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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE UNIFIED ELECTION CODE OF GEORGIA AS AMENDED ON 14 AUGUST 2003

by

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Introduction

1. *This opinion is submitted to the European Commission on Democracy through Law (the Venice Commission) in response to a request to the Commission for providing comments on the unified Election Code of Georgia (the Code), as amended on and as of 14 August 2003. In preparing the comments accordingly set forth below, I have had access to the original Code of 2 August 2001, which was presented to the Venice Commission in an unofficial (IFES) English translation of 11 September 2001 (CDL (2002) 20) and was in its time made subject of a review by the Commission, against a background of several documents and reports from the CoE Parliamentary Assembly and OSCE-ODIHR, resulting in a Commission opinion dated 24 May 2002 (CDL-AD(2002)9).*

2. *In addition, I have examined a version of the Code as amended until 25 April 2002, in unofficial English translation (published as CDL(2003)45), which also was considered by the Commission and was the subject of an opinion from Mr. Michael Krennerich of Germany on 2 June 2003 (Elections in Georgia: Comments on the Election Code and the Electoral Administration, CDL-EL(2003)5). Finally, there is the version here under review, i.e. the Code as amended until 2 August 2003, presented to the Commission in an unofficial (IFES and OSCE) English translation of September 2003 (CDL(2003)99).*

3. *The comments are being made without benefit of dialogue with representatives of Georgia, and they also take only limited account of the current political situation in Georgia and the practical experiences with the Code in connection with the general parliamentary elections of 2 November 2003, as my information thereon mainly stems from the media and does e.g. not include detailed information on the process resulting in the subsequent resignation of President Eduard Shevardnadze and the partial annulment of the election results by the Supreme Court of Georgia on 25 November.*

General remarks

4. The unified Election Code of Georgia, adopted on 2 August 2001, integrated the previous laws on presidential elections, parliamentary elections and elections for the organs of local self-government into a single body of legislation and thus unified the rules for elections at all levels within a comprehensive statute. In the opinion of 24 May 2002 by the Venice Commission, the adoption of the Code was properly viewed as representing a major and important step forward in securing democratic standards for elections for representative government in Georgia. At the same time, it had to be acknowledged that its rules were being established in an environment of difficult political and economic conditions and against a background of deficiencies in the implementation of election standards, which were seen to be reflected in the extensive detail of many of its provisions.

5. As briefly referred to in said opinion, it also appeared that some of the reformatory provisions of the Code were not based on a solid political consensus. This especially applied to the provisions on the composition of the Central Election Commission (CEC) and lower level commissions (District and Precinct, DEC and PEC), in Chapter IV (Articles 27, 32 and 36). As set out in the Code, these provisions sought to change the previous system towards depoliticisation and professionalism of the election commissions, i.e. mainly by having the members of the CEC elected by the Parliament from a list of candidates proposed by non-governmental organisations (NGOs) engaged in electoral observation.

This innovation did in fact remain an issue of conflict, and in the result, the reconstitution of the CEC according to this principle was never implemented. Instead, the Code continued to be an object of serious debate.

6. The Code has now been amended a few times, and many changes have been proposed and discussed. The amendments up to 25 April 2002, commented on in CDL-EL(2003)5 by Mr. Krennerich, were not extensive and of rather secondary importance, although of positive nature. In the spring of 2003, when the date for the forthcoming general parliamentary elections had been fixed as 2 November 2003, matters came to a head, and the debate over the Code resulted in several substantial amendments being adopted in August. Chief among these was a revision of the provisions of Chapter IV on the composition of the election commissions, involving a return to a system of having the commission members appointed by the President and the political parties. As a part of this move, it was decided to have the commissions for the November 2003 elections constituted on the basis of express transitional provisions (Article 128), which also dealt with the important matter of compilation of voter lists for these elections.

7. Although my information is limited as above noted, it seems that the relatively late resolution of the matters determined by the amendments resulted in serious problems with the implementation of the Code in relation to the November elections, so that the controversial conduct of the election process largely may be ascribed to inadequate preparation rather than inadequacy of the law.

