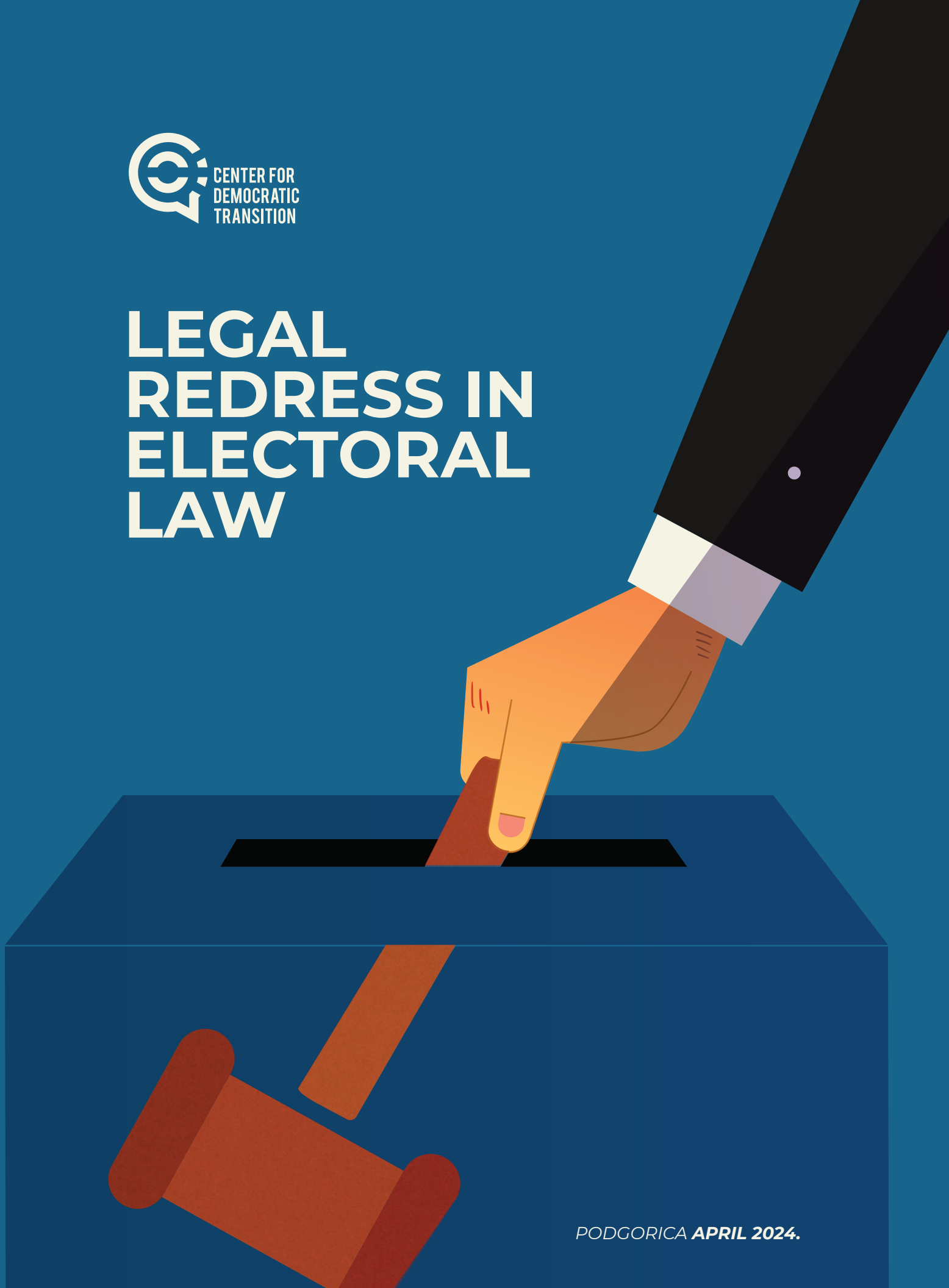




LEGAL REDRESS IN ELECTORAL LAW



PODGORICA APRIL 2024.

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IMPRINT:

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For the publisher: Dragan Koprivica

Graphic design: LUMI studio

Podgorica 2024.



This publication is developed in the framework of the "Focus on Electoral Reform: It is time!" project, implemented by the Centre for Democratic Transition (CDT) in cooperation with the Association for Responsible and Sustainable Development (UZOR) and Association of Youth with Disabilities (AYDM), with the support of the European Union provided through the Delegation of the European Union to Montenegro. The content of this publication is the sole responsibility of CDT and does not necessarily reflect the views of the European Union

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Editor's note

The 2020 political changes have not resulted in a long-awaited electoral reform, despite the fact that the new government constituents for years, and even decades spent in opposition, had been building their election campaigns, inter alia, around the idea that Montenegro needs a more just election process, deprived of procedural violations, misuse of resources or voters being brought under pressure.

Due to numerous weaknesses of the election process, lawfulness and credibility of elections have for decades been challenged through boycotts and protests, rather than being channelled through institutional mechanisms, and only in the last two election cycles the losing parties conceded defeat; the research, on the other hand, shows lack of trust in electoral institutions and outcomes among a substantial number of citizens

In the framework of the upcoming electoral law reform, Centre for Democratic Transition (CDT) intends to place focus on the concept of electoral justice, as one of the key dimensions of the rule of law in democracies. Irregularities, errors and violations are inevitable in any election process, and there is always a chance that individuals and organisations will try to undermine the election process to pursue their interests. An efficient electoral justice system plays a crucial role in ensuring that election results are perceived as legitimate and credible.

We will be addressing the matter of protection of voting rights by two publications, one focusing only on the election process and issues most tightly related to the exercise of rights in such process, while the other publication will be dedicated to protection mechanisms ensured by criminal legislation.

