



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 18 February 2002

Restricted
CDL (2002) 015
Or. eng.

Opinion no. 182-2001-geo

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**UNIFIED ELECTION CODE
OF THE REPUBLIC OF GEORGIA**

Comments by:

Mr Florian GROTZ
(Expert, Germany)

Introduction

1. This paper presents an opinion on the draft Election Code of Georgia (as of 11 September 2001). Our argumentation basically follows the structure of this law, focusing on **three questions**:

- (a) **Which crucial provisions have been changed** since the previous electoral legislation, and if such changes occurred, in which sense can the new stipulations be considered an enhancement of democratic standards?
- (b) **Which items** criticised by the Organisation for Security and Co-operation in Europe (OSCE) and the Council of Europe (CoE) **have not been changed**?
- (c) **Which regulations are still missing** in order to establish an adequate framework for holding truly free and fair elections in Georgia?

2. Before turning to the detailed legal provisions, it is important to briefly (re-)consider the overall political context in which the new Code was drafted and is to be implemented:

- Since 1995, when its current constitution went into force, post-soviet Georgia has witnessed a series of overall competitive parliamentary and presidential elections within a politically stable environment. Nevertheless, due to unsolved ethnic-territorial conflicts, an enduring economic crisis and the structural weakness of opposition parties, **the new democratic institutions are still far from being consolidated**. This is confirmed, among others, by international observers noticing systematic shortcomings during the election processes, especially regarding the functioning of the electoral administration. To overcome such democratic deficits, both the **OSCE and the CoE have suggested relevant legal amendments as adequate benchmarks for electoral reform**.
- **In late autumn 2001** – some weeks after the new Code had been drafted – a **major political crisis** occurred, as obviously suppressive measures of the State Security against an independent TV station lead not only to public protests, but also caused the resignation of the parliamentary Speaker and, eventually, the **dismissal of Government**. Almost simultaneously, the **Citizens' Union of Georgia (CUG)** – the predominant party in Parliament since 1995 – **broke apart**, after President Shevardnadze had resigned from its chairmanship. Both **the governmental institutions and the party system are thus being 'in flux'** again.

3. The new Electoral Code, therefore, has to be evaluated against a 'double background': the reform suggestions of international organisations and the (most recent) changes within the political system.

General Provisions (Chapter I)

4. Similar to the Electoral Code of neighbouring Armenia (1999), the new electoral law of Georgia integrates the previous legal acts on presidential elections, parliamentary elections

and elections for the organs of local self-government into one document. **This new form** – defining at first general conditions for all elections and then adding specific provisions for all relevant types of elections – has a great advantage: it **basically enhances the transparency of the legal framework** and, to a certain degree, the ‘democratic efficiency’, since it provides equal organisational standards for all election types. The mere size of the Code, however, can make it difficult to find all details relevant for each type of election.

5. In accordance with this outline, Chapter I presents the ‘general provisions’ in a very detailed way. The more **striking** is the fact **that the option of ‘external voting’** (i.e. the right of citizens living abroad to participate in national elections from their foreign place of residence) **is not mentioned under ‘universal suffrage’ (Art. 5)**. The existence of such election right becomes clear only later when reading through some technical stipulations of the Code (e.g. in Art. 29/3 e). Therefore, a relevant paragraph should be added under Art. 5 defining which citizens (e.g. additional qualifications with regard to the duration of absence from the motherland) may participate in which types of elections (e.g. in presidential and parliamentary elections, but not in local elections).¹

Registration of Voters (Chapter II)

6. Within the new stipulations on voter registration, the **establishment of supplementary voter lists (Art. 10)** can be considered a **definite progress towards improving the administration of elections**. In the Georgian context, this item is of especial importance due to the big number of Internally Displaced Persons (IDPs) from Abkhazia and other regions. In the 1999 parliamentary elections, several observers reported that IDPs could occasionally cast more votes than they would have been allowed to,² because the administration of voter lists did not function properly (OSCE 2000: 22). Under the new regulation, IDPs can be identified more easily by the election authorities, so ‘double voting’ of IDPs should not be possible any more. For the same purpose, Art. 12 provides precise regulations for including short-term changes of residency into the voter lists.

