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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

EXPLANATORY REPORT
ON THE DRAFT LAW AMENDING THE ELECTION CODE
OF GEORGIA*

*Draft Law amending the Election Code of Georgia, CDL-EL(2007)033

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The amendments to the Election Code were prepared considering the recommendation of the OSCE and Venice Commission, remarks expressed on the meetings held by the Council of Europe during the year 2007 and certain gaps discovered by the analysis of the Code.

Below the all changes suggested by the draft law will be discussed thematically.

1. The issue of void bulletins

The recommendations of the OSCE and the Venice Commission, among others, referred to the issue of calculating the void bulletins and determining the number of voters participating in the election¹. By experts' opinion the void bulletins should not be considered in the number of participating voters and, consequently, the ratio of received votes to participating voters should be defined without considering the number of void bulletins (votes). The same recommendation² referred the cases of the invalidation of results of separate precincts. In the suggested draft law the corresponding amendments are contained (Amendments N1, 38, 39, 40).

2. Terms of revision of number of voters and determining electoral precincts

The acting Code links the issue of revision of number of voters and determining of boundaries of electoral precincts to the date of announcement of the election. By the proposed changes the revision of number of voters and appropriate lists of voters and creation of electoral precincts shall be done rather earlier before the election date. Namely, the revision of the number of voters and lists shall be done before the March of the year of each consecutive elections, while the creation of precincts – before the June. So to make available the information on the above-mentioned issues for a long time and to make possible for political parties and citizens to revise the voters lists (Amendments N2, 5).

3. Voting right of military soldiers

The provisions of the acting code on voting right of military soldiers are unclear. The proposed changes define that soldiers have the right to vote as in the elections conducted by proportional election system, as well as in that of conducted by majoritarian system (Amendment N3).

4. Voters cards

¹ As refers to the award of the parliament member mandates, the article 105.6 defines that Candidates lists need to receive more than 7 percent of "the votes of the voters" to qualify for the allocation of parliamentary proportional mandates, but the Election Code does not specify how the value of the threshold is calculated. **It is recommended** that the Election Code specifies the manner by which this number is calculated, and that only valid votes are taken into consideration for this purpose This is necessary to determine what legal difference is between the number of signatures in the voters list and numbers of bulletins not used, bulletins annulled. It is recommended to consider only valid votes, as only those can reflect real political will (VC/ODIHR Legal Opinion).

² When invalidation of results occurs, the number of voters (participants) as well as the number of votes should be subtracted from the final results in all relevant protocols, unless polling is repeated. This is necessary since invalidating polling station results can affect a party near the representation threshold. Thus, **it is recommended** that if PEC or DEC results are annulled and polling is not repeated, the number of both voters (participants) and votes be subtracted from the final results in all relevant protocols. The terms "invalidated" (annulled) voting results and "invalid" ballots might be confused when protocols are completed. **It is recommended** that the Election Code be thoroughly checked and, if necessary, amended to ensure that the correct terminology is used in the original Georgian text when addressing issues related to "invalid votes" and "invalidated votes" (annulled election results) (VC/ODIHR Legal Opinion).

By the current Code: no later than 2 days prior to election day, the Precinct Election Commission is obliged to provide to all the voters registered on the territory of the election precinct and included in the voters' lists, a voting invitation card, in which the date and time of the poll and address of the polling place shall be included. We think that this procedure shall not be necessary any more if long time before the elections the commission revises the lists of voters and these lists are accessible for every citizen. As for the date and place of the poll, the relevant election commission still has this obligation to make this information public by all possible means (Amendments N4, 23).

5. Maximum number of voters in an electoral precinct

Another recommendation of OSCE and Venice Commission was about number of voters in election precinct³. By acting provisions number of voters in a precinct shall not be exceed 2000 persons. By experts' opinion this number is too high and they consider reduction of this number. This recommendation was fully considered and maximum number of voters in an electoral precinct was reduced to 1500, as experts of OSCE and Venice Commission recommended it (Amendment N6-a).

