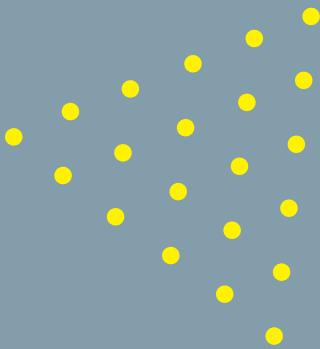


Main Trends in Reviewing Electoral Disputes

2021 Municipal Elections



GEORGIAN
YOUNG
LAWYERS'
ASSOCIATION

MAIN TRENDS IN REVIEWING ELECTORAL DISPUTES

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INTRODUCTION

The Georgian Young Lawyers' Association (hereinafter - GYLA) observed the 2021 municipal elections in Georgia. During the pre-election period, as well as on the polling day and thereafter, GYLA handled election-related disputes. Objective and impartial resolution of election disputes is one of the most important elements in assessing the effectiveness of the electoral process. The presented report analyzes the election disputes in order to evaluate the effectiveness of the applicable election mechanisms and develop recommendations for eliminating the identified obstacles. In doing so, GYLA seeks to refine electoral mechanisms, which will ultimately increase citizens' confidence in the electoral process.

It should be noted that GYLA prepared an analysis of electoral disputes last year as well, highlighting the main findings identified during the consideration of disputes related to the 2020 parliamentary elections.¹ A certain portion of the identified problems continued to arise even in 2021. Nevertheless, this report does not provide a broad analysis of these issues due to their similarity to the trends of previous years, and largely focuses on issues that have emerged as a new practice in the light of legislative changes.

EXECUTIVE SUMMARY

During the 2021 municipal elections, as in the 2020 elections,² the ineffective response of relevant election administrations to the irregularities observed during the pre-election period was problematic.³ The election administration, as a rule, did not satisfy the complaints filed during the pre-election period and did not properly substantiate the decisions made. This approach was maintained with respect to complaints on the polling day and summary protocols. Election administrations misinterpreted the legislation, the electoral commissions did not conduct a thorough investigation of the factual circumstances specified in the complaints, nor did they study the evidence presented and/or did not provide evidence on their own initiative.⁴

In parallel to this, as a result of changes introduced at the legislative level, the number of cases of re-counting polling station data by district election commissions sharply increased compared to previous years. According to the amendments, regardless of whether a complaint is lodged against a particular electoral precinct, each district election commission (DEC) is obliged to recount the voting results: 1) In five polling stations determined by random selection; 2) In those electoral precincts where the number of votes cast for an electoral subject, the total number of voters who took part in the elections and/or the number of invalid ballots are corrected in the final protocols of the voting results compiled by the precinct election

¹ See a report of the Georgian Young Lawyers' Association - "Analysis of Electoral Disputes (the Parliamentary Elections 2020, the first and second rounds)", available at: <https://cutt.ly/EIOjm1x> [verified: 22.01.2022].

² Ibid.

³ For example, see the written refusal №44/84 by Chairperson of Ambrolauri DEC of September 28, 2021; Written refusal №39/71 by Chairperson of Aspindza DEC of October 3, 2021.

⁴ For example, see the Ordinance №106/2021 by Batumi DEC №79 of October 06, 2021; Ordinance №90/2021 by Didube DEC №8 of October 7, 2021.

commission(PEC), which is not accompanied by a correction protocol. As a result, in the first round, DECs finally recounted the data from 811 out of 3743 polling stations, which is approximately 22% of the total. It should be also noted that the recounting of precinct data resulted in the change of summary protocol of the voting results in almost 7% of the total number of polling stations.

The practice of the DECs and the court has shown that the recount of votes in five randomly-selected polling stations is an insufficient mechanism because the legislation does not provide for additional response mechanisms even if any shortcomings are identified during the recount.

Another legislative innovation introduced for the 2021 elections was a response to any unrest in the perimeter of polling stations on ballot day. However, the letters received from the Ministry of the Interior confirm that reports on irregularities that took place on the perimeter of polling stations on Election Day are not properly recorded, and it is practically impossible to fully assess the effectiveness of the response to each incident.

Quite frequent were the problems identified in the summary protocols of the voting results during the 2021 elections, including in terms of imbalance. The disproportion in the summary protocols expressed in surplus or deficiency is not a new challenge to the election administrations, since the problem occurred in previous elections as well. The practice that has been firmly established in recent years shows that in the majority of cases, the surplus is eliminated based on formulaic and unreliable statements, without examining additional evidence. As for the deficiency-related imbalance, as a rule, neither the district election commissions nor the court considers it a violation, which is also a problematic practice.⁵ It should be noted that after the first and second rounds, none of the complaints filed with the court regarding the imbalance were satisfied.⁶ When rejecting claims, the courts usually referred to the argument that no material breach took place that could have had a significant impact on the outcome of the election.⁷

As in the previous year, the rate of granting electoral disputes by courts is significantly low. According to the CEC's electronic database of electoral disputes, in the 2021 municipal elections (both in the first and second rounds in total), the court considered a total of 113 cases, of which 87 were not granted, 2 - remained unconsidered, 6 – were partially granted, 12 - granted, 6 - are at the stage of consideration.⁸ Thus, the rate of satisfaction/partial satisfaction of claims amounts to almost 16%.

The court demonstrates a loyal approach to electoral violations and leaves the cases of obvious misconduct unpunished. Although the law provides for the possibility of using a verbal reprimand instead of a penalty,⁹ its use without proper justification may deprive the prohibition of its essence, and it can ultimately no longer serve as a preventive measure. In particular,

⁵ For example, see the court ruling of Tbilisi City Court of October 12, 2021, on the case №3/6320-21.

⁶ The information is based on the CEC electronic database of election disputes.

⁷ For example, see the court ruling of the Senaki District Court of November 06, 2021, on the case №3/155-2021.

⁸ It is probable that the cases marked as "under consideration" have already been finalized; however, the relevant information about them has not been entered into the electronic database yet.

⁹ Administrative Offenses Code of Georgia, Article 22.

the court considered a total of 26 cases requesting the imposition of a fine.¹⁰ Of these, the dispute was finally closed in 24 cases, of which the court found a violation in 12 cases, while the rest of the complaints were rejected. It is noteworthy that out of the 12 cases that have been finally resolved, the court did not impose the sanction provided by law in any of the cases and acquitted all persons brought to administrative liability, issuing merely a verbal warning.¹¹

The practice of bringing PEC members to disciplinary liability also remains a problem. The DECs do not properly substantiate the decisions on imposing or refusing to impose disciplinary liability on a member of a precinct election commission. DECs do not use discretionary powers when selecting a measure of disciplinary responsibility for choosing an appropriate measure of liability. As for the consideration of these types of disputes in the courts of general jurisdiction, it remains problematic for the courts to properly clarify the norms of legislation relating to disciplinary liability, which ultimately excludes the possibility of ensuring proper judicial control over decisions made by the DECs.¹²

The practice of reviewing decisions made within discretion persists to be a problem. Such an approach runs counter the essence of discretionary powers and leaves decisions made within discretion beyond proper judicial control.

The cases studied for the purposes of this report show that the authorities failed to have an adequate response to facts of restriction of the observer rights, which was mainly due to the inadequate distribution of the burden of proof on disputed facts. The bodies that reviewed the complaints did not accept the evidence and opinions presented by observers, whereas even the completely unsubstantiated arguments of potential offenders were taken into account. Despite having all the possibilities, they did not try to establish controversial facts or find neutral evidence through an in-depth investigation.

METHODOLOGY

The paper covers the cases reviewed based on the electoral law by election administrations and general courts and does not assess disputes currently in progress in other bodies (including investigative bodies) related to the 2021 municipal elections which may affect both the election process as well as its results.

¹⁰ The data have been counted based on the CEC's electronic database of electoral disputes as of January 22, 2022. GYLA does not rule out that not all data is fully reflected in the database. In order to verify the data, GYLA applied to the CEC to receive public information, yet the CEC did not provide us with the requested information.

¹¹ See the court ruling of the Tbilisi City Court of October 19, 2021 on the case №4/6510-21; Court ruling of the Ambrolauri District Court of October 13, 2021, on the case №4/90-21; Court ruling of the Telavi District Court of September 21, 2021, on the case №4/271-21; Court ruling of the Mtskheta District Court of October 8, 2021, on the case №4-a/412-21; Court ruling of the Ozurgeti District Court of September 28, 2021, on the case №4/277-21; Court ruling of the Magistrate Judge of Ozurgeti District Court in Lanchkhuti Municipality of September 30, 2021, on the Case №4/129-21; Court ruling of the Ozurgeti District Court of October 8, 2021, on the case №4/285-21; Court ruling of the Sighnaghi District Court of October 13, 2021, on the case №4/125-21; Court ruling of Kutaisi City Court of October 8, 2021, on the case №4/719-21; Court ruling of the Tsageri District Court of September 22, 2021, on the case №4/48-21; Court ruling of Akhaltsikhe District Court of October 20, 2021, on the case №4-153-21; Court ruling of the Tbilisi Court of Appeals of November 15, 2021, on the case №4a/694-21.

