



# LEGAL PROTECTION OF ELECTORAL RIGHTS WITHIN THE CRIMINAL JUSTICE SYSTEM

PODGORICA MAY 2024

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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

Protection of electoral and political rights by means of criminal sanctions is crucial for preserving the integrity of democratic societies. Such legal frameworks serve as the foundation of fair and representative governments, guaranteeing that every individual is considered, and that their choices are respected. By imposing penalties for actions that undermine these rights, such as violating freedom of choice, preventing elections, intimidation, financial abuse and other fraud, societies can prevent such behaviour and protect the democratic process. Criminal sanctions act as a deterrent, signalling the severity of violations of these fundamental rights and reinforcing the principle that free and fair elections are inviolable. Without such protection, the very essence of democracy is threatened, leading to erosion of trust in institutions and deprivation of citizens' right to vote, which ultimately undermines the foundations of a just and equal society.

Within the current cycle of reform of electoral legislation, the Center for Democratic Transition (CDT) focuses on the concept of electoral justice, as a key component of rule of law in democratic societies. In all electoral processes, electoral irregularities, errors and violations are inevitable, and the prospect of individuals and organisations attempting to undermine the electoral process for their own purposes seems inescapable. For election results to be perceived as legitimate and credible, it is essential to have an effective electoral justice system in place.

We have analysed the issue of protection of electoral rights in two publications. The first publication focused on the election process, and the issues that are most closely related to the exercise of rights in that process; while the current publication covers aspects of criminal law protection of electoral rights.

Relevant public opinion surveys in Montenegro continuously show that a significant number of citizens do not perceive election processes as fair and democratic. Although the latest surveys show certain improvements, according to an OSCE survey from 2024, a high percentage of respondents (69%) still believe that electoral fraud is an issue in the context of elections in Montenegro. According to the latest data from the Montenegrin National Election Study, every other citizen in Montenegro believes that people receive money for voting. Every other citizen believes that people are blackmailed into voting a certain way; one in five believe it happens all the time; while 30 percent think it happens very often.

Perception surveys are focused on the attitudes and beliefs of respondents, indicating that these negative perceptions can be the product of negative social and political circumstances, messages and campaigns, rather than of actual, direct exposure to unlawful activity. However, citizen's perception was, unquestionably, influenced by a series of scandals related to election processes, exposed by researchers and the media, which did not reach an adequate judicial epilogue that would feed the perception that justice was served.

In the last decade, we have witnessed a number of situations that indicated vote buying, voter pressure, electoral register manipulation and illegal campaign financing. The formula "one employee - four votes" has become an operating model for every government, instead of being subject to rigid sanctions. Five years into the so-called "envelope" affair, a judicial epilogue is nowhere in sight. Judicial statistics obtained for the purpose of this analysis show that in the past ten years, a total of 32 final convictions were handed down for criminal offences against electoral rights, most of which were for violation of the freedom of choice in the casting of ballots, while there were no cases regarding unauthorised use of state assets or abuse of election financing.

When the Committee for Comprehensive Electoral Reform was established, CDT recommended that its mandate be expanded to include discussions on the Criminal Code of Montenegro in relation to criminal offences against electoral rights. New or amended provisions in relation to legislative frameworks that the Committee discusses should be accompanied by effective and deterrent sanctions. Bearing in mind the historic lack of sanctions, or inadequate penalties being imposed for serious violations of electoral rights and rules related to elections, we believe that sanctioning through misdemeanour penalties does not suffice, and that a comprehensive reform of the electoral legislation should also entail amendments to the Criminal Code.

Recommendations for improving the criminal legislation, drawn from analyses of domestic and international legal frameworks, include as follows: transferring the criminal offence from Article 115 of the Law on Election of Councillors and Members of Parliament to the Criminal Code to ensure consolidation of the criminal legislative framework in relation to electoral rights; tightening the penal policy by eliminating the possibility of imposing fines for criminal offences against electoral rights; introducing liability for attempted crimes against electoral rights; consider suspending passive voting rights for persons convicted of offences against electoral rights; consider introducing new criminal offences such as giving and receiving bribes in connection with voting, and bribing MPs or councillors; criminalising the act of counterfeiting voter signatures, and providing contributions from prohibited sources. These changes are aimed at improving criminal law protection of electoral rights, strengthening accountability, and deterring electoral theft and fraud.

This publication was created under the framework of the project “Electoral Reform in Focus: It’s Time!”, which the Center for Democratic Transition (CDT) is implementing in cooperation with the Association for Responsible and Sustainable Development (UZOR) and the Association of Youth with Disabilities (UMHCG), with the support of the European Union, through the EU Delegation in Montenegro. Its content is the sole responsibility of CDT and does not necessarily reflect the views of the European Union.

We are open to public dialogue related to the content of this publications and to all well-intended suggestion and criticism.

### **CDT team**

# 1 INTRODUCTION

## AUTHOR KRSTO PEJOVIC

Provisions of the criminal code define behaviours that violate the social order to such an extent that the legislator frames them as criminal offences and establishes the assumptions of criminal responsibility through the system of criminal sanctions and conditions for their application. The basic task of a criminal code is to provide a protective function by preserving fundamental values that enable life in the community. Therefore, *the objective of a criminal code is to preserve legal assets that the legislator considers so valuable that their protection is ensured through provisions in the criminal code*. A criminal code has the so-called *ultima ratio* (last resort) character. In other words, a criminal code represents the last wall of defence of society against undesirable phenomena and behaviour. Therefore, whenever it is possible to provide legal protection in some other fashion, e.g. through administrative, civil law or other criminal law mechanisms (e.g. misdemeanour law), response through the criminal code is withdrawn (I. Vukovic /2021/, pp. 1-3).

Democracy is essentially dependent on elections, because they are the method by which citizens choose their representatives who exercise power. It should be noted that elections are not the only criterion of democracy, but represent an important segment of democratic governments (D. B. Lazic, A. N. Blanusa /2020/, p. 164). Protection of electoral rights is crucial for the establishment of a legal framework that contributes to implementation of democratic elections. Therefore, not only must there be mechanisms for effective remedies to protect electoral rights, but there should be sufficient criminal or administrative penalties to prevent violations of the law and electoral rights. However, precautions must be taken not to create a system in which politically motivated and unfounded accusations against political opponents are prosecuted. Furthermore, all sanctions and penalties should be proportionate to the procedure that resulted in the violation.<sup>1</sup>

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<sup>1</sup>Guidelines for Reviewing a Legal Framework for Elections, second edition, OSCE-ODIHR, 2018, p. 72



## 2 NORMATIVE FRAMEWORK

Numerous international instruments testify to the importance of electoral rights. It should be noted that Protocol 1, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) guarantees the right to free elections in such a way that the High Contracting Parties are obliged to hold free elections through a secret ballot at appropriate time intervals, under conditions that ensure free expression of the people's choice in the election of legislative bodies.

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.

Article 25 of the International Covenant on Civil and Political Rights stipulates that every citizen has the right and opportunity, without any discrimination and unfounded limitations: (a) to take part in the conduct of public affairs directly or through freely chosen representatives; (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; (c) to have access, on general terms of equality, to public services in their country.

It should be noted that back in 1954, the Socialist Federal Republic of Yugoslavia ratified the Convention on the Political Rights of Women.

In terms of the domestic legal framework, Article 45 of the Constitution of Montenegro (hereinafter: the Constitution)<sup>2</sup> stipulates that the right to vote and be elected shall be granted to every citizen of Montenegro of 18 years of age and above with at least a two-year residence in Montenegro. The right to vote is exercised in elections and that right is general and equal, while elections are free and direct, by secret ballot.

