



ELENE NIZHARADZE

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Over the recent years the electoral administration has achieved important progress in terms of transparency, cooperation with non-governmental organizations and introduction of new technologies. In 2017 only, the work of the Central Election Commission (CEC) was recognized with two international awards.<sup>1</sup> The CEC Chairperson was also awarded in 2017 for her contribution to development of electoral processes.<sup>2</sup> Such awards are indicative of success, however the question that remains is whether the work of the electoral administration was equally successful in all areas.

Over the last two years the work of the electoral administration with regard to consideration of electoral complaints in the pre-election period was less than successful. Resolving election disputes the right way is a tool for creating fair and competitive electoral environment. The electoral administration, which is in charge of considering and deciding disputes envisaged by the legislation, plays an important role in this regard. It should establish the right practice, in compliance with the spirit and goals of the electoral legislation. With its decisions the electoral administration should help create high standard, as a precondition for creating equal electoral environment.

Instead the electoral administration has failed to adequately address the challenges raised by several precedent-setting cases. Its use of electoral norms is completely against the purpose of the electoral legislation. NGO sector criticized the work of the electoral administration in resolution of election disputes as it found that the electoral administration provided narrow interpretation of norms and avoided taking of responsibility for election disputes.<sup>3</sup>

The present document summarizes the reasons why the work of the electoral administration with regard to resolution of election disputes is problematic; what caused the criticism of NGOs; which decisions of the electoral administration was the most unacceptable, and the practice established by the electoral administration with its decisions, which will have a negative impact on the electoral environment in the long run.

## Campaigning by Charitable Organizations

One of the most important cases during the pre-election period of the 2016 parliamentary elections concerned violation of campaigning rules by a charitable organization. More specifically, a non-profit (non-commercial) legal entity Georgian Dream – Healthy Future in partnership with the chairperson of the organization of the Georgian Dream – Democratic Georgia in Chughureti provided medical examinations for schoolteachers.<sup>4</sup> In addition, the logo of the Georgian Dream – Healthy Future was similar to the logo of the party Georgian Dream – Democratic Georgia, in terms of its color and design. Name of the organization was also associated with the party. All of the above led us to believe that the organization was campaigning in favor of the party.

Based on the obtained information the Georgian Dream – Healthy Future did charity work while under the electoral legislation charitable organizations are prohibited from campaigning or participating in campaigning.<sup>5</sup> ISFED subsequently filed a complaint with the CEC seeking further actions in response to the violation that had been detected.

On 26 July 2016, the CEC Chair rejected ISFED's claim<sup>6</sup> about violation of the

1 See: <http://cesko.ge/eng/list/show/113112-tsesko-ertdrou-lad-ori-saertashoriso-djildos-mflobeli-gakhda>

2 See: <http://cesko.ge/eng/list/show/112047-tamar-jvanias-djo-si-baqsteris-djildo-gadaetsa>

3 See "Evaluation of the Pre-Election Environment of the October 8, 2016 Parliamentary Elections", the International Society for Fair Elections and Democracy, Georgian Young Lawyers' Association, Transparency International – Georgia, 7 Oct 2016, <http://www.isfed.ge/main/1151/eng/>

4 Case materials are available at: <https://sachivrebi.cec.gov.ge/info.php?id=3734>

5 Organic Law of Georgia "the Election Code of Georgia", para.4"g" of Art.45

6 Evaluation of the CEC Order by ISFED, see: <http://www.isfed.ge/main/1103/eng/>



campaign rules by the Georgian Dream – Health Georgia and terminated administrative proceedings. The decision of the CEC Chairperson was based on Art.32 of the Tax Code of Georgia stipulating that an organization is considered a charitable organization if it has been granted such status. The organization that has been created for the purpose of charity, is registered under the rule prescribed by the legislation and has a yearlong experience of charity work is granted the status of a charitable organization.