8. The Code has from the outset contained nine Chapters (I-IX) of provisions applicable to elections in general, followed by two Chapters (X-XI) on elections for the President of Georgia, three Chapters (XII-XIV) on elections for the Parliament of Georgia, and three Chapters (XV-XVII) on elections for organs of local self-government (*Sakrebulo* - representative bodies, and *Gamgebeli* - mayors). The Articles of these Chapters bear numbers from 1 to 126. There is a Chapter XVIII (Articles 127-129) on transitional provisions, and a concluding Chapter XIX (Articles 130-131) proclaiming the entry into force of the Code and the repeal of prior legislation. – In the process of amendment, this structure of the Code has been maintained, including in most cases the division of the subject matter of each Chapter among its Articles, so that where the amendments have required additional Articles under a further heading, these have been given numbers subsumed to the number of the related initial Article.

9. In the following, the amendments to the Code will be discussed mainly in the order of its Chapters and Articles. By way of general comment, it is to be noted that the various amendments all relate to specific provisions and issues within the Code and do not alter its fundamental validity or potential as a legal framework for free and fair elections. Secondly, while the delicate issue of CEC, DEC and PEC composition stands somewhat apart, the amendments largely are of positive nature and contribute to the clarification of matters in their respective fields. Thirdly, while some of the amendments relate or correspond to recommendations made and points criticized by the Venice Commission and other institutions in the international forum, several issues remain which may be regarded as problematic or debatable. It follows that the various points and recommendations expressed in the Commission's opinion (CDL-AD(2002)9) and in the comments by Mr. Krennerich (CDL-EL(2003)5) remain fully valid in so far as they are not answered by the amendments.

General Provisions (Chapter I)

10. This Chapter, containing definitions used in the Code and statements of basic principles, is mostly unchanged. In Articles 2 and 3, some provisions of technical nature have been added for clarification. In Article 5 on universal suffrage, the former paragraphs 1 and 2 have been joined and reworded so as to address both the active and passive electoral right, and to make reference to those Articles in the Code under which the voting right or eligibility as candidate may be restricted consistently with the Constitution, i.e. subject to special registration or method requirements, such as in the case of persons unable to vote in their precinct on election day on account of disability or being at sea or dwelling abroad at the time. This appears to be in line with comments in the Venice Commission opinion. There are two new Articles, on the publicity of elections (8^1, stating that the conduct of the electoral process shall be open and public), and on electoral right guarantees (8^2, prohibiting the adoption of normative acts restricting free expression of a voter's will or interfering with the equality of election participants). Both are to positive effect.

Registration of voters (Chapter II)

11. The provisions of Article 9 and related clauses on voter registration (including in Article 29, on the powers and duties of the CEC, a new para. 2.w) have been amplified and reworded with a view to stating clearly that there shall be a general and centralized register or list of voters which is to be regularly updated (with reference to February and August of each year) and for the formation of which the CEC shall be responsible. The commission also will be responsible for computer processing of the voter list and publishing it on the Internet. The revision of the Chapter to this effect represents an important positive step and is largely in line with the recommendations of the Venice Commission, which remain in point.

12. The revision involves a clarification of various matters concerning the voter list, such as the position of persons who are placed outside their precinct at the time of elections (e.g. in hospitals, in detention, at sea or abroad). It is foreseen that these will belong within the general list, but entered on a special list under Article 10 compiled by the DEC, which secures them the possibility of voting (other than in majoritarian elections in their registered districts, if their current location is outside the district). The provisions of Article 12 on a voting license obtainable on the basis of changed residence until the day before election day are deleted. The term "voter's list supplement" (Article 11) is now used for the mobile ballot box list, intended for physically handicapped or forcibly displaced persons, the provisions on which have not been substantially changed.

13. Article 9.12 provides that the voter list may not be amended within the last 10 days prior to election day, and only by way of court ruling within the 19th to the 10th day. This is a significant tightening change and needs to be counterbalanced by publishing requirements and by easy access to inspection of the standing list. The latter is i.a. provided for in Article 9.7 (where each voter is expected to receive only data concerning himself and his family).

