



Strasbourg, 5 December 2005

Opinion no. 358 / 2005

Restricted
CDL-EL(2005)047
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION ON THE DRAFT ORGANIC LAW
ON “MAKING AMENDMENTS
AND ADDITIONS INTO THE ORGANIC LAW -
ELECTION CODE OF GEORGIA”***

on the basis of comments by

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(member, “the former Yugoslav Republic of Macedonia”)
Mr Bernard OWEN (expert, France)**

**Draft Law submitted to the Venice Commission on 3 October 2005*

1. Introduction

1. *The Organic Law-Election Code of Georgia,¹ is a legal basis for the preparation and conduct of the Election of the President of Georgia, the Parliament of Georgia, the local self-government representative body – Sakrebulo (local council), of Gangebeli (head of local government) and of a mayor. The Law also defines the rights and guarantees of election participants, the rules for forming the Election Administration and the competences thereof, as well as the regulations for dispute resolution in the cases provided by this Law.*

2. *The Venice Commission was requested on 3 October 2005 by the Parliament of Georgia to provide an Opinion on the draft Organic Law of Georgia “making amendments and additions into the Organic Law – Election Code of Georgia”.² This draft law has already been debated before Parliament and partially adopted. In this regard, it would have been advisable to request recommendations from the Venice Commission before any hearing and adoption before the Parliament. The Venice Commission hopes that the current stage in the Parliamentary process will still enable the present recommendations to be implemented.*

3. *Prior to these draft amendments, previous amendments relating to electoral administration were adopted by the Parliament, on 22 April 2005. This reform led to a newly composed Central Election Commission (CEC). The CEC is now composed of members selected on the basis of their professional skills, and therefore is no longer a partisan Commission. The Venice Commission regrets that it was not requested to comment on this important reform. On this aspect, it can be underlined that the Venice Commission’s Code of Good Practice in Electoral Matters³ promotes political pluralism in the electoral administration, at central and lower levels. Nevertheless, the Venice Commission supports the newly composed CEC in its wish to co-operate with all political forces and the civil society involved in the electoral process. The new CEC explicitly expressed its wish to constructively work with the Venice Commission. In this respect an assistance mission took place in September/October 2005.⁴*

4. *The Venice Commission has also been requested by the Parliament of Georgia to provide an opinion on further amendments to the Election Code. The Venice Commission will draw up an additional opinion, jointly with the Office for Democratic Institutions and Human Rights of the OSCE, before any parliamentary debate. On a more general aspect, the Venice Commission invites the Parliament of Georgia to avoid many successive electoral reforms, which cannot be in accordance with the general principle of the stability of electoral law.⁵*

5. *These comments follow previous opinions on the Election Code of Georgia provided by the Venice Commission (CDL-AD(2002)009, CDL-EL(2003)005 and CDL-AD(2004)005), which still have to be taken into consideration.*

¹Hereinafter: the Election Code of Georgia.

²Hereinafter: the draft amendments.

³CDL-AD(2002)023rev, adopted by the Venice Commission at its 52nd session (Venice 18-19 October 2002). More precisely, see II. 3.1, d & e.

⁴An expert in electoral matters – Mr Bernard Owen – was put at the disposal of the Central Election Commission to assist on technical and legal aspects.

⁵See the Code of Good Practice in Electoral Matters, I. 2.

6. *The comments are based on:*

- *the Election Code of Georgia (CDL-EL(2005)033),*
- *the Draft Organic Law on “making amendments and additions into the Organic Law – Election Code of Georgia” (CDL-EL(2005)034),*
- *the Law on the Capital – Tbilisi (CDL-EL(2005)035),*
- *the draft Law of Georgia on “making amendments and additions to the Law of Georgia on the Capital of Georgia – Tbilisi” (CDL-EL(2005)036),*
- *the Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev),*
- *the Opinion on the Unified Code of Georgia (CDL-AD(2002)009),*
- *Election in Georgia: Comments on the Election Code and the electoral administration (CDL-EL(2003)005),*
- *the Opinion on the Unified Election Code of Georgia, as amended on 14 August 2003 (CDL-AD(2004)005), and*
- *the Report on assistance to the Central Election Commission, 20 September-20 October 2005, by Mr Bernard Owen.*

2. General remarks

7. The draft amendments will be discussed in relation to the other parts of this Code which regulate local Elections. These draft amendments also have to be analysed in connection with a large territorial and administrative reform which is currently in process in Georgia.