The Resolution of the CEC Chairperson states that while according to the president of the Georgian Dream – Healthy Future the organization does charity work, this does not automatically give the organization the status of a charitable organization. Since the Georgian Dream – Healthy Future is not registered in the Ministry of Finance’s registry of charitable organizations, it may not be considered a charitable organization for the Election Code purposes. According to the resolution, only organizations registered as charitable organizations and not natural or legal persons that do charity work are subject to the relevant provisions of the Election Code.

Let’s first address *the purpose of the restriction placed on participation in campaigning*. The restriction placed by the electoral legislation on participation in campaigning serves the purpose of creating an electoral environment free of any improper influences to allow all electoral subjects enjoy equal conditions. Charitable organizations are subject to the restriction because their participation in campaigning in favor of an electoral subject will work to the significant advantage of such electoral subject. If the restriction did not exist, there would be a risk of using charity work for electoral purposes, which would have a negative impact on the quality of competition between electoral subjects. In addition, use of charity work within the context of elections is one of the most effective tools for vote buying, which is even more problematic considering the difficulty to draw the line between charity work and vote buying. Therefore, for the electoral purposes official status of the organization and registration as a charitable organization done for tax exemption purposes is unimportant. What is important here is the substance of work that the organization does, in order to shield elections against any illegal influences.

Against this background, even the reasoning of the CEC’s decision clearly illustrates that the electoral administration’s approach to the issue was rather narrow. The CEC completely relied on the Tax Code without addressing the issue of whether it is expedient to apply regulations of the Tax Code on electoral relationships. The Tax Code has different purposes and it is therefore not surprising that the decision of the CEC confined by superficial and shallow reasoning, is completely unresponsive to the interests of equal and fair electoral environment and purposes of the electoral legislation.

*Why is the said decision problematic and what are its potential negative effects on the electoral environment in Georgia?* As the history of Georgian elections suggests, appearance of a financially well-off candidate/party on the electoral scene is always a possibility. If such electoral subject wishes to use its own financial resources for influencing the electoral environment, the above decision of the CEC will completely allow it. The interested subject would only have to create an organization that carries out charity work in clear association with the subject and without registration with the taxation authority, since its purpose is to create enabling conditions for the electoral subject concerned, as opposed to getting tax exemptions by registering as a charitable organization. This will allow it to influence the elections entirely bypassing the legislation.

In light of this, the decision of the CEC is unfair and wrong not only in the case in question but it essentially undermines the restriction prescribed by the legislation. It is less likely that an organization with truly charitable purposes, registered with the taxation authority as a charitable organization, will engage in the election campaign in favor of or against an electoral subject. If such intention exists, it is more likely that an organization will conduct charity work in favor of an electoral subject without registering as a charitable organization to escape the scope of the Election Code's regulations. As a result, the decision in question creates an ample opportunity for exerting improper influence on elections in the future.

### Campaigning by Social Media

In the 21st century social networks play a profound role in people's everyday lives and activities. It is no longer a novelty that social media has an increasing influence on elections, which is why the electoral administration should be adequately responding to challenges created by advances in modern technology. The electoral administration was unprepared and unable to adequately evaluate the importance of social networks for elections. As a result, it reduced the scope of application of the electoral legislation and rendered it ineffective.

During the 2017 local self-government elections, head of the Educational Resource Center in Kvareli Municipality published on her personal Facebook account a post in support of the majoritarian candidate of the ruling Georgian Dream party. Civil servants are legally prohibited from campaigning during work hours.<sup>7</sup> Violation of the prohibition is punishable by a fine of GEL 2,000. ISFED filed an application with Kvareli District Electoral Commission demanding that the commission study the incident and take effective further actions.<sup>8</sup>

Kvareli DEC narrowly interpreted participation of a civil servant in campaigning. It disregarded the role and importance of the social media (Facebook) in public life, even though studying this issue does not require any special effort. In today's world no one questions the influence of social media not only on personal lives of individuals and on encouraging and organizing of public events but also on elections.

