, No. 39424/02, ECHR 2008

*Krasnov and Skuratov v. Russia*, Nos. 17864/04 and 21396/04, 19 July 2007

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*Labita v. Italy* [GC], No. 26772/95, ECHR 2000-IV



*Linkov v. the Czech Republic*, No. 10504/03, 7 December 2006

*Luksch v. Germany*, No. 35385/97, Commission decision of 21 May 1997, D.R. no 89-B, p. 175

*Lykourazos v. Greece*, No. 33554/03, ECHR 2006-VIII

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*M. v. the United Kingdom*, No. 10316/83, Commission decision of 7 March 1984, D.R. 37, p. 129

*Malarde v. France* (dec.), No. 46813/99, 5 September 2000

*Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113

*Matthews v. the United Kingdom* [GC], No. 24833/94, ECHR 1999-I

*Melnitchenko v. Ukraine*, No. 17707/02, ECHR 2004-X

*Mihaela Mihai Neagu v. Romania* (dec.), No. 66345/09, 6 March 1994

*Mółka v. Poland* (dec.), No. 56550/00, ECHR 2006-IV

*Moohan and Gillon v. the United Kingdom* (dec.), Nos. 22962/15 and 23345/15, 13 June 2017

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*Namat Aliyev v. Azerbaijan*, No. 18705/06, 8 April 2010

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*Occhetto v. Italy* (dec.), No. 14507/07, 12 November 2013

*Oran v. Turkey*, Nos. 28881/07 and 37920/07, 15 April 2014

*Others v. Turkey* [GC], Nos. 41340/98 and 3 others, ECHR 2003-II

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*Paksas v. Lithuania* [GC], No. 34932/04, ECHR 2011

*Partei Die Friesen v. Germany*, No. 65480/10, 28 January 2016

*Parti nationaliste basque – Organisation régionale d’Iparralde v. France*, No. 71251/01, ECHR 2007-II

*Partija “Jaunie Demokrāti” and Partija “Mūsu Zeme” v. Latvia* (dec.), Nos. 10547/07 and 34049/07, 29 November 2007

*Paschalidis, Koutmeridis and Zaharakis v. Greece*, Nos. 27863/05 and 2 others, 10 April 2008

*Paunović and Milivojević v. Serbia*, No. 41683/06, 24 May 2016

*Petkov and Others v. Bulgaria*, Nos. 77568/01 and 2 others, 11 June 2009

*Pierre-Bloch v. France*, No. 24194/94, 21 October 1997

*Podkolzina v. Latvia*, No. 46726/99, ECHR 2002-II

*Polacco and Garofalo v. Italy*, No. 23450/94, Commission decision of 15 September 1997

*Py v. France*, No. 66289/01, ECHR 2005-I

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*Riza and Others v. Bulgaria*, Nos. 48555/10 and 48377/10, 13 October 2015

*Russian Conservative Party of Entrepreneurs and Others v. Russia*, Nos. 55066/00 and 55638/00, 11 January 2007

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*Sadak and Others v. Turkey (No. 2)*, Nos. 25144/94 and 8 others, ECHR 2002-IV  
*Salleras Llinares v. Spain (dec.)*, No. 52226/99, ECHR 2000-XI  
*Scoppola v. Italy (No. 3) [GC]*, No. 126/05, 22 May 2012  
*Sejdić and Finci v. Bosnia and Herzegovina [GC]*, Nos. 27996/06 and 34836/06, ECHR 2009  
*Sevinger v. the Netherlands (dec.)*, Nos. 17173/07 and 17180/07, 6 September 2007  
*Seyidzade v. Azerbaijan*, No. 37700/05, 3 December 2009  
*Shindler v. the United Kingdom*, No. 19840/09, 7 May 2013  
*Sitaropoulos and Giakoumopoulos v. Greece [GC]*, No. 42202/07, ECHR 2012  
*Sobacı v. Turkey*, No. 26733/02, 29 November 2007  
*Socialist Party and Others v. Turkey*, 25 May 1998, Reports of Judgments and Decisions 1998-III  
*Söyler v. Turkey*, No. 29411/07, 17 September 2013  
*Staatkundig Gereformeerde Partij v. the Netherlands (dec.)*, No. 58369/10, 10 July 2012  
*Strack and Richter v. Germany (dec.)*, Nos. 28811/12 and 50303/12, 5 July 2016  
*Sukhovetsky v. Ukraine*, No. 13716/02, ECHR 2006-VI

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*Tahirov v. Azerbaijan*, No. 31953/11, 11 June 2015  
*Tănase v. Moldova [GC]*, No. 7/08, ECHR 2010  
*Timke v. Germany*, No. 27311/95, Commission decision of 11 September 1995  
*TV Vest AS and Rogaland Pensjonistparti v. Norway*, No. 21132/05, ECHR 2008

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*United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I  
*Uspaskich v. Lithuania*, No. 14737/08, 20 December 2016

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*Vito Sante Santoro v. Italy*, No. 36681/97, ECHR 2004-VI  
*Vitrenko and Others v. Ukraine*, No. 23510/02, 16 December 2008

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*X. v. Germany*, No. 2728/66, Commission decision of 6 October 1967, Collection 25, pp. 38-41  
*X. v. the United Kingdom*, No. 7140/75, Commission decision of 6 October 1976, D.R. 7, p. 95  
*X. v. the United Kingdom*, No. 7566/76, Commission decision of 11 December 1976, D.R. 9, p. 121  
*X. v. the United Kingdom*, No. 7730/76, Commission decision of 28 February 1979, D.R. 15, p. 137  
*X. v. the United Kingdom*, No. 8873/80, Commission decision of 13 May 1982, D.R. 28, p. 99  
*X. and Others v. Belgium*, No. 6837/74, Commission decision of 2 October 1975, D.R. 3, p. 137  
*Xuereb v. Malta*, No. 52492/99, 15 June 2000

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*Yumak and Sadak v. Turkey* [GC], No. 10226/03, ECHR 2008

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*Ždanoka v. Latvia* [GC], No. 58278/00, ECHR 2006-IV

*Zornić v. Bosnia and Herzegovina*, No. 3681/06, 15 July 2014

## Appendix IV

# Aspects of election interference by means of computer systems covered by the Budapest Convention

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### INTRODUCTION

The Cybercrime Convention Committee (T-CY) at its 8th Plenary (December 2012) decided to issue guidance notes aimed at facilitating the effective use and implementation of the Budapest Convention on Cybercrime, also in the light of legal, policy and technological developments.

The guidance notes represent the common understanding of the parties to this treaty regarding the use of the convention.

Interference with elections through malicious cyber activities against computers and data used in elections and election campaigns undermines free, fair and clean elections and trust in democracy. Disinformation operations, as experienced in particular since 2016, may make use of malicious cyber activities and may have the same effect. Domestic election procedures may need to be adapted to the realities of the information society, and computer systems used in elections and related campaigns need to be made more secure.

In this context, greater efforts need to be undertaken to prosecute such interference where it constitutes a criminal offence: an effective criminal justice response may deter election interference and reassure the electorate with regard to the use of information and communication technologies in elections.

This note addresses how the articles of the convention may apply to aspects of election interference by means of computer systems.

The substantive criminal offences of the convention may be carried out as acts of election interference or as preparatory acts facilitating such interference. In addition, the domestic procedural and international mutual legal assistance tools of the convention are available for investigations and prosecutions related to election interference. The scope and limits of procedural powers and tools for international co-operation are defined by Articles 14.2 and 25.1 of the Budapest Convention.

### Article 14.2

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2. Except as specifically provided otherwise in Article 21, each Party shall apply the powers and procedures referred to in paragraph 1 of this article to:

- a. the criminal offences established in accordance with Articles 2 through 11 of this Convention;
- b. other criminal offences committed by means of a computer system; and
- c. the collection of evidence in electronic form of a criminal offence.

### Article 25.1

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The Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.

The procedural powers of the Convention are subject to the conditions and safeguards of Article 15.

### RELEVANT PROVISIONS OF THE CONVENTION ON CYBERCRIME (ETS No.185)

#### Procedural provisions

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The convention's procedural powers (Articles 14-21) may be used in a specific criminal investigation or proceeding in any type of election interference, for which Article 14 provides.

The specific procedural measures can be very useful in criminal investigations of election interference. For example, in cases of election interference, a computer system may be used to commit or facilitate an offence, the evidence of that offence may be stored in electronic form, or a suspect may be identifiable through subscriber information, including an internet protocol address. Similarly, illegal political financing may be traceable via preserved e-mail, voice communications between conspirators may be captured pursuant to properly authorised interception, and misuse of data may be illustrated by electronic trails.

Thus, in criminal investigations of election interference, parties may use the expedited preservation of stored computer data, production orders, search and seizure of stored computer data and other tools to collect electronic evidence needed for the investigation and prosecution of such offences relating to election interference.

## International mutual legal assistance provisions

The convention's international co-operation powers (Articles 23-35) are of similar breadth and may assist parties in investigations of election interference. Thus, parties shall make available expedited preservation of stored computer data, production orders, and search and seizure of stored computer data, as well as other international co-operation provisions.

## Substantive criminal law provisions

Finally, as noted above, election interference may involve the following types of conduct, when done without right, as criminalised by the Convention on Cybercrime. The T-CY emphasises that the examples below are merely examples – that is, since election interference is a developing phenomenon, it may appear in many forms not listed below. However, the T-CY expects that the Convention on Cybercrime is sufficiently flexible to address them.

Relevant Articles	Examples
Article 2 – Illegal access	A computer system may be illegally accessed to obtain sensitive or confidential information related to candidates, campaigns, political parties or voters.
Article 3 – Illegal interception	Non-public transmissions of computer data to, from, or within a computer system may be illegally intercepted to obtain sensitive or confidential information related to candidates, campaigns, political parties or voters.
Article 4 – Data interference	Computer data may be damaged, deleted, deteriorated, altered, or suppressed to modify websites, to alter voter databases or to manipulate results of votes such as by tampering with voting machines.
Article 5 – System interference	The functioning of computer systems used in elections or campaigns may be hindered to interfere with campaign messaging, hinder voter registration, disable the casting of votes or prevent the counting of votes through denial of service attacks, malware or other means.
Article 6 – Misuse of devices	The sale, procurement for use, import, distribution or other acts making available computer passwords, access codes or similar data by which computer systems may be accessed may facilitate election interference such as theft of sensitive data from political candidates, parties or campaigns.
Article 7 – Computer-related forgery	Computer data (for example the data used in voter databases) may be input, altered, deleted or suppressed with the result that inauthentic data is considered or acted upon for legal purposes as if it were authentic. For example, some countries require election campaigns to make public financial disclosures. Forgery of computer data could create the impression of incorrect disclosures or hide questionable sources of campaign funds.
Article 11 – Attempt, aiding and abetting	Crimes specified in the treaty may be attempted, aided or abetted in furtherance of election interference.
Article 12 – Corporate liability	Crimes covered by Articles 2-11 of the convention in furtherance of election interference may be carried out by legal persons that would be liable under Article 12.