¹² For example, see the Ordinance №110/2021 of October 08, 2021, by the Vake DEC №2.

In the process of elaborating the report, we analyzed:

- **The relevant legislation and standards** - Relevant legal framework and international standards were analyzed while working on the report;
- **Decisions made on electoral disputes** - The report is based on an analysis of decisions delivered on electoral disputes handled by GYLA, other observer organizations, and political parties. In order to locate decisions on electoral disputes litigated by other entities, we utilized the electronic database of election disputes of the Central Election Commission of Georgia.
- **Public information** - GYLA requested public information from the Central Election Commission of Georgia, as well as from the Ministry of Internal Affairs of Georgia, and relevant information related to research issues was reflected in the report.

1. ANALYSIS OF STATISTICAL DATA

1.1. GYLA's statistics on election disputes

In connection with the 2021 municipal elections, GYLA requested a legal response to a total of **465 cases** in the first and second rounds:

Regarding the first round of the elections –in connection with 376 facts, GYLA presented:

- **6 complaints** - on violations during the pre-election period (1 - granted; 5 – rejected);
- **34 complaints** - on various procedural violations in PECs (3 - granted; 31 – rejected);
- **1 Complaint** – on a violation of canvassing rules on the polling day (satisfied).
- **23 reports to the Ministry of Internal Affairs (MIA)** - regarding violations on the perimeter of polling stations;
- **71 complaints** - on various types of violations on the polling day in DECs (23 - granted; 8 – partially granted; 40- rejected);
- **Complaints requesting re-count/verification of 235 precinct data, of which:**
 - Granted - 15;
 - Partially granted - 3;
 - The district recounted the data on its own initiative - 56;
 - The district recounted the data on the basis of a complaint from another electoral subject -7;
 - The district recounted the data in order to fit into the five randomly selected polling stations - 7;
 - Rejected - 147.
- **6 complaints** - requesting to impose only disciplinary liability on the violations found in the summary protocols (4 - granted, 2 - rejected).

With respect to the second round of the elections, GYLA demanded a legal response to a total of **89 incidents**. In particular, GYLA presented:

- **1 complaint** - about a violation during the pre-election period (rejected);
- **26 complaints** - on various procedural violations in PECs (8 - granted, 18 -rejected);
- **2 reports to the Ministry of Internal Affairs** - regarding the violations on the perimeter of polling stations (the outcome of the response is not known at this stage);
- **38 complaints** - on various types of violations on the polling day in DECs, of which:
 - Granted – 14;
 - Partially granted – 13;
 - Rejected – 10;
 - Remained unconsidered – 1.
- **Complaints requesting the re-count/verification of the election data in 22 polling stations, of which:**
 - Granted – 4;

- Partially granted – 6;
- Rejected -11;
- The district recounted the data on its own initiative – 1.

Chart №1.

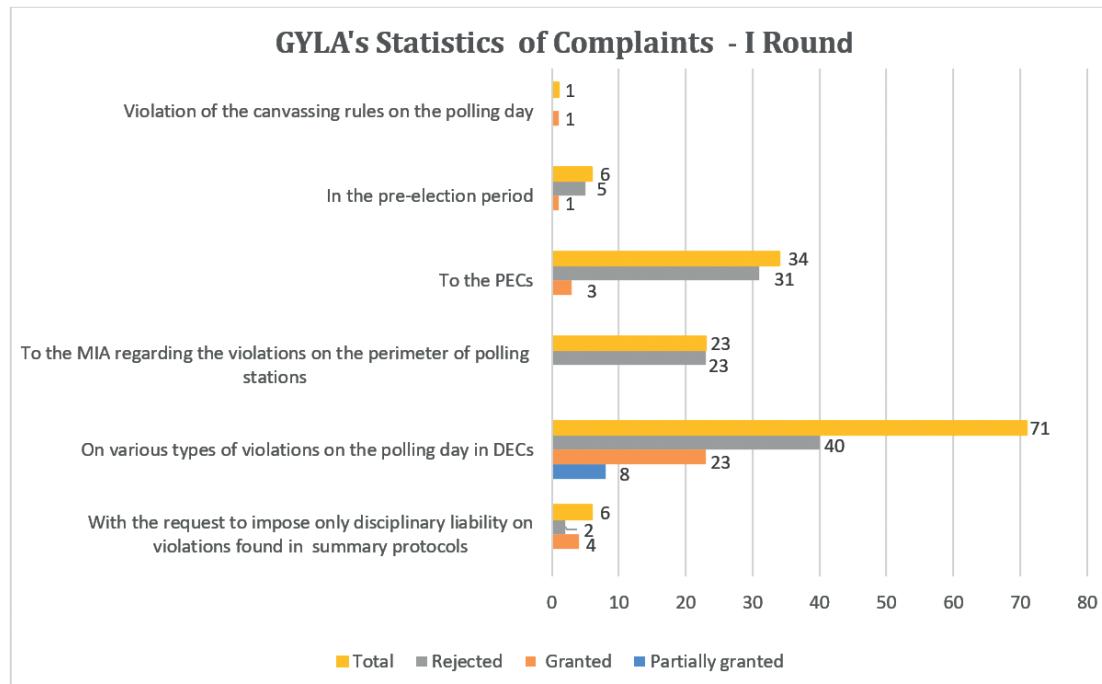


Chart №2

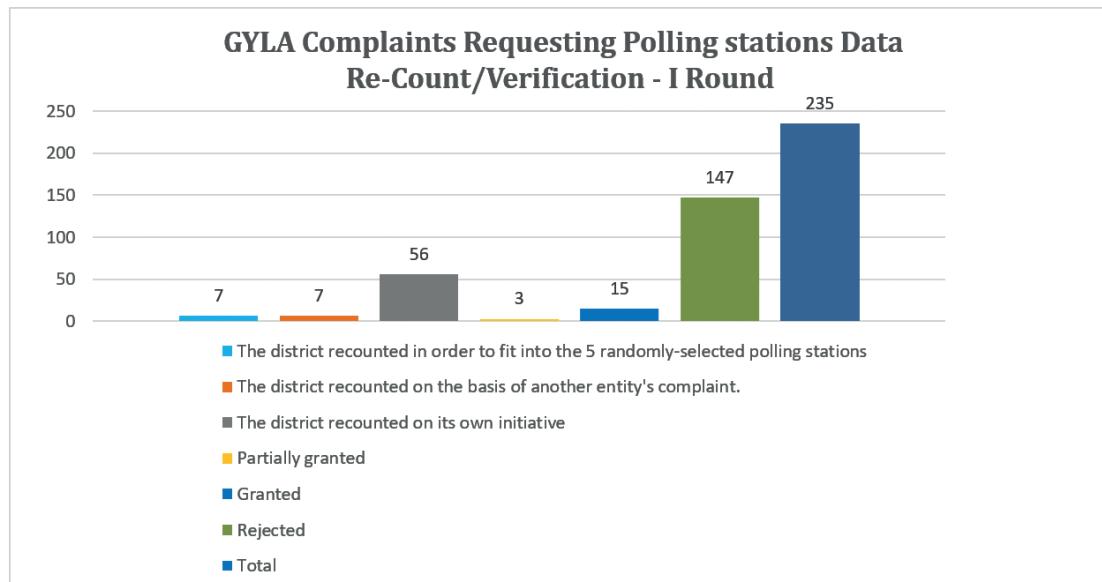
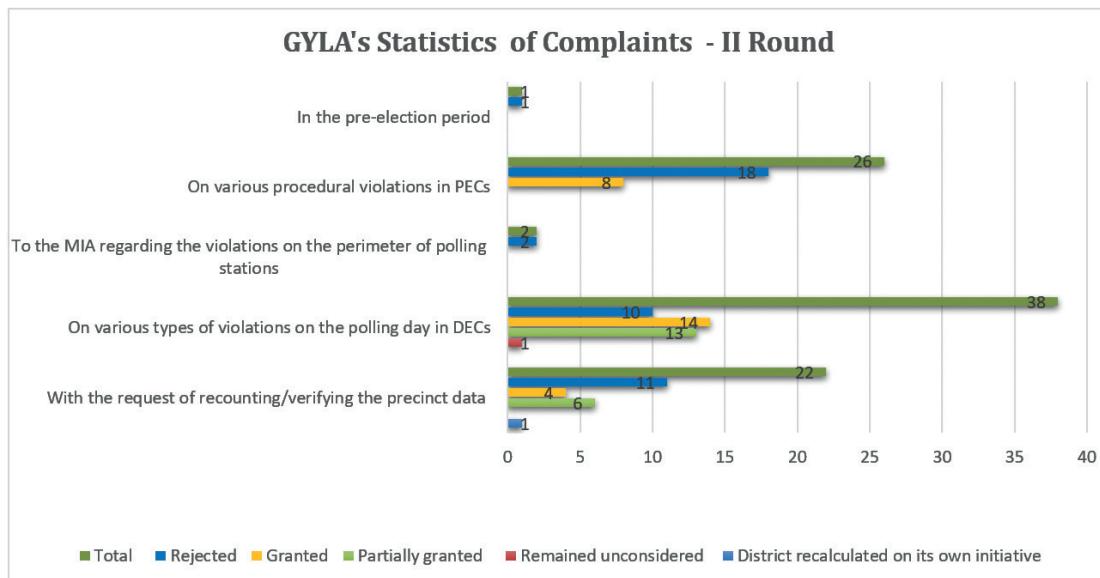


Chart №3



1.2. Rate of granting electoral disputes by common courts

As in the previous year, the rate of granting electoral disputes by the court is significantly low. According to the CEC's electronic database of election disputes, in the 2021 municipal elections (both in the first and second round in total), the court considered a total of 113 cases, of which 87 were dismissed, 2 - remained unconsidered, 6 - partially granted, 12 –granted, 6 - are still under consideration.¹³ Thus, the rate of satisfaction/partial satisfaction of claims amounts to almost 16%. It should be noted that none of the partially satisfied/satisfied cases concerned the invalidation of summary protocols/recounting of the voting results.