Over the course of more than 20 years of observing election processes, CDT has seen hundreds of situations where it was not possible to rectify injustices or errors by means of electoral disputes, punish wrong and unlawful actions or inactions, or ensure protection of active or passive suffrage in line with universally accepted standards of free election. The reform efforts ahead of us require an analysis and rectification of such shortcomings.

This is the time when consideration must be given to expanding the group of persons with standing to file electoral complaints, in line with good comparative practices. To ensure an effective legal remedy, the law should be amended so as to allow for judicial review of all types of decisions made by the State Election Commission (SEC), including those that uphold decisions of lower commissions, but also the review of any action or inaction of the election management bodies. International standards also recommend ensuring an election results review mechanism.

Following repeated international recommendations, efforts should be made to increase transparency and accountability of the Constitutional Court, ensure that electoral disputes are resolved in sessions open to the public, regulate the rights and participation methods of parties to proceedings, introduce a requirement for the Constitutional Court to publish and timely deliver to parties all electoral appeals and decisions.

There is also much room for improvement of the procedure for protecting the right to be included in the electoral register, by means of precise procedural provisions which would give better guarantees for the exercise of rights, while also facilitating the work of relevant institutions.

The upcoming electoral reform is an opportunity to begin rebuilding trust in election processes, and such effort inherently entails the establishment of a fair and credible electoral justice system, which will be used to correct errors, uphold the right to vote and punish violations of rights.

This publication is developed in the framework of the "Focus on Electoral Reform: It is time!" project, implemented by the Centre for Democratic Transition (CDT) in cooperation with the Association for Responsible and Sustainable Development (UZOR) and Association of Youth with Disabilities (AYDM), with the support of the European Union provided through the Delegation of the European Union to Montenegro. The content of this publication is the sole responsibility of CDT and does not necessarily reflect the views of the European Union.

We remain open to public dialogue concerning the content of our publications, and to any well-intentioned suggestions and criticism.

CDT Team

1 Introduction

AUTHOR SINIŠA GAZIVODA

According to the theory of electoral law, electoral rights are protected at multiple levels. Firstly, this is done by applying the general principles when drafting electoral legislation (principle of direct protection of rights, principle of judicial protection, principle of constitutionality and legality, principle of judicial autonomy and independence, principle of equality before the law, etc). Secondly, such protection is ensured by controlling elections, election processes and the conduct of election. The third segment of protection is the legal protection of the electoral right, addressed in this document.

International standards pertaining to the protection of electoral rights suggest that this area should regulate the matters concerned with registration of voters, implementation of the election process, post-election rights, but also those related to allocation of funding, media presence and protection granted by criminal legislation. The last group of matters will remain outside the scope of this document given that it primarily intends to focus on the election procedure itself and the matters most closely related to the exercise of rights in this process.

The document is divided into three sections, with the first one addressing protection of the right to be on the electoral register, the second is concerned with protection of electoral rights during election, while the third section discusses post-election rights. It concludes with recommendations deriving from the analysis of these matters.

2 Protection of the right to be on the electoral register

According to basic provisions of the Law on the Election of Councillors and Members of Parliament, Montenegrin citizens who are included in the electoral register may elect and be elected councillors and MPs, under the law governing the electoral register, based on universal and equal voting right, at free and direct elections.

Therefore, getting on the electoral register constitutes a “pass” for the exercise of active and passive suffrage in the process of electing councillors and MPs. The same applies to the process of electing the President of Montenegro. For this reason, protection of the right to be on the electoral register bears great significance.

Maintenance of the electoral register, the process of verifying entries in the register, closing of the electoral register, preparation of extracts from the register, but also protection of the right to get on the electoral register are all regulated by the Law on the Electoral Register. The electoral register is kept by the ministry in charge of the interior.

Although changes to the electoral register are made ex officio, voters may request the line ministry to make a change to the register. Voters may request such changes if: they are not on the register, incorrect or incomplete data pertaining to them are included in the register, or if the data on the polling station where they can vote are incorrect or missing in the register.

Changes to the electoral register may be requested at any moment between two election cycles, but not later than 15 days before the election day, given that the register is closed 10 days prior to the day set as election day. Indeed, international standards relating to the electoral law do suggest that the legal framework should specify the time limit for providing this kind of legal protection so as to avoid any requests and appeals submitted on the eve of the election that could impede or obstruct the election process itself. The standards fail to define the exact length of the time limit which would be considered appropriate due to differences between election and legal systems.

Under the Law on the Electoral Register, within 48 hours from the day of receiving the request the ministry is required to issue a decision granting the request and make the relevant change or correction, or a decision denying the request, and to deliver such decision to the applicant without any delay.

Urgency in decision making is one of the basic requirements in legal resolution of any disputable election-related issues. However, this type of wording, “48 hours from the day of receipt of request”, is atypical in the world of law. More precisely, time limits in law are expressed in hours, days and years, but in this case the relevant period is expressed in a combination of hours and days. The time limit is calculated from the day of filing the request and it lasts 48 hours. The way the time limit is defined here will undoubtedly result in ambiguities in implementation, and is clearly a slip made in the process of drafting the law, given that many other time limits in the same piece of legislation are expressed in hours and start to run from a certain hour, including the time limit imposed on the Administrative Court when conducting judicial review.

It should further be noted that the Law on the Electoral Register fails to include other procedural provisions which should be in place when stipulating urgency of action. More precisely, in addition to applying this law, in the decision-making process the line ministry must also apply the Law on Administrative Procedure (LAP). This Law, for instance, requires the bodies that conduct proceedings to also carry out, as a separate stage in this process, the examination proceedings, and notify the party of the results of such proceedings while enabling them to give feedback on these results within a specified time period.