The very fact that the right to vote is promoted in the Constitution, as the highest general legal act, also speaks volumes about the significance of this right. It is classified as a priority right within the section “*Political Rights and Liberties*”. That fact alone speaks for itself, so there is no need to re-articulate the weight of this right in a democratic society. Finally, the Criminal Code of Montenegro also classifies these rights immediately after the list of criminal offences against life and limb, and criminal offences against the freedoms and rights of man and citizen.

*The right to vote* (as defined in the Constitution) is terminologically more narrow than *electoral rights* (as defined in the Criminal Code of Montenegro) and represents a constitutive part of the latter. Electoral rights include (in addition to the right to vote) other rights such as: the right to run for office, the right to protect the right to vote, etc. (M. Vukcevic /2015/, pp. 144-145).

Criminal offences against electoral rights are regulated in Title Sixteen of the Criminal Code of Montenegro (hereinafter: CCM).<sup>3</sup> The list of offences includes the following: *violation of the right to stand for election* (Article 184)<sup>4</sup>, *violation of the right to vote* (Article 185), *violation of the freedom of choice in the casting of ballots* (Article 186), *abuse of the right to vote* (Article 187)<sup>5</sup>, *compilation of inaccurate electoral registers* (Article 188), *preventing the taking of the poll* (Article 189), *preventing election observation* (Article 190), *violation of ballot secrecy* (Article 191), *falsification of voting results* (Article 192), *destruction of*

<sup>2</sup>Constitution of Montenegro – “*Official Gazette of Montenegro*”, no. 1/07 and 38/13.

<sup>3</sup>Criminal Code of Montenegro – “*Official Gazette of the Republic of Montenegro*”, no. 70/03, 13/04, 47/06, “*Official Gazette of Montenegro*”, no. 40/08, 25/10, 73/10, 32/11, 64/11, 40/13, 56/13, 14/15, 42/15, 58/15, 44/17, 49/18, 3/20, 26/21, 144/21, 145/21 and 110/23.

<sup>4</sup>See the verdict of the Basic Court in Ulcinj, K. br. 3/18 dated 2 July 2018. Retrieved from: *Catalogue of Regulations*. A characteristic of the passive electoral right is that it belongs to the group of unenforceable rights, because even when the right has not been exercised, there is no possibility for an individual to make a subjective request to be elected. On the other hand, the right to equal conditions of candidacy and the right to equal conditions for the selection of nominated candidates are enforceable rights. (K. N. Golubovic /2015/, p. 103)

<sup>5</sup>See verdicts: of the Basic Court in Rozaje, K. br. 45/11 dated 4 March 2014, Higher Court in Bijelo Polje, Kz. br. 295/14 dated 4 June 2014 and the Basic Court in Pljevlja, K. br. 104/11 dated 14 May 2011 and K. br. 221/11 dated 12 December 2011. Retrieved from: *Catalogue of Regulations*.

*election papers* (Article 193), *unauthorised use of state assets for election purposes* (Article 193a), *violation of freedom allocated in the financing of political entities and election campaigns* (Article 193b), *acceptance of contributions from prohibited sources* (Article 193v) and *serious offences against electoral rights* (Article 194).

Clearly, the Criminal Code of Montenegro does not provide protection to the electoral system as a whole. This form of protection, as in other areas, is fragmentary and refers only to the most fundamental electoral rights that are protected from the most perilous forms of attack (Z. Stojanovic /2022 /, p. 562). In a modern democratic society, electoral rights are among the most important rights of citizens. However, protection through the criminal code is justified only in cases that involve the most important electoral rights and the most serious forms of their violation (N. Delic /2023/, p. 105; B. Cejovic /2007/, p. 436).

Furthermore, protection of electoral rights through the criminal code is provided by means of so-called secondary criminal legislation. In the context of Montenegro, this is achieved through the Law on Election of Councillors and Members of Parliament (hereinafter: Law on Election of Councillors and MPs).<sup>6</sup> Article 115 of this Law stipulates that anyone who orders the use of or use the military, military bodies, interior affairs bodies, judicial and state bodies and equipment of these bodies to represent, make popular or attack a certain candidate list will be punished with a prison sentence of up to three years.

The same applies to employees of these authorities and other persons who work for these authorities or cooperate with them, if they act upon such orders. If this criminal offence is committed by the President of Montenegro, the Speaker of the Parliament, prime minister and members of the Government, the President and judges of the Constitutional Court, the President and judges of the Supreme Court, a state prosecutor and the head of the state prosecution, they will be sentenced with up to five years in prison. In the wider context of electoral rights, the Law on the Election of the President of Montenegro<sup>7</sup> and the Law on the Financing of Political Entities and Election Campaigns (hereinafter: the Law on Financing)<sup>8</sup> play an important role.

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<sup>6</sup>Law on Election of Councillors and Members of Parliament – “*Official Gazette of Montenegro*”, no. 4/98, 5/98, 17/98, 14/00 18/00, “*Official Gazette of the Federal Republic of Yugoslavia*”, no. 73/00, 9/01, 41/02, 46/02, 45/04, 48/06, 56/06, “*Official Gazette of Montenegro*”, no. 46/11, 14/14, 47/14, 12/16, 60/17, 10/18 and 109/20.

<sup>7</sup>Law on Election of the President of Montenegro – “*Official Gazette of Montenegro*”, no. 17/07, 8/09, 12/16 and 73/18.

<sup>8</sup>Law on Financing of Political Entities and Election Campaigns – “*Official Gazette of Montenegro*”, no. 3/20 and 38/20.

Interestingly, the Law on Amendments to the Law on Special State Prosecution from 2016 placed the authority to prosecute perpetrators of crimes against electoral rights from CCM into the jurisdiction of the Special State Prosecutor's Office (hereinafter: SPO). However, Article 2 of the Law on Amendments stipulates that this Law enters into force on the eighth day from the day of its publication in the *"Official Gazette of Montenegro"*, and that it would be applied until legally binding conclusions have been reached in all proceedings initiated in connection with elections scheduled for 16 October 2016.

The said Article has caused some confusion. Regarding the temporal validity of the Law, the language seems to imply that the SPO would be competent to prosecute the perpetrators of such criminal offences until final conclusions have been reached in all proceedings initiated in connection with the elections scheduled for 16 October 2016. However, the question arises whether the legislator's intention was only to place the prosecution of perpetrators of criminal offences against electoral rights in the jurisdiction of the SPO in connection with the elections of 16 October 2016?

In attempts to answer this question, it was necessary to consult the Proposal of the Law on Amendments to the Law on the Special Prosecutor's Office.<sup>9</sup> The Proposal (submitted by three MPs) included only one amendment in terms of expansion of the SPO's jurisdiction. The proposal did not impose an "expiry date" for the SPO's jurisdiction, which is the case in the final and adopted version of the Law. However, the political club of the Democratic Party of Socialists submitted an additional amendment<sup>10</sup> to the initial proposal, imposing a temporal limit the authority of the SPO to the 2016 elections. It follows from the explanation that "the validity of this Law should be limited in time, because the proposed solution would otherwise be harmful in the long term, considering that it foresees an expansion of the jurisdiction of the Special State Prosecutor's Office, despite the fact that, thus far, the position of our partners from the European Commission has been that the authorities defined in the current law are set too broadly".

This decision was followed by the Amendment of three MPs who submitted the proposal of the Law, stipulating its effect in the manner proposed by the Democratic Party of Socialists. However, the explanation that accompanied this amendment clarifies that "this amendment limits the jurisdiction of the Special State Prosecutor's Office for disputes regarding the violation of electoral rights, which refer only to the upcoming parliamentary elections scheduled for 16 October 2016".

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<sup>9</sup>This document is available at: <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/1113/1168-7416-23-1-16-7.pdf>

<sup>10</sup>This document is available at: <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/1113/1168-7899-23-1-16-7-6.pdf>

In the light of the above, it is now clear that the jurisdiction of the SPO is reserved only for criminal procedural actions taken in connection with elections that took place on 16 October 2016. In other words, viewed from the context of jurisdiction, the SPO is not authorised to act on criminal offences against electoral rights, except in the context of 2016 elections.

