



Assessment of the 2021 Electoral Reform

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Introduction

The ongoing political processes started after the October 31, 2020 parliamentary elections, especially the disagreement between the ruling party and the opposition on fundamental issues, have put the country in a state of a serious crisis. Representatives of the opposition parties, which overcame the threshold in the parliamentary elections, expressed¹ distrust in the elections by refusing to accept the mandates, while the Citizens Party started its parliamentary activities on the condition of changing the issues reflected in the memorandum with the Georgian Dream. Among other topics, the memorandum covered the problems related to the self-government electoral system, the formation of the election administration and election disputes.²

In early February 2021, the Working Group on Electoral Reform, set up as a result of the signing of the memorandum, resumed its work in Parliament. Representatives of international and local observer organizations participated in the group meetings, however, due to the boycott of the opposition parties, the group continued to work without their involvement, which affected the inclusiveness of the process.³

In parallel with the electoral reform process, on February 23, the Georgian government began the process of enforcing the decision made by the Tbilisi City Court against the chairman of the United National Movement, Nika Melia. In the course of the pretrial detention measure, law enforcement officials detained Nika Melia using disproportionate force, which increased the risks of hampering the ongoing political dialogue and democratic process.⁴ The decision of the government once again revealed the lack of constructive political will in the process of managing the current political crisis, which also had a negative impact on the ongoing electoral reform. Active steps have been taken by the country's international partners to resolve the crisis and resume political dialogue. Charles Michel - the President of the European Council paid a visit to Georgia, on 28 February. He developed a six-point action plan based on the dialogue with local stakeholders, one part of which deals with electoral reform. The current mediator in the ongoing negotiations is the President Michel's special envoy, Christian Danielsson.

It is noteworthy that in order to correct the shortcomings in the electoral legislation and practice, the electoral reform process started in June 2019, mainly to reflect the recommendations of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), provided after the 2018 presidential elections. Although the working group formation process was more or less inclusive and transparent, no agreement was reached on fundamental issues such as reviewing the rules for forming the election administration, regulating social media campaigning, and resolving election disputes.

This document provides the joint assessments and recommendations of ISFED and Transparency International Georgia regarding the amendments to the Election Code, based on the memorandum signed between the political party Georgian Dream and Citizens. We also considered it necessary to present opinions in order to improve the electoral legislation and practice and address the problems that have had a negative impact on an equal and free electoral environment throughout the election cycle. The discussion space opened by the electoral reform provides an opportunity for the public to draw attention to issues that are not addressed in the proposed legislative changes, but are crucial in terms of improving the electoral environment in the country and increasing the credibility of the election results.

¹ The information is available here: <https://civil.ge/archives/380014>

² The information is available here: <https://netgazeti.ge/news/515535/>

³ The information is available here: <https://bit.ly/3dSq6lY>

⁴ The information is available here: <https://bit.ly/3lq6bN5>

1. Composition of Election Administration

1.1. Central Election Commission (CEC)

The proposed draft law envisages changes to the rule of forming the CEC. The CEC will consist of 17 members; eight of them, selected based on their credentials, will be appointed by the Parliament upon the nomination of the President, while the remaining nine members will be appointed by political parties.

A political party shall be allowed to appoint one member to the CEC, if all the following conditions are met:

1. A political party has been registered, independently or through an electoral bloc, for standing in parliamentary elections and has been granted a mandate of a member of parliament;
2. A political party is entitled to receive state funding in accordance with the rule provided in the law;
3. A political party must have at least one member in the parliament, exercising the powers of MP in accordance with the Rules of Procedure of the Parliament of Georgia.

We believe that the proposed initiative cannot ensure the formation of the CEC as a politically neutral body and will fail to deal with existing problems in selecting professional CEC members. According to the current regulations, there is a mixed model of forming the election administration: the CEC consists of a chairman and 11 members, of which 6 members are appointed by political parties, and the other 5 members are selected on a competitive basis. In this regard the problem is in both parts - the process of selection of professional members of the CEC, as well as the rule of appointing of commissioners by political parties, which allows one party to appoint more than one member in the election commission.