According to the LAP, decisions may be rendered even without hearing the party's opinion on the results of the examination proceedings in three situations:

- in case of urgency for the purpose of protecting the public interest
- if the decision is in favour of the party
- when so prescribed by the law.

Based on the above, in such a short time period voters clearly cannot be informed about the results of the examination proceedings, nor can their opinion be obtained properly. It is also clear that restriction on this right of voters can serve the public interest when the request is filed immediately before the register closing moment. However, it remains unclear what the ministry should do when the request for change or correction is filed when, for example, no election has been called. Is then the prevailing interest to complete the process urgently or to allow the party to exercise their right granted under the LAP – to give their opinion on the results on the examination proceedings. For this reason, procedural provisions in the Law on the Electoral Register should be improved as it would be beneficial for both voters seeking change or correction and the institution tasked with implementing the Law.

2.1. JUDICIAL REVIEW OF ENTRIES IN THE ELECTORAL REGISTER

According to international standards pertaining to electoral law, protection of rights in the sphere of electoral law is ensured before court or in administrative proceedings, with the possibility of obtaining judicial review of legality. In other words, the standards suggest that courts must have a role in this process for the sake of impartiality.

Under the Law on the Electoral Register, complaints against decisions of the ministry allowing or denying changes or corrections to the electoral register may be filed with the Administrative Court within 48 hours from the moment of receiving such decision. It also requires the Administrative Court to resolve these disputes within 24 hours from receiving the complaint.

One could note that the legislator intended to ensure that, if a request is filed at the last moment, i.e. 15 days before the election day, all the stages of the process, including judicial review, can be completed before the closing of the electoral register, i.e. 10 days before the election day.

To ensure that such good intention can have proper effects, the Law on the Electoral Register needs provisions that are substantially more precise than the current ones. Hypothetically speaking, if a request is filed 15 days before the day set as election day, in addition to the already mentioned doubts as to when the deadline for the Ministry's handling of the request starts to run, in view of the fact that delivery of decisions "without delay" also takes certain time, and that complaints may also be lodged by mail, while the Administrative Court has a deadline that starts to run from the receipt of complaint and has no deadline within which it needs to supply parties, and thus the ministry, with their judgment in writing, it becomes evident that the achievement of the intended goal becomes questionable in practice.

All of the above creates room for improvement of the procedure for protecting the right to be on the electoral register by means of precise procedural provisions which would more effectively safeguard the exercise of rights while also facilitating work of relevant authorities.

2.2. INSPECTORIAL OVERSIGHT AND PENAL PROVISIONS

Law on the Electoral Register empowers administrative inspectorate to oversee implementation of this Law and other pieces of legislation governing the keeping of the register. Such oversight includes regular and special inspection visits, but also the obligation of the administrative inspectorate to act upon applications of election participants, authorised election observers and the SEC.

According to the standard of urgency, administrative inspectorate is required to carry out inspection within 48 hours from receiving such application, as well as to supply the applicant with the inspection report and any act ordering specific measures and actions within 48 hours from the day of the inspection.

Penal provisions included in the Law on the Electoral Register prescribe monetary penalties for misdemeanours; i.e. responsible persons who fail to comply with the Law and time limits when handling voters' requests for change or correction to the electoral register.

2.3. PROTECTION OF RIGHTS IN THE EVENT OF DELETION FROM THE ELECTORAL REGISTER

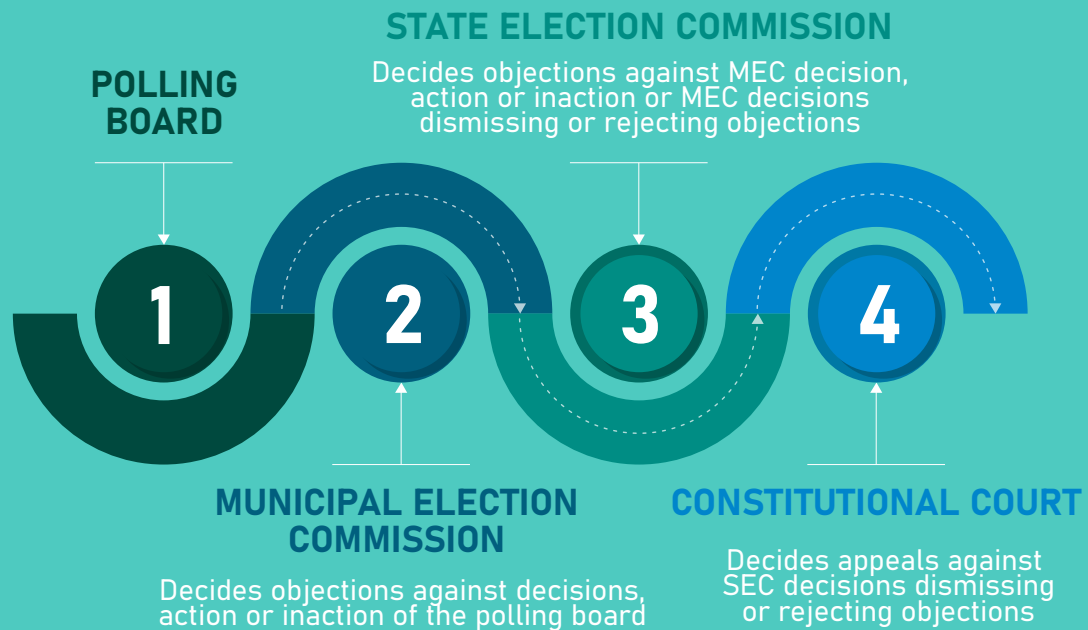
Persons who have lost the right to vote due to death, cessation of Montenegrin citizenship or cancellation of their permanent residency are deleted from the electoral register. According to the Law, deletion procedure and handling of any potential complaints in that respect are regulated by relevant provisions governing the procedure applicable to requests for change or correction to the electoral register.