However, this amendment to the Law on Election of Councillors and Members of Parliament did not correspond with amendments to the Law on Courts (hereinafter: LoC)<sup>11</sup>. It is clear that the SPO presents cases before the Special Division of the High Court in Podgorica, which is why the framework of Article 16 paragraph 2 of the LoC should have been amended to define the competence of that court to act in offences against electoral rights. The said competence should also have had a temporal limit, as was the case with the Law on Amendments of the Law on the SPO.

It is uncertain whether or not there are any pending proceedings regarding the 2016 elections, which is why it is necessary to consolidate the Law on SPO and the LoC to determine the first-instance jurisdiction of the Higher Court in Podgorica for criminal offences against electoral rights defined in Title Sixteen of the CCM for the elections held on 16 October 2016. The current legal framework does not give the High Court in Podgorica any possibility to act in these offences.

However, in line with the judgment of the Appellate Court of Montenegro, *Kz-S br. 1/17* dated 31 January 2017, the decision of the High Court in Podgorica, which declared itself incompetent to decide on the legal matter where the SPO filed the indictment, was annulled. The principles that guided the Appellate Court were based on the fact that the SPO acts before the High Court in Podgorica, which means that the jurisdiction of the Special Division of the High Court in Podgorica is fundamentally regulated by the Law on Amendments to the Law on SPO.

The external organisation of courts is linked to judicial jurisdiction, which defines the right and duty of a court to take a certain legal matter, i.e. the scope of work determined by law in which the court can fully exercise its judicial function (G. P. Ilic /2009/, p. 26).

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<sup>11</sup>Law on Courts "Official Gazette of Montenegro", no. 11/15 and 76/20.

Given the above, the conclusion of the Appellate Court, although logical, is legally unsustainable. We are of the opinion that the actual jurisdiction of the court cannot be determined by the jurisdiction of the prosecution acting before that court.

Such an approach would be possible in two situations: 1. if the LoC expressly stated that the Special Division of the High Court in Podgorica acted in cases led by the SPO and 2. if the legislator did not apply the system of enumeration, i.e. listing of criminal offences tried before this Division (although even in that case, it is questionable how far the Special Division of the High Court in Podgorica could establish the actual jurisdiction to act in these cases, with the express provision of the LoC that basic courts act as first instance courts for criminal offences for which a prison sentence of up to ten years is prescribed, apart from exceptions provided for in Article 16 of the LoC).

As neither of those two cases apply in this situation, the reasoning of the Appellate Court is, in our opinion, unacceptable.

### 3 PROBLEMS IN APPLICATION FROM THE NORMATIVE PERSPECTIVE

The previous section introduced the relevant national and international instruments, outlining the significance of electoral rights as universal rights, which form the backbone of every democratic state.

It seems that every electoral cycle in Montenegro was followed by proclamations that the elections were “rigged”, “stolen”, etc. We would argue that such qualification of a process that is absolutely vital to society is anything but benign. Of course, the allegations would have to be proven. If such behaviour by a natural or legal person could be proven, we could reach the next stage – sentencing. If we place aside serious crimes against electoral rights, the dominantly prescribed specific maximum sentence (i.e. the maximum sentence that can be imposed for a specific criminal offence, which should be distinguished from the general maximum, which is 20 or 40 years, according to Law) for criminal offences against electoral rights from the CCM is up to one year.

The following question emerges – can the specific maximum, set this low, meet the purpose of the sanction (Article 32 of the CCM), and can it, given the general purpose of imposing criminal sanctions (Article 4 paragraph 2 of the CCM), lead to suppression of crimes that violate rights protected by criminal legislation?

Take for example the violation of the right to vote (active suffrage). If someone prevents another person from voting, such an individual faces a fine or imprisonment of up to one year. Although the prison sentence of up to one year, compared with sentences for other criminal offences in the Criminal Code of Montenegro, is extremely moderate, the courts almost never resort to imposing the special maximum. Consequently, we can conclude that no offender, under the current circumstances, would be sentenced to the maximum sentence. Moreover, it is likely that some of the warning measures would be imposed in those situations.

The possibility of imposing fines for these criminal offences is far more problematic. Given that the “beneficiaries” of such activities are political parties, members of the criminal milieu and powerful interest groups, these groups can afford to pay the fine, which is likely not a deterrent or a problem for them.

Therefore, for the sake of effective protection of electoral rights and bearing in mind the essential significance of exercising these rights, as well as the motives for committing the offence, we recommend that the *possibility of imposing fines for criminal offences against electoral rights be removed*.

Attempted criminal offence is defined in Article 20 of the CCM. Paragraph 1 of that legal provision stipulates that anyone who intentionally attempts commission of a criminal offence with criminal intent, but does not complete it, shall be punished for attempted offence punishable under law by a prison sentence of five years or more, whereas other attempted offences shall only be punished where it is explicitly provided for by law that the penalty also applies to an attempt.

This provision indicates that the defendant will be held liable for the attempt only if a penalty of five years or more is prescribed for that offence, or when it is expressly prescribed.

A review of prescribed penalties from the primary (CCM) and secondary (Law on Election of Councillors and MPs) criminal legislation, implies that apart from serious crimes against electoral rights (Article 194), unauthorised use of assets for other purposes (Article 193a) and paragraph 2 of Article 115 of the Law on Election of Councillors and MPs, the attempt of other criminal offences against electoral rights are not punishable.



This circumstance should be considered, and future legal reform efforts should ensure that it is included in the CCM. In this regard, we refer to Article 107 paragraph 2 of the German Penal Code, which stipulates that attempted criminal offence is punishable if someone prevents or obstructs elections or determination of their results by force, or threat of force. Furthermore, according to the provision of Article 107a paragraph 3 of the German Criminal Code, the attempt of a criminal offence is also punishable if someone attempts to vote without having the right to do so, or if an individual establishes an incorrect election result or falsifies the result in another way, or if, acting in the capacity of an authorised assistant, they votes contrary to the vote of the person with the right to vote, or the person with the right to vote has not declared their choice, and they vote without the right to do so, inaccurately publish the election result, or cause inaccurate publication of the results.

We already mentioned that for decades, citizens, the civil sector and political actors have been underlining the issue of “unfair” elections and “theft” of election results. Regardless of whether such (unofficial) accusations reached a judicial epilogue in terms of convictions, one should not forget the numerous videos that were shown to the public following electoral cycles, with the aim of discrediting a certain political party, and the election process as a whole.

Given the above, we believe that *de lege ferenda* should consider criminalising attempted crimes against electoral rights. The very attempt to commit one of these criminal offences speaks of the seriousness of such an act and, we can safely say, undermines democracies.

## 4 PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The verdict of the European Court of Human Rights (hereinafter: ECtHR) in *Mathieu-Mohin and Clerfayt v. Belgium* (No. 9267/81, 02 March 1987, para. 50) relied on an analysis of the substance of Protocol 1, Article 3 of the ECHR, confirming that the wording of the said of the Article rests on the desire to attach more seriousness to the assumed obligations, and the fact that the primary obligation in this area is not the obligation to abstain or not interfere, as is the case with most civil and political rights, but the obligation of the state to adopt positive measures for “holding” democratic elections.

The ECtHR, therefore, does not consider that the right to free elections implies only the “institutional” right to hold free elections, but also the subjective right to participate – the “right to vote” and the “right to be elected in elections for the legislative body”. The ECtHR underlined that the right to free elections is understood as a subjective right in its verdict in *Hirst v. United Kingdom* ((No. 2) (VV), No. 74025/01, 06 October 2005, para. 59), which referred to active suffrage of prisoners, adding that universal suffrage has become a basic principle. The ECHR does not oblige signatory states to introduce a certain electoral system. However, in the case of *Hirst*, the ECtHR pointed out that it is legitimate for a democratic society to protect itself from actions aimed at suppressing the rights or freedoms contained in the Convention, and that Protocol 1, Article 3 does not exclude the possibility that a restriction of the right to vote may be imposed on a person who has seriously abused public office or whose behaviour may pose a threat to the rule of law or democracy (B. Besirevic et al. /2017/, pp. 670–677).