Without addressing the issue, Kvareli DEC established that posting/liking/sharing information in favor of or against an electoral subject by civil servants on their personal accounts is not considered by the electoral administration to be the controlled area of participation of a civil servant in campaigning. In addition to making a decision that is completely detached from reality, the DEC also established a practice that allows public servants to campaign during work hours using their personal Facebook accounts.

Irrespective of the cause of the decision – whether it is failure to evaluate the importance of social media's influence and the prohibition placed on civil servants, or the desire to relieve a concrete individual of liability, the result is the same – allowing civil servants to campaign during work hours using their personal Facebook accounts, which is against the substance and purpose of the prohibition established by the law that civil servants should not spend their work hours funded by the budget on campaigning in favor of or against an electoral subject. Allowing such precedent also goes against the state's declared goal of creating a politically neutral and unbiased civil service. In addition, campaigning during work hours even when using a personal Facebook account can be considered misspending of budget because it does not fall

<sup>7</sup> Organic Law of Georgia "the Election Code of Georgia", para.4"g" of Art.45

<sup>8</sup> Materials of the case are available in full at: <https://sachivrebi.cec.gov.ge/info.php?id=5796>

Second interim report of monitoring the 2017 local self-government elections, ISFED, p.16 <http://www.isfed.ge/main/1285/eng/>



within the scope of a civil servant's activities and it does not serve public interest. Use of the state or local budget to finance the time spent on such activity is unjustifiable.

Another negative aspect of the decision is that it may encourage managers to demand or urge their subordinates to campaign during work hours using their personal Facebook pages because according to the electoral administration the prohibition does not extend to such actions. Judging from the experience of elections, such threat is not just theoretical.

ISFED challenged the decision of Kvareli DEC in the Central Election Commission but the latter turned down ISFED's claim stating that action/opinion expressed on a personal social media account is protected under Articles 19 and 24 of the Constitution of Georgia.<sup>9</sup> Making reference to the said articles is unjustified and unreasonable. Freedom of speech and opinion as the right to receive and impart information is not absolute and can be subjected to limitations in cases prescribed by law, including the case of election campaigning. The purpose of the limitation placed on election campaigning is to protect greater cause – ensuring fair and competitive elections.

In addition, the said articles of the Constitution say nothing about campaigning by personal social media accounts during work hours, so the logic and the criteria that the CEC used to recognize campaigning by civil servants during work hours by personal social media accounts only as a constitutional right and not campaigning by any means in general, is unclear. Allowing campaigning by a personal social media account during work hours begs the following questions: *why isn't the limitation placed on campaigning by civil servants in general unconstitutional? Why isn't campaigning by civil servants during work hours protected by freedom of expression? What is a difference between campaigning by a personal Facebook page and a civil servant making a speech during a campaign event in support of an electoral subject during work hours? Why is the former protected by the Constitution and the latter is not?* None of these questions are addressed by the decision of the CEC.

The decision says that “based on the practice of the electoral administration, with regard to social networks, only the use of official social media of a corresponding budget organization, administered by budget funds and/or campaigning on social media pages administered in this way is considered an administrative violation and is prohibited, and not the action/activity carried out on one's personal social media page.” *What is the practice cited by the CEC and why did the electoral administration create such practice? Why does it put the use of social media funded from the budget for election purposes, which amounts to misuse of administrative resources, on the same level as the prohibition of campaigning during work hours by a civil servant?* The two are completely different issues, regulated by different norms. If a decision made about any of the cases was incompatible with the purpose of the legislation, the CEC not only could have corrected the improper practice but more importantly, as a supreme body of the electoral administration it was obligated to do so.

The CEC also stated that “... an opinion expressed by a citizen on his/her personal page should not be considered a violation if it is just an opinion and realization of the opinion has not led to any concrete violation.” It is unclear what kind of violation an opinion expressed in the case in question should have yielded. Expressing opinion in favor of or against an electoral subject constitutes campaigning and the law does not envisage yielding of a particular

outcome, neither when such action is prohibited nor when it is allowed. Expression of opinion is a completed act and in view of the definition of campaigning it does not need to bring about any outcome.