All of the above leaves room for improvement of the redress procedure concerning the right to be on the electoral register by means of precise procedural provisions which would ensure better guarantee for the exercise of rights while also facilitating the work of relevant authorities.

3 PROTECTION OF ELECTORAL RIGHTS DURING ELECTIONS

The concept of protection of electoral rights during elections empowers election commissions to handle this matter, while putting judicial oversight in the hands of the Constitutional Court.

According to the Law on the Election of Councillors and MPs, any objections as to violation of the right to vote during election may be lodged to the competent election commission. Objections against decisions, actions or inactions of polling boards are filed with municipal election commissions (MEC), while SEC is tasked with handling objections against decisions, actions or inactions of MECs. Under the Law on the Constitutional Court of Montenegro and the Law on the Election of Councillors and MPs, appeals against decisions of the SEC dismissing or rejecting objections may be brought to the Constitutional Court of Montenegro.



3.1. WHO HAS STANDING TO SEEK REDRESS?

The redress process, i.e. lodging of an objection to MEC or SEC may be initiated by any voter, candidate or entity submitting a candidate list, on account of violation of the right to vote during election. In addition to that, voters who believe their right to vote has been violated, candidates for MP or councillor and entities submitting a candidate list may also file an appeal with the Constitutional Court.

Complaint procedures followed by election commissions in the Montenegrin presidential elections are regulated by relevant provisions applying to elections for councillors and MPs, while the Law on the Constitutional Court gives recourse to this court to candidates, proposers of candidates and voters who believe their voting rights have been violated.

The legal terminology used in the process of electing councillors and MPs suggests that candidates are considered to be the persons who were proposed, already from the moment of proposing the candidate list, i.e. even before the candidate list is accepted. On the other hand, when the procedure for electing the president of Montenegro is concerned, applicable legal terminology leaves room for interpretation; therefore, one could conclude that the candidate status is conditioned upon acceptance of the candidacy. In the event of such interpretation, it remains unclear whether a person whose candidacy has not been accepted may resort to legal remedies as a candidate or as a voter whose passive voting right has been violated.

Concerning the issue of whether voters are allowed to lodge objections to the competent election commission, relevant legal terminology also leaves room for interpretation. More precisely, according to the Law on the Election of Councillors and MPs “any voter (...) may lodge a complaint to the competent election commission due to a voting right breach during election”. One might wonder whether voters are allowed to object only due to breach of their own right or they may also do so if someone else’s right is concerned. The position of the SEC on this matter cannot be determined with certainty based on their practice¹, given that this body merely indicates that an objection was lodged by “authorised person” while failing to give any additional explanation in that respect.

¹Decision of the State Election Commission no. 808/3 of 17 June 2023

The Law on the Constitutional Court of Montenegro causes no such dilemma, given that it clearly states that appeals, among other persons, may also be filed by the voters who believe their right to vote has been violated. Therefore, the Constitutional Court allows only the voters with the “status of victim” to file electoral appeals, i.e. the appellant needs to believe that his/her own right has been violated.

However, the Venice Commission’s Code of Good Practice in Electoral Matters suggests that the right of appeal must be granted to a broader group of persons. Electoral law reform might be a good opportunity to clearly establish whether any voter is allowed to lodge an objection to the competent election commission, or this can only be done by voters who’s voting right has been violated. Apart from that, standing to bring an electoral appeal to the Constitutional Court could potentially be granted to all voters, not just those who believe their right has been violated.

In the event of any electoral irregularities, it is in the general interest to ensure that decisions, actions or inactions of the competent election body can be reviewed by a higher body, administrative or judicial. To this end, the right to lodge objection and electoral appeals could further be given to election observers and non-governmental organisations. Such legal arrangements are in line with relevant international standards and already in place in a number of comparative electoral systems.

3.2. REDRESS PROCEEDINGS BEFORE ELECTION COMMISSIONS

The statutory time limit within which objections may be lodged to election commissions is 72 hours from the moment of making the decision and/or performing the action concerned. This time limit is notably set in an objective manner, i.e. it starts to run from the moment of occurrence of something, rather than in subjectively – from the moment one learned (was delivered such information) that a decision was made or action was performed.

Although the Law specifies that objections may be lodged against a decision, action or inaction, the section of the Law that stipulates the time limit for lodging objections makes no mention of inaction. In other words, it fails to regulate the calculation of the time limit in the case of failure of polling boards or municipal election commissions to act.

Inaction could be interpreted as a failure to act duly. We, therefore, believe that in this case the time limit for lodging an objection should start to run at the moment when the polling board or MEC should have performed the omitted act concerned or, if there is a time limit set for performing an act, from the moment when such time limit expired without them performing it.

Such a definition of the 72-hour time limit for lodging objections is aligned with relevant international standards. According to the Venice Commission's Code of Good Practice in Electoral Matters, time limits for lodging appeals must be very short, while efforts should be made to ensure that appeal proceedings do not retard the electoral process and to avoid that due to their lack of suspensive effect decisions on appeals are taken only after the election process.

The standards further suggest that the process of setting the time limit should take into account that too short time could put the right itself at risk. It is important to ensure that the time limit for lodging objections is not so short that it has a deterring effect on potential complainants or that it reduces their ability to exercise the right to object.