14. In relation to the elections of 2 November, it was found necessary to provide for a definitive voter list by transitional provisions, which are contained in Article 128^6 and

mainly intended to be in line with Chapter II but with different time limits. It appears that the problems with the compilation and maintenance of this list were among the most serious encountered in connection with the elections and thus of fateful import. This is perhaps mainly to be ascribed to time constraints and other specific circumstances. In any case, the provisions of the Chapter as amended clearly provide a sufficient basis for a satisfactory register if properly implemented.

Election Districts and Election Precincts (Chapter III)

15. The text in Article 15 on the formation of election precincts (entrusted to the CEC, as under Article 29.3.a of the original Code) has been amplified, but mainly to provide for time limits and publication rather than to provide guidelines. There is no change as regards the question of equality of apportionment of single-mandate parliamentary districts (maximum deviation in the ratio of registered voters per district), so the previous comments by the Venice Commission on the matter remain pertinent. As noted for my part, the problem is partially offset by the weight of the parallel nationwide proportional election system, and also is a constitutional problem. While the fundamental importance of this question is not to be ignored, it is tempting to think that it may be of secondary weight at this point in time as compared with the urgent problems of ensuring the integrity of the voting register and establishing public and political confidence in the election commissions.

16. The text of Article 16 on election precincts, the formation of which is entrusted to the pertinent DECs, also has been amplified. The allowable maximum of 2,000 voters per precinct (Article 17.2) has not been lowered, however, and the recommendation for its reconsideration still appears pertinent.

Election Administration (Chapter IV)

17. As above noted, the Georgian election administration appropriately is intended to operate at three levels as a centralized system, having a Central Election Commission (CEC), District Election Commissions (DECs) and Precinct Election Commissions (PECs). It is now further provided (Article 17.5 and 31^1) that the Abkhazian and Adjarian autonomous republics also shall have their own CECs. Their task will be to organize elections for the state representative authorities and elective government authorities of the autonomous republics. In elections under the Code, the DECs within the territory of each republic will be subordinate to its CEC.

18. The extensive Chapter IV (Articles 17-39) deals with the organisation, powers and functions of the ECs in considerable detail, clearly intended to promote transparency and confidence, and has now been reinforced and amplified by several revisions and additions to positive effect. The tenor of the changes may e.g. be observed in the initial Article 17, where the status of the ECs is now described in terms emphasizing their independence as entities of public law (for which purpose the prior text on the CEC in Article 26 has been moved here and expanded). Among other things, it is now spelled out in 17.6 that the CEC is accountable to the Parliament of Georgia, and is required to submit a report concerning any offences against the election law and related matters within 60 days after the end of each elections. According to 17.7, the authority to review

such report and the legality of EC activities is vested in an ad hoc parliamentary commission, where the number of majority representatives shall not be more than half.

19. Article 18, which designates the members and staff of the ECs as officials of the election administration, draws a different line than before between them and the civil service (with the staff being civil servants, but the members only so for certain purposes). A new 18.3 provides that an EC member may not join a political party and must withdraw or suspend prior membership thereof. In Article 19 on rights and responsibilities, a new para. 3 also appropriately declares that an EC member is not a representative of the election subject which may have appointed him/her, and that in his/her activities, the member shall be independent and subject only to the Constitution and the law.

20. Among the persons excluded from membership of an EC, Article 18.6.h continues to name judges and their assistants. This may constitute a disadvantage under current conditions in Georgia from the point of view of trust in the ECs, but in view of the necessary role of the courts of law in connection with the implementation of the election legislation, and of the need for trust in the courts, it may be questioned whether a departure from this should be recommended.

21. As noted in the introduction, one of the main objectives of the new amendments was to reconsider the principles for composition of the election commissions. These are dealt with generally in Article 26 and in Articles 27-28 for the CEC, 32-32 for the DECs and 36-37 for the PECs. Both the CEC and the DECs are institutions of permanent tenure, with regular appointment or re-appointment occurring in the months following each general parliamentary elections, which corresponds with the principles adopted. The PECs are constituted in advance of each forthcoming elections (generally during the second last month), and on the footing that no member can be removed within 7 days of the election (Article 21.4).