In *Sitaropoulos and Giakoumopoulos v. Greece* (no. 42202/07, 05 March 2012, para. 50-81), the ECtHR considered whether there was an obligation on the part of the state to enable their nationals living abroad to vote. Following a detailed analysis of the legal arrangements in the member states and taking into account primarily the “interest” of those individuals in influencing the legislative policy in their home state, the Court established that there was no violation of Article 3.

No less relevant is the standard adopted by the Court in the verdict on *Alajos Kiss v Hungary* (No. 33832/06, 20 May 2010, para. 38-41). This case raised the question of whether the active voting right of a person who was under guardianship for psychiatric reasons was violated.

The Constitution of Hungary provided for an automatic and general restriction of the right to vote for persons *under guardianship*. Although the Court accepted that the deprivation of the right to vote was justified by the need to only allow citizens who are capable of assessing the consequences of their decisions, and of making conscious and reasonable decisions to participate in public affairs, the Court still found a violation of the ECHR, because it could not accept that people with intellectual or psychological disabilities are treated as a unique category, i.e. that a thorough and detailed examination of their real mental abilities is not carried out. Therefore, the ECtHR concluded that the deprivation of the right to vote without an individual judicial assessment, based solely on some form of mental disability, cannot be considered consistent with legitimate grounds for limiting the right to free elections (B. Besirevic et al. /2017/, pp. 670-677).

Administrative sanctions regarding violations of national electoral rights in connection with exercising the passive right to vote have had to pass the “criminal charge” test in the judicial practice of the ECtHR. To clarify, the “criminal charge” test is a term used by the ECtHR in its considerations of whether a behaviour can be considered “criminal”, regardless of whether it (i.e. whether the criminal offence) is provided for in the legislation of the High Contracting Parties (signatories to the European Convention on Human Rights). The rules by which the Court applies this test are also known as the “Engel Rules”, because they were first established in the case of *Engel and others v. the Netherlands*.<sup>12</sup> In this case, the Court defined the rules for understanding the term “criminal charge” in the autonomous meaning of the Convention.

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<sup>12</sup>*Engel and others v. The Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976

In this sense, the following circumstances are relevant: (1) as the first criterion, the Court stated that it should be determined whether the provisions defining an offence that is the subject of the accusation, according to the legislation of the Contracting State, belong to criminal law, disciplinary law, or both. However, this is only a starting point. This indication has only a formal and relative meaning; (2) the very nature of the offence is a factor of greater importance; and (3) the degree of severity of the punishment. A society based on the rule of law will classify deprivation of liberty in the “criminal” sphere, except in cases in which the duration or method of execution of the punishment, cannot be significantly harmful.

In the case of *Pierre Bloch v. France* (No. 120/1996/732/938, 21 October 1997), the applicant, who was elected as an MP in the National Assembly of France, exceeded the prescribed amount of expenses intended for the election campaign, on the basis of which he was imposed with an administrative sanction consisting of two cumulative penalties - suspension and deprivation of the parliamentary mandate for a period of one year, and the obligation to compensate the entire amount spent in the campaign.

Examining the classification and nature of the offence, the purpose of each punishment and their severity, the ECtHR first assessed that the national classification of the offence indicated an objective violation of the right to vote. The penalty of suspension and deprivation of the parliamentary mandate for a period of one year is intended to oblige the candidates to respect the prescribed limit of expenses. Therefore, the punishment is considered a measure that is prescribed to ensure that parliamentary elections are held in accordance with regulations, and is not criminal in nature.

Although the penalty of deprivation of mandate is provided as a supplementary sanction in the French Criminal Law, its nature as a criminal sanction derives from the main penalty to which it is imposed. Regarding the severity of the threatened punishment, the deprivation of mandate is limited to one year, and the ECtHR considered that the severity of the punishment was not sufficient to characterise it as criminal. The court concluded that none of the criteria embedded in the autonomous concept of “criminal charge” were met. The sanction in the form of compensation for the entire amount spent during the election campaign, although high, was not, according to the Court, a “criminal sanction”, because the payment of the amount that the candidate abused to solicit the votes of his fellow citizens is intended to ensure proper conduct of parliamentary elections and, in particular, the equality of candidates.

In the case of *Tapie v. France* (No. 32258/96, 13 January 1997), Tapie was the owner of several companies that, due to debts, were liquidated by the court. As a result of the liquidation, in accordance with the automatic validity of the provisions of the Law on Elections, Tapie was deprived of his parliamentary mandate in the French parliament and the European Union.

Furthermore, he was banned from running for parliament for five years from the pronouncement of the judgment declaring liquidation. Tapie argued that the punishment could be classified under the autonomous concept of “criminal charge”. However, the ECtHR expressed the view that the temporary deprivation of parliamentary capacity, even for a period of five years, did not represent a sanction that, according to its nature or severity, could be classified as “criminal” (Nav. according to: K. N. Golubovic /2015/, p. 105 -106).

Bearing in mind the above, it is worth considering a ban of voting rights (at least for a certain period) for perpetrators of criminal offences against electoral rights (see standards from the ECtHR verdict in the Hirst case, cited above). Such a ban would have to be articulated in several legal texts, primarily as a security measure within the CCM, and in the Constitution as an exception to the universal right to vote and be elected.

Take, for example, Article 45 of the German Criminal Code, which stipulates the following: whoever is sentenced to a prison sentence of at least one year for a serious offence loses the ability to hold public office and to be elected in public elections for a period of five years (paragraph 1); the court can deprive the convicted individual of the right to vote on public matters for a period of two to five years, if this is expressly determined by law (paragraph 5).

## 5 DOMESTIC AND REGIONAL DE LEGE LATA FRAMEWORK AND JUDICIAL PRACTICE

The criminal offence of violation of the right to stand for elections under Article 184 of the CCM exists when candidacy in the elections is prevented or hindered through a violation of the regulations or in other unlawful ways. Seen from the aspect of consequences, it is an inchoate (obstruction) or consequential (prevention) criminal offence. In other words, this offence exists when a candidacy (passive right to vote) is prevented, and when there is interference with the candidate in the process of running for elections, by violating the law or by other illegal means.

Therefore, the criminal offence is also committed by the very act of unlawful interference in the exercise of this right to which the candidate is entitled by law, which means that it is irrelevant whether the candidate exercised that right after the interference was performed, although that factor can influence the sentencing policy (M. Petrovic, A. Jovanovic /2018/, p. 195). The doctrine unanimously advocates that there is a need for direct intent, which also includes awareness of illegality.

If, on the other hand, the violation of the right to run for office occurred in a manner that fulfilled the characteristics of another criminal offence (e.g. coercion), some theorists argue that it is a case of concurrence (Z. Stojanovic /2022/, p. 563).<sup>13</sup>

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<sup>13</sup>An apparent concurrence implies that the elements of several (usually two) criminal offences have factually been committed, but in reality there is only one (more serious) criminal offence.

We cannot completely agree with the point of view regarding concurrence. In the case of apparent concurrence, the punishment of one (main) criminal offence includes the wrongdoing in relation to the entire incident, so the second (excluded) offence is not punished (P. Novoselec, I. Martinovic, p. 345). Therefore, the application of the standard advocated by *Stojanovic* would mean that if a person is subject to coercion, which prevented the person from running in elections, such a defendant would be liable only for coercion (because coercion is a criminal offence, according to the provisions of Article 165 paragraph 1 of the Criminal Code of Montenegro, which may lead to imprisonment of up to three years). Therefore, the criminal offence against electoral rights would be excluded in that case.