Certainly, there are good reasons to question whether the provision under which objections are to be lodged within 72 hours from the making of the disputed decision rather than from the moment it is delivered guarantees adequate legal protection. For example, if an eligible person wants to lodge an objection against a MEC decision rejecting their objection against the actions of the polling board – according to the Law, the time limit for lodging such objection to the SEC starts to run from the moment the MEC issued this decision, rather than the moment the decision was delivered to the complainant. Therefore, it may happen that the time limit for objection expires even before this person receives the decision in writing and becomes familiar with its content.

It should be noted that in practice, MECs specify in their decisions the available legal remedies, explaining that objections may be lodged within 72 hours from delivery of such decisions (rather than from issuing them, as the Law requires), but they fail to indicate relevant legal grounds for such instruction².

According to the Law, objections are lodged directly to the competent election commission. This kind of legal formulation is unclear as it can be interpreted in two different ways. First is that objections are not lodged to the body that made the decision or performed or failed to perform the action which is the reason for objecting, but directly to the election commission with decision-making powers. Second is that objections, in addition to the above, are lodged to the competent election commission through its clerk's office and may not be lodged by mail, fax or e-mail.

²Decision of MEC Nikšić no. 197/2 of 18 March 2021;
Decision of MEC Cetinje no. 01-022/23-202/2 of 15 June 2023;
Decision of MEC Herceg Novi no. OIK-187/23 of 14 June 2023

In practice, election commissions accept objections sent by mail, fax and e-mail, but the law fails to explicitly allow these methods; this practice is the result of election commissions' interpretation of the Law on the Election of Councillors and MPs.

According to international standards, easily accessible and user-friendly complaint forms should be developed in the languages officially used in the country. Such forms not only make it easier to access mechanisms for the protection of electoral rights, but also may have a positive impact on the deliberation of complaints and facilitate the decision-making process, given the uniformity of a certain number of them.

The Law specifies that SEC is to prescribe various forms for performing electoral actions, but it fails to require SEC to prescribe the objection form. Regardless of this, in 2022, SEC established the objection form on its own initiative, which should facilitate the process for the interested parties. Still, the fact that this form is not easily visible on the SEC webpage could affect its practical use. Additionally, the form should also be developed in Albanian language.

3.2.1. PROCEDURAL PROVISIONS GOVERNING THE HANDLING OF OBJECTIONS

The central issue with lodging, and particularly with handling objections arises from the fact that the Law on the Election of Councillors and MPs contains very few procedural provisions concerning the protection of electoral rights.

More precisely, although procedural provisions take up most of the Law, very few of them are concerned with the protection of electoral rights. Apart from that, under this Law, administrative procedure rules (Law on Administrative Procedure) apply, to the extent appropriate, only on delivery of objections, while all the other segments are not regulated by the rules of administrative procedure³. In that regard, one should not forget that legal gaps may always lead to unpredictability (uncertainty) of the proceedings, unequal treatment in the application of the law and, generally speaking, legal uncertainty.

To illustrate the kind of legal gaps raised here, we will bring to your attention a couple of examples, without going back to the previously discussed deficiencies.

³See Decision of the Constitutional Court of Montenegro U-VI no. 584/14 of 19 June 2014

For example, Law on the Election of Councillors and MPs completely fails to regulate deliberation of objections by election commissions. The single relevant provision relating to this matter ensures that electoral management bodies reach their decisions by majority of votes. However, it is not quite clear what procedure they follow in reaching such decisions, and the answer to this question is not given by the rules of procedure of election commissions either.

Some collegial bodies, such as the Constitutional Court, have a clearly defined decision-making procedure in place, according to which, in simple terms, one member of the collegial body (rapporteur) prepares and puts forward a proposal for decision to be adopted at the meeting; this way the workload is somewhat equally distributed among members of such body. Election commissions have no such approach in their work, but they also have no other method they are required to apply and instead rely on the established practice and individual provisions in their rules of procedure.

This becomes particularly prominent when commissions give rationale for their decisions. These segments of their written decisions fail to include everything that was said at the meeting (which would also not be practical), nor do commissions establish the content of rationale at the meetings.

Apart from that, the Law entirely fails to specify the required elements of these decisions – introduction, operative part and rationale, which undoubtedly leads to barriers to implementation, while also resulting in the need to improvise, which is always associated with different risks. It goes without saying that the laws governing criminal, civil and administrative proceedings specify with absolute clarity the required elements of decisions rendered in such proceedings.

The method for establishing facts when deliberating objections, as well as for offering, accepting and presenting evidence is also completely unregulated and left to the discretion of election commissions.

Furthermore, the Law on the Election of Councillors and MPs makes no mention of the category of proxy, i.e. a competent, legally qualified person who could be involved and act as intermediary in the process of lodging objections. Generally speaking, if allowed, the option of lodging objections through a proxy might result in having objections that are formulated in a more competent manner, focused on the essence, properly explained in a legal sense, which would then facilitate the decision-making process for the relevant commissions.

It follows from above that the entire process of deciding objections, as well as of putting such decisions into effect by delivering them in a written format, is almost completely unregulated.

It should be noted that one of very few procedural provisions included in the segment of the Law that regulates protection of electoral rights requires election commissions to render their decision within 24 hours from the moment of receiving objection. However, even this provision is insufficiently precise and enables the interpretation adopted by election commissions in practice, which is that they commence their meeting to discuss the objection within 24 hours, but not necessarily render a decision within this time, let alone draft a written version of it.

When procedural rules are concerned, it should, however, be noted that there is no requirement to apply the procedural safeguards listed in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (public hearing, impartial tribunal, witness examination, sufficient time for preparation, etc) in the procedure for the protection of electoral rights. More precisely, although the right to free elections is a fundamental human right, the right to a fair trial from Article 6 of the European Convention does not apply to determination of political rights.

Nevertheless, relevant international standards include comprehensive recommendations regarding good and desirable practices in resolving electoral disputes.