Article 13 – Sanctions	<p>Crimes covered by the convention may pose a threat to individuals and to society, especially when the crimes are directed against fundamentals of political life such as elections. Criminal actions and their effects may differ in different countries, but election interference may undermine trust in democratic processes, change the outcome of an election, require the expense and upheaval of a second election or cause physical violence between election partisans and communities.</p> <p>A party may provide in its domestic law a sanction that is unsuitably lenient for election-related acts in relation to Articles 2-11, and it may not permit the consideration of aggravated circumstances or of attempt, aiding or abetting. This may mean that parties need to consider amendments to their domestic law. Parties should ensure, pursuant to Article 13, that criminal offences related to such acts “are punishable by effective, proportionate and dissuasive sanctions, which include deprivation of liberty”.</p> <p>Parties may also consider aggravating circumstances, for example, if such acts affect an election significantly or cause deaths or physical injuries or significant material damage.</p>
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### **T-CY STATEMENT**

The T-CY agrees that the substantive offences in the convention may also be acts of election interference as defined in applicable law, that is, offences against free, fair and clean elections.

The substantive crimes in the convention may be carried out to facilitate, participate in or prepare acts of election interference.

The procedural and mutual legal assistance tools in the convention may be used to investigate election interference, its facilitation, participation in it or preparatory acts.

## Appendix V

# Protection of electoral rights in the case law of the European Court of Human Rights

Presented by Dmytro Tretyakov

### EUROPEAN COURT OF HUMAN RIGHTS

The majority of international treaties have certain control mechanisms to monitor compliance of the state parties with their international obligations under the given treaty. The European Convention on Human Rights (“the Convention”) has a unique control mechanism – the European Court of Human Rights (“the Court”) that was set up to ensure that the member states of the Council of Europe meet their obligations under the European Convention on Human Rights. The Court is competent to receive and examine individual applications and also give judgments and decisions that are obligatory for execution by the states concerned.

### EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention has a number of rights relevant to the electoral process:

- ▶ right to free elections of the legislature (Article 3 of Protocol No. 1);
- ▶ right to freedom of association (Article 11);
- ▶ right to freedom of expression (Article 10);
- ▶ right to freedom of assembly (Article 11);
- ▶ prohibition of discrimination (Article 14 and Article 1 of Protocol No. 12);
- ▶ other rights that can be affected in the context of elections (for example, Article 8).

The Convention guarantees a wide range of rights and freedoms, the observance of which may come into play during the electoral process. The most obvious examples of such rights are freedom of expression, which covers, among other things, all kinds of political discussions during the election campaign, and freedom of association, which guarantees the right to form and join political parties, who are the key players in elections (*Şükran Aydın and Others v. Turkey*, Nos. 49197/06 et al., 22 January 2013; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], Nos. 41340/98 et al., ECHR 2003II)

### ELECTIONS OF THE LEGISLATURE

#### Article 3 of Protocol No. 1 Right to free elections

The High Contracting Parties undertake 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.

The European Court always underlines the importance of this provision for the protection of human rights in general. In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court noted that:

47. According to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by “an effective political democracy”. Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system.

### PECULIARITIES OF THE WORDING OF ARTICLE 3 OF PROTOCOL NO. 1

*Hirst v. the United Kingdom (No. 2)* [GC], No. 74025/01, ECHR 2005IX

Unlike other provisions of the Convention, this Article is formulated impersonally. If other articles start with “Everyone has a right...” or “Nobody shall be...”, Article 3 of Protocol No. 1 talks about the obligation of the states to hold free elections with no individual rights being mentioned. It may give the impression that no individual rights can be derived from this provision, but this is not the case. The Court has constantly held that, as with any other article of the Convention, this article implies protection of individual rights in elections of the legislature. The Court’s approach is very well summarised in the case of *Hirst v. the United Kingdom (No. 2)* [GC], No. 74025/01, ECHR 2005IX:

56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.

57. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A No. 113, pp. 22-23, §§ 46-51). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States’ commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference (*ibid.*, § 50).

## DIFFICULTIES OF APPLICATION

*Russian Conservative Party of Entrepreneurs and Others v. Russia*,  
Nos. 55066/00 and 55638/00, 11 January 2007,  
*Georgian Labour Party v. Georgia*, No. 9103/04, ECHR 2008

Despite the fact that the Court confirmed that Article 3 of Protocol No. 1 guarantees individual rights, not every violation of electoral law can be considered as a violation of the right of everyone. For instance, cancellation of registration of a political party violates the rights of this party, but not of its supporters who wanted to vote for the party (*Russian Conservative Party of Entrepreneurs and Others v. Russia*, Nos. 55066/00 and 55638/00, 11 January 2007).

In the case of *Georgian Labour Party v. Georgia* (No. 9103/04, ECHR 2008), the Court established that there were problems with registration of voters and composition of electoral commissions, but found no violation as the applicant failed to demonstrate that the mentioned shortcomings amounted to a breach of the applicant’s rights under Article 3 of Protocol No. 1 in the circumstances of the case. Thus, the execution of the judgment in this case concerned only the matters in which the Court found a violation, that is, the annulment of the election results in some constituencies, and not all shortcomings established in the electoral system.

## SCOPE OF APPLICATION

*Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113;  
*Vito Sante Santoro v. Italy*, No. 36681/97, ECHR 2004 VI;  
*Etxebarria and Others v. Spain*, Nos. 35579/03, 35613/03, 35626/03 and 35634/03, 30 June 2009;  
*Davydov and Others v. Russia*, No. 75947/11, 30 May 2017  
*Lindsay v. the United Kingdom*, application No. 8364/78, decision of  
8 March 1979, Decisions and Reports (DR) 15, p. 247;  
*Matthews v. the United Kingdom* [GC], No. 24833/94, ECHR 1999 I;  
*Demirtaş v. Turkey*, No. 14305/17, § 234, 20 November 2018

Article 3 of Protocol No. 1 guarantees only the “choice of the legislature” in compliance with the set principles. However, the word “legislature” does not necessarily mean the national parliament. That word is interpreted by the Court autonomously (meaning regardless of the classification in the domestic legislation or elsewhere) in the light of the constitutional structure of the state in question. What the Court mainly looks at is whether the competence and powers vested in the respective authority are wide enough to make it a constituent part



of the legislature in the meaning of Article 3 of Protocol No. 1. The Court considered, for instance, that the Flemish Council in Belgium had sufficient competence and powers to make it a constituent part of the Belgian “legislature”, alongside the French Community Council and the Walloon Regional Council. Likewise, the Court held that the Constitution of Italy vested the regional councils with competence and powers wide enough to make them a constituent part of the legislature in addition to the parliament. Accordingly, regional elections in Belgium and Italy, as well as in Spain and Russia, were considered to fall within the ambit of Article 3 of Protocol No. 1 (*Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113; *Vito Sante Santoro v. Italy*, No. 36681/97, ECHR 2004VI; *Etxebarria and Others v. Spain*, Nos. 35579/03, 35613/03, 35626/03 and 35634/03, 30 June 2009; *Davydov and Others v. Russia*, No. 75947/11, 30 May 2017).

The Convention bodies also examined applicability of Article 3 of Protocol No. 1 to elections to the European Parliament. Development of the case law on this matter demonstrates an important principle of interpretation of the Convention, according to which the Convention is “a living instrument” that evolves and changes together with the evolution of society. In 1979, in the case of *Lindsay v. the United Kingdom* (application No. 8364/78, decision of 8 March 1979, Decisions and Reports (DR) 15, p. 247), the European Commission, another body of the Convention control mechanism that existed before 1998, decided that the European Parliament was a purely consultative organ and, thus, the elections to it fell outside the scope of application of Article 3 of Protocol No. 1. Twenty years later, in the case of *Matthews v. the United Kingdom* [GC] (No. 24833/94, ECHR 1999I), the European Court took into account the evolution of the European Parliament after adoption of the Treaty of Maastricht and concluded that the European Parliament was “sufficiently involved in the specific legislative processes leading to the passage of legislation” and “in the general democratic supervision of the activities of the European Community, to constitute part of the ‘legislature’ of Gibraltar for the purposes of Article 3 of Protocol No. 1”.

It is also worth mentioning that Article 3 of Protocol No. 1 applies to the careers of MPs, both during their exercise of professional duties (*Demirtaş v. Turkey*, No. 14305/17, 20 November 2018) or when resigning (*G.K. v. Belgium*, No. 58302/10, 21 May 2019).

## NON-APPLICABILITY OF ARTICLE 3 OF PROTOCOL NO. 1

*Cherepkov v. Russia* (dec.), No. 51501/99, ECHR 2000 I;  
*Mółka v. Poland* (dec.), No. 56550/00, ECHR 2006 IV ;  
*Gorizdra v. Moldova* (dec.), No. 53180/99, 2 July 2002;  
*Krivobokov v. Ukraine* (dec.), No. 38707/04, 19 February 2013;  
*Hilbe v. Liechtenstein* (dec.), No. 31981/96, ECHR 1999 VI;  
*Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, ECHR 2009;  
*Zornić v. Bosnia and Herzegovina*, No. 3681/06, 15 July 2014;  
*Pilav v. Bosnia and Herzegovina*, No. 41939/07, 9 June 2016)

Article 3 of Protocol No. 1 does not apply to local elections, as well as to regional elections in the majority of states (*Cherepkov v. Russia* (dec.), No. 51501/99, ECHR 2000I; *Mółka v. Poland* (dec.), No. 56550/00, ECHR 2006IV; *Gorizdra v. Moldova* (dec.), No. 53180/99, 2 July 2002) and to presidential elections (*Krivobokov v. Ukraine* (dec.), No. 38707/04, 19 February 2013), as well as referenda (*Hilbe v. Liechtenstein* (dec.), No. 31981/96, ECHR 1999VI). Nevertheless, in the case of discriminatory limitation of election rights, Article 1 of Protocol No. 12 may come into play (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, ECHR 2009; *Zornić v. Bosnia and Herzegovina*, No. 3681/06, 15 July 2014; *Pilav v. Bosnia and Herzegovina*, No. 41939/07, 9 June 2016).

## LIMITATION OF RIGHTS IN ELECTORAL MATTERS

Active and passive electoral rights are not absolute.

As the Court noted in the case of *Mathieu-Mohin and Clerfayt v. Belgium*:

...since Article 3 recognises them [electoral rights] without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded

under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with ... (*Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A No. 113)

Unlike Articles 8-11 of the Convention, Article 3 of Protocol No. 1 does not specify “legitimate aims” of restrictions on the rights guaranteed by it. However, those rights are not absolute, and the Court has developed in its case law the concept of “implied limitations” under Article 3 of Protocol No. 1.

According to this concept, the contracting states are free to rely on any aim to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case. For example, in the case of *Campagnano v. Italy* (No. 77955/01, ECHR 2006 IV) the Court held that the suspension of the applicant’s electoral rights pending the civil bankruptcy proceedings against her had no purpose other than to belittle persons who have been declared bankrupt, reprimanding them simply for having been declared insolvent, irrespective of whether they have committed an offence. Accordingly, the Court considered that this restriction did not pursue a legitimate aim.

Generally speaking, while assessing restrictions on electoral rights, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. The Court also has to satisfy itself that the limitations do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.

The contracting parties enjoy considerable latitude in establishing rules governing parliamentary elections and the composition of the parliament, and that the relevant criteria could vary according to the historical and political factors peculiar to each state. However, their margin of appreciation is not all-embracing, and it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with (*Tănase v. Moldova* [GC], No. 7/08, §§ 158 and 161, ECHR-2010, with further references).

## ACCEPTABILITY OF THE LIMITATION OF ELECTORAL RIGHTS

Restrictions on the right to vote and the right to stand for election are permissible, when such restrictions are justified. The state shall demonstrate the necessity and proportionality of such restrictions. The restrictions shall not be discriminatory. They shall be worded with sufficient precision in order to be clear and foreseeable. If the relevant domestic legislation or administrative practice are inconsistent and unpredictable, it may lead to a violation of Article 3 of Protocol No. 1.

