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Local Elections in Podgorica, 25 May 2014

SECOND PRELIMINARY REPORT

This Report concerns the actions taken by relevant institutions responsible for reviewing the legality of the election process in Montenegro in the cases of possible violations of election-related rights, as monitored by MANS. Given that the Law does not empower the observers to report possible irregularities noted at the polling stations, as invited by MANS three contestants, meaning registered candidate lists, accepted to file complaints in these specific cases.

Aiming to restore public trust in the election process, establish the institutional practice, determine the deficiencies in the implementation, as well as other issues linked with the election administration, these three candidate lists instigated over 2,500 cases indicating to over 850 specific irregularities. The actions taken by relevant institutions show that the decision-making process on election irregularities was not fully transparent, and higher instances were even less transparent than the authorities whose decisions they reviewed.

All institutions rejected complaints and appeals with the same justifications, always with the same majority, within an exceptionally short timeframe. However, when the same irregularities were subsequently reported by other election contestants, these were discussed, some even accepted. At the session of the Election Commission for the Capital City and the State Election Commission neither the polling station reports nor other evidence of possible irregularities were discussed; rather, the complaints referring to various violations of election-related rights and for various polling stations submitted by different candidate lists received a blanket rejection in a single voting procedure.

The Constitutional Court established that due to such a decision-making process, the rights guaranteed by the Constitution and the European Convention of Human Rights were violated, but nevertheless refused to annul such decisions adopted in an illegal procedure. The final results of the elections were officially proclaimed, although some of the legal proceedings regarding the decision-making on irregularities are still pending, and the rationale to many decisions have yet not been submitted to the candidate lists that launched the proceedings. Therefore, the final report on the election process will be completed in autumn 2014.

INTRODUCTION

The election administration bodies include: polling boards (PBs), municipal election commissions (MECs), including the Election Commission of the Capital City (CCEC), and the State Election Commission (SEC).

According to the Law on Election of Councillors and Members of the Parliament (MPs), the MECs, or CCEC in case of Podgorica, pass decisions as per the complaints of election contestants on the count of violations of voting rights. Election administration bodies decide by the majority vote of its members¹. This means that the decisions to reject

¹ Art 21 Law on Election of Councillors and MPs.

complaints must be supported by the majority votes of MEC or CCEC or SEC members. Otherwise, if the decision is not made with the required majority within the stipulated 24 hour deadline, the complaint is regarded as accepted.²

The members of MECs are at the same time authorised representatives of the parties taking part in the work of the local parliament proportionally to their strength, as well as the representatives of all registered candidate lists³.

The election contestants and citizens whose electoral rights have been violated have the right to file complaints within 72 hours from occurrence.

Complaints against MECs decisions rejecting or dismissing complaints may be filed with the SEC by original complainants within 72 hours from receiving the decision.

Finally, in case the SEC would reject or dismiss complaints, the complainants have the right to lodge an appeal with the Constitutional Court within 24 hours from receiving the decision. The Constitutional Court is obliged to take the decision within 48 hours, but unlike the SEC or MECs, the appeal is not regarded as accepted in case of failing to observe this deadline.

The law does not set any deadline within which either the MECs, the SEC or the Constitutional Court are to provide the rationale for their judgments and deliver it to complainants/appellants.

The Law does not empower observers to report irregularities; hence, the institutional practice in this respect is very modest, since political actors rarely file specific complaints, even less so the individual voters. Nevertheless, following each elections the contestants would insist that numerous irregularities took place, most frequently never processed.

Aiming to increase trust in the election process and build the institutional practice in election administration bodies, MANS asked all political parties to file complaints regarding the irregularities noted at polling stations by our observers. Before the elections, four parties accepted that, but the actual complaints were filed by three election contestants⁴.

MANS legal team drafted over 2,500 complaints for three candidate lists addressing over 850 irregularities noted. The complaints predominantly concerned the local elections in Podgorica held on 25 May 2014, with around one hundred complaints filed for repeated casting of votes at several PBs⁵ in Podgorica and Danilovgrad on 8 June 2014.

A) ELECTION COMMISSION OF THE CAPITAL CITY

A1) Decision-making of the CCEC

The Capital City Election Commission (CCEC) rejected all complaints regarding possible irregularities at the elections held on 25 May at the two sessions observed by MANS.

² Art 109 para 3 and Art 110 para 2 of the Law on Election of Councilors and MPs.

³ The Municipal Election Commission is composed of a chair, a secretary, five permanent members and one authorized representative of each registered candidate list.