6. The issue of precincts abroad

By the article 16 of the Election Code, CEC establishes the precincts abroad and these precincts are assigned to the electoral district No.1. By proposed amendment this provision will be changed and abroad precincts shall not be assigned to any of election districts. The district commission functions in relation to these precincts shall be conducted by CEC. Also this amendment fully corresponds to the relevant recommendation of OSCE and Venice Commission⁴ (Amendment N6-b).

7. Status of Election Administration

By the opinion of foreign experts, the status of election administration could cause different opinions⁵. By acting provisions, the election administration is an entity of public law. Some experts consider this status incompatible to those functions that are defined for the election administration. Further, there were questions whether such a status is compatible with the guarantees of independence of the members of the commission. Taking into account all mentioned above, the provision is being changed so that the election administration shall be an independent administrative organ (Amendment N7).

8. Abolition of SEC

³ The law on the number of voters per polling station be re-examined and consideration be given to fixing a threshold of 1500 voters per polling station (CoE/VC). Article 16.2 provides that a polling station may have up to 2,000 voters. During the 2006 municipal elections, observers noted that in a number of polling stations the number of voters exceeded 2,000. This number is high and places an administrative burden on the PEC. **It is recommended** that the number of voters allocated to a polling station be decreased to a more manageable number, such as between 1,000 and 1,500 (ODIHR/VC Joint Opinion).

⁴ Article 16 is not clear as to how voters from outside of Georgia are attributed to parliamentary constituencies. Article 16.6 states "the Central Election Commission decides the issue of attributing these precincts to election districts. These electoral precincts shall be assigned to Electoral District No. 01." This could be interpreted to mean that all voters from outside Georgia are attributed to Electoral District No. 1 only, which could result in violation of the principle of equal suffrage. This provision also undermines the concept of linkage between voters and the elected parliamentarian as there is no linkage but an arbitrary assignment of these voters to Electoral District No. 1. **It is recommended** that this text in Article 16 be clarified (VC/ODIHR Legal Opinion).

⁵ Article 17.1 states that "the election administration of Georgia is a legal entity of public law". This text could be interpreted to mean that accountability is based on the "collective" conduct of the election administration, as opposed to individual acts of commissioners. **It is recommended** that it be verified that this text does not affect the right to maintain legal actions by or against individual commissions or commissioners.

By proposed amendments the Supreme Election Commissions of the autonomous republics shall be abolished, because we consider that unique election administration should be responsible for organisation of elections of any level. Therefore it is not reasonable to have intermediate entity solely for organisation of elections of supreme councils of autonomous republics (Amendments N7, 15, 20).

9. Scopes of authority of the member of precinct election commission

Article 21 of the Election Code prescribes the grounds for termination of the membership of the commission. Pursuant to the subparagraph „h“ of the section 1 of this article, the term of the member of precinct commission shall be terminated if the party, which appointed an election commission member, is banned or liquidated. By the recommendation of OSCE and Venice Commission⁶ such a restriction was contrary to the principle of independence of the member of precinct commission and therefore it was considered appropriate to abolish this rule. So the sub-paragraph “h” of the section 1 of the article 21 will be deleted by proposed amendments (Amendment N9).

10. Election of the chairperson of CEC

In spring 2007 the consultations on the Election Code was held by the participation of political unions having seats in the parliament and those not having them. The consultations were organised by the Council of Europe and OSCE. Some proposals raised during these consultations were also considered in the draft law. One of these proposals refers to the procedure of election of the CEC chairperson. By the acting provision the competition commission selects the candidates for CEC chairperson and submits it to the President of Georgia. The President of Georgia selects a single candidate and submits to the Parliament for approval. The opinion expressed at the meetings considered the election of the CEC chairperson by and among CEC members. This opinion was fully shared and relevant provisions are being introduced by the draft law (Amendments N9, 10, 11, 12, 13).