In order to check the accuracy of the CEC electronic database, GYLA applied to the Central Election Commission and the High Council of Justice, in particular, to find out how many cases were heard by the court in connection with the irregularities identified during the 2021 municipal elections and how these disputes ended.

As for the consideration of GYLA's electoral disputes in court, GYLA filed 10 complaints concerning the violations identified in the 2021 municipal elections, of which 2 lawsuits were partially granted and 8 dismissed. Among them, GYLA submitted 8 complaints concerning the first round, of which 2 were partially granted¹⁴ and 6 were rejected.¹⁵ With respect to the second

¹³ It is probable that the cases marked as “under consideration” have already been finalized; however, the information about them has not been entered into the electronic database yet.

¹⁴ See the court ruling of Kutaisi City Court of October 11, 2021, on the case №3/518-21 and decision of Kutaisi Court of Appeals of October 14, 2021, on the same case №3/b-500-21 also, court ruling of Ambrolauri District Court of October 13, 2021, on the case №4/90 -21.

¹⁵ See the court ruling of Batumi City Court of September 03, 2021, on the case №4-1718/21, court ruling of the Kutaisi Court of Appeals on the same case №4/a-392-2021; Court ruling of Tbilisi City Court of October 13, 2021, on the case №4/6432-21; Court ruling of Batumi City Court of October 10, 2021, on the case №3-644/21 and Court ruling of Kutaisi of October 13, 2021, on the case №3/b-497-2021; Court ruling of Tbilisi City Court of October 21, 2021, in the case №6512-2021 and court ruling of Tbilisi Court of Appeals of November 09, 2021, in the same case,

round, GYLA filed 2 complaints, none of which were upheld.¹⁶

Chart №4

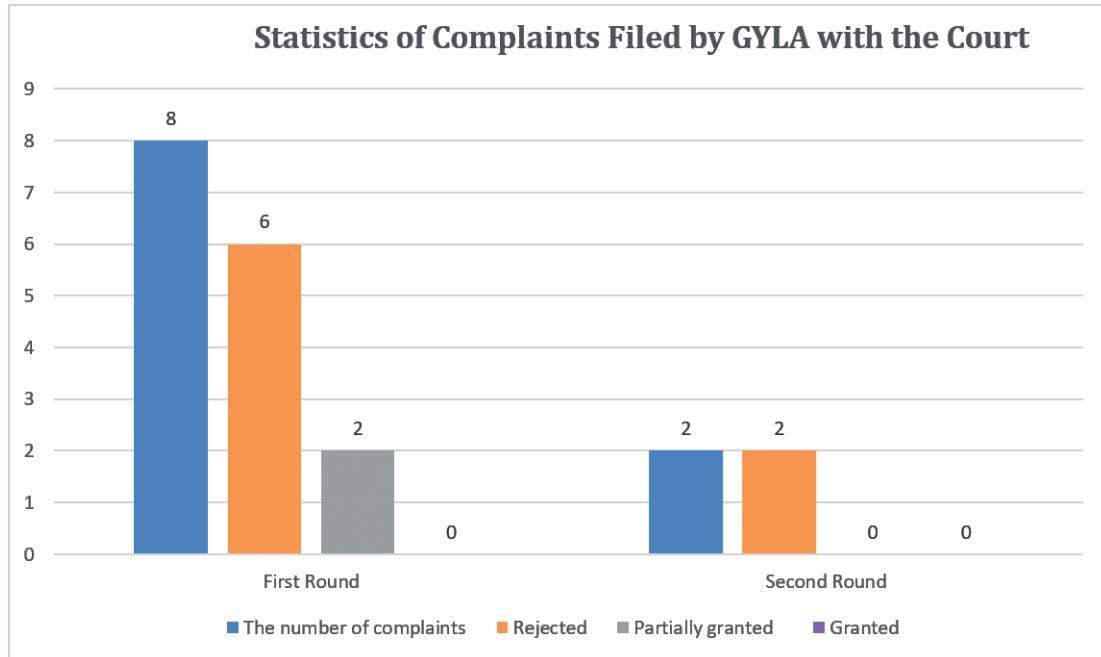
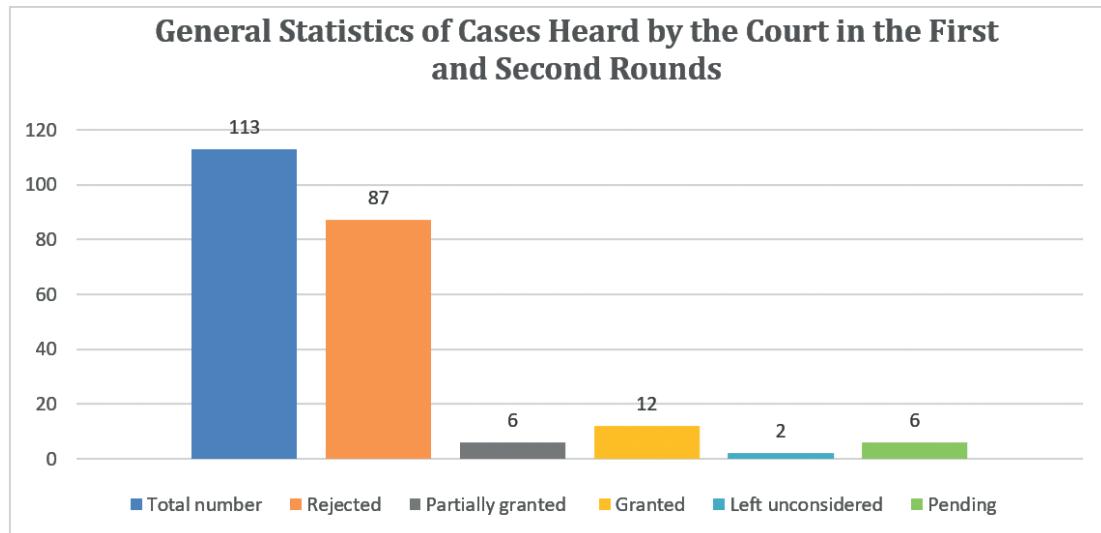


Chart №5.



case №4a/700-21; Decision of Tbilisi City Court of October 13, 2021, on the case №3/6356-21 and Court ruling of the Tbilisi Court of Appeals of October 15, 2021, on the case №3b/2028-21; Court ruling of Tbilisi City Court of October 11, 2021, on the case №3/6313-21.

¹⁶ See the court ruling №3/6952-21 of Tbilisi City Court of November 07, 2021, Court ruling №3b/2231-21 of the Tbilisi Court of Appeals of November 09, 2021, on the same case.

Court ruling №3-683/21 of Batumi City Court of November 05, 2021, and Court ruling №3/b-551-21 of Kutaisi Court of Appeals of November 08, 2021, on the same case;

1.3. Recount of disputed polling stations by DECs

1.3.1. Legislative framework

Prior to the 2021 municipal elections, significant changes had been made to the Election Code of Georgia.¹⁷ Before the amendments, the Election Code had required the DECs to verify the correctness of ballot counts only on the basis of an application/a complaint or at the initiative of the DEC.

Following the amendments to the Election Code of June 28, 2021, sub-paragraphs “d¹” and “d²” were added to Article 21, which defined the powers of the District Election Commission. According to the amendments, the District Election Commission is obliged to open the relevant election documents and recount the voting results in the event that in the summary protocol of voting results compiled by the Precinct Election Commission, which is not accompanied by a correction protocol, the total number of votes earned by an electoral subject, the total number of voters and/or the number of ballot papers considered invalid is changed.¹⁸ In addition, according to the amendment, the District Election Commission is obliged, no later than on the sixth day from the voting day, to identify by random selection five polling stations from among the electoral precincts within the territory of an electoral district, open the packages received from the PECs and recount the ballot papers again.¹⁹

1.3.2. Statistical data based on information received from the CEC

GYLA requested public information from the Central Election Commission of Georgia concerning the data of the polling stations recounted in the first round of the 2021 municipal elections.