Election Districts and Election Precincts (Chapter III)

7. Regarding the **delimitation of electoral districts**, it is quite astonishing that Art. 15 does **not include any remark on the legally allowed deviation from the average ratio of registered voters** per single-member constituency (SMC). This lack is not only unusual by international standards of electoral legislation. What is more, the **violation of electoral equality** in this sense was one of the main problems in the 1999 parliamentary elections: The average ratio of registered voters per SMC varied a lot, from app. 3,600 voters in the Lent’ekhi district or app. 4,200 in the Kazbegi district to over 138,000 in Kutaisi City (Kuchinka-Lančava/Grotz 2001: 380). Therefore, the OSCE was fully right to suggest an – internationally quite common – **maximum deviation of 10% from the average ratio of voters per district** (OSCE 2000: 28). Such provision **should definitely be added to Art. 15**. Since for organisational reasons it is quite sensible to retain the administrative division as

¹ For an extensive discussion of relevant institutional choices and their comparative evaluation cf. Nohlen/Grotz (2000).

² In the ‘two-ballot system’ of Georgia, IDPs have only been allowed to vote for national party lists, but not for candidates in single-member constituencies. The problem of electoral equality connected with this stipulation and criticised by the OSCE (2000: 15) is still unsolved.

general basis of electoral districting, the maximum **margin might be increased to 15%–20% for less accessible regions**. Any bigger deviation from the average size, however, is not acceptable from a democratic point of view.

8. The legally prescribed **average size of the electoral precincts** (2,000 registered voters; cf. **Art. 16/2**), is **(still) relatively big**. Given the high rates of electoral participation in relation to the organisational problems being observed in previous national elections, smaller precincts would surely contribute to pursuing a better ‘formalisation’ of the electoral processes.

9. Finally, the rather inconspicuous provisions of **Art. 16/6** on the **establishment of electoral precincts outside the national territory** deserve certain attention. At first glance, this measure is a purely administrative act, and the relevant competence seems to belong rightfully to the Central Election Commission (CEC). However, the ‘counting’ of external votes is a political issue and may be – depending on the electoral system and the political distribution of external votes – severely disputed among political parties (for examples see Nohlen/Grotz 2000). Therefore, it would be sensible to regulate the establishment of external precincts more precisely by law, especially if citizens staying abroad are also allowed to vote for SMC-candidates in parliamentary elections (the Code does not specify this at any place).

Election Administration (Chapter IV)

10. This chapter includes the **most important changes of the new Code: the reform of the system of Election Commissions (EC)**. Though the multi-level structure of the EC remains a ‘centralized system of election administration’ (Art. 17/2), its composition is not as ‘state-centred’ as before. Whereas the Central Election Commission (CEC) used to be completely chosen by the main state organs (President, Parliament, and regional assemblies), the Election Code has introduced a **‘bottom-up’ nomination system modelled on the Mexican CEC** (that is undoubtedly the most professional election authority throughout Latin America). According to this modus, the seven CEC-members are elected by Parliament out of a 14-candidates’ list that is exclusively nominated by non-governmental organisations engaging in electoral observation (Art. 22). Unlike previously, the Chairperson of the CEC is not elected by the President, but by the CEC among its members in a highly consensual procedure (Art. 28). The organs of election authorities at lower levels (District and Precinct Election Commissions) are to be chosen in a ‘semi-centralised’ manner, i.e. partly by the higher EC and partly by the relevant strongest parties at district and precinct levels.

11. In sum, the **new modus of (s)electing EC-members enhances the de-politicisation and**, thereby, the **professionalisation of the key actors of the electoral administration**.

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

12. The relevant provisions are within international standards of electoral legislation. An especially positive innovation in this chapter is the precisely defined procedure of checking the authenticity of supporting signatures (Art. 42/2).

Election Funding (Chapter VI)

13. The regulations of election funding are in accordance with internationally established standards. A major contribution to enhancing financial transparency is the instalment of Election Campaign Funds (Art. 46ff.).

Polling (Chapter VII)

14. The regulations of this chapter provide a functional basis for securing a democratic election process. Important items include

- the obligatory use of transparent ballot boxes (Art. 50/c);
- the introduction of special envelopes in addition to ballot papers (Art. 51);
- the detailed regulation of polling by means of a mobile ballot box (Art. 56).

Transparency During Preparation and Conduct of Elections (Chapter VIII)

15.

