



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 17 April 2002

Opinion no. 182/2001_geo

Restricted
CDL (2002) 53
Eng.Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**OPINION ON THE UNIFIED ELECTORAL CODE
OF THE REPUBLIC OF GEORGIA**

by Mr Hjörtur TORFASON (Iceland, Member)

1. This opinion is submitted to the Secretariat of 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), inter alia with a view to assessing whether the Code takes full account of recommendations made in 1999 by the Council of Europe Parliamentary Assembly Ad hoc Committee on the Observation of Elections and by the OSCE office for Democratic Institutions and Human Rights (ODIHR). The Code was ratified on 2 August, having been adopted by the Parliament of Georgia as an organic law, and has been presented to the Commission in an English translation dated 11 September 2001.
2. The opinion replaces and incorporates my Preliminary Comments dated 1 March 2002 and presented in the plenary meeting of the Venice Commission on 8-9 March. In addition to the Code and the Constitution of Georgia in English translation, I have mainly had reference to the background materials furnished by the Secretariat, which emanate from the CoE Parliamentary Assembly and the ODIHR and include the above recommendations. The opinion does not take particular account of the political situation in Georgia except as reflected in these materials.
3. My comments below are set forth mainly in the order of Chapters and Articles of the Code.

1. General Provisions (Chapter I)

4. As explained in this Chapter, the Code applies both to presidential elections, parliamentary elections and elections of the organs of local self-government and thus unifies the rules for elections at all levels within a single statute. This approach of setting forth general rules and organisational standards applicable to all elections and adding specific provisions for the respective types of elections is to be welcomed, even though it follows that the statute may seem comparatively large from the point of one dealing with detailed requirements relating to a specific election type. It results in a stronger emphasis on democratic equality and transparency, and one of the advantages gained is that the organisation of the system of election commissions can be provided for in a comprehensive and effective manner.
5. The Chapter sets out some useful definitions and a declaration of basic principles, among which it is to be welcomed that universally recognised principles of human rights and standards of international law are expressly included as elements of the legal basis for the preparation and conduct of elections (Article 2).
6. Article 5 appropriately provides, consistently with Article 28 of the Constitution, that elections in Georgia are universal and that citizens of 18 years or over have the right to vote. The Article is limited to a clear statement of this general principle, however, and leaves the problem of how to implement it in fact towards all citizens to the specific chapters of the Code. While this approach is logical, it might be desirable to include in the Article a reference to certain major aspects of this problem, such as the matter of citizens who are residing or dwelling abroad at the time of election (see e.g. Articles 9.5.d and 10.4) and the matter that the voter group may not be entirely the same in national elections (presidential and parliamentary) and in local elections, which differ at

least in that persons residing abroad are excluded in the latter (Article 110.3). Since Article 5 preferably should remain a general provision, it might be sufficient to mention there the principal or minimum effort that the State should make (through embassies and consulates and other absentee balloting arrangements) in order to enable Georgians abroad to exercise their voting right.

7. Since the Constitution does not include Georgian residence as a condition to active voting right (Article 28), I presume that the question whether permanence of foreign residence should affect voting rights will depend on the laws concerning citizenship (under Articles 12 and 13 of the Constitution), with which I am not familiar.
8. The Code does not provide for any voting right for residents who are non-citizens, but that presumably involves a constitutional question.