⁴ The complaints of irregularities noted by MANS were filed by the Albanian Coalition – Civic Initiative, the Democratic Front, and the Positive Montenegro, while the Socialist People's Party decided against filing such complaints.

⁵ Casting votes was repeated at the polling stations Primary School "Đoko Prelević" Ubli – PJ Koći, Primary School "29. novembar" Dinoša (A-K) and Primary School "29. novembar" Dinoša (L-Š) in Podgorica, and at polling stations "Kujava", "Gostilje" and "Lazine" in Danilovgrad.

At the beginning of the first CCEC session, the motion of its chair that examination of PB polling station reports and other documents to substantiate complaints is to be done only if any of the CCEC members would specifically request that. However, it never happened.

At the same session, the CCEC first considered individual complaints, but soon, following the chair's proposal, it was decided to move to "group voting". It actually meant that the CCEC rejected all complaints "filed before 18.00" with a single decision, and with the subsequent decision rejected all complaints filed that day "until 22.00". Thus, the CCEC had blanket rejection of over 1,500 complaints involving different PBs and various types of infringements filed by different electoral contestants.

At the second session held on 28 May, the CCEC rejected another 900 or so complaints. This time, they passed three "group decisions", but now not based on the time when these complaints were filed, but based on who filed them. Thus, thanks to majority votes of the CCEC, all complaints filed by one election contestant were rejected in a package, regardless on which PB or type of infringement it referred. Or in figures, at that session each complaint was on average dealt with in less than three seconds.

The minutes of these sessions are still not publicly available, although the minutes of sessions held later were published⁶.

The Law on Election of Councillors and MPs does not envisage the possibility for complaints addressing different types of infringements and different PBs to be decided jointly. However, neither the law itself nor the implementing legislation actually elaborates such method of work and decision-making for the MECs.

A2) CCEC decisions

The decisions that CCEC delivered to complainants differ radically from the method of reaching the decision followed at the actual session. Firstly, the CCEC chair subsequently compiled several conclusions to join several complaints filed by different election contestants on the count of varied infringements at different PBs without having previously informed the CCEC members at the session.

The decisions state that the CCEC inspected the PB polling station reports and thus established these were signed by PB members without objections, and thus concluded there were no irregularities noted at these PBs. As previously stated, no polling station report was ever inspected at the CCEC sessions, following the chair's proposal supported by the majority of members.

One of the examples where the CCEC⁷ adopted the decision to join cases refers to the complaints filed by Positive Montenegro (23), the Democratic Front (18) and the Albanian Coalition – Civic Initiative (9 complaints). The CCEC decision states that all complaints concerning the infringements upon election-related rights involving 18 different PBs were rejected⁸. The CCEC, however, never provided any reasoning for rejecting these complaints. It is particularly interesting that the joined cases contained allegations of different infringements. Thus, in a single go, they decided on

⁶ MANS requested those minutes invoking the Free Access to Information Law, and the same route will be followed by the election contestants as complainants. Should these be obtained before the final report is published, they will be specifically analysed.

⁷ CCEC Decision ref. no. 1613/14 dated 28 May 2014.

⁸ At PBs designated as: 87, 63-A, 87-A, 20, 66-A, 64, 72-B, 11-A, 23, 60, 39-B, 86, 107, 39-A, 100, 20-B, 61-B and 98.

allegations of irregularities in preparation of the polling station and the PB for casting votes, deficiencies of joint candidate lists, election materials, breaches of voting procedures, mobile voting, and violations regarding closing of polling stations and ballot count.

A3) Conflict of interests for CCEC members

The CCEC also decided on complaints regarding the alleged polling station irregularities caused by the CCEC members proper.

The first set of cases refers to the CCEC chair who, at the session deciding as per complaints alleging infringements of voting rights stated his party was keeping parallel records of the voters who cast votes and that such conduct is legitimate⁹.

The Law on Election of Councillors and MPs expressly prohibits any parallel records of voters who cast ballots¹⁰. The PB rules of procedure define the polling station as the room where ballots are cast with the accompanying yard¹¹. The Law expressly prohibits the use of electronic communication means, such as cell phones, to prevent keeping records, or the stay of persons who have no election administration rights or duties at the polling station¹².

The purpose of this ban of keeping parallel records is to prevent the unlawful influence on voters either to cast or not to cast votes, or to prevent any influence on the free will of voters to decide whether to exercise their right and if yes, who for. The exercise of pressure on voters is a criminal offence under the Criminal Code¹³.