None of the arguments cited in the decision hold water and leave many questions unanswered, so the decision becomes even more incomprehensible and absurd. Instead, it leaves an impression of a politically motivated and biased decision and makes it seem that the electoral administration tried to relieve of liability a certain individual, who campaigned in favor of a ruling party, by making a legally ill-founded decision.

Another case related to the 2017 local self-government elections also involved campaigning using a personal Facebook account. Head of Kutaisi City Hall's legal office posted about meetings of the p/u Georgian Dream – Democratic Georgia candidates on the personal account during work hours. Similar to Kvareli DEC, Kutaisi DEC found that the Election Code does not apply to campaigning using a personal account and the definition of campaigning does not make any reference to social networks.<sup>10</sup>

In contrast to the electoral administration, the Inter-Agency Commission on Free and Fair Elections adequately evaluated the issue. In its recommendation the Commission urged civil servants to refrain from using their personal social media accounts for campaigning and making political announcements during work hours.<sup>11</sup>

### Campaigning by Aliens

Approach of the CEC to campaigning by aliens during the 2017 local self-government elections was rather interesting.

A charity match “World Football Stars for Georgia” was held on September 29, 2017 in Tbilisi.<sup>12</sup> The match was organized by the Georgian Football Federation (GFF) and world football stars participated in it together with the ruling party's mayoral candidate Kakhi Kaladze. After the game one of the football players, a citizen of Ukraine Andriy Shevchenko announced that Kakha Kaladze would make a good mayor.<sup>13</sup> Under the Georgian legislation aliens are prohibited from campaigning.<sup>14</sup> The Georgian Young Lawyers' Association filed a subsequent complaint with the CEC, seeking further actions.<sup>15</sup>

The CEC turned down the complaint and delivered a decision that further narrowed down the meaning of campaigning. Under the decision of the CEC, violation of rules that apply to campaigning and/or to participation in campaigning may occur when appeal to voters is made during an event organized, prepared, planned and implemented for the pre-election period. The CEC explained that the GFF is not an electoral subject and a football match cannot be viewed as part of an election campaign. The match was not an event held by an electoral subject for the purpose of winning elections, it did not feature any appeals to voters or actions that facilitated or impeded election of an electoral subject. In light of this, the CEC concluded that an opinion expressed by a football player is his own personal opinion, it is not a part of the election campaign and it may not be viewed as campaigning before the elections.<sup>16</sup>

It follows from the above decision that an event where campaigning can take place should be organized exclusively by an electoral subject and it should only be held for campaign purpose - e.g. for meeting with voters, in order for it to be

<sup>10</sup> Materials of the case in full are available at: <https://sachivrebi.cec.gov.ge/info.php?id=5738>

<sup>11</sup> Recommendation of the Inter-Agency Task Force for Free and Fair Elections, 2 October 2017, <http://bit.ly/2lalleG>

<sup>12</sup> ISFED's evaluation about the event is available at: <http://www.isfed.ge/main/1285/eng/>

<sup>13</sup> <http://netgazeti.ge/news/223276/>

<sup>14</sup> Paragraph 4“f” of Article 45 of the Election Code of Georgia

<sup>15</sup> Materials of the case are available at: <https://sachivrebi.cec.gov.ge/info.php?id=5791>

<sup>16</sup> Evaluation of the decision by the Georgian Young Lawyers' Association, see: <http://bit.ly/2Fw7ad6>



considered an election campaign. Otherwise, opinions expressed during any other types of events in favor or against an electoral subject will not be viewed as campaigning.

Such definition of campaigning is unreasonably narrow, which goes against the spirit of the Election Code stipulating that campaigning is any public action that facilitates or impedes election of an electoral subject.<sup>17</sup> The CEC's explanation that the action in question was an expression of one's own personal opinion is rather obscure. Campaigning is always an expression of a personal opinion and is based on political or other subjective views. Therefore, the CEC's use of the argument to prove that campaigning did not take place is unreasonable. In addition, it probably shouldn't be disputed that a statement made by a famous football player will have a positive influence on voters and will facilitate election of the candidate.