11. Competition commission for the selection of CEC members

One of the recommendations of the OSCE and Venice Commission⁷ referred the competition commission, which selects the candidates for CEC members and submits them

⁶ Article 21.1.h provides that the authority of a commission member terminates if the party, which appointed the member, is “banned or liquidated”. The rationale for this provision is not clear and contradicts the principle stated in Article 19.3 according to which: “A member of the election commission is not a representative of his/her appointing/electing subject. In his/her activities such person shall be independent and subordinate only to the Constitution of Georgia and the Law. Any influence on the election commission member or interference with his/her activities is prohibited and punishable by law.” **It is recommended** that Article 21.1.h be deleted from the law (ODIHR/VC Joint Opinion).

⁷ A ‘Competition Commission’ is set up in order to process applications for CEC membership. The appointing process for the ‘Competition Commission’ is unclear and should be specified in Article 27.3. This article provides no guidance as it merely states that a ‘Competition Commission’ for the CEC chairperson and members shall be formed. While Article 27.3 provides that the ‘Competition Commission’ is founded upon an order of the President of Georgia, it is not clear how and according to which criteria the members are chosen and appointed. This important commission controls the gateway for CEC membership, as it is this commission that decides on the short list (at least two but no more than three names) for the President of Georgia to choose from for subsequent submission to Parliament. Arguably, the ‘Competition Commission’ has the greatest influence in the nomination process as it can limit the pool of nominees for the entire CEC to sixteen names, all of which could be from the same political force. Thus, the appointing process for the ‘Competition Commission’ is of sufficient importance to require that it be stated in the Election Code. **It is recommended** that the Election Code be amended to state the process for appointing the ‘Competition Commission’ and that this process be politically inclusive and transparent (ODIHR/VC Joint Opinion).

to the President of Georgia. The authors of the recommendation considered that this commission has a big influence on the process of completion of CEC and therefore requested to establish and make precise the provisions on the procedure of selection of the members of the competition commission to make these processes more transparent. This recommendation was fully considered. By proposed draft law the competition commission shall have a member from each parliamentary fraction, while the number of representatives of the fractions shall not be more than the half of the number of the members of the commission. Not later than 7 days from the announcement of the competition, the fractions shall submit their candidates for the competition commission to the President of Georgia. The President of Georgia shall elect the other members of the commission. The commission is established by the ordinance of the President of Georgia (Amendment N11-b).

12. Scopes of authority of the CEC chairperson

Some provisions on the authorities of the CEC and CEC chairperson caused the caution of the European experts⁸. Namely the fact that authority to register the election subject has the chairperson of CEC. By the proposed amendments, this authority will be transferred to CEC (Amendments N14, 16, 17, 31).

13. Number of the precinct election commission members

By the opinion of the foreign experts, the issue of the number of precinct election commission members needed significant revision⁹. Until 2005 number of precinct commission members was 15, further, by the amendments to the Election Code, this number was reduced to 9. According to the recommendation of the OSCE and Venice Commission, this number had to be increased to be adequate to the procedures that shall be conducted on the electoral precinct pursuant to the Code. Also this recommendation is fully considered by the draft amendments and each appointing subject can appoint one more representative to the commission. Subsequently, by the proposed draft law, precinct election commission consists of 13 members, where district election commission appoints 4 of them and each of the first three political unions having best results in the previous elections appoint 3 members (Amendments N18, 26).

14. Checking lists of supporters

According to the Election Code an election subject shall collect signatures of supporters in order to be registered and submits them to the Central Election Commission (signatures of supporters of a political party) or to the District Election Commission (signatures of supporters of majoritarian candidates). The relevant Commission shall check the authenticity signatures and in case of violation has a right to dismiss the application for registration of the candidate or the political party. The current norms do not envisage possibility to give time to election subjects in order to fill gaps and also the commission was obliged to refuse registration if gaps were founds even if number of real signatures corresponded to the norm established by the law. By the presented amendments the strict

⁸ The concern is also due to the fact that the Election Code empowers election commission chairpersons to issue ordinances on the same level as the commission. See Articles 25, 29, 34, and 37 (ODIHR/VC Joint Opinion).

