



## **Comments on Amendments to Election Legislation**

On September 19, 2011, the draft of the new Election Code was introduced to the Parliament of Georgia. The document includes a vast number of amendments, however, the primary changes are linked to the agreement made between the political parties, with particular focus on political parties' funding. In general the draft does not introduce substantial changes for improving the election environment. Rather, in some cases, proposed articles of the new Code even worsen the situation, or unspecified norms complicate understanding of various laws' formulation.

The process of draft preparation should be addressed separately. Notwithstanding high public interest towards the issue and some NGOs' active involvement in the process, the proposed version of the draft has been created secretly, with no transparency and interaction; this compels a negative assessment of the drafting process.

In the submitted document we will briefly evaluate all major issues linked to development of election legislation in Georgia. Afterwards we propose to the Parliament a more detailed and comprehensive version.

### ***Transparency and Monitoring of Elections***

- The draft of the Code does not allow persons entitled to be inside the polling premises to carry out photo and video recording according to the requirements of law;
- The draft does not say anything about video surveillance, meaning that such facilities will no longer be installed in electoral commissions;
- No marking procedure will be employed, nor has any other alternative means for implementing control been proposed so far.

It is true that neither marking procedures nor video surveillance have been effective in practice; nevertheless, it was necessary to improve the past defective practice or in case of marking procedures, replace them with more efficient procedures. Video surveillance records should have been of the utmost importance in the process of examining election disputes, yet they were never used in practice. We believe that the proposed Code should include ways to to apply these monitoring tools more effectively instead of abolishing them completely.

As for the right of persons entitled to be inside the polling premises to carry out photo and video recording, we believe that it is of a vital importance to return this norm to the Code.

### *Voter lists*

According to the draft amendments to the current election code of Georgia, a commission created on the basis of presidential order, comprised of representatives of NGOs, opposition parties and government representatives, shall be in charge of forming voter lists. We believe that it is absolutely incorrect to impose such an obligation on NGOs or even on representatives of political parties. A specific state agency, in particular, the Civil Registry Agency, which has the relevant resources and experience, should take responsibility for the formation of voter lists, while the commission should possess effective means to monitor the lists. Especially in recent years, the Civil Registry is considered to be one of the most effective state agencies and occupies the leading role in submitting voters' information to the Central Election Commission.

It is incorrect to lay responsibility on fidelity and accuracy of voter lists on the commission when there are specially authorized state agencies with adequate human resources and more experience. Moreover, the mandate and rule of operation of the commission has not been completely defined yet and there is a high probability that its work will be ineffective. We believe that the commission should be limited to a monitoring function and should possess special access to all necessary information, while the Civil Registry should be in charge of developing and maintaining voter lists.

The new draft introduces an amendment on including a voter from a mobile ballot box list. "The number of voters entered in the mobile ballot list shall not exceed 3% of total number of voters in the election precinct." If the number of voters in such a list exceeds 3 percent, or when there are less than 2 days remaining before the election, a decision must be made by a court. It should be noted that when including a voter in the mobile ballot box list, the commission does not examine any factual circumstances or verify whether health conditions or incapacity in fact prevent a given individual from arriving at the polling station, etc. Under such circumstances, fixing the 3% threshold is completely unreasonable. Court procedure will be completely ineffective in the case when less than 2 days are remaining before the election date. When there are less than 2 days remaining before voting, it is impossible to apply to a court and carry out the rather lengthy court procedures.

### *Election system*

The issue of increasing the number of Members of Parliament up to 190 MPs (83 MPs elected through a majoritarian system and 107 MPs elected on the basis of a proportional system), introduced by the draft needs to be regulated on a legislative level. It can be implemented only after a referendum, since according to Paragraph 4, Article 28 of the Organic Law of Georgia on Referendums "only a referendum can invalidate or alter the decision adopted as a result of a referendum." Otherwise, any introduced amendment to the Constitution will be treated as violation of the Organic Law of Georgia.

Besides, the proposal does not address the problem related to the ratio of votes received by political parties at the elections to the number of acquired seats in the Parliament; neither does it safeguard the equality principle of the value for each elector's vote according to administrative precincts. Pursuant to international standards, the maximum deviation in the number of electors among election districts shall not exceed 15-20%.

The proposed draft does not envisage direct election of mayors in self-governing cities. We regret that the president's promise made in UN in 2009 on direct election of mayors was left out from the draft.

### ***Administrative Resources***

- According to the draft, the scope of state officials entitled to participate in pre-election campaigning without limitation is broadened. In particular, the position of State Envoy - Governor was added to the list.
- The draft does not include a definition of the term “agitation”, which makes the process of carrying out pre-election campaign more vague.