## EXAMPLES OF RESTRICTIONS ON AN ACTIVE ELECTORAL RIGHT

### Convicted persons

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In the case of *Hirst v. the United Kingdom (No. 2)* [GC] (No. 74025/01, § 61, ECHR 2005IX), the European Court decided that despite the existence of the case law on acceptability of restrictions to the right to vote in connection with criminal conviction, such a restriction shall not constitute a general and automatic deprivation of civic rights of the convicted prisoners without due regard to pertinent issues like term of imprisonment or the nature and gravity of the committed crime. This approach was followed in the case of *Ramishvili v. Georgia* ((Committee), No. 48099/08, 31 May 2018) in which the Court noted that the ban on the prisoners’ voting rights contained in Article 28 § 2 of the constitution at the material time “was of a general, automatic, and indiscriminate character, affecting all persons convicted of a crime irrespective of the length of the sentence and the nature or gravity of their offence”. Therefore, there was a violation of Article 3 of Protocol No. 1.

### Restrictions on persons with a mental disability

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A total ban on voting for persons with “diminished faculties” without due regard for their actual abilities was found to be a disproportionate restriction on the right to vote (*Alajos Kiss v. Hungary*, No. 38832/06, §§ 39-44, 20 May 2010).

## Prohibition of the restriction of the active electoral right on the basis of ethnic origin

The right to vote cannot be restricted solely on the ground of ethnic origin of the applicant. It was reiterated by the Court in the case of *Aziz v. Cyprus* (No. 69949/01, ECHR 2004V), in which the applicant could not vote in the parliamentary elections of 2001, because under the Constitution of the Republic of Cyprus a Turkish-Cypriot could not register on the Greek-Cypriot electoral roll.

### EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT

Insofar as the passive electoral rights are concerned, the requirements for candidates can be stricter than for voters – like the higher age requirement or requirement of the constant residence in the country.

#### Requirement of a property declaration for a candidate

The Court considered that:

the requirement to submit information on the candidate's property status serves to enable voters to make an informed choice with regard to the candidate's fortune, a factor not unimportant for forming an opinion about the candidate. The introduction of such a requirement therefore does not appear arbitrary or unreasonable.

However, this requirement shall not be used with excessive formalism, like in the case of *Sarukhanyan v. Armenia* (No. 38978/03, 27 May 2008), in which the applicant was disqualified from standing in the election on the ground that he had falsified his declaration of property by concealing that he jointly owned a flat with five other members of his family.

#### Election campaigning

In the case of *Atakishi v. Azerbaijan* (No. 18469/06, 28 February 2012), an independent candidate in parliamentary elections was disqualified following allegations that he had bribed voters and insulted his opponents as well as disrupted their meetings. The Court noted that:

a finding that a candidate has engaged in unfair or illegal campaigning methods could entail serious consequences for the candidate concerned, in that he or she could be disqualified from running for the election. As the Convention guarantees the effective exercise of individual electoral rights, the Court considers that, in order to prevent arbitrary disqualification of candidates, the relevant domestic procedures should contain sufficient safeguards protecting the candidates from abusive and unsubstantiated allegations of electoral misconduct, and that decisions on disqualification should be based on sound, relevant and sufficient proof of such misconduct.

Having examined the circumstances of the applicant's case, the Court concluded that:

the applicant's disqualification from running for election was not based on sufficient and relevant evidence; the procedures of the electoral commission and the domestic courts did not afford the applicant sufficient guarantees against arbitrariness; and the domestic authorities' decisions lacked sufficient reasoning and were arbitrary.

#### Requirement for permanent residence

Requirement of permanent residence is acceptable, but it must be formulated with enough precision in domestic legislation. If the domestic law and the administrative practice are inconsistent as to what shall be a proof of permanent residence – registration or actual living in the state – it may lead to a violation of Article 3 of Protocol No. 1, as in the case of *Melnychenko v. Ukraine* (No. 17707/02, ECHR 2004-X):

The Court finds, taking into account the relevant domestic legislation and practice, that the requirement of residence in Ukraine was not absolute and that the domestic authorities, in allowing or refusing registration of a particular candidate, were obliged to take into account his or her specific situation. The Court considers that neither the relevant legislation nor practice contained a direct eligibility requirement of "habitual" or "continuous" residence in the territory of Ukraine. Furthermore, no distinction was made in the law between "official" and "habitual" residence. It is clear that the applicant's "habitual residence" was partly outside Ukraine during the relevant period, as he had had to leave the country on 26 November 2000 for fear of persecution and had taken up residence as a refugee in the United States (see paragraph 10 above). However, the *propiska* in his internal passport remained unchanged.

The Court concluded that "the decision of the Central Electoral Commission to refuse the applicant's candidacy for the *Verkhovna Rada* as untruthful, although he still had a valid registered place of official residence in Ukraine (as denoted in his *propiska*), was in breach of Article 3 of Protocol No. 1".

## Requirement of loyalty

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Specific historical circumstances may justify restrictions on participation of representatives of certain political parties in a given country at a given time, like restrictions on Communists in Latvia (*Ždanoka v. Latvia* [GC], No. 58278/00, ECHR 2006IV). Such restrictions with a view of a possible lack of loyalty to the state should apply with flexibility, taking into account the individual situation of the person concerned. In the case of *Ādamsons v. Latvia* (No. 3669/03, 24 June 2008), the applicant was considered as a person who served for the KGB in Soviet times and thus was not considered loyal and his passive electoral rights were restricted. The Court considered that such a restriction in his case was excessive and overly formalistic given that he served his active military service in the Border Guard Service, which was formally subordinated to the KGB, and this fact did not imply automatically that he was a KGB agent.

## Command of the state language

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Knowledge of the state language can be a valid requirement for a candidate, but the procedure of verifying that knowledge shall be fair and clear. In the case of *Podkolzina v. Latvia* (No. 46726/99, § 35, ECHR 2002-II), the applicant who, in accordance with law, provided the Election Commission with a certificate about her knowledge of the state language, had to pass an additional language test, despite the fact that the domestic legislation did not foresee such an additional test.

## Dual nationality of candidates

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In the case of *Tănase v. Moldova* [GC] (No. 7/08, ECHR 2010), the restriction on persons with multiple nationality to stand for elections was found to be disproportionate, in particular given that “the ban was not put in place in 1991 but in 2008, some 17 years after Moldova had gained independence and some five years after it had relaxed its laws to allow dual citizenship.” In those circumstances, the Court considered “the argument that the measure was necessary to protect Moldova’s laws, institutions and national security to be far less persuasive”. The manner and timing of introduction of the ban rather indicated that it was aimed against opposition candidates:

the Court notes that any restriction on electoral rights should not be such as to exclude some persons or groups of persons from participating in the political life of the country. In this respect, the Court emphasises the disproportionate effect of the Law on the parties which were at the time of its introduction in opposition. Pluralism and democracy must be based on dialogue and a spirit of compromise, which necessarily entails various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. In order to promote such dialogue and exchange of views necessary for an effective democracy, it is important to ensure access to the political arena for opposition parties on terms which allow them to represent their electorate, draw attention to their preoccupations and defend their interests.

## Electoral deposit amount

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While the amount of electoral deposit may become an obstacle for registration of a candidate, this restriction, however, can also be justifiable. In the case of *Sukhovetsky v. Ukraine* (No. 13716/02, ECHR 2006VI), the European Court, having analysed the existence and amounts of electoral deposits in other member states and having taken into account the position of the Venice Commission on this matter, came to the conclusion that the introduction of such a limitation had a legitimate aim of “guaranteeing the right to effective, streamlined representation by enhancing the responsibility of those standing for election and confining elections to serious candidates, while avoiding the unreasonable outlay of public funds.” The Court decided that:

the deposit required of the applicant cannot be considered to have been excessive or such as to constitute an insurmountable administrative or financial barrier for a determined candidate wishing to enter the electoral race, and even less an obstacle to the emergence of sufficiently representative political currents or an interference with the principle of pluralism.

The Court noted that the personal income of the applicant, that was apparently low, could not be a decisive factor, given that “even relatively well-off candidates in Ukraine and elsewhere in Europe must normally seek external funding for a successful electoral campaign.” So, if a person considers himself/herself a serious candidate with a certain number of supporters among the voters, she or he can also count on financial support from them.

## Annulment of the vote in electoral divisions

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In the case of *Kovach v. Ukraine* (No. 39424/02, ECHR 2008), the Court found that annulment of the vote results in four electoral divisions that affected the final count of votes in the constituency was arbitrary and disproportionate to any legitimate aim pursued.

## Existence of a high electoral threshold

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The Court accepted a rather high electoral threshold of 10% in Turkey in a concrete political context, although it noted that it would be better to lower it. Such a threshold definitely constituted interference with electoral rights, but it pursued the legitimate aim of avoiding excessive and debilitating parliamentary fragmentation and thus of strengthening governmental stability (*Yumak and Sadak v. Turkey* [GC], No. 10226/03, ECHR 2008).

## Disqualification of a party list

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In the case of *Russian Conservative Party of Entrepreneurs and Others v. Russia* (Nos. 55066/00 and 55638/00, 11 January 2007), the whole party list was disqualified due to inaccuracies in information provided by some candidates from the list. The Court found such a disqualification disproportionate:

The Court observes that neither the applicant party as an entity nor the second applicant as an individual candidate on the applicant party's list was found to have been in breach of the electoral laws. Thus, it was not their own conduct that led to their ineligibility or disqualification. As noted above, they were prevented from standing for election because the number two candidate on the party's list had been withdrawn in connection with his untrue financial declaration. However, under the domestic law, electoral blocs or candidates on the list were not required to verify the truthfulness of financial representations that were not their own. It follows that the applicant party and the second applicant were sanctioned for circumstances which were unrelated to their own law-abiding conduct and were also outside their control. Notwithstanding the considerable latitude which States are allowed in establishing criteria for disqualification, the Court considers that the disqualification of the applicant party and the second applicant for the above reasons was disproportionate to the legitimate aims pursued, namely ensuring the truthful disclosure of the candidates' financial position and promoting the integrity of electoral blocs or unions.

## Effective system of complaints and appeals during the electoral process

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Both the electoral administration and the courts should examine complaints about irregularities in the election process. As the Court stated in the case of *Namat Aliev v. Azerbaijan* (No. 18705/06, 8 April 2010):

the existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections. Such a system ensures an effective exercise of individual rights to vote and to stand for election, maintains general confidence in the State's administration of the electoral process and constitutes an important device at the State's disposal in achieving the fulfilment of its positive duty ... to hold democratic elections. Indeed, the State's solemn undertaking under Article 3 of Protocol No. 1 and the individual rights guaranteed by that provision would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections are not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter.

In the case of *Davydov and Others v. Russia* (No. 75947/11, 30 May 2017), the Court found that the authorities were under obligation to investigate allegations of serious breaches that could affect election results.

## Other requirements of the electoral process

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In the case of *Georgian Labour Party v. Georgia* (No. 9103/04, ECHR 2008), the Court also mentioned some other requirements for free elections, namely:

- ▶ stable electoral legislation
- ▶ an independent body that organises elections
- ▶ an accurate voters' roll.

