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POLICY PAPER

Depoliticized and Effective Electoral Management – Precondition for Trust in Elections



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Podgorica, January 2017

INTRODUCTION

From the introduction of multi-party political system Montenegro has been looking for an effective model of the electoral management. Frequent changes in manners of organizing and election of electoral management did not lead to the key goal: a creation of “electoral power” which defends democratic principles by the authority of a strong institution and increases citizens’ trust in the electoral process. A mutual denominator of all these attempts is a politicization of the electoral management, which holds an interest of the parties, rather than the legality of the process itself.

A “reform” of the electoral management, which started by a new set of laws in 2014, did not bring significant changes. The parties, repeatedly, assigned themselves as dominant controllers of the system and as judges in matches they play. A political agreement of key actors, made during laws’ amendments, was more powerful than professional and expert opinions. Of course, it did not bring a positive change. Everything remained as an experiment i.e. mostly failed experiment.

An experience of the parliamentary elections indicates that the electoral management, the State Election Commission (SEC), before all, created a tensional environment, which later was transferred to other significant aspects of the process. Results of its work are a complete politicization, non-transparency, inefficiency and inactivity which later, naturally, caused lack of citizens’ trust in electoral management and election process.

For some time now the Center for Democratic Transition (CDT) advocates depoliticization of the electoral management. In 2014 political parties were not responsive to our proposals.

This policy paper tends to draw attention to this major problem and to provide solutions i.e. a model, which is in line with international standards and which can be applied in Montenegro.

For that purpose, we conducted a detailed research on models of the European electoral management and we propose solutions which would, in our opinion, finally enable Montenegro to step forward in this area.

We remain at disposal for any further clarification and discussion about all details regarding our proposal.

CDT team

2014 REFORM OF THE SEC – FAILED EXPERIMENT

The State Election Commission (SEC) consists of a chairperson and ten permanent members and one authorized representative of each submitter of the electoral list. Two members of the SEC, a chairperson and a member from civil society are appointed by the Parliament of Montenegro after conducting open call competition.

Remaining nine members are appointed by the Parliament, i.e. four SEC members are appointed on the proposal of the parliamentary majority, four on the proposal of the parliamentary opposition while one member represents political party of national minorities. Each of Municipal Election Commissions and Polling Boards has five permanent members and extended composition and they are entirely composed of representatives of the political parties¹.

A concept of multi-party electoral management is based on the idea that parties will control each other in order to come to fair decisions, which do not give preference to any political option. It is based on the idea that consensus decision-making would strengthen control and build citizens' and institutions' trust in elections. However, in Montenegro this concept transformed into its opposite.

Complete politicization and disputable legitimacy

An experience from the campaign for 2016 parliamentary elections indicates that decisions and activities of the electoral management in Montenegro were conditioned by interests of the political parties and not by interests of the legal election process. Important decisions were made by outvoting in accordance with a clear line authority-opposition, on the basis of political views rather than necessary legal norms.

The legitimacy of the part of 17 members of extended composition of the SEC was disputable due to the fact that it was based on a system of verification of signatures, which does not envisage the verification of authenticity. Representatives of interested public expressed justified suspicions in a falsification of a part of signatures aimed at supporting specific electoral lists. However, the SEC rejected an initiative to deliver to a competent prosecution² these documents for verification.

Based on the consent of all Commission members (with the exception of NGO sector) the SEC tried to forbid to election observers a right to operate in a full capacity and thereby it ignored international standards and the Law³.

1) The Law on Election of Councilors and Representatives, "Official Gazette of the Republic of Montenegro", No. 16/2000 revised text, 9/2001, 41/2002, 46/2002, 45/2004 decision of the Constitutional Court (CC), 48/2006 and 56/2006 decision of the CC and "Official Gazette of the Republic of Montenegro", No. 46/2011, 14/2014, 47/2014 decision of the CC and 12/2016 decision of the CC, Chapter V – Election Management Bodies

2) "State Election Tragedy: " In an overcoat of the authority", Monitor, 04.11.2016, www.monitor.co.me

3) "CDT: The SEC forbade an access to significant activities in the electoral process", CDM, 27.07.2016, www.cdm.me

The SEC also determined final results of the parliamentary elections after a several hours long session, marked by quarrels, tension, replacement of authorized representatives, backdoor political agreements, pressures upon specific members and suspicions in political corruption⁴.

At lower levels, which are less under public scrutiny, irregularities often remain unnoticed. Polling boards and Municipal Election Commissions (MEC), guided by political interests, often make illegal decisions, some of which are never verified in higher instances. Contrary to the legal security⁵, numerous cases of different acting in similar legal situations are marked.

Non-transparency

During the last election process the SEC informed the public about its work mainly through its non-functional and outdated web-site⁶. The SEC published significantly less information on its website in comparison to previous election processes.