We evaluate the mentioned amendment negatively, since instead of decreasing the number of persons who are entitled to participate in pre-election campaigning without limitation, their number has increased, which comes into conflict with all recommendations made by local or international organizations with a view to improving the election environment.

Major problems still need to be addressed with regard to application of administrative resources.

- There is no limit between political party activities and implementation of administrative functions during the pre-election campaign;
- The scope of persons who are absolutely prohibited to participate in pre-election campaigning should be broadened. Specifically, Deputy Minister; State Envoy - Governor and his Deputy; Head of Municipality, Mayor of self-governing city (except Tbilisi Mayor) and his Deputy; Heads of the territorial units of Gangeoba/Mayor’s office - Rtsmunebuli; Head of the Chamber of Control; Public Defender of Georgia should be added to this list;
- The use of all kinds of administrative resources should be limited during pre-election campaigning, except state premises.
- Election subjects and all other persons who take part in pre-election agitation (including political officials) shall be prohibited to use state funded events for carrying out pre-election campaigning. (Including agitation during such events, distribution of goods procured from the state or local budget with their participation).

### ***Election Funding***

- The draft introduces a new norm, according to which the Election Administration is entitled to implement state procurement in a simplified manner during the election/referendum period with a view to conducting elections in an organized way. Furthermore, during the pre-election/election period any appeal of the CEC or tender commission’s actions/decisions does not cause suspension of the procurement procedures.

We believe that this rule can only be justified in the exceptional case, during conduct of an extraordinary election, when the election administration is restricted in time. However, the issue does not require additional regulation, since the law on procurement already includes implementation of procurement by a simplified method in such cases. We view the proposed amendment as unacceptable.

- The draft mandates doubling the limits of contributions to the election campaign funds, set up by law. Namely, the right to receive contribution from a natural person, is set to a maximum of GEL 60,000. The maximum contribution limit from legal entities is raised to GEL 200,000.

It is unclear what caused the doubling of these limits. Limits on contributions are introduced for preventing political corruption, and we should be careful in granting freedom to legal entities and parties by raising these limits. The existing thresholds are high enough and in respect to high contributions Georgia is one of the leaders.

- According to draft, the parties which exceed a 5% election threshold will receive compensation of GEL 1,000,000.00 from the state budget for covering pre-election campaign expenses.

We believe that compensation should not be set as a lump sum and it should correspond to the sums spent by each political party, and that they be compensated in accordance to submitted financial reports.

- According to the draft, representatives of election subjects in district and precinct election commissions will be financed from the state budget, GEL 50 for each precinct election commission and GEL 100 for each district election commission.

It is possible not to have any representatives in election commissions. So it is strange that money should be wired to political parties without taking into consideration this factual situation. Furthermore, there is no payback obligation in case the transferred funds are not spent completely.

- According to the draft, donation is allowed for legal enterprises where the state share is less than 50%.

According to the applicable Code, a for-profit legal entity, of which the government holds shares, was prohibited from making any contributions to the election campaign fund of any election subject. If for-profit legal entities, where the state holds shares, are allowed to make contributions to political parties, the risk of using state funds for political purposes increases considerably. We believe that this article should not be included in the Code and any entity with a state-held share should be prohibited from making contributions.

In terms of party financing, the draft leaves out a number of issues that were repeatedly stated in recommendations of local NGOs and international organizations (GRECO, OSCE/ODIHR, CoE). In particular:

- Establishment of an independent controlling body obliged to inspect the legality of political parties' funding regularly (annually) as well as during election campaigns, to work out more developed procedures for financial reporting, and to make relevant information available to the public;
- Transparency of funds transferred by the party to the election campaign fund of the proposed election subject;
- Frequency of publishing financial reports: the report of each election campaign fund shall be issued not only after elections, but also prior to the polling day.
- Contributions from legal entities that were winners of state tenders – it is desirable to ban contributions from the enterprises that won state procurement contracts during the election year or the previous year and to prohibit participation in state procurement during the election year and the following year for the enterprises that fund political parties at the elections.
- It should be strictly defined that the limit of contributions comprises the total of each parties' account and the amount that was transferred by it to the account of all submitted election subjects.

### ***Election Administration***

- The draft Election Code decreased transparency of procedures for selection and appointment of the CEC Chairperson and members; namely, information about the identities of candidates and their experience are no longer required as mandatory documents for submission. We believe this harmful, because the noted information should be accessible to public, including information (a) about all candidates that nominate themselves to the president's administration (e.g. their list and biographies should be posted on the website of the president's administration),

(b) members of the commission who are conducting the selection process of the candidates, as commissioned by the president and (c) the specific criteria that serve as the basis for the competitive selection of candidates by the commission members.