The above example is perhaps the best illustration of how inadequate the current legal text is in terms of dealing with these serious violations of human rights. Therefore, we consider it necessary that criminal policy should be more severe. If an offence was committed using force, coercion, threat, blackmail, etc., it should be defined as a more serious form of criminal offence. Only then will this criminal offence gain its autonomy, and this right will be adequately protected with significantly higher penalty ranges (which will be higher than the individual special maximum defined for these criminal offences - coercion, blackmail, etc.).

Most of these criminal offences are characterised by their substance being partial. As a rule, their existence cannot be specified without relevant legal norms that regulate the field of elections (Z. Stojanovic /2022/, p. 562). The criminal offence of violation of the right to stand for election is a blanket criminal offence, because the illegality of preventing or making it impossible to stand for election is determined by reference to regulations that are not included in the Criminal Code (B. Cejovic /2007/, p. 437; Lj. Lazarevic, B. Vuckovic, V. Vuckovic /2017/, pp. 501-502).

It is true that for determining a “violation of the law” we would have to consult other laws, and then specify the article of those laws, and include the law itself in the factual description of the offence,<sup>14</sup> but this would not be the case if the phrase “in other unlawful ways” was used. If we accepted the fact that it is a blanket criminal offence, the enacting clause would have to contain some regulation that would supplement the act of execution.

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<sup>14</sup>For example: for the criminal offence of unlawful possession of weapons or explosive substances from Article 403 of the Criminal Code of Montenegro, in the factual description of that criminal offence, we will always refer to the fact that the defendant violated some provision of the Law on Weapons (and this provision must be included together with this Law) which regulates the conditions under which a natural person can hold a certain type of weapon.

As the offence can be committed by coercion, blackmail, threat, force, etc., it is not clear how the enacting clause of the indictment should read in those situations, i.e. what the blanket enacting clause of the regulation would look like. On the other hand, there is no need to supplement the term “candidacy” with provisions from the Law on Election of Councillors and MPs, because the Constitution guarantees this right and the conditions under which it can be exercised.

The perpetrator of this act can be any person. However, authors often take the view that it can only be a person who decides on someone's request to run in the elections (Lj. Lazarevic, B. Vuckovic, V. Vuckovic /2017/, pp. 501-502). We do not agree with this approach. First of all, such a conclusion does not follow the intent of this Article. Furthermore, it would mean that all actions that affect a contender for a position – coercion, threat, blackmail, etc. – which can, in principle, be undertaken by any person, are deleted from the corpus of actions for the execution of this criminal offence.

In the context of the criminal offence – violation of the right to vote from Article 185 of the CCM – it exists when someone illegally fails to enter a person in the electoral register, removes another from the electoral register, or takes another unlawful action to prevent or obstruct their right to vote. Therefore, an individual can be prevented from voting or interfered with in that intention. In case of the latter, it does not matter whether the person has exercised the right to vote. This offence can only be committed with direct intent, and intention is also required.

We cannot agree that this act can be performed only by an official who is in a position that enables influence over the competent authority (B. Cejovic /2014/, p. 246). It seems that such an approach disregards the part of the provision that refers to “or takes another unlawful action to prevent or obstruct their right to vote” that may imply that coercion, threat, blackmail and deception, which can be carried out by any person.

The Criminal Code of the Republic of Serbia<sup>15</sup> provides, as a special criminal offence, the giving and taking of bribes in connection with voting (Article 156). Criminalisation of these offences aims at preventing the buying and selling of votes in elections.

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<sup>15</sup>Criminal Code of the Republic of Serbia – “*Official Gazette of RS*”, no. 85/2005, 88/2005 – amend., 107/2005 – amend., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.



The Montenegrin legal framework envisages passive election bribery in paragraph 2 of Article 186, while paragraph 1 of the same Article refers to active election bribery, albeit not explicitly; rather, it is inferred from the phrase “otherwise exerts unlawful influence on them to cast their ballot or not to cast their ballot in an election or referendum, or to cast their ballot in favour of or against a specific candidate, electoral list or a proposal”.

Therefore, it would be beneficial if future amendments to the CCM *criminalised active election bribery* in the way that it has been done in Article 156, paragraph 1 of the Serbian Criminal Code, i.e. to explicitly criminalise the situation in which one “offers, gives, promises reward, gift or other benefit to another in order to vote or not to vote in elections or referendum for or against a particular person or issue.”

Within the framework of criminal offences against voting rights, the Criminal Code of the Republic of Croatia<sup>16</sup> criminalised “*bribery of representatives*”. It covers active and passive bribing of representatives or councillors in order to vote in a certain way in Parliament, i.e. in the municipal assembly. Article 108e of the German Criminal Code contains a similar provision.

The Supreme Court of the Republic of Croatia adopted the decision, I Kz-Us. br. 6/14-4 dated 21 January 2014, with regard to this criminal offence, with the following reasoning:



Thus, bearing in mind that citizens in the Republic of Croatia participate in the exercise of power through their elected representatives, namely those whose programmes, ideas and goals of the political parties of which they are members reflect their will as voters to the greatest extent, the defendant's effort to ‘buy’ the council seat of a member of another political party to change the original will of citizens G. V. represents a distinct threat to democracy. Therefore, it is rightly pointed out in USKOK's file that the circumstances of the specific case, especially bearing in mind the interest of the entire Croatian society and prevention of the so-called ‘trade in seats’, justify that the conduct of the defendant is considered a serious criminal offence where the interest of criminal prosecution and punishment of the perpetrator prevails over the violation of his rights from Article 10, Paragraph 2, Point 1 of the Criminal Procedure Code/08, and the fact that the conversation was recorded without the order of the judicial authority, i.e. without the defendant's knowledge and consent to such recording.”

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<sup>16</sup>Criminal Code of the Republic of Croatia – “*People's Gazette of RH*”, no. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23.

Therefore, in addition to provisions that regulate the giving and receiving of bribes, as a special provision within this group of criminal offences, the criminal offence of *bribing councillors and MPs, should also be criminalised*.

The verdict of the High Court in Podgorica, *Kz. br. 136/19 dated 28 February 2019*,<sup>17</sup> confirmed the verdict of the Basic Court in Cetinje, *K. br. 33/2018 dated 19 November 2018*, by which the court declared two persons guilty, one of them for the criminal offence of a serious offence against electoral rights from Art. 194 para. 2. in connection with Art. 189 para. 2 of the CCM; and the other for the criminal offence of preventing of taking of the poll Art. 189 para. 2 of the CCM. In terms of appeals, the second instance court agreed with the decision of the first instance court, which stated that the criminal offence of preventing of taking of the poll, Article 189 paragraph 2 of the CCM, was committed by a person who obstructed the voting process by causing a disturbance at the polling station, as a result of which the voting was interrupted.

According to this Article, the obstruction can be done in various ways, such as talking with individual members of the polling committee while other voters are exercising their right to vote, using a mobile phone at the polling station and the like. Causing a disturbance implies that there is physical contact at the place of the election in the form of pushing, fighting and the like, physically moving the voting booths box during the voting process, moving the booths and preventing their use, thereby violating the secrecy of the vote. An important element of the cited criminal offence, according to the verdict, is that as a result of some of the aforementioned actions, voting was interrupted.

The verdict of the Appellate Court of Montenegro, *Kz-S 10/17 dated 27 June 2017*, annulled the verdict of the High Court in Podgorica, *Ks. br. 40/2016 dated 10 April 2017*. The facts in the case included the first defendant coming to the house where the second defendant lived and offered to the latter EUR 60 to buy her identity card, to which the latter agreed and took the money, while the former took the identity card. However, the second defendant changed her mind the next day, realising that she had committed a wrongdoing, and that she wanted to exercise her right to vote, so she went to the house of the first defendant to demand that she return her identity card, which she later returned to her. Upon receiving the identity card, the second defendant returned most of the money.