2. Registration of Voters (Chapter II)

9. The basic principle for voter registration should be to have a single and permanent list of voters which is generally accessible and is brought up-to-date at regular intervals (annually) and published on a preliminary basis upon each updating. It should then be specifically updated and definitively published well in advance of any upcoming elections. The list should be coordinated with the civil registration in the country and its compilation and maintenance should be charged to the central and municipal authorities responsible for the civil registers, in close cooperation with the Central and District Election Commissions. There should be a clear opportunity for individuals to demand inclusion in the list according to residence and age (and also for interested persons to challenge the list) before election day.
10. The provisions of Chapter II appear to be drawn up with these principles in mind. However, it does not seem clear that the main list of voters should be permanent and regularly updated, as the emphasis is on the compilation of the list by the District Election Commissions according to precincts and the transfer of data to the DEC's at certain deadlines before election day (Article 9). This may be reasonable according to present conditions in Georgia, but if the laws on the civil registration system in the country (with which I am not familiar) do not include rules specifically relating to the use of census data for purposes of voting lists, I believe that an amendment of the Code in these respects should be considered.
11. Owing to the notorious indifference of voters in many countries to their registration until elections are imminent, the provisions of the Code relating to updating or correction at that time (Article 10 on a supplementary list of voters and Article 12 on a voting license to persons who have changed residence) are very necessary and of great importance.
12. As regards changes in residence, Article 12 allows the voting list to be altered by license to cover changes made up to 6 p.m. on the day before election. While it is desirable to have the possibility for correction until this time, it is questionable whether the correction ought to be made that late unless the actual change of residence has been completed earlier, e.g. more than 10 days before election (cf. Article 13) or further back in time. However, if the provision is made more restrictive in this regard, a system of absentee

balloting may be needed in order to enable recently transplanted persons to vote at their prior residence.

13. As regards persons who are not included at all on the voter list, Article 12.3 allows them to be introduced up to and including the election day itself. While this liberal solution of this important matter has its positive side (and is known in some other countries, including my own), it also has a dangerous side, and it seems questionable to allow the Precinct Election Commission (as the clause seems to indicate) to make the introduction on its own. The correction rather ought to be supported by the decision of a court to which the voter can have recourse, or at least the DEC. In any case, the acceptability of the clause depends very much on the reliability of the Georgian citizen identity card and registration card which the voter is required to present.
14. Article 11 and related provisions in other parts of the Code envisage the use of mobile ballot boxes for persons unable to go to the polling station for health reasons or are otherwise hampered as there described, and the preparation of voter lists for that purpose. This method of voting should be discouraged and limited as far as possible, and Georgia should consider the introduction of a system of absentee ballot voting under appropriate procedures, using models from other European countries as applicable to Georgian circumstances.
15. In any case, mobile box and absentee ballot votes should be counted and published separately beside the votes given directly at the fixed polling station in the respective precincts.

3. Election Districts and Precincts (Chapter 3)

16. According to Articles 49 and 4 of the Georgian Constitution, the Parliament of Georgia consists of 235 members, i.e. 150 members elected by a proportional system on a nationwide basis (The Council of the Republic) and 85 members elected by a majoritarian system (the Senate). According to Article 15.1 of the Code, these 85 are to be elected in as many single-mandate constituencies or election districts (SMCs), 10 of which are in the city of Tbilisi and 75 are established in accordance with the administrative-territorial division of the country. As I understand, this reflects the intention of the provisions of the Constitution.
17. In the reference materials, it is noted that there are considerable differences in the number of voters within each of the SMCs, and they include a recommendation by the OSCE/ODIHR that the constituencies should be apportioned so as to ensure that the number of voters within each should not vary by more than 10% from the average number. While I assume that the actual discrepancies may in some cases be of serious proportions, I also assume that the possibility for territorial representation may be of high importance under present conditions. In view of this and of the fact that the other 150 members are elected on a nationwide basis (thus favouring equality of representation among the political parties and giving equal weight to all votes), I doubt whether it is appropriate to require so strict a rule of territorial equalisation. It should be possible to accept a substantially higher margin of deviation in favour of sparsely populated districts (in my country, a deviation of up to 1:2 is allowed), and perhaps other solutions than a reapportionment of single-mandate districts can be looked for in order to maintain

territorial representation. It further is to be noted that the consequences of the inequality may partly depend on the functions allotted to the two houses or chambers of the parliament.

18. In any event, if my understanding of the Constitution is correct, the said problem will be a constitutional problem rather than a matter within the Election Code.
19. In Article 16 on election precincts, the maximum of 2,000 voters allowed for each precinct seems rather high, and a figure closer to 1,000 might be considered.
20. The provisions of Article 16.6 on the establishment of precincts or election facilities outside the territory of Georgia are not very specific, and appear to leave the matter to the Central Election Commission and the facilities of the Foreign Service. While this is an appropriate basis, it may be appropriate to regulate the problems of external voting more precisely by law (as already mentioned under Art. 4). Furthermore, the provisions of Chapters II and III do not seem to make clear whether citizens abroad will be voting both in the nationwide constituency and the respective SMC in parliamentary elections. If the latter is in fact not intended, a system for allowing it ought to be considered.