- Besides the structural reform of the Electoral Commissions, Chapter VIII is the second major change in the new Code. In international comparison, a separate paragraph on transparency is not very common in electoral laws. The more it can be considered a **progress to summarise preconditions for free and fair elections** in ‘fragile’ democracies. Such items include
- open access to the sessions of the Election Commissions (Art. 67/1);
- politically unrestricted accreditation of domestic and foreign election observers and a precise definition of their rights (Art. 68–70);
- providing equal formal conditions for electoral campaigning, especially with regard to agitation in public and private TV channels (Art. 74);
- clear separation of technical and financial resources for electoral campaigning from the State budget (Art. 76).

Adjudication of Disputes (Chapter IX)

16. The adjudication of electoral disputes is regulated in a very precise and strict manner. This is a profound legal basis, though one may doubt whether the relevant provisions can be implemented as strictly as foreseen by law. For example, it is quite questionable whether the **Constitutional Court** will always be able to **decide upon election appeals** within only five days, as requested by Art. 77/4. For fully informed judgments on complex cases of (alleged) election fraud, this **time span may prove to be too narrow**. In such cases, the legitimacy of the constitutional review – and, eventually, of the Electoral Code – might be challenged.

Elections of President (Chapter X–XI)

17. The basic **provisions for presidential elections** have not been modified. The relevant stipulations on the regular term of office, the possibility of re-election, the candidacy and the electoral system are **generally in accordance with international standards** of direct elections for President.

18. One detail, however, is **quite problematic** from a normative point of view: **Art. 86/2** prescribes that the **majority requirement** (50%+1) is to be **based on** the number of **votes cast** and not, as commonly, on the valid votes. In other words, in this system invalid votes systematically count against the strongest candidate. In non-competitive contexts this does not pose a problem since in such ‘elections without choice’ invalid votes may reasonably be considered a kind of ‘negative vote’. In multi-candidate races, on the contrary, invalid votes cannot be interpreted as clear political choice, thus they should not be taken into account. Therefore, **the relevant formulations should be altered from ‘votes cast’ to ‘valid votes’** (see also ‘Elections for Parliament’).

Elections for Parliament (Chapter XII–XIV)

19. The regulations of parliamentary elections have not substantially changed either. Some provisions, however, were modified.

20. A mere technical, but not unimportant adjustment is the stipulation in **Art. 96/2** that ‘double candidatures’ (in SMCs and on party lists) have to be indicated besides the relevant personal names on the party lists (according to Art. 37/2 of the 1999 Election Law a list of the SMC-candidates had to be attached to each party list). The new procedure **should make it easier for the voters** to be fully informed in this respect, thus making the ‘parallel’ electoral system more transparent.

21. A more important innovation is the stipulation of **Art. 102** that, unless the CEC ‘issues consent’ upon relevant notices from the Prosecutor’s office, the **immunity of parliamentary candidates** must not be lifted before the electoral results have officially been published. Especially in view of the negative experiences during the 1999 elections, the legislator was right to delimit the power of the CEC in this respect. Since the formulation (‘issues consent’) seems to be still too vague (at least in the English translation), it might be put even more precisely, being replaced by ‘unanimously decides’.

22. The **high level of the legal threshold (7%)** has not been lowered despite being sharply criticised by international organisations. It goes without saying that setting a threshold of exclusion is always a political decision; therefore, legal thresholds in proportional electoral systems vary quite a lot, from 0.67% to 10% of the national vote. Within this empirical spectrum, however, Georgia has **one of the highest legal hurdles world-wide**.³ Generally, it can be stated that the ‘mechanical’ concentration effect of such a high threshold will hardly remain within the acceptable limits of ‘proportional representation’. In other words: It will exclude a considerable number of parties/valid votes from Parliament in favour of the strongest political forces; consequently, it tends to produce a rather majoritarian effect. This is basically confirmed by the 1999 parliamentary elections, where all in all 283,279 valid votes (14.1%) were ‘lost’ (see Table 1). Given the recent fragmentation of the Georgian party system following the break-up of the predominant CUP, the ‘exclusion effect’ of the threshold will surely be reinforced during the next elections; it might even come to a result similar to the Russian Duma elections of 1995, when almost 50%

³ Currently, the only country with a higher legal threshold world-wide is Turkey (10%). Even Azerbaijan which had a 8%-hurdle lowered it to 6% before the 2000 parliamentary polls. For an international overview of the relevant provisions cf. Nohlen/Grotz/Hartmann (2001: 43–46).

of the valid votes were ‘filtered’ by a 5%-threshold and, due to this effect, the bigger parties could double (!) their seats (in relation to a pure proportional distribution of votes). In sum, the 7%-threshold is **definitely too high not only in normative terms, but also with regard to the actual political context**. Therefore, it would be highly recommendable to **lower it to 4%-5%**.