Most of the irregularities reported by MANS observers referred to keeping unlawful parallel records by the PB members, but also by the persons located at the polling station proper or in its vicinity.

The CCEC chair, who previously stated the political party he is affiliated to was keeping parallel records of voters, voted on all complaints concerning that issue.

In addition, the CCEC decided also on the complaint regarding the physical assault on the observer for reporting irregularities at a polling station, for which a CCEC member was suspected. This member was not exempted from deciding in the case involving himself nor has such a possibility ever been considered¹⁵.

⁹ The CCEC chair is Srđan Raičević, a representative of the Democratic Party of Socialists (DPS).

¹⁰ Art 71a para 2 reads "PB member and persons monitoring the work of election administration bodies are prohibited during the casting of ballots to keep any records at the polling station of voters who cast votes, or to use a copy of the voter list or any other ancillary voter records".

¹¹ Item 2 para 1 of the Rules on Definition of and Arrangements at Polling Stations and Measures to Ensure Secrecy of Ballot reads: "The building where ballots are cast and its yard are regarded as the polling station".

¹² Art 71a and 72 of the Law on Election of Councillors and MPs.

¹³ The Criminal Code in Art 186 sets forth the fine or up to three years imprisonment sentence for whoever influences a citizen to cast or not to cast ballot, or to vote for a specific candidate or a candidate list. In case this offence is committed by a PB member or other persons with official duties in the election process, it is punishable by imprisonment ranging between three months and five years. In the same Article, the Criminal Code envisages a fine or imprisonment up to one year for whoever calls a voter regarding casting of votes or demands to state how he cast ballot, or why he did or did not cast ballot.

¹⁵ One of the CCEC members is the Chef Administrator of the Capital City, Željko Vuković, who at the election day physically assaulted the NGO MANS observer Anđela Nicović, who drew attention to the fact that the invisible ink whose expiry date has passed was unlawfully used at a PB. MANS filed a criminal report, and complaints with the CCEC due to the interruption of ballot casting at the polling station and preventing proper marking of voters who already casted ballots.

A4) Physical assault at the CCEC premises

Given extremely short deadlines for passing the CCEC decisions, and the actual number of complaints and possible irregularities, MANS filed the same complaints for the three election contestants in stages to facilitate the work of the CCEC by not being obliged to establish facts for equal cases three times¹⁶.

Since the legal team of MANS drafted all complaints and took care of the deadlines and of all means of redress, after the complaints were signed by the three candidate lists, our logistic team would take all the complaints and file them with the CCEC simultaneously.

In the first stage, our logistic team had no problems in filing the complaints on behalf of all candidate lists.

However, when the representatives of MANS attempted to file the second batch of complaints, the CCEC staff refused to accept the complaints without the presence of the representatives of candidate lists that signed them.

The Constitution of Montenegro envisages that everyone has the right to file complaints, and then the state authorities, in terms with the law, decide whether the complaint was filed by an authorised complainant. Still, no law stipulates the obligation of filing the complaint in person or by third parties authorised by the complainant nor has such practice ever been recorded with state administration authorities. Furthermore, the Criminal Code envisages sanctions for responsible persons in state authorities if acting contrary to these provisions.¹⁷

Despite the calling upon the constitutional and legal provisions, the CCEC administration refused to accept the complaints. MANS representatives attempted to document this irregularity by recording it with their cell phones only to be physically assaulted by one member of the CCEC staff, and then locked in the CCEC premises. It was only after the police was called that MANS staff were enabled the freedom of movement and the premises were unlocked.

The second batch of complaints was filed without problems, with policy protection and in the presence of the CCEC Chair and Secretary, after having talked to the Chair of the State Election Commission.

The deadline for submission of complaints to CCEC expired at 5 o'clock in the morning for those irregularities that occurred while preparing the polling stations for opening¹⁸. When MANS staff, escorted by the police, attempted filing the last batch of complaints before the expiry of the deadline, the CCEC was closed. It was not opened even at the request of police officers although it was evident the staff were inside. The filing of these complaints was delayed, but were not dismissed on this ground, but in package with others, as explained in the previous section.

¹⁶ As already stated, MANS prepared the same complaints for three candidate lists to prevent them from being abused for particular political interests.

¹⁷ Article 177 of the Criminal Code of Montenegro reads: "(1) Anyone who prevents another person from exercising his right to file a request, application, action, lodge a complaint, objection, other legal remedy or any other filing, shall be punished by a fine or a prison term up to one year. (2) Where the offence under para. 1 above was committed by a public official while acting in his official capacity, he shall be punished by a prison term up between three months and three years".