According to the information received from the CEC, in the first round of the 2021 local self-government elections, the data of a total of 811 polling stations were recounted, out of which the data of the summary protocol of the voting results of 247 polling stations were ultimately changed.²⁰

Out of 811 polling stations, 360 were recounted with the view to fitting within the five randomly-selected polling stations,²¹ where, as a result of the recount, the data in the summary protocol of the voting results of 121 polling stations were permanently changed.²²

Based on the violations identified in the summary protocols,²³ as well as the applications/complaints and the initiative of the District Election Commission,²⁴ the election commissions recounted the data of 194 polling stations, in connection with which the data of the final pro-

¹⁷ Organic Law of Georgia on amending the Organic Law of Georgia “Election Code of Georgia” 28/06/2021.

¹⁸ Election Code of Georgia, Article 21, Subparagraph “d¹”.

¹⁹ Ibid., Sub-paragraph “d²”.

²⁰ Letter №03-02 / 1727 of the Central Election Commission of Georgia of November 6, 2021.

²¹ Election Code of Georgia, Article 21, Subparagraph “d²”.

²² Letter №03-02/1727 of the Central Election Commission of Georgia of November 6, 2021.

²³ Election Code of Georgia, Article 21, Subparagraph “d¹”.

²⁴ Ibid., Sub-paragraph “e”.

tocols of 66 polling stations were changed.²⁵

As for the remaining 257 polling stations, they were recounted as per the proposal of the Chairperson of the Central Election Commission.²⁶ On October 8, 2021, the CEC Chairperson issued a recommendation advising the DECs to recount, on their own initiative and within the scope of their discretion, the results of those polling stations where:

- Complaints requesting the recount/verification of results were filed by observer organizations with multiple years of experience in observing the elections who carried out a large-scale observation mission in the October 2 elections, as well as published their reports regarding the elections;
- The summary protocols recorded a large number of invalid ballot papers by specific electoral districts;
- The sum of invalid ballots and actual votes in the summary protocols was five times more than the number of voters participating in the voting.²⁷

Based on the recommendation of the CEC Chairperson, the data of 60 polling stations were changed as a result of the recount.²⁸

For better clarity, if we compare the above results with the recounts of voting results by DECs in previous elections, we will see that in the parliamentary elections of October 31, 2020, a total of 39 electoral precincts were counted, where the election results were altered with respect to final protocols of 12 polling stations, and during the presidential elections of October 28, 2018, the results offered by PECs were not recounted at all.²⁹

As a result of the amendments to the Election Code of Georgia, the number of recounts of polling station data by DECs has sharply increased compared to previous years. Eventually, the data from 811 polling stations out of 3743 were recounted, which is approximately 22% of the total number. It should be also noted that the recount of polling station data led to the alteration of the voting results in the final protocols of almost 7% of the total number of polling stations.

²⁵ Letter №03-02/1727 of the Central Election Commission of Georgia of November 6, 2021.

²⁶ Recommendation of the Chairman of the Central Election Commission of Georgia, available at: <https://bit.ly/3IuRpil> [Verified: 24.01.2022].

²⁷ Ibid.

²⁸ Letter №03-02/1727 of the Central Election Commission of Georgia of November 6, 2021

²⁹ Ibid.

Chart №6

**A total of 811 polling stations were recounted, of which
the voting results in the summary protocols of 247
polling stations were changed as a result of the recount**

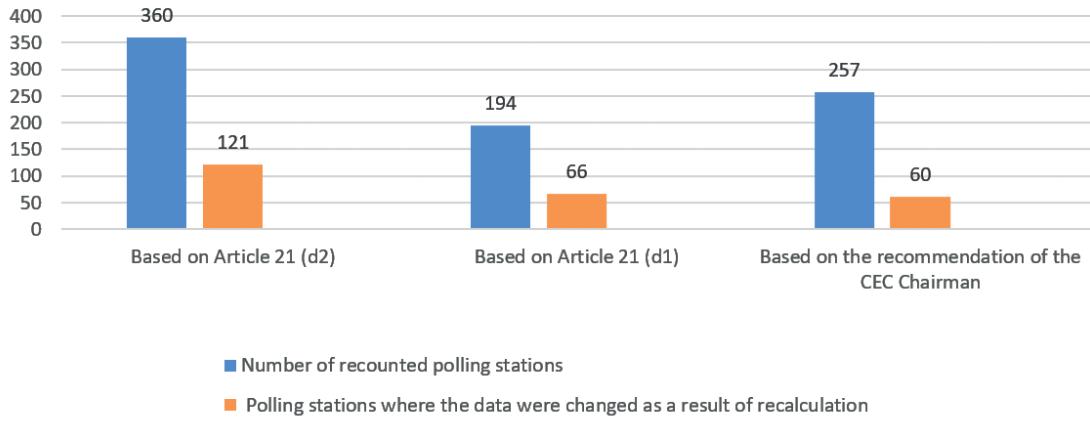
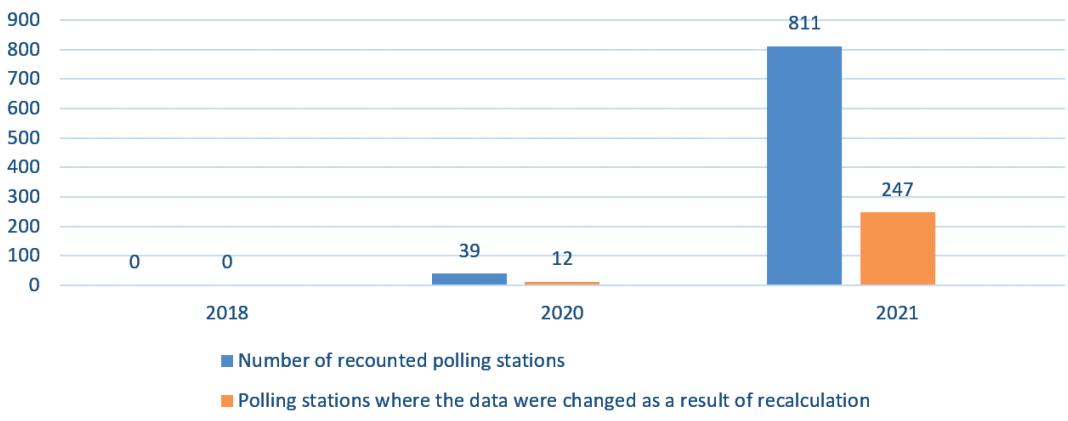


Chart №7

The Rate of Recounted Polling Stations by Years



2. RESPONDING TO VIOLATIONS OBSERVED ON THE PERIMETER OF POLLING STATIONS

2.1. Legislative framework

The amendments to the Election Code of Georgia dated June 28, 2021, also covered Article 45, which defines the pre-election campaign rules. Prior to the introduction of the mentioned changes, the article had read as follows: "It shall be prohibited to place election materials 25 meters away from the entrance of the polling station, this material shall be subject to removal/dismantling/taking off. On voting day, the movement of voters cannot be physically obstructed in a polling station or within a distance of 25 meters from the polling station."³⁰ After the amendments, the 25-meter restriction with respect to obstructing the movement of voters in the polling station was changed and this provision was finally formulated as follows: "Canvassing materials may not be placed at a distance of 25 meters from the entrance of the polling station. The materials shall be subject to removal/dismantling/taking off. The movement of a voter may not be physically obstructed on the polling day in a polling station or within the distance of 100 meters from a polling station."³¹ Per the amendments, it is also forbidden for citizens to gather or voters to be recorded on the voting day within the distance of 100 meters from a polling station.³² Prior to the amendments, Article 10 of the Election Code, which defines penalties for violating the electoral law, did not cover this article, and as of today, the Election Code provides for a fine in the amount of GEL 2,000 for violating of the above norm.³³

2.2. Responding to identified violations

Voter registration is a mechanism utilized for influencing and controlling the will of voters. This tendency was evident during the election period of previous years and still persisted this year as well. In the first round of the 2021 municipal elections, GYLA applied to the patrol police 23 times, and in the second round - 2 times with a request to draw up a protocol of an offense concerning violations that occurred on the perimeter of electoral precincts.³⁴ With the view to finding out how many reports were filed on these types of violations and what the response to them was, GYLA contacted the Ministry of Internal Affairs. According to the response received from the Ministry of Internal Affairs, on the polling day of the 2021 municipal elections (both first and second rounds), the MIA responded to more than 350 facts of violations on the perimeter of electoral precincts, yet the specified information on the preparation of a protocol of offense was recorded in relation to only one incident.³⁵ According to the letter, the MIA does not categorize reports/notifications based on their specific content and maintains

³⁰ Election Code of Georgia, Article 45, Part 12 (The edition in force until June 28, 2021).

³¹ Ibid (Current edition).

³² Ibid

³³ Ibid., Article 79, Part 2.

³⁴ GYLA's statistics of complaints regarding the first round of the 2021 Local Self-Government Elections, available at: <https://bit.ly/3KBRvGT> [last seen: 23.01.2022].