⁹ The rationale for the reduction of PEC members from fifteen to nine is unclear, especially since voting procedures are not simple and the number of voters per polling station is high. **It is recommended** that the relationship between the number of PEC members, the number of voters and the number of steps to be performed in polling stations is improved. In addition, the reduction of the number of PEC members from fifteen to nine, limits inclusiveness at this stage of the electoral process. The amendment introducing "reserve" members appointed by political parties appointing "regular" members does not fully address these concerns (ODIHR/VC Joint Opinion).

mechanism of refusing registration is abolished and the election commission will have a possibility to give time to the election subject to fill the gap and consequently, if the gap is filled according to the established procedure and number of real signatures corresponds to the requirement set by the law the election subject will be registered by the Commission (Amendment N19).

15. The issue of obligation to set up an election campaign fund

Norms related to obligation to set up an election campaign fund were specified based on recommendations¹⁰ of the OSCE and the Venice Commission experts and in the relevant article it was exhaustively defined who does not have an obligation to set up an election campaign fund.

16. The issue of responsibility for violating election campaign fund management rules

By the proposed amendments mechanism regarding responsibility for violating requirements for election campaign fund was specified. The aforementioned norms were specified based on recommendations¹¹ of the OSCE and the Venice Commission. In the proposed amendments sanctions should not be applied without prior warning, strict sanctions should also not be used if the violation is not substantial and would not affect the election outcome. In cases when the violation is substantial the Election Commission should apply to the Court and present relevant documents proving fact of violation and its results (Amendment N22).

17. Making Summary Protocols of Voting and Record Book in Foreign Language for Special Cases

The OSCE and the Venice Commission have positively evaluated those amendments according to which voting ballots may be printed in language different from the state one in

¹⁰ Articles 46 through 48 regulate campaign contributions and election campaign funds. These articles are positive steps for transparency and accountability in elections. Article 47 requires the submission of reports on campaign funds to relevant election commissions. As amended on 16 December 2005, Articles 46 and 48 bring additional regulation. Only candidates running for membership "of local self government of a community or village – *sakrebulo*" (Article 46.2) are now exempted from the obligation to set up a campaign fund. Previously, majoritarian candidates for Parliament were also exempted (VC/ODIHR Legal Opinion). It should be more clearly specified the legislative requirement, which obliges election subjects of all categories to set up election campaign funds (ODIHR).

¹¹ *Sanctions for violating provisions regulating election campaign funds.* Sanctions related to violations of campaign finance regulations seem disproportionate, and potentially problematic. In particular Article 48.8 as amended on 16 December 2005: "Election subjects who receive the necessary number of votes determined by this Law and do not submit an election campaign fund report within the established deadline, or in violation of the requirements of paragraphs 2, 3, 4, 5 and 7 of Article 46 of this Law, paragraphs 4 and 5 of Article 47, paragraphs 4, 5 and 6 of this Article, is proven, the relevant district/municipal court considers and decides the issue of the consolidation of the results of the elections without taking into account the votes received by these election subjects." Such sanction, amounting to cancelling the votes received by a contestant when consolidating the results, on the mere basis of a late delivery of campaign accounts, is disproportionate and could easily be abused in order to "cancel" an electoral subject once the results are known. It is also not clear how courts, which are normally not in charge of consolidating results, would handle such cases. The code does not seem to indicate that the contestant, whose votes are cancelled, would benefit from the same type of protection as he/she would in a fully fledged court process. Finally, the code does not specify whether courts could act on their own motion, or whether election commissions would have to submit cases to them. **It is recommended** that the provisions of Article 48.8 are reviewed to address the above-mentioned concerns (VC/ODIHR Legal Opinion)