8. The Code of Good Practice in Electoral Matters stipulates:⁶ “The fundamental elements of electoral law, in particular the electoral systems proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law”. Bearing in mind that this principle concerns the fundamental rules of electoral law, it is to be welcomed that amendments will be adopted one year ahead of the next local elections.⁷

9. In the current Election Code, Chapters XV to XVII regulate the election of local self-government bodies that are *sakrebulo* (local council); the appointment of *Gamgebeli* (head of local government) and mayors. In the process of amendments, this structure of the Code has been maintained, including in most cases the division of the subject matter of each Chapter among its Articles including a new Chapter XVII.⁸ The observation made in previous Venice Commission opinions concerning the extensive nature of the regulations, remains valid for these draft amendments.

10. It should be recognised that the amendments are basically of a positive nature and contribute to the clarification of some matters in the respective field of local elections. While some of the amendments relate or correspond to international legislation and good practice, several issues remain debatable. Therefore, the draft amendments could still be improved, particularly in the area of the newly proposed electoral system.

⁶II.2.B.

⁷Next local Elections will be held in 2006.

⁸From the official translation of Draft Organic Law of Georgia on “making amendments and additions into the Organic Law – Election Code of Georgia” (version of 8 September 2005) it is not clear whether the present Chapter XVII become Chapter XVIII or whether it will be replaced by a newly proposed Chapter.

3. General framework of the reform

11. By deleting Articles 109.2, 111.2, 112.3, 115.5 and 118.5, the legislator has introduced a new chapter XVII, "Election to *Sakrebulo* of the Capital of Georgia – Tbilisi". This chapter prescribes: General Rules for the Election to the *Sakrebulo* (Council) of the Capital of Georgia – Tbilisi; Composition of Tbilisi *Sakrebulo*; Electoral System; Equal Suffrage; Election Districts; Determining number of mandates in the respective local election district, to be distributed through the Majoritarian Electoral rule during Tbilisi *Sakrebulo* Election; Right to participate in and registration for Tbilisi *Sakrebulo* Election; Submission of Party Lists for Tbilisi *Sakrebulo*; Nomination of Majoritarian Candidates for Tbilisi *Sakrebulo*; Ballot Papers; Determining the Majoritarian Election Results in Local Electoral District; The Rule for the Distribution of Mandates under the Proportional System; and Registration of the Tbilisi *Sakrebulo* members.

12. This reform is an important one, since the Municipal Council of the Capital represents 650,000 citizens and moreover has significant powers in comparison to those of the Mayor. Indeed, Article 12 of the Law on the Capital⁹ regulates the powers of the *Sakrebulo*, including amongst many others, the right to initiate legislative acts, to adopt the Tbilisi budget, etc. Article 16 (5) of the same Law regulates the rules of voting. In this context, the *Sakrebulo* also grants extended powers to the Mayor. The Council makes decisions by a majority of the votes of those present. If the Mayor resubmits the issue to the council for review, the Council can as a last resort keep the initial draft and vote it with a qualified majority.

13. The Tbilisi *Sakrebulo* is composed of 37 members: 25 are elected in 10 majoritarian constituencies; and 12 are elected through a proportional system, the city representing in this case one single constituency.

14. Concerning the majoritarian system, the size of the constituencies will depend on the number of voters on 1 January. The rule is one elected member for 25,000 voters, considering that the number of elected members in each constituency varies from two to three. For instance, a constituency with 45,000 voters will have two representatives at the *Sakrebulo*.

15. Each party or coalition which wishes to participate in an election in one or more majoritarian constituencies will have to present the number of candidates corresponding to the number of candidates to be elected.

16. From normative and technical aspects, it is notable that the text of the proposed amendments is very extensive on the one hand, while on the other hand the same articles are dealing with some very general aspects. Therefore, this would cause confusion and problems in their practical implementation. Electoral Laws should be precise, clear and in accordance with international law. Laws should be understandable and accessible for electoral administration, but also for all those who will participate in Elections, both as candidates or voters. Generally, most of these articles have already been introduced into the current Election Code and they may only be amended by adding paragraphs on the Tbilisi *Sakrebulo*, if such a paragraph is in fact necessary.

⁹The Law on the Capital – Tbilisi (CDL-EL(2005)035).