## ELECTORAL RIGHTS ARE POLITICAL RIGHTS

Article 6 of the Convention:

*Pierre-Bloch v. France*, 21 October 1997, Reports of Judgments and Decisions 1997 VI;

Article 13 of the Convention:

*Grosaru v. Romania*, No. 78039/01, ECHR 2010

Procedural obligation under Article 3 of Protocol No. 1:

*Namat Aliyev v. Azerbaijan*, No. 18705/06, 8 April 2010

*Davydov and Others v. Russia*, No. 75947/11, 30 May 2017

Reference to the findings in the decisions of domestic courts:

*Babenko v. Ukraine* (dec.), No. 43476/98, 4 May 1999

*Melnychenko v. Ukraine*, No. 17707/02, ECHR 2004 X

Article 6 guarantees the right to a fair trial but it does not apply to electoral disputes since such disputes concern political and not civil rights (*Pierre-Bloch v. France*, 21 October 1997, Reports of Judgments and Decisions 1997VI).

It shall be however kept in mind that:

1. there are requirements for the existence of effective domestic remedies under Article 13 of the Convention (*Grosaru v. Romania*, No. 78039/01, ECHR 2010) and for effective examination of complaints during the electoral process as a procedural obligation under Article 3 of Protocol No. 1 (*Namat Aliyev v. Azerbaijan*, No. 18705/06, 8 April 2010; *Davydov and Others v. Russia*, No. 75947/11, 30 May 2017);
2. the European Court refers to the decision of the domestic courts in electoral dispute resolution to assess the circumstances of the case and the perception of the relevant domestic legislation that is applicable in the electoral disputes (*Babenko v. Ukraine* (dec.), No. 43476/98, 4 May 1999; *Melnychenko v. Ukraine*, No. 17707/02, ECHR 2004X).

## DISCRIMINATORY RESTRICTIONS IN THE ELECTIONS OTHER THAN THOSE OF THE LEGISLATURE

Article 1 of Protocol No. 12

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Cases concerning elections to the Presidency of Bosnia and Herzegovina according to ethnic quotas (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, ECHR 2009; *Zornić v. Bosnia and Herzegovina*, No. 3681/06, 15 July 2014;

*Šlaku v. Bosnia and Herzegovina* [Committee], No. 56666/12, 26 May 2016;

*Pilav v. Bosnia and Herzegovina*, No. 41939/07, 9 June 2016).

Since the holding of elections is subject to legislative regulation and both the right to vote and the right to stand for office in any type of elections without discrimination, complaints about discriminatory restrictions on electoral rights can be examined under Article 1 of Protocol No. 12. The Court in its case law clearly defined that for any complaints about discrimination in the electoral process, Article 3 of Protocol No. 1 in conjunction with Article 14 of the Convention are the *lex specialis*. So, when someone complains about parliamentary elections or other types of elections that fall within the scope of Article 3 of Protocol No. 1, this provision applies in conjunction with Article 14 that provides that no discrimination shall exist in the enjoyment of rights guaranteed by the Convention (protocols thereto included). If complaints about discrimination concern elections that fall outside the scope of Article 3 of Protocol No. 1 and, accordingly, Article 14 of the Convention, the Court examines such complaints about discrimination in the electoral process under Article 1 of Protocol No. 12.

The first case examined under Article 1 of Protocol No. 12 was the case of *Sejdić and Finci v. Bosnia and Herzegovina* [GC] (Nos. 27996/06 and 34836/06, ECHR 2009), in which two politicians of Roma and Jewish origin accordingly complained about discrimination based on ethnic origin. According to the 1995 Constitution of Bosnia and Herzegovina, which was an annex to the Dayton Peace Agreement of the same year, only Bosniacs, Croats and Serbs, described as “constituent peoples”, were eligible to stand for election to the state Presidency, which consisted of three members and the House of Peoples, the upper chamber of the state parliament. The applicants complained that, despite the relevant experience they were prevented by the constitution from standing for such posts solely on the grounds of their ethnic origin.

The European Court noted that the House of Peoples was a part of the legislature and thus elections to it fell under Article 3 of Protocol No. 1. Therefore, it examined the applicants’ complaints in this part under the said provision in conjunction with Article 14.

As to the elections to the state Presidency, the Court noted that:

whereas Article 14 of the Convention prohibits discrimination in the enjoyment of “the rights and freedoms set forth in [the] Convention”, Article 1 of Protocol No. 12 extends the scope of protection to “any right set forth by law”. It thus introduces a general prohibition of discrimination.

It continued that “whether or not elections to the Presidency fall within the scope of Article 3 of Protocol No. 1, this complaint concerns a ‘right set forth by law’ (which makes Article 1 of Protocol No. 12 applicable)”.

For both types of elections in this case, the Court applied the same case law developed under Article 14, since in its view “the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner”. The Court noted that although originally the provisions complained of served a purpose of restoration of peace with the time passed it ceased to be necessary and could be changed in order to allow persons of other ethnic origins to stand for elections. The Court considered those restrictions to electoral rights to be in a violation of Article 3 of Protocol No. 1 insofar as elections to the House of Peoples were concerned and a violation of Article 1 of Protocol No. 12 with respect to elections to the state Presidency.

The judgment in this case was followed by three more cases in which the Court found a violation of Article 1 of Protocol No. 12 in the context of elections to the state Presidency with respect to two applicants who refused to identify themselves with any ethnic group (*Zornić v. Bosnia and Herzegovina*, No. 3681/06, 15 July 2014; *Šlaku v. Bosnia and Herzegovina* [Committee], No.56666/12, 26 May 2016) and one applicant who belonged to the required ethnic group but resided in the “wrong” part of the country – a Bosniac living in the Republika Srpska (*Pilav v. Bosnia and Herzegovina*, No. 41939/07, 9 June 2016).

## ARTICLE 8 OF THE CONVENTION

*Mółka v. Poland* (dec.), No. 56550/00, ECHR 2006IV

The applicant complained about a lack of appropriate access for him, as a person confined to a wheelchair, to a polling station in local elections. The Court, examining whether this complaint falls within the scope of the concept of “respect” for “private life” set forth in Article 8 of the Convention, noted that it “does not rule out the possibility that, in circumstances such as those in the present case, a sufficient link would exist to attract the protection of Article 8”. The Court, however, found it unnecessary to determine the applicability of Article 8, finding that the application was in any event inadmissible on other grounds.

## ARTICLE 10 OF THE CONVENTION

*Etxebarria and Others v. Spain*, Nos. 35579/03, 35613/03, 35626/03 and 35634/03, 30 June 2009

In the case of *Etxebarria and Others v. Spain*, the applicants complained about their disqualification from local and regional elections. Having found no problem under Article 3 of Protocol No. 1 insofar as the regional elections were concerned, the Court examined the applicants’ complaint about disqualification from the local elections, to which Article 3 of Protocol No. 1 was not applicable, under Article 10 of the Convention, on the applicants’ right to express their political views and found no violation of this article either, applying the same line of reasoning as that for Article 3 of Protocol No. 1.

## ARTICLE 10 OF THE CONVENTION

Issues of freedom of expression were also raised in the context of the electoral process but not directly with respect to the electoral process itself:

*Vitrenko and Others v. Ukraine* (dec.), No. 23510/02, 16 December 2008;

*Salov v. Ukraine*, No. 65518/01, ECHR 2005 VIII (extracts);

*Ukrainian Media Group v. Ukraine*, No. 72713/01, 29 March 2005;

*Shapovalov v. Ukraine*, No. 45835/05, 31 July 2012;

*Gazeta Ukraina-Tsentr v. Ukraine*, No. 16695/04, 15 July 2010.

In the case of *Vitrenko and Others v. Ukraine* ((dec.), No. 23510/02, 16 December 2008), the main complaint of the applicant concerned her TV debates during the electoral campaign. Her opponent did not show up and the applicant during the live broadcast called her opponent a “thief”. She was warned by the Central Electoral Commission and was ordered to concede 51 seconds of airtime for her opponent to exercise her right to reply. The European Court found those interferences with the applicant’s freedom of expression proportionate under Article 10 of the Convention.

In the case of *Salov v. Ukraine* (No. 65518/01, ECHR 2005VIII (extracts)) the applicant was sentenced to five years’ imprisonment for distributing falsified copies of a newspaper, in which it was stated that the current president, who was also a candidate for another term of office, had died and that it was his double who participated in the presidential elections. With a view to the severity of sanction, the Court considered that the interference with the applicant’s freedom of expression was disproportionate in violation of Article 10 of the Convention.

In the case of *Ukrainian Media Group v. Ukraine* (No. 72713/01, 29 March 2005), journalist K. and the editors were punished for publication of an article about two candidates during the same presidential elections as in the Salov case. The journalist in allegoric form suggested that the two candidates were helping the current president to be re-elected by attacking his main rival in the elections. The national courts in that case did not differentiate between statements of facts and value judgments and punished the journalist and the editors in violation of Article 10 of the Convention.

In the case of *Shapovalov v. Ukraine* (No. 45835/05, 31 July 2012), the applicant, who was a journalist and an election observer, was denied access to information about the results of the voting in a polling station. The Court found no violation, given that the information in question was soon after the request had been made public and published on the information board.

In the case of *Gazeta Ukraina-Tsentr v. Ukraine* (No. 16695/04, 15 July 2010), the newspaper was punished for printing information received during a press conference in the context of elections for a mayor. The Court found a violation of Article 10.

## ARTICLE 11 OF THE CONVENTION

*Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], Nos. 41340/98 and 3 others, ECHR 2003II

In the case of *Refah Partisi (the Welfare Party) and Others v. Turkey* ([GC], Nos. 41340/98 and 3 others, ECHR 2003II), the dissolution of the political party was examined under Article 11, which guarantees, among other things, freedom of association; the complaint of the applicant party under Article 3 of Protocol No. 1 did not require a separate examination.

## CASE STUDIES ON ELECTORAL RIGHTS

### Case study 1

Three applicants belonged to a separatist party that was declared illegal and banned from participation in political life of the country, including participation in national and local elections. Following the dissolution of their party, the applicants continued their participation in political life in their personal capacity. Their rhetoric was similar to that of the banned party. They believed that their region should gain independence and that on their way to that goal any means were acceptable. This latter position had been viewed by many as indirect



support for the extremist movement that had committed numerous acts of violence in what they considered the fight for independence for their region.

When the applicants decided to run for seats in the local council the electoral commission refused to register them as candidates given that they were members of the banned political party and although they positioned themselves as independent candidates their programme and views was very much in line with the goals of their banned political party. In deciding on the issue, the commission further referred to the findings related to another member of the same party who had been suspected of direct involvement in acts of violence. During the search of his apartment, the police found documents that described actions that the banned political party had advised its active members to follow after the dissolution, including attempts to continue being present in political life in a personal capacity and within the electoral unions as a chance to continue expressing their views on independence for their region.

The applicants challenged the refusal before the courts, alleging that their passive electoral rights and right to freedom of expression of their views were restricted unjustifiably. The court of first instance rejected their complaints considering that the interference with the above rights of the applicants was lawful and justified.

The court of appeal and the court of cassation upheld the judgment of the first-instance court. The applicants then complain about the violation of their rights guaranteed by Articles 6 and 10 of the Convention and Article 3 of Protocol No. 1.

You are asked to examine the issue of admissibility and the merits of these complaints.

The participants should be able to identify that Article 6 does not apply to electoral disputes, while Article 3 of Protocol No. 1 does not apply to local elections. The remaining complaint under Article 10 should be examined and the interference with the applicants' freedom of political expression should be deemed justified.

## Case study 2

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The applicant wanted to stand for elections to the parliament. Having submitted all documents necessary for registration to the Central Electoral Commission (CEC), he received a request from the latter to complete his file with a language certificate. Such a requirement is not provided for by the law on elections to the parliament, but the CEC considered that, having the authority to ask the candidates to correct the mistakes in their applications, it could ask the applicant to submit the said certificate attesting to a good command of the state language that was a precondition for proper performance of functions by a member of parliament.