³⁵ Letter MIA 62200169597 of the Ministry of Internal Affairs of January 21, 2022.

no statistics thereof.³⁶

From another letter, it can be concluded that the Ministry of Internal Affairs does not properly register violations that occur on the perimeter of electoral precincts. According to the letter received in the form of public information from the MIA, the receiver of calls of the LEPL Public Safety Management Center “112” of the Ministry determines the type of a problem or an incident, the purpose of which is to assign the priority to the incident and decide whether to allocate an emergency assistance resource to respond to it, rather than to specify the exact content of the report in relation to the legislative disposition. An example of such an incident is a “violation of the electoral law,” which consolidates reports on election violations or physical obstruction of movement of voters within an electoral precinct or at a distance of 100 meters from a polling station or on voting day. Reports on people gathering or registering voters at a distance of 100 meters from the election building are not separately recorded, therefore, they cannot be segregated from the overall statistics.”³⁷ According to the statistics provided by the Ministry of the Interior, on October 2, 2021, the Public Safety Management Center “112” received 165 reports in connection with “violations of the election law,” while 49 reports were received on October 30, 2021.³⁸

The letters from the Ministry of Internal Affairs show that protocols of violations that took place on the perimeter of polling stations on the voting day are not properly recorded. Therefore, it is impossible to fully evaluate the effectiveness of the response to each incident.

³⁶ Ibid.

³⁷ Letter MIA 92200134651of the Ministry of Internal Affairs of January 18, 2022.

³⁸ Ibid.

3. GENERAL TRENDS IDENTIFIED DURING THE CONSIDERATION OF ELECTORAL DISPUTES

In the municipal elections of 2021, just like in the 2020 elections,³⁹ the ineffective response of the relevant election administrations to the irregularities observed during the pre-election period was rather problematic.⁴⁰ The election administration, as a rule, did not satisfy complaints filed during the pre-election period and did not properly substantiate decisions made. A similar approach was maintained with respect to complaints on polling day as well as summary protocols. The election administrations largely misinterpreted the legislation. Furthermore, the commissions did not thoroughly investigate the factual circumstances indicated in the complaints, did not study the presented evidence and/or did not provide evidence on their own initiative.⁴¹

Problems identified in the summary protocols of voting results, including in terms of imbalance, were also frequent during the 2021 elections. Imbalance expressed in surplus or deficient data in the final protocols is not a new challenge the election administrations face, as was the case in previous elections. The practice of recent years shows that in many cases the elimination of surplus imbalance is usually formulaic, accompanied by unreliable explanations and without examination of additional evidence. As for the deficiency-expressed imbalances, as a rule, neither the DECs nor the court considers them a violation, which is also a problematic practice.⁴² It should be noted that after the first and second rounds, none of the complaints filed with the court regarding the imbalance were upheld.⁴³ Courts, when dismissing complaints, usually refer to the argument that there is no material breach that could have had a substantive impact on the results of the election.⁴⁴

The practice of imposing disciplinary liability on PEC members remains a problem. In particular, DECs do not properly substantiate the decisions on bringing or refusing to bring members of PECs to disciplinary liability. In addition, when choosing a measure of disciplinary responsibility, DECs do not comply with the rules of discretionary powers to select an appropriate measure of responsibility. With regard to the consideration of these types of disputes in the courts of general jurisdiction, it is still problematic for them to clarify the legislative norms related to the imposition of disciplinary liability, which precludes proper judicial control over the decisions made by DECs.⁴⁵

³⁹ See the report of the Georgian Young Lawyers' Association - "Analysis of Electoral Disputes (the Parliamentary Elections 2020, the first and second rounds)", available at: <https://cutt.ly/EIOjm1x> [Verified: 22.01.2022].

⁴⁰ For example, see the written refusal №44/84 by Chairperson of Ambrolauri DEC №44 of September 28, 2021; Written refusal №39/71 by Chairperson of Aspindza DEC №39 of October 3, 2021.

⁴¹ For example, see the Ordinance №106/2021 by Batumi DEC №79 of October 06; Ordinance №90/2021 of the Didube DEC №8 of October 7, 2021.

⁴² For example, see the Decision of Tbilisi City Court of October 12, 2021, on the case №3/6320-21.

⁴³ The information is based on the CEC's electronic database of electoral disputes.

⁴⁴ For example, see the court ruling of Senaki District Court of November 06, 2021, in the case №3/155-2021.

⁴⁵ For example, see the Ordinance №110/2021 of October 08, 2021, by Vake DEC №2.

4. WHAT ARE THE RESULTS OF RECOUNTING FIVE RANDOMLY SELECTED POLLING STATIONS

4.1. Legislative framework

According to the Election Code of Georgia, the District Election Commission is obliged to identify through a random selection procedure five electoral precincts from the polling stations in the election district no later than the 6th day after the voting day, to open the packages received from the precinct election commissions and to count ballot papers again. This provision was added to the Election Code on June 28, 2021.⁴⁶ This chapter of the report reviews the trends and case law identified as a result of the recalculation in accordance with the determined rule.

4.2. Results of the recount of polling stations in Isani DEC

In the first round of the elections, Isani DEC №5 recounted votes in the five randomly selected electoral precincts - №4, №43, №45, №50, and №78. As a result of the recount, violations were detected in 4 out of 5 polling stations. Of these electoral precincts, only polling station №45 reported no irregularities. The remaining four faced the problems such as the imbalance expressed in an excessive number of votes, adding invalid ballots to genuine ballots, and invalidating ballot papers.⁴⁷

In addition to recounting the five polling stations identified by the above-mentioned random principle, the Isani DEC, on its own initiative, recounted 12 other precincts in full or partially. These were the polling stations №02, №07, №08, №16, №26, №40, №44, №53, №58, №62, №65, and №81. The final protocols of these electoral precincts were also marked by various significant shortcomings. For example, the violations concerned the inaccuracy of the number of voters participating in the elections, as well as the votes earned by specific electoral subjects.⁴⁸

⁴⁶ Election Code of Georgia, Article 21, sub-paragraph "d".

⁴⁷ Ordinance №85/2021 of Isani DEC №5 of October 4, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/a19afbae-125b-49f0-89a7-5b9bbbc201e [Verified: 29.01. 2022]; Ordinance №86/2021 of October 4, 2021, of Isani DEC №5, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/46be67c9-e8b8-4aa7-8af2-071d8e375dba [Verified: 29.01.2022]; Ordinance №84/2021 of October 4, 2021, of Isani DEC №5, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/377e4316-e869-474f-a639-de4dcf46fce1 [Verified: 29.01.2022]; Ordinance №88/2021 of Isani DEC №5 of October 4, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/ce8cab9a-c91a-42b2-b3f6-e1934f7589a8 [Verified: 29.01.2022].

⁴⁸ Ordinance №100/2021 of Isani DEC №5 of October 5, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/68630ea1-0de4-42ab-86e6-bf2f54c467be [Verified: 29.01.2022]; Ordinance №144/2021 of Isani DEC №5 of October 8, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/2ca55be4-0c5c-4304-8c1a-3e0ad89f0438 [Verified: 29.01.2022]; Ordinance №104/2021 of Isani DEC №5 of October 6, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/40e9f1d2-7403-4ef8-b890-9f49c7ec2d4e [Verified: 29.01.2022]. Ordinance №102/2021 of Isani DEC №5 of October 5, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/8e96cc8b-3e31-4599-b8ee-ee0b897c2212 [Verified: 29.01.2022]; Ordinance №198/2021 of Isani DEC №5 of October 9, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/1e3469ec-35c1-4365-bb84-caaf53e05fff6 [Verified: 29.01.2022]; Ordinance №199/2021 of Isani DEC №5 of October 9, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/d7af8d5c-e88c-4f30-a93a-8db8395fab8e [Verified: 29.01.2022]; Ordinance №200/2021 of Isani DEC №5 of October 9, 2021,

The results of full or partial recounts of polling stations identified randomly or at the district's own initiative show that in almost all electoral precincts there were shortcomings in the summary protocols. Consequently, these polling stations had serious problems with regards to summarizing the results and drawing up protocols.

Given the magnitude of the revealed irregularities, GYLA challenged the final protocols of the results of the fifty polling stations in Isani district, which the DEC did not recount, and demanded that the summary protocols of the mayoral, majoritarian and proportional election results and corresponding correction protocols drawn up in each precinct be declared invalid, the sealed documents opened and the data/results recounted.⁴⁹

The Isani DEC №5 did not satisfy the complaint, after which GYLA appealed the decision first to the Tbilisi City Court and then to the Tbilisi Court of Appeals. The court of both instances dismissed the claim.⁵⁰

The Tbilisi City Court, in its judgment of October 13, 2021, notes that "*the complainant's arguments regarding the recount of results of other polling stations may not be accepted, since the statements of the parties and partly the disputed ordinance show that in relation to violations identified at randomly identified electoral precincts and those polling stations determined by the decision of the DEC, the Isani DEC took appropriate measures, namely, a disciplinary penalty was imposed on members of six PECs within the district. Accordingly, the described circumstances unequivocally confirm that the defendant party adhered to the requirements of Article 21, subparagraphs "d" and "e" of the Organic Law of Georgia "Election Code of Georgia."*"⁵¹

In relation to the recount of results in the present case, the Court established a standard according to which a DEC is obliged only in three cases to open relevant electoral documents and recount the election results if certain alterations have been made to:

- Number of votes cast for an electoral subject;
- Total number of voters participating in the elections;
- Number of invalid ballot papers.