23. In order to enhance the re-institutionalisation of the fluid party system, two further changes would be sensible:

- (1) A **‘differentiated threshold’** should be introduced, i.e. a separate one for parties (e.g. 4%) and higher ones for electoral alliances (e.g. 6% for two-party alliances, 8% for coalitions of three and more parties). ‘Invented’ in the transition processes of Central and Eastern Europe in the early 1990s,⁴ differentiated thresholds had all in all positive effects on the consolidation of competitive party systems since they provided not only an incentive to build electoral coalitions, but also stimulated fusion processes among mini-parties (with similar programmes) and thus contributed to increasing intra-fractional cohesion within Parliament.
- (2) In order to guarantee a pluralist representation in the proportional part of the electoral system, the **special provisions in case no party passes the legal threshold** should be re-designed in a less strict manner. In such extraordinary case, holding repeat elections within a smaller sample of parties (with at least 2% of the original vote), as **Art. 105/17** states, is a viable regulation. However, if **one** party passes the threshold, no repeat elections are foreseen by law. Since the proportional part of an electoral system is not intended to produce a one-party system in Parliament, the relevant **qualification on repeat elections in Art. 105/16 ought to be altered** from ‘none of the parties’ **into ‘less than two parties’**. Additionally, the legislator might consider to lower the legal threshold for repeat elections, like the Polish Electoral Law of 1993 did.⁵

Table 1: The 1999 Parliamentary Elections in Georgia

Year	1999 ^a	
	Total number	%
Registered voters	3,143,851	–
Votes cast	2,133,878	67.9
Invalid votes	130,844 ^c	6.1
Valid votes	2,003,034	93.9
CUG	890,915	44.5
B-RG	537,297	26.8
B-ISG	151,038	7.5
GLP	140,595	7.0
B-NDA-TW	95,039	4.7
B-PP-D	87,781	4.4
B-UCP-WU	28,736	1.4
GPG	11,400	0.6
GPPV	11,708	0.6

⁴ Differentiated thresholds were introduced in the Czech Republic (1992–), Hungary (1994–), Poland (1993–), Romania (1992–), and Slovakia (1992–1998).

⁵ According to Art. 6 and 7 of the 1993 Parliamentary Electoral Law of Poland, the legal threshold in repeat elections was to be lowered from 5% to 3% (for parties) and from 8% to 5% respectively.

MKS	10,357	0.5
USJG	1,200	0.1
Others ^d	36,968	1.8

Source: Kuchinka-Lancava/Grotz 2001.

^a The relevant figures refer to the “second votes” cast for the party lists in the nationwide constituency.

^c Since the number of invalid votes is not given explicitly in the CEC protocol, this figure was calculated by the authors.

^d Others include a total of 22 parties: B-RT-FG: 5,657 (0.3%); B-PF-CS: 4,339 (0.2%); B-VG-GC: 4,275 (0.2%); B-C-S: 3,778 (0.2%); B-RCPP: 3,229 (0.2%); CDUG: 2,951 (0.1%); PESDPG: 2,171 (0.1%); PDP: 1,917 (0.1%); B-XXIC-GN: 1,058 (0.1%); B-UNM: 994 (0.0%); FPG: 828 (0.0%); DAP: 758 (0.0%); B-GNUP: 733 (0.0%); PUC-LUG: 643 (0.0%); NPG: 593 (0.0%); UGN: 555 (0.0%); NIDPG: 529 (0.0%); DCG:452 (0.0%); PM-FG: 419 (0.0%); PU-S: 412 (0.0%); ILG: 344 (0.0%); PUC-AGFU: 333 (0.0%).

24. Finally, the **calculation basis of the threshold requirements** should be modified as well. Like in presidential elections, the distribution of both the majoritarian and the proportional seats of the parliamentary electoral system is still **based on the votes cast**. As already explained above, the calculation procedure **should be adapted** to internationally common standards, i.e. **the valid votes** ought to be the calculation basis.