¹⁸ Item 1.2 paragraph 1 of the PB Rules of Procedure sets forth: "Polling Board (permanent members and authorised representatives of registered candidate lists) is obliged to arrive at the polling station at 5:00 o'clock (two hours before opening of the polling station at the election day). All unauthorised persons shall be removed from the polling station".

B) STATE ELECTION COMMISSION

B1) Decision-making

At the beginning of the first State Election Commission (SEC) session held on 31 May 2014, it was decided by the majority vote of the SEC members to close the session for the public. The Law on Election of Councillors and MPs envisages that the work of the election administration bodies is public¹⁹.

A complaint filed by the Democratic Party of Socialists (DPS) was discussed at this session, and SEC voted twice on the same issue. Adequate majority for decision-making was not secured during the first vote. As already stated, the law is explicit in saying that in case of failure to reach the decision, the complaint is regarded as accepted, hence, after the adjournment, the SEC repeated the vote this time with the adequate majority to reject the complaint.

A day later, on 1 June Dan 2014, the second SEC session was held, deciding on complaints lodged by MANS observers. At that session, two SEC members nominated on behalf of DPS reasoned the complaints filed by the Democratic Fund, the Positive Montenegro and the Civic Initiative, and then called for rejection, put for vote by the SEC. Thus, all complaints prepared by MANS observers discussed at that session were rejected, without inspection of the PB polling station reports or any other data and documents annexed to the complaints.

Asked by MANS observers about the principle for selecting “rapporteurs” in different cases, whether it involved any internal procedure or SEC decisions to that effect, SEC called a separate session to adopt the operational procedures. It was agreed on this session to work in the so-called “mini working groups” to discuss the materials and evidence outside the SEC sessions. The SEC Rules of Procedure set forth that SEC is to operate and pass decisions in plenary sessions, and to discuss complaints and other matters related to the election process in sessions.

At the next SEC session, several members acted as rapporteurs and stated only the information on the number of complaints, the date of filing and the complainants, noting then there were no grounds to accept the complaints. Without any discussion or inspection of evidence, the SEC Chair²⁰ acted identically in every single case and proposed to pass the decision to reject the complaint. In each case the split of votes was equal, nine SEC members would vote for rejection, and two for acceptance. The same happened to all other complaints regarding the irregularities noted by MANS observers decided upon at SEC sessions.

Following this methodology, the SEC discussed and decided, on average, upon two complaints a minute.

B2) SEC decisions

As already noted, SEC rejected without discussion all complaints filed by three candidate lists for all irregularities noted by MANS observers. However, SEC accepted some complaints of other complainants regarding the very same irregularities noted by MANS observers that were previously, without any discussion, rejected by SEC²¹.

¹⁹ Art 22 Law on Election of Councillors and MPs.

²⁰ The SEC Chair is Ivan Kalezić, a DPS member.

²¹ The example of the Socialist People’s Party, whose complaint was accepted, and casting votes repeated at 3 polling stations in Podgorica.

In the decisions passed as per the complaints, SEC stated it inspected the challenged CCEC decisions, the complaints and the PB polling station reports, and established that no infringements or irregularities were noted at those polling stations, hence found the complaints unfounded. Nowhere did SEC state even the alleged infringement on the count of which the complaint was filed, nor discussed any proposed piece of evidence.

As already stated, MANS observers were prevented from monitoring the SEC work in “mini working groups”, and there was no discussion in sessions when decisions were passed, nor any examination of accompanying documents to which SEC referred. The minutes of such SEC sessions were not publicly available at the time of this report.

Another problem referred to the fact that it took SEC eight days to come up with the first documents in which they justified their decisions and deliver them to complainants. The Law sets no deadline by which SEC would be obliged to do so, saying only that the deadlines for other means of redress start running with the receipt of such decisions.

In addition, SEC decided on the legality of CCEC’s decision to join cases. Initially, without any discussion, SEC rejected MANS appeals against the conclusions to join cases, noting their lack of competence in that matter since it did not involve violation of electoral rights; however, the legal advice at the end of such decisions instructed that their decisions might be challenged before the Constitutional Court in the procedure for electoral right infringements.