The applicant refused to provide such a certificate as no such requirement was foreseen by the domestic legislation and other candidates were not asked to furnish one. The Central Electoral Commission disqualified the applicant on the basis that he did not submit the complete file for registration.

The applicant challenged this disqualification before the Supreme Court. The CEC in their reply to the applicant's complaint submitted to the Supreme Court the arguments that the applicant was a foreigner who moved to the country only recently and he had no previous link to the country, so there was very serious doubt that he had sufficient knowledge of the national language. They further noted that the lack of a requirement in the law to prove sufficient knowledge of the national language could be explained by the fact that the requirement to be a national of the state in order to stand for elections led to a presumption that all nationals spoke the language fluently. If a foreigner was naturalised he was required to pass a language exam, but it was also common knowledge that sometimes the granting of nationality could be conducted via a streamlined procedure if the interests of the state so required. In the latter case, no proper check of the command of national language was conducted. As the CEC had doubts about the applicant's knowledge of the national language, it requested the applicant to prove such knowledge, despite a lack of clear provision for doing so in the domestic law.

The Supreme Court agreed with the CEC and rejected the applicant's complaint.

Was the applicant a victim of discrimination?

Were his rights violated?

If so, what rights were violated?

While a requirement of a good command of the state language should be considered reasonable, and while such a difference in the treatment of those who do and do not speak the state language should be deemed to be justified, the applicant's passive electoral right is limited in a manner not compatible with Article 3 of Protocol No. 1, given that the domestic law does not provide for checking the command of language in case of doubt, and thus such a limitation was not in accordance with law.

### Case study 3

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The four applicants are internally displaced persons who had moved from an area of armed conflict to the capital of the country and had been living there for more than a year with a provisional registration of residence (they did not want to change their permanent residence from their home towns located in the conflict area, as it would affect the title to their dwellings abandoned there). When the local elections were announced, they submitted requests to be placed on the voters' lists in the capital, stating that they had lived there for more than a year already, and had been working there and paying taxes. In their opinion, they were well integrated into the local community and had resided for a sufficiently long period of time in order to qualify to vote in the local elections for the council and the mayor.

The local electoral commission refused their request for registration on the ground that their permanent residence registration was in a different part of the country. The higher electoral commissions and the domestic courts upheld this refusal, stating that the legislation was clear enough that only persons who permanently resided had the right to participate in the local elections and the only proof of permanent residence was a relevant permanent residence registration. Since the applicants were registered permanently outside the capital they could vote in the national elections for the president and the parliament, but they could not vote in local elections in the capital.

What articles of the Convention and its protocols could be applicable to the applicants' situation?

Was there an interference with their rights?

Please discuss.

Given that we are talking about local elections, Article 3 of Protocol No. 1 and Article 14 of the Convention do not apply. Nevertheless, given that the organisation of local elections is regulated by law, the restrictions on the applicants' active electoral right should be examined under Article 1 of Protocol No. 12.

## **SPEAKING NOTES: ELECTION STANDARDS IN THE INTERNATIONAL LEGAL INSTRUMENTS**

### Slide 1

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Principles of democratic elections

Universal suffrage

Equal suffrage

Free suffrage

Secret suffrage

Direct suffrage

Frequency of elections (periodic elections)

### Slide 2

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International standards

International obligations

Soft law

Election observations by international organisations

### Slide 3

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Universal Declaration of Human Rights, Article 21.

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

3. The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

#### Slide 4

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International Covenant on Civil and Political Rights

Article 25 of the Covenant guarantees to every citizen, among other things, the right and the opportunity“(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”.

*Slide 5*

The Human Rights Committee is the body responsible for monitoring implementation of the International Covenant on Civil and Political Rights by its states parties. One of its competences is interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work. The Committee's General Comment No. 25 (57) concerns also the right to elections, guaranteed by Article 25 of the Covenant.

#### Slide 6

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Electoral matters are also dealt with in some more specialised treaties adopted within the UN, such as:

International Convention on the Elimination of All Forms of Racial Discrimination

Convention on the Elimination of All Forms of Discrimination against Women

Convention on the Rights of Persons with Disabilities

Convention on the Political Rights of Women

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

Convention (No. 169) Indigenous and Tribal Peoples Convention

United Nations Convention against Corruption

#### Slide 7

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Regional organisations

Council of Europe

Parliamentary Assembly of the Council of Europe (PACE)

Congress of Local and Regional Authorities

Committee of Ministers

European Commission for Democracy through Law (Venice Commission)

European Court of Human Rights

#### Slide 8

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Regional organisations

Organization for Security and Co-operation in Europe

#### Slide 9

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DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE

7. To ensure that the will of the people serves as the basis of the authority of government, the participating States will

7.1. — hold free elections at reasonable intervals, as established by law;

7.2. — permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;

7.3. — guarantee universal and equal suffrage to adult citizens;

7.4. — ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;

7.5. — respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;

7.6. — respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organisations and provide such political parties and organisations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;

7.7. — ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;

7.8. — provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process;

7.9. — ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.

8. The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organisations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.

## Slide 10

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### CHARTER OF PARIS FOR A NEW EUROPE

"...We affirm that, without discrimination ... everyone also has the right ... to participate in free and fair elections..."

"We decide to establish an Office for Free Elections in Warsaw to facilitate contacts and the exchange of information on elections within participating States."

Office for Democratic Institutions and Human Rights

## CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

*Ādamsons v. Latvia*, No. 3669/03, 24 June 2008

*Alajos Kiss v. Hungary*, No. 38832/06, §§ 39-44, 20 May 2010

*Atakishi v. Azerbaijan*, No. 18469/06, 28 February 2012

*Aziz v. Cyprus*, No. 69949/01, ECHR 2004V

*Babenko v. Ukraine* (dec.), No. 43476/98, 4 May 1999

*Cherepkov v. Russia* (dec.), No. 51501/99, ECHR 2000I;

*Davydov and Others v. Russia*, No. 75947/11, 30 May 2017

*Demirtaş v. Turkey*, No. 14305/17, § 234, 20 November 2018

*Etxeberria and Others v. Spain*, Nos. 35579/03, 35613/03, 35626/03 and 35634/03, 30 June 2009;

*Gazeta Ukraina-Tsentr v. Ukraine*, No. 16695/04, 15 July 2010.

*Georgian Labour Party v. Georgia*, No. 9103/04, ECHR 2008

*Gorizdra v. Moldova* (dec.), No. 53180/99, 2 July 2002;

*Grosaru v. Romania*, No. 78039/01, ECHR 2010

*Hilbe v. Liechtenstein* (dec.), No. 31981/96, ECHR 1999VI;  
*Hirst v. the United Kingdom (No. 2)* [GC], No. 74025/01, ECHR 2005IX  
*Kovach v. Ukraine*, No. 39424/02, ECHR 2008  
*Krivobokov v. Ukraine* (dec.), No. 38707/04, 19 February 2013;  
*Lindsay v. the United Kingdom*, application No. 8364/78, decision of 8 March 1979, Decisions and Reports (DR) 15, p. 247;  
*Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113;  
*Matthews v. the United Kingdom* [GC], No. 24833/94, ECHR 1999I;  
*Melnichenko v. Ukraine*, No. 17707/02, ECHR 2004-X  
*Mółka v. Poland* (dec.), No. 56550/00, ECHR 2006IV ;  
*Namat Aliyev v. Azerbaijan*, No. 18705/06, 8 April 2010  
*Pierre-Bloch v. France*, 21 October 1997, Reports of Judgments and Decisions 1997VI;  
*Pilav v. Bosnia and Herzegovina*, No. 41939/07, 9 June 2016).  
*Podkolzina v. Latvia*, No. 46726/99, § 35, ECHR 2002-II  
*Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], Nos. 41340/98 et al., ECHR 2003II  
*Russian Conservative Party of Entrepreneurs and Others v. Russia*, Nos. 55066/00 and 55638/00, 11 January 2007,  
*Salov v. Ukraine*, No. 65518/01, ECHR 2005VIII (extracts);  
*Sarukhanyan v. Armenia*, No. 38978/03, 27 May 2008  
*Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, ECHR 2009;  
*Shapovalov v. Ukraine*, No. 45835/05, 31 July 2012;  
*Shindler v. the United Kingdom*, No. 19840/09, 7 May 2013  
*Sitaropoulos and Giakoumopoulos v. Greece* [GC], No. 42202/07, ECHR 2012  
*Šlaku v. Bosnia and Herzegovina* [Committee], No. 56666/12, 26 May 2016;  
*Sukhovetsky v. Ukraine*, No. 13716/02, ECHR 2006VI  
*Şükran Aydın and Others v. Turkey*, Nos. 49197/06 et al., 22 January 2013,  
*Tănase v. Moldova* [GC], No. 7/08, ECHR 2010  
*Ukrainian Media Group v. Ukraine*, No. 72713/01, 29 March 2005;  
*Vito Sante Santoro v. Italy*, No. 36681/97, ECHR 2004VI;  
*Vitrenko and Others v. Ukraine* (dec.), No. 23510/02, 16 December 2008;  
*Yumak and Sadak v. Turkey* [GC], No. 10226/03, ECHR 2008);  
*Ždanoka v. Latvia* [GC], No. 58278/00, ECHR 2006IV;  
*Zornić v. Bosnia and Herzegovina*, No. 3681/06, 15 July 2014.

**GENERAL COMMENT ADOPTED BY THE HUMAN RIGHTS COMMITTEE  
UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL  
COVENANT ON CIVIL AND POLITICAL RIGHTS**

Addendum

General Comment No. 25 (57)

Text of the comment can be found at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en)

CODE OF GOOD PRACTICE IN ELECTORAL MATTERS

[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e)

# PRESENTATION: PROTECTION OF ELECTORAL RIGHTS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS



## PROTECTION OF ELECTORAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

by Dmytro Tretyakov



### ECHR and elections

The ECHR has a number of rights relevant to the electoral process.

- right to free elections of the legislature (Article 3 of Protocol No. 1);
    - freedom of association (Article 11);
    - freedom of expression (Article 10);
    - freedom of assembly (Article 11);
  - prohibition of discrimination (Article 14 and Article 1 of Protocol No. 12);
- other rights that can be affected in the context of elections (for example, Article 8).



### EUROPEAN COURT OF HUMAN RIGHTS

Majority of international treaties have certain control mechanism to monitor compliance of the State Parties with their international obligations under the given treaty.

The European Convention on Human Rights (ECHR) has a unique control mechanism – the European Court of Human Rights (Court) that was set up to ensure that the Member States of the Council of Europe meet their obligations under the European Convention on Human Rights. The Court is competent to receive and examine individual applications and also give judgments and decisions that are obligatory for execution by the States concerned.



## ECHR and elections

The ECHR has a number of rights relevant to the electoral process.

- right to free elections of the legislature (Article 3 of Protocol No. 1);
  - freedom of association (Article 11);
  - freedom of expression (Article 10);
  - freedom of assembly (Article 11);
- prohibition of discrimination (Article 14 and Article 1 of Protocol No. 12);
- other rights that can be affected in the context of elections (for example, Article 8).



## ELECTIONS OF THE LEGISLATURE

### Article 3 of Protocol No. 1

#### Right to free elections

The High Contracting Parties undertake 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.