According to the proposed draft law, the professional CEC members will be appointed by the Parliament upon the nomination of the President. Even though the initiative envisages the establishment of a selection commission for picking CEC member candidates, a problem is the formation of this commission. Considering persisting challenges in the process of selecting professional CEC members, one can hardly exclude a likelihood of politically biased organizations making it into the commission. One should also note that other political parties have experienced mistrust towards the selection process of professional members and selected candidates and, as a rule, perceived such candidates as appointees of the ruling party, who act in its favor.

The most recent competition to select professional CEC members, which was announced by the President in 2019 to fill four vacant positions within the CEC, resulted in selecting such individuals whose political neutrality and professionalism were called into question and hence cast doubt on the impartiality of the competition. Although the requirements of the Election Code were formally followed in the formation of the commission, neither the composition of the commission, nor the eligibility criteria set for applicants ensured the reaching of the main goal of the competition – selection of professional members through independent and impartial process.

As for the commission members that should be appointed by political parties, given the refusal of the opposition to take up parliamentary mandates, many parties will not have the right to appoint members to the CEC. As it was already mentioned, according to the draft law, the parties that have cleared the threshold will only be able to appoint CEC members if they have, at least, one representative in the parliament. In the light of the domination of one political party, this poses a risk that the seats to be taken by political and professional nominees will be captured by persons associated with and representing that single political party.

1.2. District Election Commissions (DECs)

According to the draft law, the CEC will appoint five professional members of DEC for the term of five years and three members - for the duration of the election period, while political parties, after a respective election is scheduled, will appoint nine DEC members according to the similar principles applied for the CEC members.

During the years, many professional DEC members, who were selected by the CEC through a competition, had a partisan past. In 2016, out of 182 selected DEC members 67 were members previously appointed by various political parties, which yet again highlights the necessity to revise the rule for the composition of the commissions at all levels and the need for additional criteria to be provided by the law.⁵ To solve this problem, one of the requirements when appointing professional members must be the exclusion of a candidate from the selection process, who was appointed by a political party to a commission of any level during the previous general elections. Such regulation can reduce risks of impartiality of professional members or linkage to a particular political party.⁶

1.3. Precinct Election Commissions (PECs)

According to the legislative initiative, a PEC will be staffed by seven professional members. If the number of registered voters within the boundaries of a precinct exceeds 300, the PEC composition will be extended by an additional member per 300 voters. The DEC will elect members to a PEC by a majority vote of the total number of DEC members including at least three members elected by the CEC for a term of 5 years in the relevant DEC.

Much like irregularities observed in the process of selecting professional members of the DEC, the selection process of professional PEC members has also had shortcomings. It has been years that observer organizations have discussed these problems in their reports and statements. For the 31 October 2020 election, a large number of DEC members had the lists, compiled in advance, of candidates to be elected to PECs, while the competition process was just a formality, not envisaging a true selection of candidates. A similar trend was observed in 2016. According to opposition representatives, these lists were dominated by family members and relatives of the ruling party's activists.⁷

Recommendations

In the long run, we support the move to a fully professional election administration. However, considering the current reality, we believe that the immediate switch to this model can be problematic because of a lack of trust towards selection procedures. We deem it necessary to revise the mixed model of election administration staffing and in this process, to take into account the following principles

1.1. CEC:

- It will be fairer to tie the appointment of members by political parties to parliamentary election results instead of eligibility for state funding. The right to appoint members to the CEC must be granted to electoral subjects showing best results by votes garnered in elections;

⁵ The information is available here: <https://bit.ly/3bNNTIL>

⁶ Ibid

⁷ The information is available: <https://bit.ly/3cxQWOa>

- Appointment of members by political parties must be based on the principle of parity, giving the right to one electoral subject to appoint only one member;
- Political parties that refuse to take up mandates and do not have representatives in the parliament, must not be denied the right to appoint a CEC member;
- To ensure impartiality and independence of a selection commission, set up to pick candidates for CEC membership by their professional credentials, the commission must include observer organizations with experience in electoral issues and relevant reputation;
- It is important to define an interview as a stage in the competition for selecting professional members;
- Standards must be set for the publicity and transparency of the competition and an obligation must be imposed on the commission to substantiate its decisions;
- Considering limited timeframes in the electoral law, mechanisms must be defined for appealing decisions of the selection commission;
- For the decision-making by the parliament on the appointment of professional CEC members, it is necessary to define a quorum that will, on the one hand, exclude a possibility of taking a biased decision and, on the other hand, will not pose a threat of artificial impediment to the process.