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<sup>17</sup>All the verdicts reached by courts in Montenegro that are quoted in this paper have been taken from: [www.sudovi.me](http://www.sudovi.me)

It was not disputed that the second defendant went to the polls and exercised her right to vote. However, the Appellate Court overturned the first-instance conviction, stating that the criminal offence of violation of freedom of choice in the casting of ballots from Article 186 paragraph 1 of the Criminal Code of Montenegro implies unlawfully influencing a passive subject to exercise or not exercise the right to cast a ballot in an election or referendum, or to vote for or against a specific candidate from the electoral list or proposal. The act was completed when the passive subject voted or failed to exercise their right to vote due to the action that was undertaken.

Starting from the quoted legal provision, and the established factual situation that the second defendant exercised her right to vote, the first instance court's conclusion that those facts were irrelevant to the commission of the criminal offence charged to the first defendant is incomprehensible.

In addition, the decision on annulment states that, taking into account the established facts including that the second defendant returned the money she had received so that she would not vote in the parliamentary elections, the Appellate Court of Montenegro found that the first-instance court failed to give clear and valid reasons as to whether this defendant voluntarily decided not to commit a criminal offence by such action, given that she had exercised her right to vote in those parliamentary elections.

The proposed interpretation of the legal norm - Article 186 paragraph 1 of the CCM - as provided by the Appellate Court is correct, in our opinion. However, the Appellate Court of Montenegro, after the High Court in Podgorica reached the same verdict and convicted the defendants in the retrial, supported such a decision in its verdict *Kz.S. br. 20/2017 dated 22 December 2017*, stating the following:



The allegations contained in the defendant's defence attorney's appeal, that the defendant J.D. decided not to commit the criminal offence because she had returned the identity card to N.V. who then exercised her right to vote have no effect on the existence of this criminal offence, due to the fact that it is a purely inchoate criminal offence that does not contain a consequence as a constitutive element of the criminal offence, as correctly concluded by the first instance court, for which it gave a clear and comprehensible explanation in the challenged verdict, which was fully accepted by this court."

Firstly, the Appellate Court provided no explanation for the change compared to its earlier decision. Secondly, the criminal offence of violation of freedom of choice in the casting of ballots is not an inchoate, but a consequential criminal offence.

The reason is as follows - in the case of a formal or inchoate criminal offence, the essence of the criminal offence is exhausted in the act itself, so they have no consequence in the described sense, e.g. with the basic criminal offence of giving a false statement, it is not required that the giving of a false statement had some consequence (P. Novoselec, I. Martinovic /2019/, pp. 75-76).

Inchoate criminal offences are completed by the very act of execution, i.e. the wrongdoing that they entail does not include the lack of any harmful consequences caused, but only the circumstances that form part of the action (I. Vukovic /2021/, p. 73).

The criminal offence of violation of freedom of choice in the casting of ballots from Article 186 paragraph 1 of the CCM exists if by means of force or threats, one coerces another person or otherwise exerts unlawful influence on them to cast their ballot or not to cast their ballot in an election or referendum or to cast their ballot in favour of or against a specific candidate, electoral list or a proposal.

The consequence of coercion or exertion of influence is the exercise or failure to exercise the right to cast a ballot or not cast a ballot in favour of or against a specific candidate, electoral list or a proposal.

Therefore, in our opinion, the courts are wrong when they qualify this offence as an inchoate offence. It is a consequential criminal offence, because the intended consequence of the offence is for the casting of ballot to not take place, or that the casting of ballot was done in a way that someone else wanted.

Furthermore, the verdict of the High Court in Bijelo Polje, *Kz. br. 63/16 dated 17 March 2016*, confirmed the verdict of the Basic Court in Pljevlja *K. br. 27/2015 dated 06 October 2015*, by which the defendant Dj. J. was found guilty of the criminal offence of violation of freedom of choice in the casting of ballots from Article 186 paragraph 1 of the Criminal Code of Montenegro.

It follows that the defendant unlawfully influenced the injured party to vote for the electoral list ... in the local elections, by offering the injured party M. money several times over the phone, so that her family would vote for ..., while the defendant addressed the injured party D. in front of his house, saying “L. is our man, it would be good if you supported him, we will win the elections anyway, it would be good if you voted, because you know you have to make a living after the elections, we will win anyway, pass it on to your mother and father” who on that occasion rejected the offer made by the defendant, after which she took her wallet and offered him money, and at that moment the injured party turned on the camera on his mobile phone and started recording their conversation. While the injured party D. was recording the course of the conversation between him and the defendant, the defendant tried to snatch his phone, grabbed his hand while he was moving towards the house, at which point he jerked his hand and pushed the defendant away, who continued to follow him and begged him to stop recording and while the camera was still on, he insisted that the defendant repeat the number she was offering once more in order for him to vote for ...

In this case too, the court considered that the criminal offence of violation of freedom of choice during the casting of ballots was an inchoate criminal offence. It did so in the following case as well: the verdict of the High Court in Bijelo Polje, *Kz. br. 700/2013 dated 16 January 2014* confirmed the verdict of the Basic Court in Pljevlja, *K. br. 132/13 dated 22 October 2013*, by which the defendant K. R. was found guilty of the criminal offence of violation of the freedom of choice during the casting of ballots from Art. 186 para. 1 of CCM.

It appears that on 10 October 2012, there was a conversation regarding the elections between the defendant and the injured party K.M., which they confirmed. On that occasion, the defendant illegally influenced K. to go to the parliamentary elections held on 14 October 2012 and to vote for .... Upon evaluating the evidence presented at the main hearing, the court decided to give credence to the testimony of the injured party, as the testimony was confirmed by the transcript of the conversation recorded on the audio recording. From the testimony of the injured party, it follows that the defendant influenced the injured party during the conversation and his decision during the casting of the ballot, which is also shown by the defendant's words, which he uttered after the injured party said that he might not vote for anyone: “you can't just vote for no one, so tell me, if you're not going to vote for ..., let me write that you're not going to vote at all, because they'll be checking whether you've been out to vote or not”.

With this kind of behaviour, the defendant illegally influenced the injured party to exercise or not exercise the right to vote in the elections, as concluded by the first instance court.

Article 193a of the Criminal Code of Montenegro criminalises unauthorised use of state assets for electoral purposes. This offence is committed by an official who, for the purpose of presenting the electoral list, uses or facilitates the use of assets owned by state bodies, public enterprises and funds, local self-government units and companies in which the state has an ownership interest.

The previously quoted provision of the CCM should be linked to Article 36 of the Law on the Financing of Political Entities and Election Campaigns, which prohibits the use of premises of state bodies, state administration bodies, local self-governing bodies, local administration bodies, public enterprises, public institutions and state funds and companies founded and/or owned in major part or partly by the state or local self-government unit, for the preparation and implementation of the campaigning activities, unless the same conditions are provided for all participants in the election process.

However, Article 65 paragraph 1 item 6 of the Law on Financing provides for a misdemeanour fine in the amount of EUR 5,000 to EUR 20,000 for a political entity, i.e. in the sense of paragraph 2 of this Article for a responsible person in a political entity, who uses the premises of state bodies, state administration bodies, local self-governing bodies, local administration bodies, public enterprises, public institutions and state funds and companies founded and/or owned in major part or partly by the state or local self-government unit, for the preparation and implementation of the campaigning activities, unless the same conditions are provided for all participants in the election process.

According to Article 2 paragraph 1 of the Law on Financing, the following are understood as political entities: political parties, coalitions, groups of voters and candidates for the election of the President of Montenegro. In this context, we observe a problem in the form of an overlapping misdemeanour and a criminal offence, if the responsible person in the political entity is also a public official. In such situations, there is justified cause for concern that the responsible person would be punished only for a misdemeanour, thereby avoiding criminal liability, due to *res iudicata*.