## PECULIARITIES OF WORDING OF ARTICLE 3 OF PROTOCOL NO. 1

*Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX



## Importance of the right to free elections

*Mathieu-Mohin and Clerfayt v. Belgium*, 2  
March 1987, Series A no. 113



## DIFFICULTIES OF APPLICATION

*Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, 11 January 2007

*Georgian Labour Party v. Georgia*, no. 9103/04, ECHR 2008



## PECULIARITIES OF WORDING OF ARTICLE 3 OF PROTOCOL NO. 1

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## DIFFICULTIES OF APPLICATION

*Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, 11 January 2007

*Georgian Labour Party v. Georgia*, no. 9103/04, ECHR 2008





## SCOPE OF APPLICATION

*Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A no. 113;

*Vito Sante Santoro v. Italy*, no. 36681/97, ECHR 2004-VI;

*Etxeberria and Others v. Spain*, nos. 35579/03, 35613/03, 35626/03 and 35634/03, 30 June 2009;

*Davydov and Others v. Russia*, no. 75947/11, 30 May 2017

*Lindsay v. the United Kingdom*, application no. 8364/78, decision of 8 March 1979, Decisions and Reports (DR) 15, p. 247;

*Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I;

*Demirtaş v. Turkey*, no. 14305/17, § 234, 20 November 2018



## NON-APPLICABILITY OF ARTICLE 3 OF PROTOCOL NO. 1

*Cherepkov v. Russia* (dec.), no. 51501/99, ECHR 2000-I

*Mólka v. Poland* (dec.), no. 56550/00, ECHR 2006-IV

*Gorizdra v. Moldova* (dec.), no. 53180/99, 2 July 2002

*Krivobokov v. Ukraine* (dec.), no. 38707/04, 19 February 2013

*Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI

*Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009

*Zornić v. Bosnia and Herzegovina*, no. 3681/06, 15 July 2014

*Pilav v. Bosnia and Herzegovina*, no. 41939/07, 9 June 2016).



## LIMITATION OF ELECTORAL RIGHTS

Active and passive electoral rights are not absolute.

As the Court noted in the case of *Mathieu-Mohin and Clerfayt v. Belgium*:

«...since Article 3 recognises them [electoral rights] without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with ...» (*Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113)



## ACCEPTABILITY OF THE LIMITATION OF THE ELECTORAL RIGHTS

*Seyidzade v. Azerbaijan*, no. 37700/05, 3 December 2009



## Prohibition of the abuse of rights under Article 17

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

*Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p.

187



## EXAMPLES OF RESTRICTIONS ON ACTIVE ELECTORAL RIGHT

### Convicted persons

*Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005-IX

*Ramishvili v. Georgia* (Committee), no. 48099/08, 31 May 2018



## EXAMPLES OF RESTRICTIONS ON ACTIVE ELECTORAL RIGHT

### Restrictions on persons with mental disability

*Alajos Kiss v. Hungary*, no. 38832/06, §§ 39-44, 20 May 2010



## EXAMPLES OF RESTRICTIONS ON ACTIVE ELECTORAL RIGHT

### Restrictions based on place of residence

*Shindler v. the United Kingdom*, no. 19840/09, 7 May 2013

*Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, ECHR 2012



## **EXAMPLES OF RESTRICTIONS ON ACTIVE ELECTORAL RIGHT**

### **Prohibition of restriction of the active electoral right on the basis of ethnic origin**

*Aziz v. Cyprus*, no. 69949/01, ECHR 2004-V



## **EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT**

In so far as the passive electoral rights are concerned, the requirements for candidates can be stricter than for voters – like the **higher age requirement** or **requirement of the constant residence in the country**.



## **EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT**

### **Requirement of property declaration for a candidate**

*Sarukhanyan v. Armenia*, no. 38978/03, 27  
May 2008



## **EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT**

### **Election campaigning**

*Atakishi v. Azerbaijan*, no. 18469/06, 28  
February 2012



## **EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT**

### Requirement for permanent residence

*Melnychenko v. Ukraine*, no. 17707/02, ECHR  
2004-X



## **EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT**

### Requirement of loyalty

*Ždanoka v. Latvia* [GC], no. 58278/00, ECHR  
2006-IV

*Ādamsons v. Latvia*, no. 3669/03, 24 June  
2008



## **EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT**

### Command of the State language

*Podkolzina v. Latvia*, no. 46726/99, § 35,  
ECHR 2002-II



## **EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT**

### Dual nationality of candidates

*Tănase v. Moldova* [GC], no. 7/08, ECHR 2010



## **EXAMPLES OF RESTRICTIONS ON THE PASSIVE ELECTORAL RIGHT**

### **Electoral deposit amount**

*Sukhovetskyy v. Ukraine*, no. 13716/02, ECHR  
2006-VI



### **Other examples of interference**

*Annulment of the vote in electoral divisions (Kovach v. Ukraine*, no. 39424/02, ECHR 2008)

*Existence of the high electoral threshold (Yumak and Sadak v. Turkey [GC]*, no. 10226/03, ECHR 2008)

*Disqualification of party list (Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, 11 January 2007)



### **Effective system of complaints and appeals during the electoral process**

*Namat Aliev v. Azerbaijan* (no. 18705/06, 8  
April 2010)



### **Other requirements to the electoral process**

*Georgian Labour Party v. Georgia*, no.  
9103/04, ECHR 2008

- accurate voters list (electoral roll)
- stable electoral legislation
- independent body that organises elections



## ELECTORAL RIGHTS ARE POLITICAL RIGHTS

*Article 6 of the Convention:*  
*Pierre-Bloch v. France*, 21 October 1997, Reports of Judgments and Decisions 1997-VI;  
*Article 13 of the Convention:*  
*Grasaru v. Romania*, no. 78039/01, ECHR 2010  
*Procedural obligation under Article 3 of Protocol No. 1:*  
*Namat Aliyev v. Azerbaijan*, no. 18705/06, 8 April 2010  
*Davydov and Others v. Russia*, no. 75947/11, 30 May 2017  
*Reference to the findings in the decisions of domestic courts:*  
*Babenko v. Ukraine* (dec.), no. 43476/98, 4 May 1999  
*Melnychenko v. Ukraine*, no. 17707/02, ECHR 2004-X  
*Enforcement of the final judicial decision:*  
*Petkov and Others v. Bulgaria*, nos. 77568/01, 178/02 and 505/02, § 63, 11 June 2009  
*The Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, 11 January 2007



## DISCRIMINATORY RESTRICTIONS IN THE ELECTIONS OTHER THAN THOSE OF THE LEGISLATURE

*Article 1 of Protocol No. 12*  
«1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.  
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.»



## DISCRIMINATORY RESTRICTIONS IN THE ELECTIONS OTHER THAN THOSE OF THE LEGISLATURE

*Cases about elections to the Presidency of Bosnia and Herzegovina according to ethnic quotas (Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, ECHR 2009; Zornić v. Bosnia and Herzegovina, no. 3681/06, 15 July 2014;*  
*Šlaku v. Bosnia and Herzegovina [Committee], no.56666/12, 26 May 2016;*  
*Pilav v. Bosnia and Herzegovina, no. 41939/07, 9 June 2016).*



## ARTICLE 8 OF THE CONVENTION

*Mótko v. Poland* (dec.), no. 56550/00,  
ECHR 2006-IV



## ARTICLE 10 OF THE CONVENTION

*Etxebarria and Others v. Spain*, nos. 35579/03, 35613/03, 35626/03 and 35634/03, 30 June 2009



## ARTICLE 10 OF THE CONVENTION

*Issues of freedom of expression were raised also in the context of electoral process but not directly with respect of the electoral process itself:*

*Vitrenko and Others v. Ukraine* (dec.), no. 23510/02, 16 December 2008;

*Salov v. Ukraine*, no. 65518/01, ECHR 2005-VIII (extracts);  
*Ukrainian Media Group v. Ukraine*, no. 72713/01, 29 March 2005;  
*Shapovalov v. Ukraine*, no. 45835/05, 31 July 2012;  
*Gazeta Ukraina-Tsentr v. Ukraine*, no. 16695/04, 15 July 2010.



## ARTICLE 11 OF THE CONVENTION

*Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, ECHR 2003-II

*Staatkundig Gereformeerde Partij v. the Netherlands* (dec.), no. 58369/10, 10 July 2012

## Election standards in the international legal instruments

by Dmytro Tretyakov

### Principles of democratic elections

Universal suffrage  
Equal suffrage  
Free suffrage  
Secret suffrage  
Direct suffrage  
Frequency of elections (periodic elections)



### International standards

Universal Declaration of Human Rights

#### Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

...

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.



### International standards

International obligations  
Soft law  
Election observations by international  
organisations  
International NGOs





## International standards

United Nations

International Covenant on Civil and Political Rights

Article 25 of the Covenant guarantees to every citizen, among other things, the right and the opportunity *“(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”*.



## International standards

United Nations

International Covenant on Civil and Political Rights

The Human Rights Committee is the body responsible for monitoring implementation of the International Covenant on Civil and Political Rights by its State parties. One of its competences is interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work.

The Committee’s General Comment No. 25 (57) concerns also the right to elections, guaranteed by Article 25 of the Covenant.



## International standards

International Convention on the Elimination of All Forms of Racial Discrimination

Convention on the Elimination of All Forms of Discrimination against Women

Convention on the Rights of Persons with Disabilities

Convention on the Political Rights of Women

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

Convention (No. 169) concerning indigenous and tribal peoples in independent countries

United Nations Convention against Corruption

## International standards

Regional organisations

The OSCE and the Council of Europe

## International Standards

Regional Organisations  
OSCE  
Office for Democratic Institutions and Human Rights

DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON  
THE HUMAN DIMENSION OF THE CSCE

CHARTER OF PARIS FOR A NEW EUROPE

"...We affirm that, without discrimination ... everyone also has the right  
... to participate in free and fair elections..."

"We decide to establish an Office for Free Elections in Warsaw to  
facilitate contacts and the exchange of information on elections within  
participating States."

## International Standards

Regional organisations

Council of Europe

Parliamentary Assembly (PACE)

## International Standards

Regional organisations

Council of Europe

Congress of Local and Regional Authorities

## International Standards

Regional organisations

Council of Europe

Committee of Ministers

## International Standards

Regional organisations

Council of Europe

European Commission for Democracy  
through Law (Venice Commission)



## Appendix VI

# Training Course on Election Law and Electoral Dispute Resolution

### HIGH SCHOOL OF JUSTICE

#### Training Module

#### Training Course on Election Law and Electoral Dispute Resolution

##### (Administrative Law Field)

### 1. About High School of Justice

The mission of the High School of Justice is to professionally train prospective judges in the system of the common courts of Georgia. The school aims to deepen judicial candidates' theoretical knowledge, to support them develop practical skills and to become aware of the responsibility and freedom to act within constraints of law, as well as to facilitate judicial candidates' gradual integration into the social environment in which they will operate, if appointed as judges.

The school also aims to train incumbent judges for their professional advancement, as well as to train and retrain prospective judicial assistants and other specialists to ensure that the system of the common courts of Georgia is composed of highly qualified staff.

### 2. About Training Programme for Judges and Other Court Officials

High School of Justice's one of the main functions is continuous professional growth of current judges and other court officials. To this end, the High School of Justice conducts activities of various formats and content (training, seminars, workshops, conferences, etc.) all throughout the year. Judges' and other court officials' training programme is elaborated in September-October of each respective year and envisages training activities to be undertaken by the High School of Justice both by its own resources as well as in cooperation with foreign entities and international organisations. The content of the programme is determined based on training needs assessment conducted by the High School of Justice. Each year, the School Director puts forward the following year's training programme for judges and other court officials to the School's Independent Board for approval.