The SEC did not publish information on held sessions and all important decisions it made. It also did not publish documents, which it was obliged to publish pursuant to the Law on Free Access to Information⁷. Extended composition of this body was never published on the website of the SEC, thus we do not have information who were representatives of specific parties in this body. CDT failed to obtain the information even on basis of the request for a free access to information from mid November 2016⁸.

SEC sessions were closed for media, the public was not officially informed about their timing. The SEC often failed to publish press releases after sessions. Additionally, SEC representatives very rarely answered to media's calls and they very often deprived the public of explanations, important for the election process and citizens' trust in elections.

The situation is worse at lower levels of the electoral management. A majority of MECs did not meet the legal obligation to have its own website and to publish important data. Information about the extended composition of MEC were available only in five municipalities. Citizens were deprived of information about personnel composition of Polling Boards.

Nobody can give a comprehensive answer to the question who were representatives of the electoral management in the parliamentary elections in Montenegro.

4) "The SEC proclaimed election results, scandal at the session", Portal Vijesti, 30.10.2016, www.vijesti.me

5) 2016 Parliamentary Elections, Final Report, Center for Democratic Transition, www.cdtmn.org

6) The site is available on old.dik.co.me. A new site www.dik.co.me was published after a completion of the electoral process.

7) An obligation of proactive publishing of data is prescribed in the Article 12 of the Law on Free Access to Information, "Official Gazette of the Republic of Montenegro", No. 44/12

8) On 27th of January 2017 the Agency for Personal Data Protection and Free Access to Information approved CDT complaint for administrative silence and ordered SEC to issue a decision and act upon CDT request from 11th November 2016.

9) "Video: SEC determined 36 mandates for DPS, and 18 for DF: Quarrel among members!" Portal Antena M, 18th of October 2016, www.antenam.net

10) OSCE/ODIHR, Montenegro, Parliamentary Elections, 16 October 2016: Final Report, published on 25th of January 2017, www.osce.org

Inefficiency and inactivity

In addition to described lack of transparency and politicization, a work of Montenegrin electoral management bodies was followed by unprecedented public scandals⁹, which negatively affected the trust in elections as a whole. Opposition representatives in the SEC did not vote for election results. It is one of reasons why opposition parties do not approve the election result and why they boycott the Parliament.

In periods between elections the SEC did not carry out training of the electoral management, it does not propose improvements of electoral legislation and it does not implement education of voters as well. Scientific and research components of its work do not exist.

The institution's contribution to the improvement of the electoral system is minimal.

OSCE/ODIHR opinions

Described problems are recognized in the Final Report of the OSCE/ODIHR observation mission¹⁰. OSCE/ODIHR gives a recommendation to undertake measures, which would ensure independence and professionalism of the electoral management, address a potential conflict of interests and avoid political tensions. OSCE/ODIHR proposes clarifying the role of authorized representatives and limiting their direct involvement in the decision-making process. In addition, the Report emphasizes a need for increasing transparency and accountability of the electoral management through opening sessions of SEC for the public and publishing all relevant documents.

MODEL: INDEPENDENT, MIXED OR GOVERNMENTAL?

In a comparative experience there are three models of electoral management organization – independent, governmental and mixed, with many variations.

The governmental model of electoral management implies that executive power organizes and conducts elections through a specific ministry or administrative authority. In these cases the head of electoral management is an official of executive power. These electoral managements often do not have members, but officials and employees from an executive power. The governmental model is represented in many developed Western European democracies¹¹, in which there is no problem regarding the trust in electoral processes.

Having in mind the low level of democratic development in Montenegro as well as pronounced lack of trust in election process, the governmental model is not acceptable for Montenegro.

The mixed model successfully functions in several countries¹² and includes electoral management, which consists of two structures. Decision making and supervision are conducted by a body independent from the executive power, while enforcement of decisions, technical and organizational aspects of elections are conducted by a specific section of the executive power, which is accountable to the first, independent structure.

Mixed models have beneficial elements, which can serve as role models in creation of Montenegrin model. However, models, in which a specific part of executive power is accountable to an independent institution, do not have a stronghold in the institutional tradition in this region, thus due to lack of trust serious problems in functioning may appear.

The independent model¹³ implies that electoral management is autonomous and independent from the executive power and its members are not representatives of the executive power. It is most frequently accountable to a parliament or to some systems of judicial power. Electoral management has its own budget and it enjoys a high level of financial autonomy and accountability.

Compositions of independent election commissions are different. In some countries we talk about expert bodies, in some countries about representatives of parties while in some countries members are experts or political representatives. The independent model is often applied to a transitional democracy.