The Constitutional Court annulled such SEC decisions and ordered them to decide on the merits of such cases²². In the new decisions, SEC accepted its jurisdiction, but still rejected the appeals as unfounded. Still, they gave the same reasoning as the first time that the methodology of deciding upon complaints on alleged electoral process violations does not involve electoral rights “nor has such a document prevented protection of electoral rights for complainants, and thus could not have had an impact on the exercise of electoral rights under the Law on Election of Councillors and MPs”²³. At the time of this report, the proceedings on this ground are still pending.

C) CONSTITUTIONAL COURT

The final say in the protection of electoral rights rests with the Constitutional Court of Montenegro²⁴, which rejected all appeals of all three candidate lists concerning the irregularities noted by MANS observers. MANS observers were not allowed to monitor the Constitutional Court sessions, thus we are unaware of the methodology followed.

Not even fifteen days after the first Constitutional Court decision was passed did the complainant receive any written reasoned decision, and the Law is silent as regards any deadlines for doing so.

As regards the decisions as per appeals regarding joining of cases, the Constitutional Court, as already noted, accepted them and returned to the SEC for repeated decision. In its decision, the Constitutional Court stated that redress may be sought “against all decisions, acts or omissions, etc, and not only against the decisions of municipal election commission dismissing or rejecting the complaint”. Finally the Constitutional Court noted:

“With its arbitrary interpretation of the procedural legislation, the State Election Commission has, in the opinion of the Constitutional Court, violated both the constitutional and the convention right to an effective remedy of the complainants, guaranteed by the provisions of Art 20 of the Constitution and Art 13 of the European Convention.

²² More details in Section D concerning the Constitutional Court.

²³ Quote from a SEC decision.

²⁴ Art 110 para 2 of the Law on Election of Councillors and MPs

Given the above, the Constitutional Court finds the challenged decisions of the State Election Commission to be legally unfounded.”

As regards the procedures involving the polling station “Đuđevina” in Kolašin, and the repeated casting of ballots at several polling stations in Danilovgrad, which reveal substantial deficiencies of the Law on Election of Councillors and MPs, favouring election misuses, their analysis will be given in the final report.

D) TRANSPARENCY OF DECISION-MAKING ON SUSPECTED ELECTION IRREGULARITIES

The Law on Election of Councillors and MPs envisages that the work of election administration bodies is public²⁵. The Law on Constitutional Court stipulates the principle of publicity which, among other things, is to be secured by holding public discussion in the proceedings before the Constitutional Court²⁶. The Constitution of Montenegro stipulates the general principle of public adjudication, as well as that the public may be excluded only for the reasons which are necessary in a democratic society and only to the extent needed and stipulated in the Constitution²⁷.

The actions taken by several institutions show that higher instances that decided on the complaints filed were even less transparent than the bodies whose decisions they reviewed. Thus, the Constitutional Court denied the right to authorised observers to monitor its sessions, and then denied the statutory right for the parties to attend the session and take part in discussions.

The Constitutional Court informed us via e-mail that the judges were of unanimous opinion that “the possibility for you in the capacity of election observers to attend the Constitutional Court sessions does not stem from the Law on Constitutional Court and the Rules of Procedure of the Constitutional Court of Montenegro“. This message makes no reference to any provision, ether of the Constitutional Court Law or the Rules of Procedure, as the grounds for rejecting MANS application.

Moreover, the Law on the Constitutional Court of Montenegro envisages that both the appellants and the persons they authorise may take part in the proceedings before this Court²⁸. All three candidate lists that filed complaints submitted to the Chief Judge of this Court also the request for authorised representatives to take part in the discussion. These requests remained unaddressed until the closure of this report.

Previously the SEC excluded the media from their sessions, and the observers were not allowed to monitor the work of the so called “mini working groups”, but only the actual vote at the plenary session.

As regards the CCEC, the media showed no interest in attending their sessions, while the observers were allowed to monitor its work, but not to record the plenary sessions.

MANS used several means of redress in an attempt to obtain specific CCEC decisions, and the grounds for banning the monitoring of some parts of the SEC work, but until the closure of this report we have not received the written responses or decisions.

²⁵ Art 22 para 1 Law on Election of Councillors and MPs.

²⁶ Art 3 para 1 Law on Constitutional Court of Montenegro.

²⁷ Art 130 of Montenegro’s Constitutions stipulates that public may be excluded only “in the interest of morality; public order; when minors are trialled; in order to protect private life of the parties; in marital disputes; in the proceedings related to guardianship and adoption; in order to protect military, business or official secret; and for the protection of security and defence of Montenegro“.

²⁸ Art 22 Law on Constitutional Court of Montenegro.