Thus, in the opinion of the Court, in order for the DEC to make a decision to open the election documentation and recount the voting results, the above circumstances ought to have existed

available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/dbb4d5ec-c77f-4674-a648-343887531434 [Verified: 29.01.2022]; Ordinance №201/2021 of October 9, 2021, by Isani DEC №5, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/192e786f-fa63-42d5-9f96-ab417b628dbch [verified: 29.01.2022]; Ordinance №105/2021 of Isani DEC №5 of October 6, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/df5a0c59-25db-41b7-891a-99f577420a97 [verified: 29.01.2022]; Ordinance №143/2021 of Isani DEC №5 of October 8, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/6aa19f6f-7e49-41e2-bf69-9d9937d8c485 [Verified: 29.01.2022]; Ordinance №168/2021 of Isani DEC №5 of October 9, 2021, available at: https://results.cec.gov.ge/#/ka-ge/election_45/prot/922e26d2-84eb-4440-aa75-6a5ba656f214 [Verified: 29.01.2022].

⁴⁹A complaint of the Georgian Young Lawyers' Association (Registration №05-510), available at: <https://sachivrebiapi.cec.gov.ge/api/file/DownloadFile?id=04e2d4e8-a93c-4ed2-b89b-aba2025bd93c>, [Verified: 01.02.2022].

⁵⁰Ordinance №171/2021 of Isani DEC №5 of October 9, 2021, available at: <https://sachivrebiapi.cec.gov.ge/api/file/DownloadFile?id=fd63b7d4-ce31-4a1c-a851-9da983bb065>, [Verified: 01.02.2022].

⁵¹Court ruling of Tbilisi City Court of October 13, 2021, on the Case №3/6356-21.

separately or simultaneously. The same viewpoint was upheld by the Court of Appeals.⁵² *The Court of Appeals held that certain types of irregularities found as a result of counting several polling stations may not give rise to reasonable doubt and cannot create a high probability that the similar or other types of violations occurred in other polling stations. According to the Court, in the absence of solid evidence of specific violations in the disputed polling stations, among others relevant complaints about possible violations in these polling stations, it is practically impossible to prove the unconditional necessity for declaring the voting results void and carrying out a recount merely on the basis of statistical data, especially that this goes contrary to the relevant legislative norms.*

Against the background of the above rationale, the legislative change in question and the empowerment of districts with the authority to recount votes become completely meaningless. This mechanism actually allows DECs the opportunity to identify and ensure the elimination of shortcomings in the summary protocols, in respect of which no complaints were filed or there were no obvious violations in the protocols at first glance. It is in such circumstances that it is important to use the mechanism, which in the given case was not taken into account by either the DECs or the court.

It should be noted that in addition to the shortcomings identified in the practice of counting the voting results, the entire mechanism needs to be clarified, the exact analog of which with the same legal outcome is not typical for other countries with similarly developed electoral systems. Countries that normally utilize the recalculation mechanism have the criterion based on which the contested results (polling stations) are recounted. For example, this may be a small difference in the number of votes between candidates, certain irregularities in relation to specific electoral precincts,⁵³ electronic vote counting, etc.⁵⁴

Based on the foregoing, the Venice Commission had the expectation that, on the one hand, the mechanism would make it possible to identify the polling stations the results of which should be recounted by DECs, and on the other hand, it would determine the actions to be taken by the election administration in the event of a breach or non-compliance being detected, in order not to reduce the effectiveness of the verification.⁵⁵

The practice established by the DECs and the court confirms that the right granted by the Election Code to DECs to recount five randomly selected electoral precincts is an insufficient tool, which ultimately fails to achieve the goal for which the legislative change was introduced.

⁵² Court ruling of the Tbilisi Court of Appeals of October 15, 2021, Case №3b/2082-21.

⁵³ How close does an election have to be to trigger an automatic recount? (2020) available at: [https://ballotpedia.org/How_close_does_an_election_have_to_be_to_trigger_anAutomatic_recount%3F_\(2020\)](https://ballotpedia.org/How_close_does_an_election_have_to_be_to_trigger_anAutomatic_recount%3F_(2020)) [Verified: 01.02.2022].

⁵⁴ County of Santa Cruz, Elections Department, (E.C. §15360), available at: <https://www.votescount.us/Home/Electionguidebooks/VoterRequestedRecounts.aspx> [Verified: 01.02.2022].

⁵⁵ JOINT URGENT OPINION ON DRAFT AMENDMENTS TO THE ELECTION CODE Issued pursuant to Article 14a of the Venice Commission's Rules of Procedure, opinion N1030/2021, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2021\)005-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2021)005-e), p.25 [verified: 18.01.2022]. Also, URGENT JOINT OPINION ON REVISED DRAFT AMENDMENTS TO THE ELECTION CODE Issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 18 June 2021 Endorsed by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021), opinion N1043/2021, p.6, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2021\)005-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2021)005-e), [verified: 18.01.2022].

5. INTERFERENCE WITH THE OBSERVER ACTIVITIES

5.1. Cases of obstructing the observer activities and response to incidents

The participation of observer organizations in the election process and the provision of free conditions for them to work is one of the necessary prerequisites for the democratic conduct of elections. Therefore, the election administration must ensure that the observer organizations are allowed to carry out their activities smoothly and without any obstacles.

Restriction of the rights of observers provided for in the electoral law or obstruction of their activities is an administrative offense, and whenever this type of violation is committed by a PEC member or a person authorized to be present at a polling station, the chairperson of the DEC has the authority to draw up a protocol of administrative offense.⁵⁶

Unfortunately, as in previous years, the 2021 municipal elections were marked by massive infringement of the rights of GYLA observers. During both rounds of elections, GYLA's representatives approached the DECs with a request to respond to a total of 13 incidents throughout Georgia.

Interference with the rights of observers in the 2021 municipal elections was mainly expressed in:

- Prohibition of photo-video shooting at the polling station;⁵⁷
- Refusing to register a complaint;⁵⁸
- Refusing to make a remark in the log-book;⁵⁹
- Restricting the right to view the log-book;⁶⁰
- Expelling an observer from the polling station.⁶¹

In none of the above 13 cases did the authorized person draw up a report on the offense. In majority cases, these decisions are based on the argument that the evidence presented by an observer is not sufficient while the statements of potential perpetrators are unequivocally accepted. Complaints of this type are often considered by reviewers without an oral hearing, to which they are entitled, yet, despite the possibilities available, they do not try to establish disputed facts and find neutral evidence through an in-depth investigation.

⁵⁶ Election Code of Georgia, Articles 91 and 93.

⁵⁷ The response №79/118 by Batumi DEC №79 of October 13, 2021; the response №74/2021 by Zugdidi DEC №67 of October 6, 2021; the response №08/107 by Didube DEC №8 of October 12, 2021; the response №05/108 by Isani DEC №5 of October 12, 2021;

⁵⁸ The response №02/137 of October 12, 2021, by Vake DEC №2; the response №17/106 by Telavi DEC №17 of October 13, 2021; the response №22/111 by Marneuli DEC №22 of October 13, 2021; the response №22/112 by Marneuli DEC №22 of October 13, 2021;

⁵⁹ The response №156 / 2021 by Saburtalo DEC №3 of October 7, 2021;

⁶⁰ The response №64/301 by Senaki DEC №64 of November 8, 2021;

⁶¹ The response №67/114 by Zugdidi DEC №67 of October 12, 2021; the response №67/119 by Zugdidi DEC №67 of October 12, 2021; the response №22/109 by Marneuli DEC №22 of October 13, 2021;

5.2. Prohibition of photo-video shooting at polling stations

Of the incidents of interference in the activities of observers, the cases of preventing observers from making photo-video recordings are particularly worth noting. With respect to such incidents, GYLA filed four complaints, which the chairpersons of the Batumi, Zugdidi, Didube, and Isani DECs not only rejected but also refused to draw up a protocol of an administrative offense on the obstruction of observer activities. In making the above decisions, the persons examining the above complaints basically argued that the relevant evidence was not presented by the complainant. Moreover, the written responses also contain an argument that the PEC chairpersons were authorized to prevent a representative of the observer organization from producing photo or video recordings in the polling station for more than ten minutes.

This explanation not only contradicts the rights of observers and hampers their activities, but is also completely inconsistent with the election law. In particular, the Election Code explicitly provides for the right of an observer to take photos and videos without obstructing the work of the election commission.⁶² The CEC has also established that a person authorized to be present in a polling station can take photos and video recordings without interfering with the electoral process.⁶³ The only restriction in the ordinance concerns the same press and other mass media outlets that have the right to take photos and videos during the voting process in one polling station for no more than 10 minutes.⁶⁴ However, neither the Election Code nor the CEC's ordinance has any indication that this restriction should apply to observers as well. In parallel to this, the guidelines developed by the CEC explicitly provide that the restriction imposed on the media applies to all persons who have the right to be present in the polling station, including observers, which completely unjustifiably and unlawfully restricts the rights of observers.