Elections of Local Representative Bodies and of Mayors (Chapter XV–XVII)

25. The legal provisions for local elections differ from those at national level in several respects. For European democracies, this difference is a common feature, because the relationship between voters and representatives at local level is generally regarded as closer than at national level. The relevant stipulations thus follow an international trend to design specific legal provisions for the local context. These include

- a lower age of candidacy (21 instead of 25 years at national level; Art. 100/1);
- the non-existence of external voting (Art. 110/3);
- an electoral system (plurality system with ‘multiple vote’⁶) which enhances the ties between voters and representatives (Art. 111)

In sum, there are no serious shortcomings in this chapter of the Code.

Transitional and Conclusive Provisions (Chapter XVIII–XIX)

26. There are no special comments on these paragraphs.

⁶ This means that every voter has as many votes as seats are to be filled within a multi-member constituency. Candidates with the highest numbers of votes are elected. In comparison with party-list electoral system, the ‘personal factor’ tends to be more important in this less (pre-)structured form of candidacy.

Summary: Preliminary Evaluation of the Unified Election Code of Georgia

27. The Unified Election Code of Georgia can be considered a further step towards securing democratic standards in national elections under difficult conditions. In comparison with the preceding legislation, the **most important innovations** include

- the **reform** of the system of **Election Commissions** (Chapter IV);
- the **regulations on** transparency of **electoral campaigning and polling** (Chapter VIII);
- several **technical adjustments** enhancing the transparency and efficiency of the electoral administration (e.g. the introduction of supplementary voter lists in Chapter II).

28. Notwithstanding this overall positive picture, **some provisions** remain **highly problematic** and **should be altered before the next election**:

- The **stipulations for ‘external voting’** ought to be outlined **explicitly and more precisely**. This concerns both the general provisions of suffrage (Chapter I) and the more specific regulations of organising and counting votes from citizens being abroad (Chapter III and X–XIV).
- Concerning the delimitation of electoral boundaries, a **maximum deviation of 10% from the average ratio of voters per SMC should be introduced** (Chapter III).
- In the proportional part of the parliamentary electoral system, the **threshold of exclusion should be lowered to 4%-5%** (with an additional option for a ‘differentiated threshold’ for parties and electoral alliances; Chapter XIV).

References

Kuchinka-Lančava, Natalie/Grotz, Florian 2001: Georgia, in: Nohlen, Dieter/Grotz, Florian/Hartmann, Christof (eds.): Elections in Asia and the Pacific. A Data Handbook. Vol. I: The Middle East, Central Asia, and South Asia. Oxford: Oxford University Press, 371–406.

Nohlen, Dieter 2000: Wahlrecht und Parteiensystem. 3rd edition. Opladen: Leske & Budrich.

Nohlen, Dieter/Grotz, Florian 2000: External Voting: Legal Framework and Overview of Electoral Legislation, in: Boletín Mexicano de Derecho Comparado Vol. 33/No. 99, 1115–1145.

Nohlen, Dieter/Grotz, Florian/Hartmann, Christof 2001: Elections and Electoral Systems in Asia. The Middle East, Central Asia and South Asia, in: idem (eds.): Elections in Asia and the Pacific. A Data Handbook. Vol. I: The Middle East, Central Asia, and South Asia. Oxford: Oxford University Press, 1–46.

Nohlen, Dieter/Grotz, Florian/Krennerich, Michael/Thibaut, Bernhard 2000: Appendix: Electoral Systems in Independent Countries, in: Rose, Richard (ed.): International Encyclopedia of Elections, Washington D.C.: Congressional Quarterly, 353–379.

Office for Democratic Institutions and Human Rights 2000: Georgia. Parliamentary Elections. 31 October and 14 November 1999. Final Report. Warsaw: ODIHR.

Office for Democratic Institutions and Human Rights 2000a: Republic of Georgia. Presidential Elections. 9 April 2000. Final Report. Warsaw: ODIHR.

Slider, Darrell 1997: Democratization in Georgia, in Kenneth Dawisha and Bruce Parrott (eds.): Conflict, Cleavage, and Change in Central Asia and the Caucasus. Cambridge: Cambridge University Press, 146–198.