11) Example: Germany, Italy, Norway, Sweden, Finland and Greece

12) Example: France, the Netherlands, Iceland, Portugal, Spain, Hungary and Slovakia

13) Example: Croatia, Slovenia, Estonia, Lithuania, Latvia, Malta, Bulgaria and Romania

The independent model, composed dominantly of parties, has shown a great number of serious disadvantages in our environment (as it was previously explained).

A development of politically, budgetary and functionally independent SEC, which is accountable to the Parliament of Montenegro for its work, is the most appropriate for Montenegro. The SEC should develop its own professional service which will conduct all administrative, technical and logistic aspects of election processes.

An integrity of electoral management does not depend only on its composition, but also on conducted procedures and decisions made. In any case, electoral management must be based on principles of transparency, impartiality, accountability, efficiency and professionalism. Respecting these principles ensures free elections from which arise democratic institutions, in which citizens will have trust.

RECOMMENDATIONS FOR THE CREATION OF A NEW MODEL OF ELECTORAL MANAGEMENT

1. Expert management with a lower number of members

The SEC should be composed of members who meet strictly determined conditions of professionalism and political impartiality.

The number of members should be significantly reduced i.e. 5-7 members of permanent composition (including a president also) with an appropriate technical service are sufficient. A lower number of members will result in more efficient discussions and decision-making. Odd number of members guarantees that decisions can be made by a simple majority, thus it is not necessary to assign to the president a “golden voice”.

A broad representation should be enabled in the period of election campaign, through extended composition of the SEC including representatives of parties/candidates. They would participate in a work and discussions, but without voting right.

Municipal Election Commissions (MEC) should be composed in the same manner, the only difference is that from three to five members are sufficient for MEC.

In this moment it is not possible to depoliticize polling boards completely, but it is necessary to undertake steps towards its professionalism. It is also necessary to prescribe that members of polling boards may be appointed

only from the candidates who passed trainings, tests and acquired certificates by the SEC.

2. High criteria and qualified majority as a guarantee for the selection of the best candidates

Members of the permanent composition of the SEC may be elected after conducted public competition or nominated to the Parliament by a certain authorized nominator. Conducting of public competition is a desirable model in the context of the transparency of the process, but it can discourage the best candidates from application. Thus, countries, which have independent models, often give the right of nomination to some other nominator¹⁴. If we would decide to apply for the option of authorized nominator, the best situation for Montenegrin model would be to assign that task to an appropriate Parliament Committee¹⁵.

In the comparative experience it is a frequent case for members of the highest election body to be appointed from a group of judges¹⁶, which is not possible in Montenegro without Constitution amendments. Namely, the Constitution prescribes that a judge can neither perform other public function nor professionally perform any other activity. Therefore, it is necessary to prescribe detailed conditions, which must be met by specific members.

A member of the SEC must have Montenegrin nationality and voting right.

When it comes to professionalism, candidates for members of the SEC must have a diploma from a faculty of social sciences¹⁷, at least 10 years of working experience in his/her own profession as well as a good knowledge regarding electoral system/ statistics.

Regarding the exercise of impartiality, it should be prescribed that a member of the SEC must not be a member or activist of a political party and a person may not be a member of a political party's body or a candidate on a political party's list for a period of 5 years. Also, it is necessary to draw attention to a possible conflict of interests and to prevent the appointment of persons who are in kinship and business relations with prominent political representatives¹⁸.

Specific systems request from candidate members of the highest election body to have a good professional reputation and to enjoy trust of the public¹⁹. In order to meet these criteria, it would be necessary to require from candidates references (recommendations) from previous employers or relevant institutions or organizations.

14) In Lithuania the Minister of Justice and Bar Association have the right of nomination of candidates. The president of Malta appoints members of Election Commission, on the proposal of Prime Minister and after consultations with a leader of opposition.

15) Committee on Political System, Judiciary and Administration or Administrative Committee.

16) Example: Croatia, Slovenia, Estonia, Romania, Poland

17) It may be additionally prescribed that 5 members are lawyers and 2 members, experts for elections and political processes or election statistics, who may have diploma of political scientist or economist.

18) Example: Bulgaria, Hungary

19) Example: Bulgaria

20) Example: Serbia

21) Example: Estonia

22) Two-thirds majority is needed for the appointment of the National Election Commission in Hungary.

23) In Croatia the State Election Commission appoints a president and members of a permanent composition of election commissions of a constituency from a group of judges and prominent lawyers.

24) In Croatia a mandate of State Election Commission lasts for 8 years as it is the case with the Permanent Electoral Authority of Romania. Poland does not limit the duration of mandate. In Bulgaria and FYR of Macedonia the mandate lasts for 5 years. The mandate lasts for 4 years in Latvia, Lithuania, Estonia and Slovenia.

Members of electoral management bodies must not be persons convicted for criminal offenses against electoral right or criminal offenses from the area of corruption.