4. Constituencies and electoral system

17. Regarding the electoral system, a municipal council election must offer two main advantages: ensure that the municipal council has real authority, and enable at the same time opposition to be represented in the Council. The redistribution of electoral seats in 10 majoritarian constituencies (with two or three elected representatives per constituency) seems to be in accordance with these principles.

18. A third requirement appears necessary at the municipal level but has repercussions at the national level: the necessary coalition of parties due to the relative majority system. 12 councillors are elected through the proportional system. This could also lead to coalitions.

19. Mandates will be distributed to parties having obtained at least 4% of the votes.¹⁰ The electoral system is the following: number of votes from Party "A" x 12, divided by the total number of votes expressed; the result will give the number of seats allocated to the Party "A". In the case of non allocated seats, complementary seats would be allocated to parties having obtained the highest number of votes.

20. Article 127.⁵ 4) suggests that the number of mandates shall be determined by the CEC no later than 10 days after the Election has been called. In our opinion, 10 days is too long. The procedures and actions of CEC must be simple, with short deadlines and must provide guaranties for an effective system of appeals.¹¹

21. In our view, Articles 127⁴ (election districts) and 127⁵ (number of mandates in the majoritarian system) should be more precise. It is not clear how the Central Election Commission will ensure the distribution of the mandates of those who will be elected by proportional electoral system. Obviously, the intention is for Tbilisi to be one electoral unit covered by 10 election districts, but this should be clearly stipulated. Moreover, the formula regarding the proportional electoral system needs to be further explained.

22. Article 15.1, prescribes that there shall be 85 single-mandate election districts established for the parliamentary Election in Georgia, 10 in the city of Tbilisi and 75 in view of the administrative-territorial division of the country. Since 2003, Article 15.3 has stipulated that for the purposes of local self-government Elections, the city of Tbilisi shall be treated as one local electoral district covering all ten electoral districts of Tbilisi.

23. Article 127¹ (composition of Tbilisi *Sakrebulo*) and Article 127² (electoral system) may be introduced as one Article by replacing paragraph 1 of Article 127² and adding paragraph 2 of 127² as paragraph 2 of Article 127¹. Proportional electoral systems and majoritarian electoral systems have already been introduced and are defined by Article 3 (Definition of Terms) of the Election Code.

24. In its 2004 opinion,¹² the Venice Commission has already recognised that the Election Code still contains no provisions on the maximum deviation from the average ratio of registered voters per single-member district. At that time, it was recommended that it would

¹⁰Normally, the threshold is calculated on the basis of validly expressed votes, whereas in the draft amendments invalid ballot papers are also taken into account; this may be due to an inaccurate translation.

¹¹See the Code of Good Practice in Electoral Matters, II 3.3, related to an effective system of appeal, more particularly, subparagraphs a & c.

¹²CDL-AD(2004)005.

be important to define the maximum deviation permitted by law, and to set forth the necessary procedure to fulfil the requirement. By striking out Article 15.3 of the Election Code, with no further clarification, it is still not clear how the City of Tbilisi will be treated in this respect. Nevertheless, the draft prescribes that there are from two to three *Sakrebulo* members elected per constituency, depending on the number of registered voters; this could be considered as partially implementing the recommendation.

5. Equal Suffrage

25. Equal suffrage, as one of the general principles of the European electoral heritage, has already been introduced by Article 6 in Chapter I, General Provisions, and in our view there is no need to repeat this principle separately in Article 127³ (equal suffrage). The introduction of this principle, as one of the principles under the general provisions of this Law, means that it is generally accepted and applicable to all Elections, and by that, on *Sakrebulo* of the Capital of Georgia – Tbilisi, as well.

7. Submission, participation and registration of candidates and party lists

26. Article 127⁶ (participation and registration) prescribes the right to participate and register for Tbilisi *Sakrebulo* Election. This right (right to vote), as both an active and passive electoral right, has already been defined by Article 3 subparagraphs *d*, *e*, *f*, *g* and *h*. Also, Chapter V very extensively prescribes the way of registering election stakeholders and support lists. On the other hand, Article 120 also stipulates the registration of party lists, candidates for membership in the local self-government representative body - *Sakrebulo*, Candidates for *Gamgebeli*, Mayor. By redrafting the special provisions on the right to participate in and register for Tbilisi *Sakrebulo* Elections, the Election Code will be difficult to implement and understand by the election participants with different roles (candidates and voters, observers, electoral administration, etc.).