Although the standards explain that complaint proceedings may be conducted by electoral bodies (provided that judicial review is guaranteed), they also indicate that such disputes should be resolved by independent and impartial bodies. Considering the fact that all municipal election commission members are representatives of political parties, just as are almost all members of the state commission (except for the president and CSO representatives), along with the fact that authorised representatives of candidate lists or candidates are heavily involved and have decision making powers in the activities of election commissions, clearly, in our context, there can hardly be any independent and impartial decision making inside the election commissions.

This is also one of the main arguments in favour of professionalisation of at least the State Election Commission, as an institution at the top of the election management bodies pyramid.

3.2.2. WHICH LEGAL ACTS MAY BE DISPUTED BEFORE ELECTION COMMISSIONS?

As already mention, there is one Article in the Law specifying that objections may be lodged against a decision, action or inaction, whereas another Article states that objections are lodged against written decisions refusing or rejecting an objection.

Such vague provisions have in practice resulted in a dilemma of whether objections against procedural decisions that manage the proceedings are allowed, so election commissions were at first of the opinion that it may not be done, and that only objections against written decisions refusing or rejecting an objection are allowed.

Having reviewed this practice, the Constitutional Court of Montenegro took the position⁴ that it would lead to violation of the constitutional and conventional right to legal remedy enshrined in Article 20 of the Constitution and Article 13 of the ECHR. Therefore, in the Constitutional Court's opinion, appeal proceedings may be initiated against any decision, action or inaction on the part of the polling board.

However, outside the scope of such review have stayed the written decisions allowing objections against decisions, action or inaction of lower bodies in the election management hierarchy. For example, if a MEC renders a written decision allowing an objection against an action performed by a polling board, such a decision is unappealable. This kind of restriction creates plenty of opportunities for misuse, especially in view of the shortage of independence and impartiality in the election commissions' decision-making processes, where the extent of potential misuse may even reach a magnitude of electoral engineering.

Consequently, it is not practically impossible for a MEC to allow objections and repeat elections on one or more polling stations to ensure any desirable election result, without the possibility of review of such decisions by higher bodies

Although potential review of decisions by higher bodies (when an objection is allowed) would somewhat prolong the decision-making process, it would also reduce the risk of misuse.

⁴See Decision of the Constitutional Court of Montenegro U-VI no. 421/14 of 15 June 2014

Finally, electoral law, in this respect, seems to neglect the competitive characteristic of the election process. More precisely, in vast majority of cases decisions have an impact on several stakeholders – if one political entity's objection is allowed, it may also affect the position of some other political entity; if one entity's objection is unlawfully allowed, the other one must have the right to review the lawfulness of the decision allowing the objection which is concerned with their rights and legal interests.

It follows from above that the electoral law reform should particularly focus on determining the list of legal acts for which redress may be sought.

3.2.3. DELIVERY OF LEGAL ACTS

Any actions related to the furnishing of decisions, conclusions and other legal acts, files, documents, submissions etc. are regulated by the rules governing delivery in administrative proceedings, unless the Law on the Election of Councillors and MPs provides for otherwise.

As already noted, this is the only segment of redress proceedings before election commissions which is governed by the provisions of a procedural piece of legislation, i.e. the Law on Administrative Procedure.

According to the Law on Administrative Procedure, briefs may be delivered via postal operator, by electronic means or personal delivery. If the delivery is done via postal operator, it may be done by regular or registered mail. In the case of regular mail, the party is considered to have received the brief on the seventh day after the day it was handed over to the postal operator. In the case of registered mail, the party is considered to have received the brief on the day indicated in the confirmation of receipt of such mail. For electronic delivery, the party needs to request such delivery and provide an e-mail address. Electronic briefs are considered delivered on the day and at the time specified in the confirmation of receipt of electronic document, in accordance with the law governing the electronic document. This means that the method of electronic delivery is still quite demanding and thus not often used in practice, or it is done by simple e-mail, which cannot be considered a completely lawful method of delivery.

Indeed, during the Montenegro parliamentary election in 2023, election commissions had major issues with delivering decisions to a large number of parties who lodged objections. Such circumstances cannot be taken against these persons, given that they were exercising the rights given to them by the Law and were using the prescribed method of delivery.

Nevertheless, these circumstances do indicate that the electoral law reform should also consider the possibility of introducing a delivery method which would ensure that this activity does not prolong the election process.

3.2.4. FINALITY AND ENFORCEABILITY OF THE DECISIONS RENDERED

The Law requires the competent election commission to ascertain the final results of elections for councillors/MPs within 12 hours from the expiry of the time limits for lodging objections and/or appeals, that is, from the moment decisions on objections or appeals become final or enforceable.

Due to previously elaborated shortcomings of relevant legal provisions, the definition of finality and enforceability is missing from the Law on the Election of Councillors and MPs.

According to the previous Law on General Administrative Procedure⁵, a decision was considered final if it no longer could be challenged. Under this Law, decisions would become enforceable once the time limit for appealing expires if the appeal was not lodged, at the moment of delivery to the party if appeal was not allowed, at the moment of delivery to the party if appeal did not stay enforcement, or at the moment of furnishing the party with a decision rejecting or dismissing the appeal. The current Law on Administrative Procedure fails to recognise the concept of finality, and acknowledges only concepts of validity and enforceability, with the latter being regulated in a manner relatively similar to that in the previous Law on General Administrative Procedure.

An argument from analogy could be that decisions in electoral appeal proceedings are final if they are not challenged by means of objection or if such objection is rejected or dismissed, and that they are enforceable if no proceedings have been brought before the Constitutional Court or if such proceedings resulted in rejection or dismissal of electoral appeal.