22. The solution adopted in August was to have the commissions appointed by the President and the political parties. It is thus foreseen that the CEC normally will have 14 members, of which two are appointed by the President, one each by the Presidents of the two autonomous republics, and two each by the five parties or election blocs obtaining the most votes in the latest parliamentary elections. Normally the condition is that the party has passed the threshold of 7% of the popular vote, but if these are less than five, the limit will be lowered to 3%. If the latter leaves less than five parties, these parties will each be entitled to appoint one additional member. – Similar rules apply to the DECs, where one member is appointed by the newly constituted CEC, and the remainder by the parties/election blocs. These nominate one member each, with a minimum total of 7 members being required. – This principle again applies for the PECs, where the total members will be from 9 to 13 depending on the number of voters in the precinct.

23. Under the transitional provisions of Article 128, the CEC was constituted of 15 members, with a chairperson appointed by the President according to nomination by the OSCE. The President appointed another five members, while the remaining nine members were appointed by political parties (three each), starting with the party with the second best results in the last parliamentary elections.

24. While the rules for CEC appointment under the original Code were of particular interest, it must also be said that the solution adopted for the future ECs of Georgia according to

the amendments appears to constitute a basically valid approach, making it possible to maintain consistency with international standards in the long term, and in the short term, the consistency does apply if it may be said that the solution was based on a real political consensus at the time. The achievement of the standards under this model may require a certain political stability or balance which may not be at hand as of now, but the main premise is in any case that the commissions work independently and professionally and are generally regarded as legitimate. This is possible under "partisan" appointment, since abuse of trust in the electoral process will in the end affect all parties. Further, the model is one which can be improved upon without departing from the underlying concept.

25. It remains to be added that the Chapter contains a new Article 39[1] with provisions concerning the nomination of candidates for election as members of the election commissions. These provisions include a right for NGOs (non-governmental and non-commercial entities) and voter initiative groups to nominate candidates for DEC and PEC memberships. This would seem to be a positive element.

26. It also is to be noted that the provisions concerning the selection by the ECs of their administrative officers (Chairperson, Deputy and Secretary) have been amplified in a new Article 22[1] (replacing 22.2). The principle of election by majority has not been abandoned, but full majority by roll-call is required in the first instance.

Registration of Election Subjects and Lists of Supporters (Chapter V)

27. The provisions for candidate registration procedures have been amplified for added clarity, and now allow for giving a short respite to the applicants to correct inconsistencies in their documents, in line with suggestions from the Venice Commission. This also is reflected in Article 98 on parliamentary election registration. The provision for random checking of supporter lists (Article 42.2) has, however, not been altered.

Election Funding (Chapter VI)

28. The provisions on financing of the election administration have been amplified and clarified by requirements for an annual budget of the CEC, in Article 43, which also authorizes the CEC to file a claim in the Supreme Court if allocated funds are not transferred to its account.

29. As to campaign funding, the provisions of Articles 46-48 are progressive and conducive to transparency, and remain unchanged.

Polling (Chapter VII)

30. This Chapter includes several amendments contributing to increased clarity of the law and orderliness of the voting, and provisions for safeguards against electoral fraud have been strengthened, both towards the voters and election officials and those present at polling stations. The former include a new Article 52[1] directed against multiple voting, providing for the marking of voters by invisible chemical ink. This innovation, which was discussed in the above opinion of Mr. Krennerich, presumably is the more important while there are problems with voter lists. There also is an innovation in Article 50.3.a,

which requires one side of each voting booth to be open to enable observers to keep the voter in sight. It is to be hoped that this requirement can be abolished with before long, though it may perhaps be reasonable in the light of recent experiences.