1.2. DEC's

- Appointment of members by political parties must be conducted following the same principles as in case of the CEC;
- Additional criteria must be set for the selection of professional members, which will exclude the appointment of such members to DEC, who were appointees/representatives of political parties in the previous election or were associated with them;
- It is important to define an Interview as a stage in the competition for selecting professional members;
- Standards must be set for the publicity and transparency of the competition and an obligation must be imposed on the commission to substantiate its decisions.

1.3. PEC's

- PECs can be fully staffed by professional members only if the recommendations provided herein are taken into consideration when revising the rule for CEC and DEC composition;
- To extend the term of competition for the selection of PEC members;
- To define an Interview as a stage in the competition for selecting professional members and set publicity and transparency standards for the competition

2. Electoral system

A mixed electoral system for local self-government elections has been criticized by local and international organizations for many years now. One of the major problems of the current electoral system has been manifested in violation of principles of equal weight and proportionality of votes cast by voters. In particular, there are instances of huge differences between the size of electoral districts; in many municipalities, the number of members of a Municipal Assembly, Sakrebulo, to

be elected through a majoritarian electoral system is unreasonably high. Consequently, the existing system creates a problem of highly disproportionate conversion of votes into mandates. The results of local self-government elections have repeatedly shown that political parties with smaller voter support receive fewer mandates than the proportion of votes they garnered in the elections and vice versa, powerful political parties receive a higher number of seats in Sakrebulo than the share of support they gained in elections.⁸

According to the draft law, local self-government bodies will be formed through a mixed electoral system again. Part of Sakrebulo members in self-governing communities will be elected through a proportional electoral system whereas another segment will be elected through a single-mandate majoritarian electoral system. However, the legislative amendment will increase the share of party-list proportional component, including in Tbilisi Sakrebulo where instead of the symmetrical distribution of mandates, 80% of seats will be allocated according to the proportional rule; the same share of Sakrebulo members in self-governing cities will be elected through party lists, while in self-governing communities, a proportional representation will comprise two-thirds of the total number of members. The electoral threshold for proportional elections in Tbilisi will be 2.5% instead of current 4%. In self-governing cities and communities, other than Tbilisi, the electoral threshold for proportional elections to Sakrebulo will be 3%.

Recommendations

We believe that the above-mentioned amendments will decrease disproportionality in translating the votes garnered by electoral subjects into mandates in municipal representative bodies, but it still leaves room for a winning political party to get additional seats as a bonus through a majoritarian system. Therefore, giving even greater preference to a proportional electoral system would be better.

Furthermore, since there is a theoretical chance that some settlements will no longer have their majoritarian representatives in Sakrebulo and several administrative units will have to agree on one representative, this will require a thorough consideration and estimation of sizes and borders of majoritarian electoral districts. In this process, it is important to balance the relative equality of size of electoral districts with various geographic, social and cultural peculiarities. Moreover, a threat of gerrymandering must be excluded in determining the borders of districts.

With regard to the proportional component on the local level, we think the use of open-list instead of a closed-list electoral system to be more in line with the interests of voters. However, considering difficulties related to vote-counting, this may be implemented in the longer run.

Increased share of the party-list representation enhances the role of political parties on a local level but reduces chances of independent candidates to get into a representative body. A proportional representation electoral system may be used so that it considers, along with decreasing disproportionality, the right of independent candidates to be elected to a representative body. This problem can be solved by granting the right to submit electoral lists to initiative groups too.

⁸ The information is available here: <https://bit.ly/30LEncr>

3. Misuse of administrative resources during electoral processes

3.1. Pre-election campaign

In terms of the use of administrative resources for elections, one of the most common practices in Georgia has been the involvement of public sector employees in the election campaign, during which public servants were formally relieved of their duties and actively participated in supporting or opposing specific candidates.

According to the draft law, restrictions on pre-election campaigning will apply to almost all employees of the public sector. This change is a significant novelty and should be welcomed as it expands the circle of people who are employed in the public sector and have limitations on campaigning during working hours and / or when they are directly performing their duties. Under the current regulations, the restriction only applies to public officials - persons who are appointed to a public service position for an unlimited term by the state, autonomous republic, municipality, and Legal Entity of Public Law (LEPL).⁹ Accordingly, this regulation did not apply to public sector employees who worked under a labor or administrative contract. The concept of public servant¹⁰ is much broader and includes all employees except political and public-political officials. This list includes all public servants employed under administrative or labor contract, the representatives of the municipality mayors (except for the municipality of Tbilisi) and other persons employed in the municipality.