However, one should always bear in mind that the rules of administrative procedure apply only on delivery activities, while in the absence of adequate norms, the conclusions as to when decisions on appeals are final or valid depend on the interpretation.

⁵Ceased to apply on 01 July 2017

It should further be noted that enforceability, in simple terms, also entails the existence of mechanisms for executing a decision even when the addressee is not willing to execute it voluntarily. Whether such mechanisms are needed in the national legislation is a different issue, but it is clear that the legislation in force fails to recognise such a possibility.

Finally, international standards attach particular importance to the matter of finality/validity and enforceability of the legal acts adopted in electoral proceedings, emphasising that it must be regulated in detail, but also underlining that election management bodies must have the possibility to conduct or institute efficient proceedings ensuring the execution of their decisions.

3.3. APPEAL PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

The Constitutional Court is empowered to hear electoral disputes (other than those falling within jurisdiction of other courts) by the Constitution of Montenegro. This responsibility is further regulated by the Law on the Election of Councillors and MPs, according to which SEC decisions rejecting or dismissing an objection may be appealed to the Constitutional Court of Montenegro. Additionally, the Law on the Constitutional Court of Montenegro specifies that proceedings for violations of rights during the election of councillors and MPs are instituted by lodging an appeal against written decision of the competent election commission rejecting or dismissing objection against a decision, action or inaction of the polling board or election commission within 48 hours from the delivery of the written decision. Apart from that, the Law allows appeals brought by voters who believe their voting right was violated, candidates for councillors and persons submitting the candidate list.

To avoid repeating, we will note that numerous dilemmas and vague provisions, but also other shortcomings in the legal framework which are concerned with redress proceedings before election commissions also exist with respect to the appeal proceedings before the Constitutional Court. First of all, SEC notably renders a substantial number of other documents (decisions on acceptance of candidacy and others) other than decisions whereby an objection is rejected or dismissed; therefore, one could raise the question of whether it is allowed to initiate an electoral dispute to challenge those documents. Based on the previously mentioned interpretation of the Constitutional Court, one could say that refusal to hear such electoral appeals would lead to violation of the right to legal remedy ensured by the Constitution and conventions. Certainly, this matter is not clearly regulated and elaborated by the law, which should be the case. The necessity of introducing a possible review of even the decisions allowing an objection, for the purpose of preventing any misuse, including electoral engineering cases, also applies to the electoral dispute resolution process.

Legal framework should also be improved by allowing the public to attend sessions of the Constitutional Court discussing electoral matters, given that transparency of this process is a generally accepted international standard.

Additionally, legal framework would also benefit from separate regulation of the matter of public hearings in electoral appeals cases handled by the Constitutional Court, which would ensure that these hearings take place whenever it is in the best interest of relevant proceedings and the parties involved.

Other aspects of transparency are already regulated but their practical implementation is unsatisfactory. More precisely, Rules of Procedure of the Constitutional Court state that publicity of work is ensured, inter alia, by publishing this court's case law on its webpage.

However, standard search of this webpage reveals that at the end of 2023, only two decisions of this court were published here, despite the fact that during this year the Constitutional Court was the court of last resort for cases related to local elections in the majority of municipalities, and that presidential and parliamentary elections were held.

Concerning the decision-making process, the Law requires the Constitutional Court to supply the competent election commission with a copy of the appeal, asking the commission to provide its response and supporting election-related documents within a certain time limit, which may not be longer than 24 hours from receipt of this request. The Constitutional Court is required to decide the appeal within 48 hours from the moment of receiving such response.

Such short time limits for reaching a decision are related to the previously discussed international standard of necessity of urgent completion of appeal proceedings. However, the Constitutional Court in practice misuses the fact that no time limit has been prescribed for delivering the copy of appeal to the competent election commission. Based on the spirit and meaning of the Law, it is completely clear that such delivery should be done without delay also because the election commission has to meet a tight deadline in providing the response and case files (24 hours), just like the Constitutional Court (48 hours) to reach the decision after receiving the response.

In 2023, the Constitutional Court had a tendency to fail to supply SEC with constitutional appeals for days, thus rendering all electoral dispute resolution time limits meaningless. Although the related norms are completely clear, they obviously need to be defined with more precision to avoid such practice in the future.

Concerning the work of the Constitutional Court, another absurd situation has been seen in practice. More precisely, after it reaches a decision in an electoral dispute, instead of forwarding it in writing to the SEC, it is a habitual practice of this court to merely inform the SEC of the outcome of their deliberation and then send the decision itself later. If the appellant, for example, gives several reasons for appeal and the Constitutional Court allows such appeal and then only notifies the SEC of this information, then this commission in repeated proceedings is unaware of the position of the court and has no way of knowing whether only one, two or all five reasons were acknowledged by the Court. This practice also renders the role of the Constitutional Court in the redress process meaningless, while ensuring no proper exercise of significant powers that the Court has in the election process.

Finally, Constitutional Court may annul the entire election process or parts of it, i.e. individual activities in the process, if it determines that any given irregularity had a substantial impact on the election result. Such a decision, according to the law, takes effect from the moment of its delivery to the competent election commission.

3.4. PROTECTION OF ELECTORAL RIGHTS IN DETERMINING THE FINAL ELECTION RESULTS

As already mentioned, final results of elections are determined by the competent election commission within 12 hours from expiry of the time limit for lodging objections or appeals, as the case may be, or from the moment when decisions on objections or appeals become final or enforceable.

It is questionable whether the document determining the final results is subject to review, i.e. whether complaint may be brought against such document. In that regard, the legal system should undisputedly ensure that any open issues are previously discussed and final results are determined based on the outcome of this process.