31. As regards the election officials, there are amended and detailed provisions in the new Article 51¹ and 51² concerning summary protocols of the PEC of voting and election results and an election day record book, which aim at promoting the security of the election data and facilitating their certification and eventual publication. There are also additional provisions to promote voter flow and prevent crowding at the polling place, the latter of which include authorizations for limiting the number of observers and requiring them, if necessary, to choose representatives from among their number. – On the other side, there are improved provisions concerning access of disabled persons and voting by persons with limited eyesight.

32. In Article 58.4, it is now clearly provided that ballots from mobile ballot boxes shall be counted separately, as suggested by the Venice Commission.

33. The Articles on vote counting (58-60) provide clearly for the entry of results information into the PEC summary protocol, and also that six copies of the protocol shall be given directly to the most successful election contestants in the precinct and two to observer organisations, while the original is dispatched to the DEC. Further copies can be requested the following day. Under the Articles relating to consolidation of voting results by the DECs (60-63), similar provisions apply.

Transparency of Preparation and Conduct of Elections (Chapter VIII)

34. There are also several specific amendments in this Chapter, one of which (Article 66.3) importantly requires the public broadcasting TV to use gesture-translation or other technology in favour of people with limited hearing when communicating information from the election commissions. The provisions of the Chapter concerning the media have generally been amplified in a positive direction, inter alia to promote equality in political campaigning.

35. In Article 73 on election agitation, para. 3 curiously has been limited so as to proclaim only a deadline for agitation in the press and other mass media, which is set at 24:00 on the day prior to election day. There appears to be no general deadline, and the original wording including dissemination of agitation materials in vicinity of the DEC buildings has been dropped. There seems reason to reconsider this matter.

36. On the other hand, a clear deadline for publication of opinion poll results has been added in 73.12 (forbidden from 48 hours prior to voting time and until 24:00 on election day), and disclosure as to whether a poll is paid for or unpaid must now be added to other information on the poll.

Adjudication of Disputes (Chapter IX)

37. The provisions of this Chapter (Article 77), containing timeframes and rules for handling of disputes over breaches of the election law and the election process, have been reviewed and partially revised and expanded in the interest of added clarity and

efficiency. The instructions as to court referral are quite precise, and although a choice between appeals to an election commission or a court has been maintained, the significance of potential problems therewith appears to have been reduced.

Elections of the President (Chapters X-XI)

38. The changes in these Chapters are mostly minor. With reference to prior comments by the Venice Commission, it is a disappointment that the possibility of withdrawal of candidates during the campaign (at any time before polling day, Article 84.4) has not been restricted. The requirement for not less than 50,000 supporters of the candidature also has been maintained (Article 81.2).

Elections for the Parliament (Chapters XII-XIV)

39. These Chapters contains certain amendments, mainly for clarification in various respects. With reference to prior comments, it is to be noted that the requirement of 50,000 supporters in the nationwide elections for a non-parliamentary party (now in 95.10) is being maintained. There is, on the other hand, a new Article 95[1] concerning election registration of voter-initiative groups, presumably to supplement other provisions for their participation in presidential and single-mandate elections.

40. Again with reference to prior comments, the 7% level of the threshold for parties in the nationwide elections (now in 105.6) has not been lowered, but the matter is also constitutional.

41. In Articles 92.3 and 107[1], there are now provisions preventing drug addicts or users from being elected for Parliament, and requiring attestation in that respect before an elected member is recognized. This is rather exceptional and may merit consideration.

Local Government Elections (Chapters XV-XVII)

42. The provisions of these Chapters were not amended in August, and do not call for comment here.

Transitional Provisions (Chapter XVIII)

43. The transitional provisions added in August behind the original Article 128 deal with the organisation of the elections of November in considerable detail. Owing to my limited information at this point on these elections and the associated controversy, I am refraining from specific comments on the text for the time being.

Conclusion

44. As a concluding general remark, it is proper to state that the Electoral Code of Georgia as amended since 2001 remains a comprehensive and thoroughly drafted body of legislation which does in principle provide an adequate legal framework for democratic elections. In the recent amendments, note has been taken of several views and comments expressed by the Venice Commission in respect of the original Code. There still are certain provisions which may be regarded as problematic, and it is to be hoped that circumstances in the country will permit their consideration in due course.