27. Articles 127⁶ and 127⁷ (submission of party lists), prescribe that candidates in the Tbilisi *Sakrebulo* Election may be “any party, electoral block, the candidate(s) nominated either by a party or an electoral block”, or “only political parties and electoral blocks shall have the right to participate in *Sakrebulo* Elections through the proportional electoral rule and obtain a mandate of *Sakrebulo* member”. These provisions appear too restrictive. Contrary to this, Article 119 of the Election Code prescribes that an individual group of voters, consisting of no less than 5 persons also has the right to nominate candidates for membership in the local self-government representative body. Article 119 should apply and the provisions in Articles 127⁶ and 127⁷ should be avoided.

28. The draft Article 127^{7.5} (submission of party lists for Tbilisi *Sakrebulo*) prescribes that the party list shall also contain (besides other information on each of the nominated candidates) information on profession, occupation (position) and working place (if unemployed, the word “unemployed” shall be inscribed). This information, in our view, is without any importance for the candidacy and should be avoided. We are aware that some of information has already been prescribed by Article 119.4, and this seems sufficient.

29. "The fact of permanent residence in Georgia during 5 years"¹³ is not consistent with the new legislation trends of European states. Particularly bearing in mind that in these same European states even foreign citizens can participate in local Elections, provided that they have permanent residency on the territory of the state.¹⁴

30. Finally, it is also recommended for the legislator to try to attain gender balance by introducing Articles which ensure an adequate representation of female candidates on the ballot.¹⁵

8. Ballot papers and majoritarian election results

31. Bearing in mind that Article 51 (ballots and special envelopes), and Article 122 of the Election Code fully cover the issue of ballots, we believe that the proposed Article 127⁹ (ballot papers) is redundant. Also, the proposed Article 127¹⁰ (determining the majoritarian election results in local electoral districts) is, in our opinion, a repetition of Article 125 and should be avoided.

9. Conclusions

32. The Venice Commission, in its previous opinions (CDL-AD(2002)009, CDL-EL(2003)005 and CDL-AD(2004)005), already recognised that the Election Code of Georgia is a very extensive and comprehensive law. Some of the proposed draft amendments might improve the existing articles, some however seem superfluous. The draft amendments may be therefore considered as offering some improvements to the Election Code.

33. By deleting Articles 109.2, 111.2, 112.3, 115.5 and 118.5, and introducing a new chapter XVII, Election to *Sakrebulo* of the Capital of Georgia – Tbilisi, the same problems which were raised by the Venice Commission still remain open. Also, the proposed amendments do not solve the legislative gap, already recognised by the Decision N1/2/213,243 of the Constitutional Court of Georgia, dated February 2005.

34. Since the draft amendments will introduce a new electoral system on Election of *Sakrebulo* of the Capital of Georgia – Tbilisi (instead of a proportional electoral system which was prescribed by Article 109.2) further clarification could be given. This combined electoral system needs to be clearly defined.

35. Restrictions for candidacy of those who have not been residents of Tbilisi for a period of 5 years should be avoided. It is broadly recognized that electoral rights are the basis of democratic legitimacy and the representativeness of the political process. It is then interesting to question whether legal residents on the territory of the state where they are obliged to pay their local taxes should have the right to vote and to stand as candidates in local elections.

¹³Draft amendments, Article 127⁷.7. Although it is not clear from the draft amendments whether this means the last 5 years or not.

¹⁴In this context by Resolution 1459(2005), adopted on 24 June 2005 (24th sitting), the Parliamentary Assembly of the Council of Europe urges the countries concerned to implement the recommendations by the Council of Europe Commissioner for Human Rights on granting that right also to residents with the special status of "non-citizens" in accordance with the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144). See also Recommendation 1714(2005), adopted by the Parliamentary Assembly of the Council of Europe on 24 June 2005 (24th sitting).

¹⁵Parliamentary Assembly Recommendation 1676(2004) on women's participation in Election.

36. The period for the announcement of the final results and the effective system of appeals should be precisely stipulated and further developed by the proposed draft amendments. The appellate procedure and, in particular, the powers and responsibilities of various bodies, should be clearly regulated by law, so as to avoid conflicts of jurisdiction (both positive or negative).¹⁶

¹⁶*Code of Good Practice in Electoral Matters, II.3.3, c.*