Article 193b paragraph 1 of the Criminal Code of Montenegro stipulates that whoever, by force or threat or in another unlawful ways, influences a political entity to be given monetary, non-monetary or other means for financing an election campaign or financing a political entity, shall be punished by a fine or prison sentence for up to three years. A more serious form of this offence exists if it is committed by an official.

The term “in other unlawful ways” can include coercion, blackmail, etc. This criminal offence essentially represents a special form of the criminal offence of extortion from Article 250 of the Criminal Code of Montenegro and blackmail from Article 251 of the Criminal Code of Montenegro. However, it is striking that the sanction for this criminal offence is much lower than for the aforementioned (general) criminal offences.

This criminal offence, together with the criminal offence from Article 193v (acceptance of contributions from prohibited sources) was introduced into Montenegro’s criminal legislation by the adoption of the Law on Amendments to the Criminal Code of Montenegro from 2020 (“Official Gazette of Montenegro”, No. 3/20). However, the explanation provided by the entity that proposed the amendment is much more interesting. It follows from the proposal<sup>18</sup> that “According to the Law on Financing of Political Entities and Election Campaigns, certain actions (are) prescribed as misdemeanours, which are characterised as posing a lower degree of social risk than a criminal offence.”

Bearing in mind the change in social circumstances, i.e. the level of social risk when these offences are in question, it was seen as necessary to have the actions that are defined by the Law on Financing of Political Entities and Election Campaigns as misdemeanours, prescribed as criminal offences in the Criminal Code.

The CCM specifically frames these offences as criminal offences against electoral rights. If these offences are criminalised, conditions will be created for provisions of the Code to be supplemented with new criminal offences, with the aim of preventing the violation of freedom of choice and acceptance of contributions from prohibited sources”.

Simultaneously, Article 193v criminalises the acceptance of contributions from prohibited sources.

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<sup>18</sup>Draft Law on Amendments to the Criminal Code of Montenegro can be found at: <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/898/2196-12908-23-1-19-12.pdf> (accessed 19 March 2024).

This offence, according to paragraph 1 of this Article, is committed by a responsible person in a political entity, who accepts funds, contributions or other benefits that represent a prohibited source of financing of political entities.

The second paragraph of the same Article foresees criminal liability in cases when the responsible person in a political entity could and should have known that funds, contributions, or other benefits represent income obtained through criminal activity.

Paragraph 3 stipulates a mandatory security measure, whereby funds, contributions or other benefits shall be forfeited. It can rightly be asked why paragraph 2 of this Article targets only “income obtained through criminal activity”. Apparently, the legislator considered this type of “income” extremely dangerous for the election process itself, given that he considered it sufficient for the responsible person to (only) have the duty to know.

Such an attitude is perfectly legitimate. And such situations are much easier to prove than those in which the “knowledge” of the responsible person in the political entity that the income had been obtained through criminal activity was requested.

However, we believe that the legislator, in line with paragraph 2 of this Article, should think about penal provisions even if the responsible person could and should have known that the income came from abroad. Income obtained through criminal activities, and contributions from abroad both represent a serious and major “threat” to democratic elections, primarily due to the intended objectives of such financing, and the subsequent (significant) influence of those financiers (legal and natural persons) on the political situation in the state.

Article 193v of the Criminal Code of Montenegro is in line with Article 33 of the Law on Financing, which provides different models of banning the financing of political entities. In this sense, political subjects are not allowed to receive material, financial assistance and non-monetary contributions from: other states, companies and legal entities outside the territory of Montenegro, natural persons and entrepreneurs who do not have the right to vote in Montenegro, anonymous donors, public institutions, legal entities and companies with the share of state-owned capital, trade unions, religious communities and organisations, non-governmental organisations, casinos, bookmakers or other providers of games of chance. It is also forbidden for a person convicted by a final court decision for a criminal offence with elements of corruption and organised crime to finance a political entity.



Legal entities, companies and entrepreneurs and related natural persons which, based on a contract with the competent bodies and in accordance with the Law, performed activities of public interest or concluded a contract through the public procurement procedure, in the period of two years preceding the conclusion of the contract, for the duration of the business relationship, as well as two years after the termination of the business relationship shall not give contributions to the political entities.

Natural persons and legal entities against which the tax authority initiated a procedure of forced collection of debt through the adoption of the decision on forced collection of tax, shall not make contributions to political entities.

A legal entity which failed to meet the outstanding obligations towards the employees within the past three months shall not give contributions to legal entities. Violation of this prohibition is considered a misdemeanour in the sense of Article 64, paragraph 1, points 9, 10 and 11, Article 66, paragraph 1, points 39 and 40, and Article 70, paragraph 1, points 4, 5, 6 and 7 of the Law on Financing.

The relative statute of limitations for these offences is three years, and the absolute statute of limitations is six years. In other words, if no procedural action is taken within three years from the day when the offence was committed, the offender can no longer be prosecuted (relative statute of limitations). If some activity is taken to prosecute the perpetrator, but the procedure is not legally terminated within six years since the offence has been committed, the offender will not be held liable for the misdemeanour (absolute statute of limitations).

Given the content of Article 33 of the Law on Financing, and bringing it into connection with Article 193v of the Criminal Code of Montenegro, which criminalises the taking of contributions from prohibited sources, an offence that, according to paragraph 1 of this Article, is committed by a responsible person in a political entity, who accepts funds, contributions or other benefits that represent a prohibited source of financing of political entities, i.e., in the sense of paragraph 2 of this Article, in cases where the responsible person in the political entity could and should have known that the funds, contributions or other benefits represent income obtained through criminal activity, it is worth analysing whether the criminal offence and the misdemeanour are defined in the same terms.

Article 66, paragraph 1, point 39 of the Law on Financing stipulates that a political entity will be fined for a misdemeanour in the amount of EUR 10,000 to EUR 20,000, if it receives material and financial assistance and in-kind contributions from: other states, companies and legal entities outside the territory of Montenegro, natural persons and entrepreneurs who do not have the right to vote in Montenegro, anonymous donors, public institutions, legal entities and companies with the share of state-owned capital, trade unions, religious communities and organisations, non-governmental organisations, casinos, bookmakers or other providers of games of chance (Article 33 paragraph 1); or if, in accordance with point 40, they take loans from natural persons (Article 33 paragraph 4).

However, paragraph 2 of the same Article stipulates that a responsible person in a political entity will be fined from EUR 500 to EUR 2,000 for a misdemeanour from paragraph 1 of this Article.

Given that a responsible person in a political subject, pursuant to Article 66 paragraph 2 of the Law on Financing, is responsible for a misdemeanour for accepting contributions from prohibited sources, and that the misdemeanour is defined in the same terms as a criminal offence from Article 193v of the CCM, the misdemeanour provision referring to the “responsible person in a political entity” in the Law on Financing should be deleted, leaving only the criminal legal ramifications in place.

The existing legal constellation can lead to an individual avoiding responsibility for a criminal offence due to enforcement of a misdemeanour penalty. Furthermore, the question of why only “accepting” and not “giving” contributions from prohibited sources is criminalised is also justified. We argue that the degree of responsibility for the donor is all the greater because they engage in donation of funding to a political entity despite being aware of that such assistance is illegal. Therefore, we believe that this type of activity also carries criminal liability.

Finally, ahead of virtually every parliamentary election, we see a stream of accusations claiming that signatures in support of a certain political party were forged.<sup>19</sup>

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<sup>19</sup>For more details, see some of the following articles available on online media portals: <https://www.dan.co.me/vijesti/politika/sagovornici-dana-o-preporukama-psse-i-ako-su-potpisi-falsifikovani-nema-posljedica-po-izborni-proces-5173443> (accessed 19 March 2024); <https://www.vijesti.me/vijesti/politika/646785/aplikacija-otkrila-lazne-potpise> (accessed 19 March 2024); <https://lat.sputnikportal.rs/20230310/skandal-u-crnoj-gori-kako-su-otkriveni-lazni-potpisi-podrske-predsednickim-kandidatima--1152157544.html> (accessed 19 March 2024).