4. Election Administration (Chapter IV)

21. This Chapter contains extensive provisions on the organisation and functions of the commissions in charge of elections, appropriately operating at three levels, namely a Central Election Commission (CEC), District Election Commissions (DECs) and Precinct Election Commissions (PECs). The provisions appear to constitute a successful response to the recommendations made in the reference materials and represent a significant reform enhancing the capacity for professionalism and neutrality which may be expected from these essential institutions.
22. One of the basic matters is that the members of the CEC are not directly appointed by the Parliament or President, but elected by the Parliament from a group of candidates nominated by non-governmental organisations (NGOs), under a requirement of approval by at least 2/3 of the Parliament members (I understand this to be a required majority and not a quorum). This requirement is desirable in order to ensure a multi-party influence on the composition of the CEC, while it poses the technical problem of achieving this majority. If that problem is difficult to solve, the method of choosing the members by a proportional parliamentary vote perhaps may be considered.
23. As I understand Article 32, the DECs of 7 or more members are organised so that all parties who have been successful (overcome the threshold) in the nationwide elections are ensured of appointing a member, i.e. in addition to 3 appointed by the CEC (from candidacies as per sections 4 and 5) and 1 by the local governmental body. This is highly acceptable, except that it does perhaps not cover the contingency of the successful majoritarian (single-mandate) member from the last election not belonging to one of these parties. I am assuming that the right for this member to propose candidates to the CEC is not supposed to offset this and is secondary to the right of the NGOs (i.e. will not be exercisable if they propose a sufficient number of candidates).

24. As to Article 32, the system of appointment of the 11 members of the PECs is also highly acceptable, except that it also perhaps does not take full account of the above contingency.

5. Registration of Candidates and Supporter Lists

25. The provisions of this Chapter (Articles 40 - 42) are quite acceptable by recognised standards. In 41.5, it would be proper to require a statement of the birth date, identity number and address of the candidate in addition to his name. As regards the information to be provided on the candidates and the supporters, it would be desirable to require the election commissions to give the persons responsible for the lists a limited opportunity to remedy defects in relation to the signatures (i.e. to correct obvious errors or omissions, but *not* to collect substitute signatures) without resorting to an appeal.
26. It also might be provided that a supporter cannot withdraw his support after the list has been submitted to the election commission.

6. Election Funding

27. The provisions of this Chapter (Articles 43 - 45) on election funding and 46 - 48 on campaign funding are acceptable by recognised standards, and the latter seem to represent significant reform.

7. Polling (Chapter VII)

28. The provisions of this Chapter (Articles 49 -64) reflect sound democratic standards. It is interesting to note that transparent ballot boxes and envelopes, are provided for. It is attempted to give the problematic matter of mobile ballot boxes a clear regulation, and observers are permitted to go along. The use of numbered ballots (as provided in Article 51.5) normally is to be discouraged, as it may weaken the secrecy of the voting process. It may be desirable under present circumstances in Georgia, but their abolition should be a future aim.
29. It may also be asked whether it is necessary to have the actual ballots signed by PEC members (even though this is to occur in the presence of the voter and under possibility of observation), as provided in Article 54.2. If signature is needed, perhaps it might be sufficient to apply it to envelope.
30. In the interest of secrecy, it should be forbidden to a voter to mark his ballot in any way other than as necessary to express his elective will (in order that the ballot is not identifiable after opening), and ballots found to be marked so as to indicate an intent by the voter of showing that it is his ballot should be discounted as invalid. I am not sure that this is covered in the Chapter (except perhaps at the end of 54.2.a).

8. *Transparency of the Process and Agitation Rules (Chapter VIII)*

31. The provisions of this Chapter (Articles 65 - 72 on the former and 73 - 76 on the latter subject) are exemplary in many ways and represent a progressive effort to ensure free and fair elections.