Some countries have examples when for the membership in the central electoral body a representative of national statistics agency²⁰ or state audit²¹ is also appointed. The SEC has a need for an expert in election statistics in order to ensure the independence in processing election results. Therefore, it is necessary to additionally consider whether this function is to be searched through the election of members of the SEC or through the development of these capacities in the framework of the professional service.

The permanent composition of the SEC in the Parliament should be elected by a qualified majority in order to ensure that the best nominated candidates are elected. We propose two-thirds majority²² in the first round of voting and three-fifths majority in the second round as a mechanism for prevention of gridlock. Thus, parties would be forced to find consensus and to appoint high-quality candidates. Apart from that, the qualified majority would give a great legitimacy to members of the SEC, as well as a freedom of decision-making and acting.

Members of the MEC should be appointed by the SEC, on the basis of conducted public competition²³ or elected by local assemblies by the qualified majority. Members of the SEC should also meet the conditions of professionalism and impartiality.

3. Status which allows independence

In order to ensure independence, it is necessary for the SEC to have longer mandate than the Parliament. Thus, its members would not be under pressure of reelection in the case of a government's change. A longer mandate ensures institutional memory and stability as well.

A mandate of the SEC should last for 6 years²⁴. A president of the SEC is elected from members, for a period of 2 years.

Members of the SEC should be permanently employed, with prohibition of performing other public function and with limitations for performing other activity.

It is necessary to ensure a financial autonomy for the SEC. It may be implemented based on the model of financing the Agency for Prevention of Corruption or the State Audit Institution where the SEC would propose draft

budget and deliver it to the relevant body of the Parliament, competent for financial issues. The body would determine draft budget and deliver it to the Government.

Ultimately, it is necessary to prescribe that a member's mandate ends when he/she ends to meet the conditions determined during his/her appointment, as well as to prescribe a possibility for the Parliament to dismiss a member of the SEC due to convictions for an act which makes him/her ineligible to perform this function, due to a permanent loss of ability to perform this function or public expression of political beliefs²⁵.

4. Responsibility for improvement of electoral process

An establishment of a professional, expert SEC should be accompanied by an introduction of new responsibilities and obligations for it, which this institution should conduct continuously in periods between elections.

The SEC should be prescribed the obligation to prepare annual work plans and to submit annual performance reports to the Parliament of Montenegro for review and adoption.

Some of obligations which must be prescribed for the SEC are the following:

- Training of members from lower levels of electoral management bodies
- Election and appointment of members from the MEC and polling boards
- Initiatives for changes and improvement of election legislation
- Training and informing citizens about elections and voting right
- Development of personal capacities and staff capacity
- Preparation of professional publications
- Enhancement of technical aspects of elections through the introduction of new technologies

25) Based on the solution from the Law on the Constitutional Court.

5. Transparency as a basis of trust

The SEC must reach high standards of transparency aimed at increasing trust in elections and eliminate suspicions in the regularity of the electoral process.

It includes the availability of all information regarding the institution's work and its openness for media and interested public.

It is necessary to open SEC sessions for media and to enable direct transmission of sessions during the proclamation of election results.

The SEC must drastically change its approach to the use of technologies and it must ultimately start to deal with election statistics and data presentation. On the website of the SEC it is necessary to enable monitoring of processing of election results in real time, in which Montenegro is not only behind developed democracies, but also behind the region²⁶.

It must also develop models of cooperation and communication with all interested parties in the electoral process – parties, media, NGOs and it must serve as an example of transparency and openness.

26) Croatia: www.izbori.hr,
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3. Lithuania, Law on the Central electoral commission, 20.06.2002, No. IX-985, Vilnius;
4. Poland, Election Code, Journal of Laws 31.01.2011;
5. Latvia, Law on the Central Election Commission, 01.11.2002.
6. Bulgaria, Election Code, SG No. 19/5.03.2014, SG No. 35/22.04.2014, SG No. 53/27.06.2014, SG No. 98/28.11.2014, SG No. 79/13.10.2015, SG No. 39/26.05.2016, SG No. 57/22.07.2016, SG No. 85/28.10.2016;
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12. Macedonia, Изборен законик, Службен весник на Република Македонија, бр. 40/06, 136/08, 148/08, 155/08, 163/08, 44/11, 51/11, 54/11, 142/12, 31/13, 34/13, 14/14, 30/14, 196/15, 35/16, 97/16, 99/16;
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Accession negotiations between Montenegro and the EU - active and well informed citizens or mere observers in the process

<https://www.cdtmn.org/eu/eu-analize/pregovori-o-pristupanju-cg-eu/>

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<https://www.cdtmn.org/nato/nato-analize/stratesko-komuniciranje-procesa-evroatlantskih-integracija/>

Legal and transparent use of public resources – a precondition for building trust in elections

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