Although we have not come across any court verdicts regarding these accusations, we assume that, according to the current legal configuration, such behaviour could be brought under the criminal offence of counterfeiting of a document from Article 412 paragraph 1 of the CCM, which exists if someone produces a fake document or issues a false document or alters a genuine document with the intention to use such a document as a genuine one, or if someone uses such a fake or false document as a genuine one or who obtains it for the purpose of using it.

Pursuant to Article 43 of the Law on Financing, the electoral list for the election of councillors or MPs can be established if at least 0.8% of voters from the total number of voters registered in the constituency support the list with signatures, whereby the calculation takes into account the number of voters from the elections that preceded the decision on calling for elections, regardless of whether they are presidential or parliamentary elections. Simultaneously, voters who sign the lists for the election of councillors must reside in the territory of the respective municipality, and voters who sign the lists for the election of MPs must reside in the territory of Montenegro. Article 44 of the same Law stipulates that a voter can sign off support for only one electoral list for the election of councillors and only one electoral list for the election of MPs. In case of violation of Article 44, misdemeanour liability is enforced (Article 116 paragraph 1 item 2 of the Law on Financing).

In view of the above, it is clear that signatures of a predetermined number of voters represent a condition for a single electoral list to be established, and therefore for that political entity to be a candidate for seats in the Parliament. Therefore, given the immense significance of this issue for the electoral process, activities aimed at counterfeiting signatures for the purpose of establishing an electoral list should be criminalised, and form part of the group of criminal offences against electoral rights, in such a way as to define the criminal responsibility of whoever counterfeits voter signatures in order for the electoral commission to determine the electoral list for the election of councillors or MPs. A more serious form of this criminal offence is the situation in which the electoral list is actually established.

## 6 STATISTICAL DATA

In order to provide an overview of activities in relation to these criminal offences in court practice, we have asked the Judicial Council of Montenegro to provide data on the number of filed indictments and their court epilogues for the period 2013 – 31 December 2023. The request for information was granted. However, in terms of the criminal offence from Article 115 of the Law on Election of Councillors and MPs, the Judicial Council of Montenegro informed us that it was not able to provide this data, because data in relation to that Law were not being recorded through the existing information system.<sup>20</sup>

Article of the CC	No. of received cases	No. of total ongoing cases	No. of final decisions	Final decisions – number of persons				
				Conviction	Release	Abandonment	Suspension	Dismissal
184	1	1	1	1				
185	30	30						
186	23	24	15	22	7	3	1	
187	2	3	3	3				
188		0						
189	37	37	2	3				
190		0						
191	1	1						
192		0						
193	28	28	2	2				
193a		0						
193b		0						
193v		0						
194	2	2	1	1				

The table above shows that most of the indictable offences were for the criminal offence of preventing of taking of the poll, from Article 189 of the CCM. Out of 37 offences, only two reached a conclusion. Next comes the criminal offence of violation of the right to vote, i.e. violation of the active right to vote (Article 185 of the CCM). However, it is surprising that none of the 30 cases have been legally concluded. In terms of the offence of destroying election papers from Article 193 of the CCM, the statistics are below par. Out of a total of 28 cases, only two reached a final decision.

<sup>20</sup>Information provided by the Judicial Council of Montenegro, no. 17-2-247/4-2 dated 29 January 2024

## 7 CONCLUSIONS AND RECOMMENDATIONS

Before moving on to conclusions and recommendations, it is worth noting the extremely low number of court decisions in relation to criminal offences against electoral rights. The number is not sufficient to observe an “established” judicial practice on a certain issue.

The fact that the consulted legal literature very narrowly analyses these criminal offences is equally surprising. Moreover, the authors failing to refer to judicial practice testifies to the clear deficiency of judicial practice in these areas.

Searching the websites of the Supreme Courts in Serbia and Croatia, we also did not come across any material that merits special attention. Moreover, a search of the database of the Supreme (Cassation) Court of Serbia, and typing in key words, did not produce a single verdict or decision.

Finally, a search of the official websites of Montenegrin courts also failed to produce a single verdict or decision indicating that the courts considered the criminal responsibility of a person from the perspective of Article 115 of the Civil Code.

## 7 CONCLUSIONS AND RECOMMENDATIONS

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Analysis of the domestic and international legislative framework, domestic, regional and ECtHR practice, facilitated drafting the following recommendations for improving the existing legal framework:

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|--|---|--|
| <p><b>1</b></p> <p>That the criminal offence from Article 115 of the Law on Election of Councillors and MPs be transferred to the Criminal Code of Montenegro, so that the substantive criminal law in the field of electoral rights would be systematised in one place;</p> <p><b>2</b></p> <p>That the Law on Courts be amended so that the Special Division of the High Court in Podgorica absorbs the jurisdiction of deciding on criminal offences against electoral rights for elections held on 16 October 2016 (assuming that there are still pending proceedings from that period);</p> <p><b>3</b></p> <p>Introduce tighter penal policy and eliminate the possibility of imposing fines for criminal offences against electoral rights;</p> | <p><b>4</b></p> <p>prescribe responsibility for the attempt of committing a criminal offence, where the attempt itself is ex lege not punishable;</p> <p><b>5</b></p> <p>Consider the idea of temporarily suspending passive voting rights for persons convicted of criminal offences against electoral rights. Additionally, consider the option of prohibiting these persons from having any formal engagement in the election process itself, i.e. exclude the possibility of these persons being members of SEC, MEC, polling committees, etc.;</p> <p><b>6</b></p> <p>Consider the possibility of introducing a special criminal offence of giving and receiving bribes in connection with voting;</p> | <p><b>7</b></p> <p>Consider the possibility of special criminalisation of the criminal offence “bribery of MPs or councillors”;</p> <p><b>8</b></p> <p>Remove the misdemeanour liability in relation to “responsible person in a political entity” from Article 66 paragraph 2 of the Law on Financing, since the same incrimination is contained in Article 193v of the Criminal Code of Montenegro;</p> <p><b>9</b></p> <p>Specifically criminalise the criminal offence of counterfeiting voter signatures in order to establish electoral list;</p> <p><b>10</b></p> <p>Tighten the special minimum and maximum for the criminal offence from Article 193b of the CCM;</p> |
|--|---|--|

## 7 CONCLUSIONS AND RECOMMENDATIONS

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**11**

Criminalise the offence of counterfeiting signatures of support for electoral lists;

**12**

Criminalise the giving of contributions from prohibited sources, in such a way as to expand the offence provided for in Article 193v of the Criminal Code of Montenegro;

**13**

Consider extending paragraph 2 of Article 193v to situations where a responsible person in a political entity could and should have known that funds, in-kind contributions or other benefits come from abroad.

The analysed court practice provides grounds for recommendation to prosecutors' offices and courts, who should consider the following in their future operations:

**1**

Until the penal policy is made more rigorous, allow for concurrence of criminal offences against electoral rights and other criminal offences - such as coercion, blackmail, etc. Because if these cases were seen as a matter of apparent concurrence, the framework of criminal law protection against violations of electoral rights would be lost;

**2**

Take into account that not all criminal offences against electoral rights are blanket offences;

**3**

Until attempts to commit the following criminal offences are criminalised, consider that the criminal offence of violation of freedom of choice in the casting of ballots from Article 186 of the CCM is a consequential, rather than an inchoate criminal offence, the attempt of which is not punishable;

**4**

Take into account that these criminal offences can, in principle, be committed by anyone, i.e. that these are general criminal offences; however, certain forms of these criminal offences can only be committed by persons who have authorities in the electoral process.



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