### 3. Module Trainer/Expert

The training shall be conducted by the following judges-trainers based on the materials elaborated in close cooperation with international and national experts:

1. Shota Getsadze – Judge at the Tbilisi Court of Appeals
2. Ilona Todua - Judge at the Tbilisi Court of Appeals
3. Tea Dzimistarashvili - Judge at the Tbilisi Court of Appeals
4. Leila Mamulashvili - Judge at the Tbilisi Court of Appeals
5. Nana Daraselia - Judge at the Tbilisi Court of Appeals
6. Nino Buachidze - Judge at the Tbilisi City Court

### 4. Relevance of the Subject Matter

Domestic courts deal with electoral disputes only once in several years during very short and intensive periods of time with very high pressure and serious time restraints. Therefore, first hand updated knowledge of the domestic

law and practice, as well as understanding of the overall scope of human rights issues that may be related to the election process, are of a paramount importance for smooth and quick resolution of electoral disputes.

## 5. Concept and Overall Goal of the Training Module

The overall goal of the training module is to improve quality of court decisions on electoral matters, to provide judges with knowledge and tools to decide electoral disputes submitted to them in the most efficient and diligent way. To achieve this goal, it is of an utmost importance to ensure that regardless of their previous experience, all judges have the same minimal guaranteed level of expertise in the electoral law and practice, which includes the national legislation, normative acts and practice of election administration, and jurisprudence of domestic courts. The judges will further be reminded about the relevant human rights standards that shall guide them in situations when they have judicial discretion in application of the law. Therefore, the training will offer both theoretical part and practical exercises that will assist in strengthening of the acquired knowledge.

The syllabus of the training will include four modules:

**Module I.** International standards and principles of democratic elections;

**Module II.** Review of electoral legislation of Georgia;

**Module III.** Peculiarities of electoral dispute resolution and settlement. Practice of the Constitutional Court of Georgia and common courts;

**Module IV.** Case law of the European Court of Human Rights (ECtHR) on electoral disputes.

## 6. Training Objective

The overall objective of the training is to provide judges with a deeper knowledge of domestic electoral legislation and court practice, peculiarities of electoral dispute resolution within courts and the Election Administration of Georgia, and international standards in electoral matters and ECtHR case law:

- ▶ Participants are able to apply respective norms of electoral legislation and justify decisions based on national and international standards when dealing with electoral dispute resolution;
- ▶ Participants have analysed and are better familiar with court practice of common courts of Georgia, the Constitutional Court of Georgia, ECtHR case law on electoral matters and decisions of the Election Administration of Georgia.

## 7. Training Module Target Group

All incumbent administrative law judges, magistrate judges, and court clerks assisting judges in the preparation of electoral dispute resolution deliberations in administrative law field.

## 8. Training Module Designing Process

The training course on Election Law and Electoral Dispute Resolution was developed by the working group composed of international and local experts, as a joint effort of cooperation of the High School of Justice, Council of Europe in the framework of the project 'Reform of the electoral practice in Georgia' and International Society for Fair Elections and Democracy (ISFED).

The training of trainers was successfully conducted. Prior to the training, the High School of Justice was asked to nominate six candidates for the ToT. Participants received special training in 4 modules.

## 9. Partners

- ▶ Council of Europe project 'Reform of the electoral practice in Georgia'
- ▶ International Society for Fair Elections and Democracy (ISFED).

## 10. Working Group Composition

The training module was designed, and the training of trainers was conducted by the working group composed of the following experts:

1. Maia Vachadze – Judge at the Supreme Court of Georgia
2. Nino Kadagidze – Judge at the Supreme Court of Georgia

3. Dmytro Tretyakov – CoE international expert, case lawyer at ECtHR
4. Elene Nizharadze – Deputy Executive Director, ISFED
5. Nino Rizhamadze – Lawyer, ISFED
6. Tatia Kinkladze – Lawyer, ISFED

## 11. Instruction Method

The following instruction methods will be used during the training: presentation / lecture/ case studies / practical examples/ and exceptionally, facilitator-led discussions.

On one hand, presentations and case studies are the most common and easily consumed types of instruction that shall be favoured during the training. It was agreed that more efficient way to carry case-studies is to provide participants with different legal situation related to the topic discussed before and to ask them to answer some questions. This method will help, among other things, to check whether the presented information was well received and understood.

On the other hand, facilitated discussions shall be used with extreme care, as this method aims at providing the participants with the sense of ownership of the ideas developed therein, while the facilitator shall be able to lead the discussion to the wanted outcome without depriving the applicants of the said sense of ownership. Thus, the latter method can be used when the facilitator is trained to conduct it and feels confident in using it.

Finally, it is worth reminding, that all regular trainings will be conducted exclusively by the judges-trainers, while the outside experts could be involved in other qualities (observers, contributors to the training materials, etc.)

## 12. Training Evaluation

Evaluation is a training quality management tool that enables the school to evaluate / measure training effectiveness and to identify issues that need further improvement. Methodology used:

- ▶ The training will be assessed both by the participants as well as the trainers using the appropriate types of questionnaire within 2 weeks of the conduct of the training;
- ▶ Depending on the need, pre-training and post-training tests will be employed to measure participants' level of knowledge before and after training;
- ▶ Long-term results of the training will be assessed with a separate questionnaire distributed among participants using the school E-portal.

## 13. Appendices:

**Appendix 1:** Agenda

**Appendix 2:** Syllabus

### Appendix 1: Agenda

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#### Trainer/Expert:

1. Shota Getsadze – Judge at the Tbilisi Court of Appeals
2. Ilona Todua - Judge at the Tbilisi Court of Appeals
3. Tea Dzimistarashvili - Judge at the Tbilisi Court of Appeals
4. Leila Mamulashvili - Judge at the Tbilisi Court of Appeals
5. Nana Daraselia - Judge at the Tbilisi Court of Appeals
6. Nino Buachidze - Judge at the Tbilisi City Court

**Training Format:** Classroom Instruction

**Training Methods<sup>1</sup>:**

- Brainstorming
- Snowball effect
- Discussions led by a facilitator
- Discussion in small groups
- Debates
- Problem resolution
- Role play / Mock trial
- Cases / practical examples
- Briefing
- Presentation/lecture

**Training duration:**

3 days

**Day 1**

09.30 -10.00	<i>Registration</i>
10.00 -10.15	Welcoming remarks and introduction to the training objective (content, objective, expected outcome)
	<b>Module I. International standards and principles of democratic elections</b> <b>Method:</b> Presentation/lecture/discussion led by a facilitator <b>Trainer/expert:</b> Dmytro Tretyakov
10.15 -11.00	Principles of democratic elections. International election standards. Universal level. Regional level (OSCE, School of Europe). Election observation by intergovernmental organisations, international NGOs
11.00-11.15	<i>Coffee break</i>
11.15-12.00	Elections - European standards. Venice Commission / OSCE documents
12.00-13.00	Discussion
13.00-14.00	<i>Lunch</i>

1. Please select those methods that you plan to use as part of the training. When drafting the agenda, please indicate the selected methods in the specific sessions as well.

	<b>Module II. Review of electoral legislation of Georgia</b> <b>Method:</b> Presentation/lecture <b>Trainer:</b>
14.00-14.30	General review of the legal framework regulating elections (Constitution of Georgia, Organic Law of Georgia, Election Code of Georgia, Organic Law of Georgia on Political Unions of Citizens, legal acts of the State Audit Office and the Election Administration of Georgia)
14.30-15.45	Electoral legislation of Georgia, general provisions <ul style="list-style-type: none"> <li>▶ definition of terms</li> <li>▶ basic principles</li> <li>▶ Election administration, structure, competence, and legal acts.</li> </ul>
15.45-16.00	<i>Coffee break</i>
16.00-16.30	Voter lists and registration of electoral subjects
16.30-17.00	Discussion, summing up of Day 1

## Day 2

	<b>Module II. Review of electoral legislation of Georgia (continued)</b> <b>Method:</b> Presentation/lecture/practical examples/case studies <b>Trainer/expert:</b>
10.00-11.00	Pre-election campaign <ul style="list-style-type: none"> <li>▶ purpose of campaign regulations and established restrictions;</li> <li>▶ existing regulations;</li> <li>▶ modern challenges: campaigning via social network;</li> <li>▶ prohibition of campaigning for certain categories of persons (religious and charity organisations)</li> <li>▶ campaigning by foreign citizens;</li> <li>▶ case law.</li> </ul>
11.00-11.15	<i>Coffee break</i>
11.15-12.30	Prohibition of the use of administrative resources <ul style="list-style-type: none"> <li>▶ types of administrative resources;</li> <li>▶ purpose of prohibition of using administrative resources;</li> <li>▶ existing regulations;</li> <li>▶ case law.</li> </ul>
13.00-14.00	<i>Lunch</i>
14.00-14.30	Vote buying: <ul style="list-style-type: none"> <li>▶ review of existing regulations;</li> <li>▶ legal consequences;</li> <li>▶ case law.</li> </ul>
14.30-15.30	Donations: <ul style="list-style-type: none"> <li>▶ existing regulations and importance of financial transparency;</li> <li>▶ subjects of monitoring;</li> <li>▶ who has the right of donations;</li> <li>▶ case law.</li> </ul>
15.30-15.45	<i>Coffee break</i>



15.45-16.30	E-day violations: <ul style="list-style-type: none"> <li>▶ violations of the voting day and redress mechanisms;</li> <li>▶ practice of the election administration;</li> <li>▶ case law of the Constitutional Court of Georgia and of the common courts of Georgia</li> </ul>
16.30-17.00	Discussion, case study, summing up of Day 2

### Day 3

	<p><b>Module III. Peculiarities of Electoral Dispute Resolution and Settlement. Practice of the Constitutional Court of Georgia and Common Courts</b></p> <p><b>Method:</b> Presentation/lecture/practical examples/case studies</p> <p><b>Trainer/expert:</b></p>
10.00-11.30	<p>Litigation, dispute settlement at court</p> <ul style="list-style-type: none"> <li>▶ electoral dispute proceedings</li> <li>▶ jurisdiction</li> <li>▶ special subjects</li> <li>▶ time-limits</li> <li>▶ case law</li> </ul>
11.30-11.45	<i>Coffee break</i>
11.45-12.30	Discussion, case study
12.30-13.00	<p>Administrative offenses</p> <ul style="list-style-type: none"> <li>▶ judicial competence</li> <li>▶ competence of an administrative body</li> <li>▶ case law of the common courts of Georgia</li> </ul>
13.00-14.00	<i>Lunch</i>
14.00-14.45	Discussion, case study
	<p><b>Module IV. Case law of the European Court of Human Rights (ECtHR) on electoral disputes</b></p> <p><b>Method:</b> Presentation/lecture/case studies</p> <p><b>Trainer/expert:</b> Dmytro Tretyakov</p>
14.45-15.45	ECtHR case law related to electoral dispute resolution
15.45-16.00	<i>Coffee break</i>
16.00-16.30	ECtHR case law related to electoral dispute resolution (continued)
16.30-17.00	A case study on the ECtHR case law
17.00-17.15	Summing up of the training and concluding remarks