This suggests that just like in other cases the CEC interpreted the law narrowly in an attempt to avoid making a highly publicized decision. Such approach is clearly wrong and goes against the goals that the electoral administration should be serving.

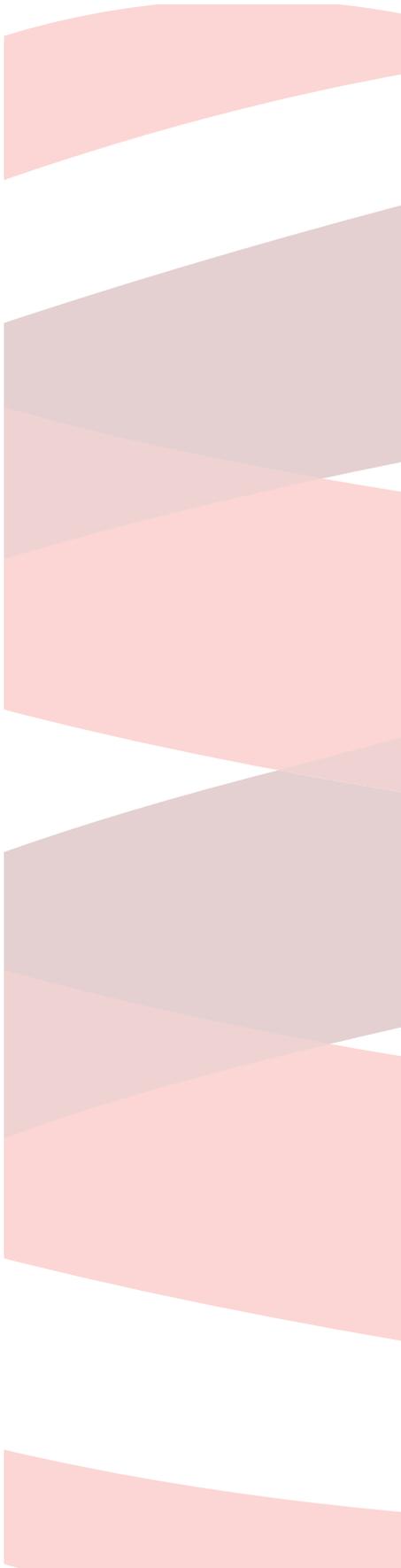
### Conclusion

In cases discussed in this paper the electoral administration should have applied the electoral norms according to their purpose and spirit, which would have promoted fair and competitive electoral environment. Instead, the electoral administration interpreted the norms in a way that not only stripped them of their substance but also created the possibility of abusing the norms in violation of principles and objectives of the electoral legislation.

The electoral administration, which should have the best understanding of importance of the restrictions and requirements established by the electoral legislation and should be promoting their use in a manner that is responsive to the existing challenges, failed to behave at its best. It seemed that the administration was trying to avoid in-depth discussions and provided extremely narrow interpretations of the existing legislation. It is unclear as to what caused such approach - whether it was the lack of qualifications, attempt to escape responsibility, or the motive of making decisions that worked in favor of a particular political force.

Irrespective of the cause, it is clear that such decisions not only set wrong precedent undermining attempts to create equal electoral environment, but they are also quite damaging to the image of and public trust towards electoral administration. It is safe to say that when deciding on problematic issues, which were important not only for a particular electoral dispute but for future interpretations and correct use of the electoral legislation, the electoral administration failed to live up to its responsibility. Therefore, its work in this area was not as successful as it probably was in other areas.

- The electoral administration, as a guarantor of fair and free elections, should use the electoral legislation according to its goals and spirit;
- When handling electoral disputes, the electoral administration should take into account contemporary challenges and interpret the Election Code accordingly;



- To avoid difference of opinions, the electoral legislation should be amended to ensure its consistent interpretation and update in view of the existing challenges.