The proposed reform also envisages the amendment of Article 45, paragraph 4, subparagraph "k" of the Election Code. This norm specifies that the restriction of involvement in pre-election campaigning during working hours or while performing official duties applies to: the directors, educators, teachers, and other employees of preschools and educational institutions, and general education institutions established by the state or municipality.

In addition, the draft law prohibits organizing the election-related gatherings of public servants, employees of LEPLs, Non-profit (Non-commercial) Legal Entities (N(N)LEs) and educational institutions established by the state or municipality.

Election observer organizations in their monitoring reports have repeatedly referred to the gathering of public school and kindergarten teachers to participate in pre-election meetings, which contained signs of the misuse of administrative resources and pressure. The proposed changes should have a positive impact on the election environment and reduce the instances of misuse of administrative resources.

Recommendation

In terms of further restricting the use of human administrative resources for elections, and refining the standard, we believe that, in addition to public servants, deputy ministers and state representatives in the regions should not be allowed to participate in the election campaign during working hours.

3.2. Pre-election campaign through social networks

The role and influence of social networks in socio-political issues has been growing from year to year. It has become an important tool of electoral technology and is increasingly used by parties and candidates to deliver political messages to the electorate. In Georgia, given the special popularity of social networks, the problem is even more acute.

⁹ The Law of Georgia on Public Service. Article 3, paragraph "e": <https://matsne.gov.ge/en/document/view/3031098?publication=26>

¹⁰ The Law of Georgia on Public Service. Article 3, paragraph "d": <https://matsne.gov.ge/en/document/view/3031098?publication=26>

According to Article 1 of the Law of Georgia on Public Service, the public service is based on political neutrality. According to Article 45, paragraph 4, subparagraph "h" of the Election Code, public servants are prohibited from campaigning during working hours and / or when they are directly performing their official functions.

The problem is that the election administration does not consider campaigning carried out through social networks as a violation of the law and studies these actions only if public property is used as an agitation instrument. This creates a space for illegal campaigning.

Recommendation

It is necessary to clarify the definition of pre-election campaigning in the Election Code and to add the following sentence to Article 2, paragraph "h"¹¹:

- Pre-election campaigning can also be an action carried out on social networks, including a personal account / page.

4. Influencing the will of the voters

Amendments are also envisaged to the paragraph 12 of Article 45 of the Election Code, which read as follows: "It is also inadmissible to gather people or register voters within 100 meters from a polling station on the polling day." At present, this restriction works only within 25 meters.

Increasing this distance and banning voter registration should be welcomed. Observer organizations have repeatedly indicated that this was a mechanism for influencing and controlling the will of the electorate during many elections. However, the proposed changes do not specify the effective mechanisms of enforcement, liability for violators, which carries the risk of leaving the norm inactive.

Recommendation

Specific mechanisms, including the extent of liabilities, should be defined that will properly enforce this restriction.

5. Election dispute settlement

The negative trend in election dispute settlement, described in the 2019-2020 Electoral Reform Assessment Document¹¹ of observer organizations, also continued in 2020 parliamentary elections. The process of reviewing complaints in DEC's was mostly formalistic, the case materials were not thoroughly studied and administrative proceedings were not properly conducted. The main and often the only basis for the decisions of DEC's was the explanation of the members of PEC's. Even when there were cases of illegally corrected data in summary protocols, or imbalances between the number of voters and the votes received by the election subjects, DEC's mostly rejected complaints, refused to recount the ballots and corrected the protocols without it. In a number of cases, DEC's, in contrary to their own practice, refused to hear complaints and in violation of the requirements of the General Administrative Code, avoided discussing significant violations and fulfilling their legal obligations.

The court grievance process was problematic as well. Among other shortcomings, the problem of judges' expertise in election disputes was identified. Part of the judges did not know electoral legislation, documents, and this hindered the process of proper consideration of disputes.