Constitutional Court has taken the position that documents determining the final results of elections are unappealable.⁶ This Court maintains that the election results established by an act of the competent election commission constitute a final declaration of undisputed and general results after the conduct of such election and the elimination of infringements of rights during the course of election, resulting from “calculations made on the basis of reports of election commissions”.

⁶See Decision of the Constitutional Court of Montenegro U-VII no. 14/16 of 03 November 2016

International standards are clear about a mechanism that must be in place to review the election results, but whether such mechanism is ensured throughout the process preceding the determination of final election results is debatable.

Nevertheless, such view of the Constitutional Court fails to answer the following question – what if a decision on determination of election results is made without meeting the legal requirements (legal remedies have not been exhausted) or if the calculation is simply wrong?

We believe that this question leads to the conclusion that a possibility for reviewing the act determining the final election results should be ensured.

Finally, we also note that SEC in practice explains that the law allows lodging of objections “during election”; based on this argument, SEC concludes that objections lodged against the acts determining final results of election are not allowed, given that it means that the election is over.

Such a view leads to the conclusion that electoral rights are left without protection after the moment of determining the final results of election.

4 POST-ELECTION PROTECTION OF ELECTORAL RIGHTS

In the post-election period, the office of newly elected councillors or MPs is a manifestation of their passive suffrage, i.e. the right to be elected.

Their offices are confirmed in the following manner – person chairing the session of any relevant assembly acknowledges and declares that the report of the competent election commission on the election results confirms office of newly elected councillors or MPs. In the case of expiry of term of office of a councillor or an MP, efforts are made to fill such vacant positions.

Who exactly will be in office depends on the rules stipulated by the Law, and, accordingly, on the order in which candidates are listed, potential need to replace an MP of underrepresented gender, and in the case of coalition lists, on the political membership of the MP whose position is vacant and on the coalition arrangements.

The need to ensure redress mechanisms may also arise in the very process of termination of office of a councillor or an MP.

According to the Law, their office terminates:

- if they resign
- if they are sentenced by a final court decision to an unconditional prison sentence of at least six months or for a criminal offence making them unworthy of office
- if they are deprived of legal capacity by a final court decision

- if any of the incompatibility of offices requirements is met, as prescribed by the Constitution and law
- if they no longer have Montenegrin citizenship and in the event of their death.

Several such situations in practice may cause a dilemma as to whether termination was lawful, that is, whether any rights have been violated by termination.

As concerns termination of office, the Administrative Court has in several cases assessed whether councillors had their office terminated in a lawful manner.

However, administrative disputes are not resolved with sufficient urgency to ensure timely and adequate relief; besides, it is unclear whether this court would accept jurisdiction over all of the matters listed here. Consequently, there is a need to explicitly regulate methods of redress regarding all of these matters, the decision-making powers, but also to stipulate urgency of action

5 RECOMMENDATIONS

- 1 Redefine time limits applicable to the protection of the right to be on the electoral register so as to ensure their clarity and strictness;
- 2 Consider the possibility of introducing additional procedural provisions in the Law on the Electoral Register, in line with the law governing administrative procedure;
- 3 Consider whether urgency of action is needed when corrections and changes to the electoral register are requested at a time when no election has been called;
- 4 Clearly define in electoral law who and when may be granted status of election candidate, given that the protection of rights of this person is conditioned upon such status;
- 5 Ensure that a broader group of persons has standing to lodge objections and appeals by including additional legal entities.
- 6 Clearly define in electoral law the time limits for lodging objections and the moment from which such limits start to run;
- 7 Until potential legislative amendments are introduced, MECs should draft their explanation of available legal remedies in accordance with the legislation in force;
- 8 Clearly define in electoral laws the method for delivering objections to election commissions;
- 9 SEC should make the objection form visible and easily accessible on their webpage. The form should also be developed in Albanian language;
- 10 In the process of amending electoral law, give consideration to introducing procedural provisions, concerned, inter alia, with the following:
 - Precisely defined decision-making method (rendering of decisions) applied by election commissions;
 - Content of decisions (introduction, operative part, rationale, legal remedy) in objection proceedings;
 - Method for determining facts and rules of evidence;
 - Right to lodge an objection via proxy;
 - Precise definition of time limits for reaching a decision and delivering it in writing;

5 RECOMMENDATIONS

11

In the process of amending electoral law consider the possibility of professionalisation of election commission members to ensure independent and impartial redress process;

12

In the process of amending electoral law consider the possibility of redefining the documents subject to complaints to ensure enjoyment of the right to legal remedy while also preventing that certain decisions which might be relevant to the election process remain unreviewed by higher instances

13

In the process of amending electoral law reconsider the methods for delivering acts and introduce mechanisms to accelerate delivery;

14

Clearly define in electoral law the matters of validity/finality and enforceability of decisions rendered in the redress process;

15

In the process of amending electoral law consider the possibility of allowing public access to sessions of the Constitutional Court discussing electoral appeals;

16

Constitutional Court should, in line with the existing rules, promptly publish decisions on electoral appeals on their webpage;

17

In the process of amending electoral law consider the possibility of stipulating time limit for the Constitutional Court to deliver electoral appeals to competent election commissions for their feedback, given that this court's practice has rendered the existing norms meaningless;

18

In the process of amending electoral law consider the possibility of stipulating time limit for the Constitutional Court to deliver reasoned decision to the SEC when handling electoral appeals;

19

In the process of amending electoral law consider the need for defining methods of review of decisions determining final results of elections;

20

In the process of amending electoral law consider the possibility of redefining post-election complaint processes (with respect to individual appointments of candidates to councillor and MP offices, filling of vacant councillor and MP seats and termination of office of councillors and MPs) including clear definition of responsibilities and introduction of procedural rules ensuring urgency of action.

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