Also problematic was an incident that occurred at the electoral precincts №8 in Didube district, where the PEC chairperson required the GYLA observer to delete the video footage taken at the polling station from his/her personal mobile phone. In the given case, the DEC argued that the video recording made by the observer at the polling station without the prior permission of the PEC chairperson violated the electoral law. Accordingly, the complaint filed by the GYLA representative to the polling station was not satisfied.⁶⁵

The above reasoning of the DEC was also upheld by the Court. The Tbilisi Court of Appeals, in its decision, held that "Article 8, Paragraph 25 of the Election Code of Georgia contains provisions restricting the basic fundamental human right to freely receive and impart information. The organic law itself does not specify what is meant by the term "without interference".⁶⁶ It is somewhat general, which required the authorized subjects involved in the electoral process

⁶² The Election Code of Georgia, Article 8, Part 25: "*A person authorized to be present in the electoral precinct, in addition to the polling booth, as well as a person entitled to attend a meeting of the election commission, may take photos and videos without interfering with the election process/election commission session.*"

⁶³ Ordinance №42/2012 of the Central Election Commission of September 24, 2012, on defining some electoral procedures, Article 2.

⁶⁴ Ibid., Article 3, paragraph 3.

⁶⁵ The response №08 /107 by Didube DEC №8 of October 12, 2021.

⁶⁶ Ibid.

to further clarify the legislator's goal.”⁶⁷

The Court found that a by-law adopted by the CEC made it possible to define the existing norm of the organic law. Thus, the phrase “without interference” was clarified by an ordinance, according to which the prior consent of the chairperson is mandatory if one wishes to produce video footage. However, the Court did not focus on GYLA’s argument that the ordinance does not in any way establish this right or technically explains the procedures for exercising this right, but rather restricts and further narrows its content, which is contrary to the legislation on normative acts.⁶⁸

The cases studied for the purposes of the report show that the authorities fail to have a proper response to the facts of restricting the rights of observers, which is mainly due to the inadequate distribution of the burden of proof in controversial cases. The persons handling the disputes do not accept the evidence and opinions presented by observers, whereas even the most groundless arguments of potential perpetrators are taken into account. The reviewers of complaints do not try, despite the available opportunities, to establish disputed facts and find neutral evidence through in-depth study.

⁶⁷ Court ruling of the Tbilisi Court of Appeals of November 9, 2021, in the case №4a/700-21.

⁶⁸ Organic Law of Georgia on Normative Acts, Article 7.

6. DISCRETIONARY POWERS IN THE CONSIDERATION OF ELECTION DISPUTES

6.1. The practice of the election administration and the court

Another problematic issue in the 2021 electoral disputes concerns the scope of judicial control over decisions made by the election administration within its discretionary powers. On several occasions, GYLA challenged the summary protocols of electoral precincts and demanded to have invalid ballots recounted. In managing electoral disputes, the GYLA argued that during the counting of the data at one of the polling stations, the GYLA's observer identified instances where the PEC deemed questionable ballots to be invalid while the will of the voter was clearly expressed on the ballot paper.

Both the election administration and the court refused to grant the complaints concerning such cases, arguing that the issue of invalidating the disputed ballot papers was to be decided by the PECs at their own discretion. According to the Court, "[...] the DEC was entitled not to deem the decision of the commissions doubtful and refrain from analyzing its content."⁶⁹

The purpose of the mechanism of filing a complaint with the superior election administration is to fully examine the decision made by the lower election administration, both in terms of legality and expediency. Therefore, the superior election administration has the same decision-making competence as the body that made the contested decision, including, the right to correct or completely change the grounds of the decision made within its discretion.⁷⁰ In the event that the superior election administration does not properly review the appealed decision, and if the complaint is referred to the Court, the court is obligated to examine the lawfulness of the decision made within the scope of discretionary powers.

The practice established by the election administration and the court is problematic and incompatible with the essence of discretionary powers, leaving decisions made by the election administration within such powers beyond the control of the higher election administration and court. This approach does not meet the requirements of the law.

6.2. Dissenting opinion of the judge

The Court's approach to overseeing the decisions made within the discretion was criticized by Ms. Khatuna Khomeriki, Judge of Kutaisi Court of Appeals, in her dissenting opinion on GYLA's electoral disputes.⁷¹ She considers completely unfounded the reasoning of the Court according to which the issue of invalidating ballot papers was considered as a discretionary power of the PEC, thus depriving the superior election administration and the court of the right to provide proper control. Following this, the judge elaborates on the issue relating to the invalidation of ballot papers and explains that the entry in Article 69.3 (d) of the Election Code - "It is impossible to determine which election subject the voter voted for" - is for evaluation purposes only, and the commission must come to such a conclusion through

⁶⁹ For an example, see the court ruling by Batumi City Court of October 10, 2021, on the case №3-644/21; Also, the court ruling of the Kutaisi Court of Appeals of October 13, 2021, in the case №3/b-497-21.

⁷⁰ The Election Code of Georgia, Article 21, paragraph "e".

⁷¹ Dissenting opinion of Khatuna Khomeriki, Judge of Kutaisi Court of Appeals, on the case №3/ b-497-21.

reasonable discussion, during which the provisions of Articles 147.4-147.5 must be taken into account, which state that the voter shall circle the sequence number of not more than one electoral subject, but this norm cannot serve as the only criterion for assessing the voter's will (for example, when the voter expresses his will not by circling the sequence number but the name of the preferred candidate or party, this may not be considered a void ballot)." Any other interpretation of the norm contradicts the free exercise of the right to vote. In summary, the inability to determine the will of the voter should not raise suspicions; it should be clear and obvious." The judge further notes that "it is unacceptable for the superior election commission and the court to consider any irregularities insignificant merely because they do not affect the outcome of the elections. Cancellation of a real ballot paper and leaving this fact without response by the superior election administration is a type of violation that, despite its scale and impact on the voting results in a particular electoral precinct, can hardly be seen as a decision aimed at achieving the legitimate goal [...]. Finally, in her dissenting view, the judge notes that the DEC and subsequently the Court ought to have granted the GYLA's complaint and that there were the grounds for recounting the invalid ballots.⁷²

The rationale offered in the judge's dissenting opinion sets an important precedent for proper resolution of election disputes and needs to be taken into account by the election administrations and the courts. This approach can contribute to the proper resolution of election disputes in the future and raise the existing standard.

⁷² Ibid.

7. THE PRACTICE OF RELEASING FROM ADMINISTRATIVE LIABILITY

The Constitution of Georgia strengthens and ensures the right to vote and the free expression of the will of voters.⁷³ This right imposes a positive obligation on the state to take effective steps in order to enable the voter to freely express his or her will. At the same time, NGOs play a tangible and important role in the election observation process. Thus, it is the duty of the state to equip observer organizations with the possibility to appeal against any decision made at any level of the election administration in order to ensure judicial oversight of the reasonableness of any refusal by a relevant official to draw up the protocol on violations. In addition, according to international practice, the resolution of disputes on electoral matters in the administrative body alone is not enough and it is necessary to have a mechanism of judicial control.⁷⁴

According to the OSCE recommendation, “in order to ensure effective redress mechanisms, the law should provide for expedited review of those complaints that seek administrative sanctions for pre-election violations. All decisions by election commissions, even when these decisions are made by a specific person, should be subject to appeal.”

The amendments to the legislation in 2020 introduced a ten-day timeframe for drawing up a protocol on violation before filing a complaint with the election administration and the court. Election commissions are obliged to make a decision on drawing up a protocol of violation within ten days, and the same deadline is set for the court.⁷⁵ However, in the past, there was no tool for appealing against the refusal to draw up an administrative violation protocol. This possibility appeared in the law only as a result of the changes made in 2021. According to the amendments to the legislation, the decision refusing to draw up a report on violation can be appealed within two calendar days.⁷⁶

The new appeal mechanism in the 2021 municipal elections was utilized by the court in hearing of a total of 26 cases requesting the imposition of a penalty.⁷⁷ Of these, the proceedings were finally closed in 24 cases, of which the court found a violation in 12 cases, while the remaining complaints were rejected. **It is noteworthy that out of the twelve finally resolved cases, the court did not impose the punishment provided by law in any of the cases and acquitted**

⁷³ Constitution of Georgia, Article 24.

⁷⁴ See for example, the UN Human Rights Committee Concluding Observation on Nicaragua CCPR/C/NIC/CO/3 (Dec, 12 2018); See. Also, CDL-AD (2002) 023rev2-cor, Code of Good Practice in Electoral Matters, European commission for democracy through law (Venice Commission), adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), Page 11, Paragraph 3.3. Available: <https://bit.ly/3p5PHu1> [last viewed: 08.02.2021]; See also Guidelines for Reviewing a Legal Framework for Elections, Warsaw, OSCE/ODIHR, Warsaw, 2001, available at: <https://www.osce.org/odihr/elections/17579?download=true> [last viewed: 08.02.2021]; See also, International Election Legal Mechanisms, John Hardin Young, 2016, American Bar Association ISBN: 978-1-63425-774-9; See also Georgia Presidential Election, 28 October and 28 November 2018 ODIHR Election Observation Mission Final Report, OSCE/ODIHR, Warsaw, January 2019, 22. Available at: <https://www.osce.org/odihr/elections/georgia/412724> [Last viewed: 08.02.2021].