9. *Adjudication of Disputes (Chapter IX)*

32. This Chapter (Article 77) sets out very precise rules for the resolution of electoral disputes, stating the type of dispute and the available recourse to a higher election commission and a court of law (or the Constitutional Court), with specification of time limits. They represent a reasonable response to recommendations in the reference materials. In provisions of this kind, it should be made clear as far as possible to which court the recourse should lie, and this is generally the case. The time limits given are very short, but in the case of appeals between election commissions, this is appropriate, and the matters in issue tend to be ones of urgency.
33. My comments mainly are that the time limits given should as far as possible be related to the time when the relevant decision, ordinance or measure becomes known to the interested persons through publication or direct notification, which may not always be the case. The situation in this regard might perhaps be clarified by further provisions within this Article, but also by provisions within the Chapter on the election commissions to ensure the proper notification of their decisions (upon being made) where this is not already covered.
34. If the time limits for decision by the respective courts prove too narrow in fact, I presume that this does not necessarily mean that the appeal to them will be frustrated.

10. *Elections of the President of Georgia (Chapters X and XI)*

35. The provisions of these Chapters (Articles 78 - 86 and 87 - 89) are generally in accordance with recognised standards, and I have no adverse comments.
36. It should be noted, however, that the possibility for withdrawal by a presidential candidate at any time before polling day (i.e. without time limitation) appears questionable (Article 84.4).

11. *Elections for the Parliament of Georgia (Chapters XII - XIV)*

37. I understand that these Chapters have not been changed in major respects from the prior law, but have not made a detailed comparison.
38. The question of determination of SMCs has already been commented upon. I believe that if it is to be possible to reapportion them or redraw their boundaries (at certain intervals) through provisions in the Election Code, the authority for this should be clearly spelled out in the Constitution.

39. I note that the recommendation to readdress the question whether non-parliamentary parties should need to present 50,000 supporters in the nationwide elections seems not to have occasioned a change in the law (cf. Article 95.3).
40. I also note that the provisions for possible withdrawal of candidates or parties until 2 days before polling may be too liberal, though I suppose that this mainly may cause a problem in the SMCs.
41. Finally, I note that the threshold for political parties or blocs competing in the nationwide proportional election of 150 members remains at 7% of votes cast, and does appear too high. However, a lowering of the threshold (such as to 5% or less or by a differentiated arrangement) would not only require an amendment of the Code, but of Article 50.2 of the Constitution.

12. Elections of Local Governments (Chapters XV - XVI)

42. The provisions of these Chapters (Articles 108 - 114 and 115 - 126) appear to be consistent with recognised standards, and reflect the fact that differences in certain respects from national elections (e.g. candidate age and the exclusion of non-resident voters) are a quite natural characteristic of local government elections.
43. The Code provides for election by popular vote of practically all local government authorities, which constitutes an important change from prior legislation.
44. I have no adverse comments on these Chapters, but I wish to second the comment that there might be reason to consider, at least for future purposes, the possibility of changing the method of election in multi-mandate districts or communities from the majoritarian (or plurality) system now envisaged to a system of cumulative voting or single transferable vote (voting for as many individual candidates as required, but ranking them), resulting in a form of proportional voting. If it appears likely in fact that the people would prefer voting by party or independent lists as time goes by, however, the need for this may not be strong.
45. I also wish to note that it would be appropriate to consider developing absentee balloting facilities in order to enable persons temporarily outside the country to vote in their community.

13. Transitional and Concluding Provisions (Chapter XVIII - XIX)

46. I have no specific comments on these chapters.

14. General Remarks

47. In conclusion, I wish to affirm that the new Electoral Code of the Republic of Georgia may be regarded as an important step forward in the process of securing democratic standards for representative government in the country. The comments on specific Chapters set out in the above are not entirely exhaustive, but are very largely to positive effect, and my overall view of the Code is favourable. And as a general comment concerning the recommendations referred to first above, it seems that they have largely

been taken into account in the Code, when one excludes the two basic features which I believe to stand at constitutional level.

48. I shall be pleased to remain at disposal for such further clarification or consideration of the subject matter as may be appropriate.