Those sanctions for violating provisions regulating election campaign financing, which provide for invalidation of votes received by the relevant subject during summing up the votes are of disproportional character and do not provide with guarantees for fair trial. Moreover, once voting is done through putting a ballot in a ballot box the given vote can not be invalidated, except the cases when the voting was done multiple times and this is proved by the Court. **It is recommended** to review this provision (VC/ODIHR Legal Opinion).

those election precincts where a big part of population does not speak state language. At the same time experts have raised an issue to have the similar approach for the rules regarding making Summary Protocols and Record Book¹² (Amendments N24-25).

18. The issues related to voting by means of mobile ballot box

By the proposed draft issues related to voting by means of mobile ballot box are amended. Particularly, if according to the current version of the law during voting by means of mobile ballot box only 1 member of the commission and observers take part, in the presented draft in this procedure 2 members of the commission should participate and those members should not be appointed by the same nominating subject. This amendment fully reflects recommendation¹³ of the OSCE and the Venice Commission.

19. The issue related to participation of international observers

According to article 69 observer organizations shall indicate election district and precinct and also concrete persons who will be presented as observers in the given district or precinct. Based on the recommendations¹⁴ of the OSCE and the Venice Commission the abovementioned norm was simplified for representatives of international observer organizations and their possibility to observe will be unlimited. Consequently, they will have a right to make observations in any district and precinct without a preliminary registration (Amendment N28).

20. The issues related to pre-election agitation

Issues on pre-election agitation are specified in several ways. Technical gaps were filled. It will also be established that agitation in military forces is prohibited. Moreover, according to the recommendation¹⁵ of the OSCE experts' requirement which is related to the so called "silence period" was specified. By the proposed draft only TV advertising shall be prohibited during the day of elections. (Amendment N29)

¹² Article 51 obliges the CEC to print ballots in languages other than Georgian where necessary for local populations. This meets a prior recommendation. Similarly, Article 129³ provides for printing of voters' lists in minority languages. This is a positive amendment. The Parliament should also consider, as it enacts legislation, to facilitate the participation of all societal groups in elections, by introducing a requirement that **other election materials, such as PEC manuals, the Election Code, and protocol forms are also printed in minority languages (VC/ODIHR Legal Opinion).**

¹³ Article 56 regulates mobile voting. Article 56 should contain some additional safeguards to minimise the possibilities for fraud during the use of the mobile ballot box. Of particular concern is the fact that following 2006 amendments, Article 56 now provides that mobile voting is administered by only one member of the PEC. **It is recommended** that consideration be given to amending Article 56 to include the following safeguards: (1) there should be two members of the PEC for administering mobile voting and they should not have been appointed to the PEC by the same appointing authority, and (2) Article 56 should expressly state that all procedures for identifying a voter, issuing a ballot, marking a ballot, and for observation and transparency are applicable to the mobile voting procedure. The Parliament has improved Article 56 by amending the deadline for submission of requests for mobile voting, as previously recommended by the Venice Commission and the OSCE/ODIHR, from 18 hours to two days before election day. The two recommendations above would be consistent with the Parliament's efforts to improve Article 56.

¹⁴ Article 69.9.c contains a requirement for observers to indicate in the accreditation application the name and the number of the election district and precinct (1) where the observation will be conducted. While in practice during the 2006 municipal elections it was possible to register for observation on the territory of the entire country, this provision could be applied in a restrictive manner and might hinder efficient observation. This provision should be deleted (VC/ODIHR Legal Opinion). Protection of observation principles shall be ensured and legislation should be amended in this regard so that **international observer organizations would not be required to indicate those election districts where they carry out observation (CoE/VC).**

¹⁵ Prohibition of election campaign ("silence period"). Norms of the code that concern prohibition of election campaign ("silence period") should be specified more clearly in order to establish its duration and the activities that are prohibited during such period (ODIHR).