## Appendix 2: Syllabus

### Election Law and Electoral Dispute Resolution (Administrative Law Field)

Day I	
Session topic	Training materials for the session
<p><b>Session I:</b></p> <p><b>International standards and principles of democratic elections</b></p> <ul style="list-style-type: none"> <li>▶ Principles of democratic elections</li> <li>▶ International election standards</li> <li>▶ Universal level</li> <li>▶ Regional level (OSCE, School of Europe)</li> <li>▶ European standards. Venice Commission / OSCE documents</li> <li>▶ Election observation by intergovernmental organisations, international NGOs</li> </ul>	<ul style="list-style-type: none"> <li>▶ Presentation and speaking notes 'Election Standards in the International Legal Instruments'</li> <li>▶ Relevant extracts from the following treaties: <ul style="list-style-type: none"> <li>Universal Declaration of Human Rights</li> <li>International Covenant on Civil and Political Rights</li> <li>International Convention on the Elimination of All Forms of Racial Discrimination</li> <li>Convention on the Elimination of All Forms of Discrimination against Women</li> <li>Convention on the Rights of Persons with Disabilities</li> <li>Convention on the Political Rights of Women</li> <li>International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families</li> <li>Convention (No. 169) concerning indigenous and tribal people in independent countries</li> <li>United Nations Convention against Corruption</li> <li>European Convention of Human Rights</li> <li>Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE</li> <li>Charter of Paris for a new Europe <ul style="list-style-type: none"> <li>▶ General comment adopted by the human rights committee under article 40, paragraph 4, of the international covenant on civil and political rights</li> </ul> </li> </ul> </li> </ul> <p>Addendum</p> <p>General Comment No. 25 (57)</p> <ul style="list-style-type: none"> <li>▶ Documents of the OSCE and the Venice Commission (see attachment)</li> </ul>
<p><b>Session II:</b></p> <p><b>Review of electoral legislation of Georgia</b></p> <ul style="list-style-type: none"> <li>▶ General review of the legal framework regulating elections</li> <li>▶ Election Code of Georgia: <ul style="list-style-type: none"> <li>Definition of terms</li> <li>Basic principles</li> <li>Election administration, structure, competence, and legal acts</li> </ul> </li> <li>▶ Voter lists and registration of electoral subjects</li> </ul>	<ul style="list-style-type: none"> <li>▶ Organic Law of Georgia, Election Code of Georgia (Chapters I, II, III, IV)</li> <li>▶ Presentation 'Legal Definitions, General principles, Structure of Election Administration'</li> <li>▶ Presentation 'Election Law and Electoral Dispute Resolution'</li> <li>▶ Court practice/case studies</li> </ul>

Day II	
<p><b>Session III:</b></p> <p><b>Review of electoral legislation of Georgia (continued)</b></p> <ul style="list-style-type: none"> <li>▶ Election campaign: <ul style="list-style-type: none"> <li>Purpose of campaign regulations and established restrictions</li> <li>Modern challenges: campaigning via social network</li> <li>Prohibition of campaigning for certain categories of persons (religious and charity organisations)</li> <li>Campaigning by foreign citizens?</li> </ul> </li> <li>▶ Prohibition of the use of administrative resources <ul style="list-style-type: none"> <li>Types of administrative resources</li> <li>Purpose of prohibition of using administrative resources</li> <li>Existing regulations</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▶ Organic Law of Georgia, Election Code of Georgia (Chapter VI)</li> <li>▶ Organic Law of Georgia on Political Union of Citizens</li> <li>▶ Presentation 'Pre-election campaign, Administrative Resources, Vote Buying'</li> <li>▶ Presentation 'Election Law and Electoral Dispute Resolution'</li> <li>▶ Court practice/case studies</li> </ul>
<p><b>Session IV:</b></p> <p><b>Review of electoral legislation of Georgia (continued)</b></p> <ul style="list-style-type: none"> <li>▶ Vote buying: <ul style="list-style-type: none"> <li>Review of existing regulations</li> </ul> </li> <li>▶ Legal consequences</li> <li>▶ Donations: <ul style="list-style-type: none"> <li>Existing regulations and importance of financial transparency</li> <li>Subjects of monitoring</li> <li>Who has the right of donations?</li> </ul> </li> <li>▶ E-day violations: <ul style="list-style-type: none"> <li>Violations of the voting day and redress mechanisms</li> <li>Practice of the election administration</li> </ul> </li> <li>▶ Case law of the Constitutional Court of Georgia and of the common courts of Georgia</li> </ul>	<ul style="list-style-type: none"> <li>▶ Organic Law of Georgia, Election Code of Georgia (Chapters VI, VIII)</li> <li>▶ Organic Law of Georgia on Political Union of Citizens</li> <li>▶ Organic Law of Georgia on Constitutional Court of Georgia (Chapter III, Articles 19, 22, 23)</li> <li>▶ Presentation 'Voting Procedures, Court Practice'</li> <li>▶ Presentation 'Election Law and Electoral Dispute Resolution'</li> <li>▶ Court practice/case studies/practice of the election administration</li> </ul>
Day III	
<p><b>Session V:</b></p> <p><b>Peculiarities of Electoral Dispute Resolution and Settlement. Practice of the Constitutional Court of Georgia and Common Courts</b></p> <ul style="list-style-type: none"> <li>▶ Litigation, dispute settlement at court: <ul style="list-style-type: none"> <li>Electoral dispute proceedings</li> <li>Jurisdiction</li> <li>Special subjects</li> <li>Time-limits</li> </ul> </li> <li>▶ Administrative offenses <ul style="list-style-type: none"> <li>Judicial competence</li> <li>Competence of an administrative body</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▶ Organic Law of Georgia, Election Code of Georgia (Chapters IX, X, XIV)</li> <li>▶ Code of Georgia on Administrative Offences</li> <li>▶ Presentation 'Electoral Dispute Resolution – Legal Framework, Court Practice'</li> <li>▶ Presentation 'Recommendations of the Supreme Court of Georgia'</li> <li>▶ Court practice of the Constitutional Court of Georgia - annotations</li> <li>▶ Court practice/case studies</li> </ul>

<b>Session VI:</b> ECtHR case law related to electoral dispute resolution	<ul style="list-style-type: none"> <li>▶ Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights</li> <li>▶ Presentation and speaking notes 'Protection of Electoral Rights in the Case-Law of the European Court of Human Rights'</li> <li>▶ Cases identified and translated</li> <li>▶ Case-studies</li> </ul>
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## List of Training Materials

N	Training materials	To be sent	To be printed
1.	Organic Law of Georgia, Election Code of Georgia		X
2.	Organic Law of Georgia on Political Union of Citizens		X
3.	Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights, Right to free elections	X	
4.	Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report (the Venice Commission)	X	
5.	Research: Analysis of Electoral Dispute Resolution (Council of Europe, Project 'Reform of the electoral practice in Georgia')	•	
6.	Pre-Electoral Disputes: Achilles Heel of the Electoral Administration (ISFED)	•	
7.	Electoral disputes as an insurmountable problem of the electoral administration (ISFED)	•	
8.	Presentation and speaking notes 'Election Standards in the International Legal Instruments'	•	
9.	Presentation and speaking notes 'Protection of Electoral Rights in the Case-Law of the European Court of Human Rights'	•	
10.	ECtHR case studies (3 cases)		•
11.	Presentation 'Legal Definitions, General principles, Structure of Election Administration'	•	
12.	Presentation 'Pre-election campaign, Administrative Resources, Vote Buying'	•	
13.	Presentation 'Voting Procedures, Court Practice'	•	
14.	Presentation Electoral Dispute Resolution – Legal Framework, Court Practice'	•	
15.	Presentation 'Recommendations of the Supreme Court of Georgia on Electoral Matters'	•	
16.	Presentation 'Election Law and Electoral Dispute Resolution' (ISFED)	•	
17.	Case studies		•

## LINKS TO THE SESSION I

### Materials of the OSCE

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Handbook for the Observation of Election Dispute Resolution

Election Observation Handbook: Sixth Edition

### Materials of the Venice Commission

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955/2019 - Inclusion of a not internationally recognised territory in a State's nationwide constituency for parliamentary elections

913/2018 - Study on election dispute resolution

840/2016 - Study on publication of lists of voters having participated in elections

807/2015 - Exclusion of offenders from Parliament

778/2014 - Joint Guidelines on preventing and responding to the misuse of administrative resources during electoral processes

764/2014 - Report on open and closed lists in proportional electoral system

748/2013 - Electoral lists and voters residing de facto abroad

721/2013 - Method of nomination of candidates within political parties

678/2012 - Declaration of Global Principles for non-partisan election observation and monitoring by citizen organizations and Code of Conduct for non-partisan citizen election observers and monitors

656/2011 - Report on measures to improve the democratic nature of elections in School of Europe member states

601/2010 - Opinion on the need for a code of good practice in the field of funding of electoral campaigns

586/2010 - Recommendation 273 (2009) of the Congress of Local and Regional Authorities of the School of Europe "Equal access to local and regional elections"

585/2010 - Use of administrative resources

584/2010 - Revised interpretative declaration to the code of good practice in electoral matters on the participation of people with disabilities in elections

583/2010 - Report on figure-based management of possible election fraud

580/2010 - Report on out-of-country voting

553/2009 - Registration of voters

[507/2008 - Report on the cancellation of election results](#)

485/2008 - Report on Thresholds and other features of electoral systems which bar parties from access to Parliament

482/2008 - Report on the Impact of Electoral Systems on Women's Representation in Politics

477/2008 - Guidelines on an internationally recognised status of election observers

428/2007 - Opinion on proposed changes to Recommendation R(99)15 on Media Coverage of Election Campaigns

426/2007 - Report on choosing the date of an election

414/2006 - Code of Good Practice in the field of Political Parties

387/2006 - Report on Dual Voting for Persons belonging to National Minorities

369/2006 - Guide on the evaluation of the elections

366/2006 - Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources

352/2005 - Report on Electoral Law and Electoral Administration in Europe - Synthesis study on recurrent

challenges and problematic issues

351/2005 - Summary Report on the Secrecy of the Vote in the context of Elections by Parliament

348/2005 - Interpretative Declaration on the Stability of the Electoral Law

329/2004 - Report on the Participation of Political Parties in Elections

325/2004 - Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers and Pledge to accompany the Code of Conduct for International Election Observers

324/2004 - Declaration on Women's Participation in Elections

307/2004 - Report on Electoral Rules and Affirmative Action for National Minorities' Participation in decision-making process in European countries

306/2004 - Opinion on Parliamentary Assembly Recommendation 1714 (2005) on the Abolition of Restrictions on the Right to Vote

285/2004 - Report on Media Monitoring during Election Observation Missions

260/2003 - Report on the compatibility of remote voting and electronic voting with the standards of the School of Europe

250/2003 - Report on Electoral Systems - Overview of available solutions and selection criteria

247/2003 - Guidelines on Legislation on Political Parties

244/2003 - Documents informing electors

235/2003 - Election Evaluation Guide

190/2002 - Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report

One of the main postulates of a democratic society is the peaceful, periodic transition of office through free and fair elections, which are perceived as legitimate by the public. The credibility of elections and sustainability of the election environment hinge on the effectiveness of electoral dispute resolution throughout the electoral cycle. Systems of electoral justice should be designed in a way to ensure the effective exercise of the rights to vote and to stand for elections.

This publication provides a set of legal standards and good practices for the judiciary, election authorities and other legal practitioners who work with electoral dispute resolution. It provides a comprehensive overview of the European Court of Human Rights case law on electoral matters, and of the general principles regarding the effectiveness of a domestic system for electoral dispute resolution developed by the Court.

This toolkit also presents national practices and experiences on electoral dispute resolution from Bosnia and Herzegovina, Georgia and Ukraine. Since the international standards are of a rather general nature, examples of national good practices, and failures, may serve as valuable guidance in implementing and strengthening a system of effective electoral jurisprudence in other Council of Europe member states.



[www.coe.int](http://www.coe.int)

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