⁷⁵ Organic Law of Georgia, Election Code of Georgia, Article 93, Paragraph 6.

⁷⁶ Ibid., Article 93, paragraph 9.

⁷⁷ The data are counted based on the electronic database of CEC complaints as of January 22, 2022. GYLA does not rule out that not all data in the database have been fully reflected. In order to verify the data, GYLA applied to the CEC for public information, yet the CEC did not provide the data.

all persons brought to administrative responsibility merely by giving a verbal reprimand.⁷⁸

It should be noted that the above decisions were made not only by one court but by various courts of the first instance (Tbilisi, Ambrolauri, Mtskheta, Telavi, Ozurgeti, Kutaisi, Tsageri, Akhaltsikhe, Sighnaghi). Only in two cases did the courts of the first instance use a fine, and in one of them, the Tbilisi Court of Appeals replaced the fine with a verbal reprimand,⁷⁹ and in the other, the dispute is still pending.⁸⁰

Thus, the judicial practice clearly shows that having discovered a violation, the court refrains from imposing the penalties provided by the relevant articles of the Electoral Code, assesses the incident as a minor offense, and instead of a fine gives the offender an oral warning.

For example, on October 2, 2021, on the polling day, the then Speaker of the Parliament of Georgia, Mr. Kakhaber Kuchava, arrived at the polling station wearing a face mask showing the logo of the Georgian Dream, which constitutes a vivid infringement of the Electoral Code and is subject to a fine of 2000 GEL.⁸¹ In seeking a response to this fact, GYLA filed a complaint with the election administration. The Central Election Commission (CEC) found a violation of the rules of pre-election campaigning and drew up an administrative violation report against Mr. Kakha Kuchava, which was subsequently referred to the Tbilisi City Court for further consideration. The Court pronounced Mr. Kakha Kuchava an offender, however, acquitted him and applied the mechanism of a verbal warning.⁸²

Another case litigated by GYLA concerned the N(N)LP Ambrolauri Ucha Japaridze Art School, which shared several posts of the Georgian Dream party, including in support of the Georgian Dream Ambrolauri mayoral candidate Mr. Zviad Mkheidze, on the school's Facebook page.⁸³ The Election Code of Georgia prohibits the use of administrative resources during the pre-election campaign. In particular, municipal organizations funded from the state budget are prohibited from using communication or information media for canvassing purposes.⁸⁴ Any violation of the rule is an infringement of the law and is subject to a fine of 2000 GEL.⁸⁵ In the given case too, although the court shared the arguments of GYLA regarding the violation, the

⁷⁸ See the decision of Tbilisi City Court of October 19, 2021, on the case №4/6510-21; Decision of Ambrolauri District Court of October 13, 2021, in the case №4/90-21; Decision of Telavi District Court of September 21, 2021, in the case №4/271-21; Decision of Mtskheta District Court of October 8, 2021 in the case №4-a/412-21; Decision of the Ozurgeti District Court of September 28, 2021 in the case №4/277-21; Decision of Magistrate Judge of Ozurgeti District Court in Lanchkhuti Municipality of September 30, 2021, in the case №4/129-21; Decision of Ozurgeti District Court of October 8, 2021, in the case №4/285-21; Decision of Sighnaghi District Court of October 13, 2021, in the case №4/125-21; Decision of Kutaisi City Court of October 8, 2021, on the case №4/719-21; Decision of Tsageri District Court of September 22, 2021, in the case №4/48-21; Decision of Akhaltsikhe District Court of October 20, 2021, on the case №4-153-21; Decision of Tbilisi Court of Appeals of November 15, 2021, in the case №4a/694-21.

⁷⁹ The Tbilisi Court of Appeals by a decision of November 15, 2021, overturned the court ruling of the Magistrate Judge of Tsalka Municipality of October 18, 2021.

⁸⁰ The decision of Tetritskaro District Court of September 27, 2021, on the case №4/108-21 was appealed by the Tetritskaro DEC. Available at: <https://sachivrebi.cec.gov.ge/#/223151> [Verified: 22.01.2022].

⁸¹ Ibid., Article 45, paragraph 11, as well as Article 79.

⁸² Decision of Tbilisi City Court of October 19, 2021, on the case № 4/6510-21.

⁸³ The official Facebook page of Ambrolauri Art School, available at: <https://bit.ly/3ltNjxl>, updated: 16.09.2021.

⁸⁴ Election Code of Georgia, Article 48, Part 1, Subparagraph "b".

⁸⁵ Ibid., Article 88.

judge deemed the misconduct as a minor offense and used a verbal reprimand instead of a penalty.⁸⁶

Therefore, based on the examples and statistics discussed, it can be concluded that the court demonstrates a loyal attitude towards violations of the electoral law and leaves the cases of obvious violations unpunished. It is true that the law provides for the possibility of using an oral reprimand instead of a sanction,⁸⁷ however, its groundless and unsubstantiated application may deprive the prohibition of its meaning, and it can ultimately fail to serve as a deterrent.

Furthermore, GYLA believes that the current legislation needs to be refined in terms of penalties for electoral violations. The applicable law precludes the possibility for the court considering an administrative offense to individualize an administrative penalty, which may result in the establishment of the practice of improper use of a verbal warning. In particular, the law provides for certain amounts of fines on electoral violations and does not allow the judge to customize the amount of the fine, taking into account the individual circumstances of the case. In such cases, there is a high probability that the judge will use an oral warning instead of an appropriate sanction, which is a mechanism releasing the offender from administrative liability rather than an individualization of the administrative penalty. According to the case-law of the Constitutional Court of Georgia, “the principle of individualization of the sanction does not presuppose the possibility of releasing an administrative offender from liability by the court hearing the case, but rather determining an adequate punishment for the offense committed, taking into account the individual circumstances of the case and ensuring that the offender is protected against a completely disproportionate and inadequate sanction.”⁸⁸

⁸⁶ Decision of Ambrolauri District Court of October 13, 2021, Case №4/90-21.

⁸⁷ Code of Administrative Offenses of Georgia, Article 22.

⁸⁸ Judgment №1/2/1475 of the Constitutional Court of Georgia of 12 November 2020 on the case “Bekanas LLC v. Parliament of Georgia”.

8. RECOMMENDATIONS

With the view to eliminating the problems identified through the analysis of electoral disputes, GYLA has developed the following recommendations:

For the Parliament of Georgia:

- Determine sanctions for electoral violations in such a way that the principle of individualization when imposing a penalty can be observed.

For the Election administration:

- Eliminate the practice of formal consideration of complaints in the DECs and improve the quality of substantiation of DEC decisions.
- Statements provided by members of PECs must not be considered as indisputable evidence and their authenticity should be verified by other evidence.
- Improve the quality of substantiation of decisions imposing or refusing to impose disciplinary liability on PECs members. The decision must contain the circumstances, facts, evidence, and arguments considered by the commission, which ultimately serve as the basis for the decision.
- DECs should adhere to the rules of discretionary powers when selecting the size of disciplinary liability so that the chosen penalty is adequate. In particular, when imposing disciplinary liability, DECs should take into account the proportionality and adequacy of the sanction, mitigating circumstances of the liability, the absence of violations perpetrated prior to the imposition of liability, the severity of the offense, the personality of the offender, which must ensure the adequacy of the penalty applied.
- Based on the magnitude and content of irregularities identified during the recount of randomly selected polling stations, DECs should decide to recount other electoral precincts in the same district.
- Exercise due control over the decisions made by PECs within their discretion, both in terms of legality and expediency.
- A relevant normative act should offer a procedure for reviewing violations, which should include:
 - Reviewing a complaint at an oral hearing;
 - Summoning the parties to the hearing;
 - Procedure for locating and evaluating evidence.
- In accordance with the Election Code, specify the procedure for taking photographs and videos at polling stations and amend the provision restricting the scope of this right.
- The electoral legislation should be interpreted in such a way that the restriction es-

tablished for the media – the right to take audio and video recordings for not more than 10 minutes during the voting process - does not apply to observers of monitoring organizations.

- DECs chairpersons must properly distribute the burden of proving the facts when reviewing complaints and refrain from automatically accepting the statements offered by potential perpetrators.

For Common Courts:

- If a complaint is filed with the court, examine the lawfulness of decisions made by the election administration within its discretionary powers.
- Refrain from using the mechanism of exemption of responsible persons from sanctions without proper justification when considering electoral violations.
- In case of doubts about the reliability of the data recorded in the final protocols, their accuracy should be confirmed by examining all possible evidence, including recounting the voting results.
- In case of appealing to the court regarding the extent and content of violations found during the recount of randomly selected polling stations, such districts should be required to recount other precincts included in the district.
- Improve the quality of justification of court decisions, encourage the establishment of a uniform, law-abiding practice.
- Revise the judicial practice, according to which determining the disciplinary liability is considered to be the prerogative of the election administration.

For the Ministry of Internal Affairs:

- Maintain comprehensive statistics and have effective response mechanisms in place to respond to reports on physical obstruction of the movement of voters, as well as gathering of unauthorized individuals or registering voters in the polling stations or at the distance or within 100 meters from the electoral precinct or placement of electoral materials within 25 meters from the polling stations on the voting day.