¹¹ Evaluation of the 2019-2020 Election Reform, pg: 7: <https://bit.ly/38N040f>

Against the background of extremely tight deadlines for election disputes, a serious obstacle for observer organizations is the complexity of grievance forms and the lack of time, as well as the inability to file complaints electronically. It should be also noted that strictly prescribed hours are an obstacle for persons wishing to appeal, while these terms are frequently violated by the court itself and the decision is not delivered to a party in a timely manner. Court hearings are also scheduled and take place during non-business hours, while the Court Chancellery refuses to register an appeal after 18:00 on a relevant day of the appeal deadline.

During the pandemic, most trials took place remotely, which greatly enhanced the speedy resolution of disputes, especially given the fact that such disputes were held in various district, city and appellate courts, it would be hard to attend them in the short time period.

Recommendations

In view of all the above, we consider it necessary to reflect the following changes in the legislation:

- Election commissions shall be obliged to open relevant election documents during the review of a complaint and recount the voting results if the votes received by the subjects, the number of invalid ballots or number of voters are wrongly corrected in a summary protocol; or the sum of the number of invalid ballots and the votes received by election subjects exceeds the number of voters. Opening the election documents and recounting can also be done in other cases defined by relevant election commissions;
- Election commissions should be obliged to conduct a thorough administrative proceeding and not rely solely on the explanations of the commission members / stakeholders when making a decision;
- An entity with the right to file a complaint for all types of election disputes should be an observation organization and / or its observer. In this process, the obligation to submit a power of attorney issued by the organization should be excluded and the observer certificate issued by the CEC should be considered as a sufficient document;
- DEC's should develop uniform practices for receiving and reviewing complaints;
- Specialization or training for judges hearing election disputes should be defined;
- For election disputes, the forms of administrative complaints / appeals should be simplified and adapted to the specifics and tight deadlines of election disputes;
- All types of communication with the court, including the submission of an appeal, should be possible in electronic form;
- Submission of a court appeal should be possible before 24:00 on the relevant day of the appeal deadline;
- A court trial should be possible remotely, at the request of a party.

6. Amending the summary protocols of the voting results and recounting the ballot papers

During the 2020 parliamentary elections, there were frequent cases when, after the final closure of the polling station and the sealing of documents / inventory, correction protocols to the summary protocols were later drawn up by PEC members summoned to DEC's. As a rule, in such cases certain data of summary protocols were corrected without recounting the ballots. Such corrections were only based on written and / or oral explanations of PEC members. In our opinion, only explanations of PEC members are not sufficient to justify corrections.

In certain polling stations, where correction protocols were not written, the summary protocols were amended based on the ordinances of relevant DEC. Some of these ordinances were issued based on the recount of ballot papers, while others were based only on the explanations of PEC members, which, in our opinion, was also problematic.

We welcome the fact that the Electoral Reform Working Group took into account and reflected in the draft law the recommendations we have submitted on correcting summary protocols. According to these amendments, it will no longer be possible to write a correction protocol after the PEC documents are sealed. Correcting data in the summary protocol by the DEC will be allowed only on the basis of the DEC ordinance, which will be obtained after opening the sealed packages received from the PEC, and the recount of ballot papers and the number of voters.

7. Use of electronic means in election processes

Throughout years, including during the previous parliamentary election, it became obvious that the introduction of electronic means may help boost trust towards a number of procedures on a polling day. Electronic means make things easier, reduce risks of human error or deliberate violation. The submitted draft law envisages the introduction of certain technologies, however, this initiative requires to be further detailed later. What has become known so far is that the registration of voters by their fingerprints at polling stations will be introduced and votes will be cast and counted by means of special devices at a number of polling stations.

Recommendations

In general, we support the use of electronic means in polling, however, when introducing IT technology, it is important to take into consideration the Council of Europe's standards for e-voting. Furthermore, one should allocate a period of time necessary for proper preparation for the process both in terms of voter education and election administration training. Another problematic issue is the disenfranchisement of those people who will not have ID cards. Also, one should consider the issue of exercising the right to vote of those people who cannot travel to polling stations due to the condition of their health and need the use of mobile ballot boxes.

Voter verification by using fingerprints or any other biometric data, raises the issue of security of the collected data, which requires a great deal of caution. Transparent and reliable procedures for the protection and use of personal data must be drawn up thoroughly.

Any future attempt to use IT technology must be well thought out in order to avoid questioning the reliability of the election process and election results by voters, electoral subjects or observers.