21. The issue of restrictions established for publishing media

The Election Code used to envisage certain obligations for newspapers regarding allocation of newspaper space for election campaign (article 73.14). Such obligations are abolished by the proposed amendments for all publishing media sources except those newspapers that are funded by the state or local budget (Amendment N29).

22. The issue related to notion of qualified election subjects

According to the Article 73¹ of the Election Code only qualified subjects of election have a right to receive election advertising time for free. This article also envisages that a qualified election subject can be a political party which according to the public opinion polls has gained not less than 4 % of the votes of voters in not less than 5 public opinion polls held on the election year. By the proposed draft the aforementioned norm is amended and in order to get a status of a qualified subject it is enough to consider results of only 2 polls (Amendment N30).

23. The issue of Media Monitoring

The Election Code did not envisage any obligation to carry out monitoring on mass media whether they abide to the requirements set by the law. The recommendation¹⁶ of OSCE experts dealt with necessity of creation of such legal mechanism. Consequently, by the proposed amendments it was put as an obligation on the Central Election Commission to carry out control over media whether they follow the norms established by the Election Code and to analyze application and operation of the relevant norms (Amendment N30).

24. The issue of court fees

According to the opinion¹⁷ of OSCE experts the court fees for citizens in order to file an appeal with a court on inclusion of a voter in an election list was too high. Consequently, by the presented draft an obligation to pay a court fee for a citizen in such cases was abolished (Amendment N33).

25. The issue of defining a sequential number

Regarding defining of a sequential number of an election subject there were two different procedures envisaged by the Election Code. According to one procedure the sequence had to be awarded to a party according to the position which that party occupied in the last Parliamentary elections. And the second procedure envisaged that a political party had a right to keep the same sequential number which it had during the last elections. By the proposed amendments the norms were specified and the procedure for defining a sequential number was written in detail. These amendments ensure uniform interpretation in this regard (Amendment N37).

¹⁶ Carrying out media monitoring by the Central Elections Commission. CEC shall consider a possibility to carry out its own monitoring of media during elections in order to identify facts of non-equal or preferential coverage or to identify violations of requirements regarding granting free of charge or not free broadcast time/place (ODIHR). CEC should ensure implementation of and supervision over those requirements of the Election Code, which put an obligation on media to present information on their activities related to elections, which should also include information on granting free of charge or not free broadcast time/place, schedule and fees for broadcasting/publishing campaign materials. It should also be envisaged a possibility to put such information up on the web-page of CEC (ODIHR).

¹⁷ **Fee for filing an appeal with a court.** Fee for filing an appeal with a court regarding including voters in the list shall be considerably reduced or completely taken out from the law. It is desirable to envisage increasing term for inclusion of a voter in an election list based on a court decision (ODIHR).

26. The issues related to inclusion of candidates nominated by the majoritarian procedure in party list

The norm of the Election Code, which was regulating the issue of inclusion of a candidate nominated by the majoritarian procedure in a party list, could have been interpreted in different ways. The aforementioned norm could be interpreted so that it was necessary for a majoritarian candidate to be included in the party list, which, of course, is not logical. Consequently, those norms were specified and explained so that it is not necessary to include a candidate nominated by the majoritarian procedure in a party list and these issues shall be decided by the relevant political party based on their own views (Amendment N36).

27. Amendments of technical nature that were made in 2007

Certain issues were specified by the amendments to the Constitution adopted in 2007 which concern terms and dates for holding parliamentary and presidential elections. Consequently, an issue was raised on necessity to harmonize the Election Code norms with the Constitution. The proposed amendments to the election code specify those norms that are related to the date of parliamentary and presidential elections. Technical gaps, which appeared since the upper limit for electoral activity was eliminated, were also filled (Amendments N34-35).