- The draft reduces the quorum necessary for the Election Commission to make certain decisions. We disapprove of this proposal, as we believe that in order to ensure high public confidence in the election administration and the decisions made by it, important decisions such as staffing of commissions, adoption of voting summary protocols, making decisions during review of complaints, etc. should be made with 2/3 of the Commission's membership.
- Under the draft code a chairperson of a Precinct Electoral Commission will no longer have the authority to expel an offender from the premises of the electoral precinct, if the offender is a party proxy. According to the existing legislation, the chairperson has the right to make a one-sided decision on expulsion. According to draft, if the offender is a representative of a political party, the decision on his/her expulsion will be made by the corresponding Election Commission, as a collegial entity. We also believe that the collegial rule of making the decision should also apply expulsion of observers and media representative in addition to party proxies.

### *Election disputes*

- The draft law offers an alternative mechanism for appealing when a dispute involves violations committed during the procedures for vote counting and tabulation. A claim or appeal regarding violations during the procedure of counting votes and the conclusion of the election results, rechecking of the election results or concerning the request to nullify them shall be handed over to the higher district election commission by the precinct election commission within 2 calendar days of the election day. The Claimant/appellant may himself submit the claim/appeal to the district election commission within the same deadline, or appeal in the relevant region/city court within 4 calendar days from the election day, which will then review the appeal according to the rule prescribed by this law.  
We believe that the applicable provision is unclear. It does not specify the point of reference for calculating the period for appealing. Considering that the draft no longer provides a definition for the Voting Day, we support current edition of the Code and believe that when submitting an appeal in a higher DEC, the period should be calculated by indicating a specific time.
- The draft Election Code offers a new formulation of certain rules and terms for appealing against electoral violations. The amendment affects terms and conditions for appealing against the decision of PEC only by offering the alternative to apply to a higher commission or court only when PEC's decision is appealed. Such partial and unsystematic change further complicates the existing election norms and promotes double standards and regulations, which should not be allowed. The alternative for appealing should be available in cases that involve DEC decisions as well.
- The proposed draft increases the existing term for appealing against the decision made by a DEC upon a decision of a PEC in only one case, namely, 2 calendar days will be increased up to 3 calendar days. It is noteworthy that most of the terms in the existing Code remain intact, namely 12 out of 20.
- In two cases the existing terms are decreased, which should be viewed as a negative development. Such negative amendments will also affect cases when district/city courts and courts of appeal

examine a decision delivered by DEC upon a decision made by PEC, and relevant complaint. The existing legislation provides for 2 calendar days for reviewing a complaint, while the draft proposes decrease of the term to a single calendar day, which is unreasonable. It is highly likely that due to the one-day term courts will refuse to grant motions to solicit video material or other information from the CEC, examine the noted evidence, etc.

- We also disapprove of the fact that the draft Code increases terms for submission of applications/complaints in election commissions and courts during the electoral period.
- Collision parts of the proposed draft that deal with electoral disputes and circle of applicants should be reviewed. Para. 19 should be removed from Article 78.

*Additionally, the following issues remain problematic:*

- **Simplification of norms regulating procedures for appealing** – ambiguity and equivocal nature of norms for appealing allow for different interpretation of the Election Code by election commissions and courts, as well as applicants;
- **Terms for reviewing appeals by election commissions** – we believe that terms for reviewing appeals/complaints both in election commissions and courts are short and insufficient for effective review and settlement of a dispute;
- **Calculation of periods for appealing** – in consideration of the short periods prescribed for reviewing election disputes, starting calculation of the period for appealing at the time the decision was made instead of the time when substantiated decision was submitted to the party involved will be a negative development. Periods for appealing should be calculated starting from the time the substantiated decision was submitted to the party but no later than 12 p.m. the day after the decision was adopted/delivered.
- **Dropping a boundary between the authorities of entities that review complaints** – in certain cases the existing Election Code allows for submission of complaints to several agencies at the same time. The new Code should clearly define the single entity where corresponding complaint must be submitted in every individual case.
- **State fee** – due to the nature of legal relations involving electoral issues, state fee is one of the obstacles faced by voters, election subjects and monitoring organizations. The state fee for election disputes should be abolished, which will increase access to justice.
- **Deficiencies in systematizations of sanctions** – administrative liability measures for electoral offences are unsystematically covered by the election legislation. Some of the sanctions are laid out by the Code of Administrative Offences, the rest are contained by the Election Code itself. Therefore, we believe that all measures of administrative liability related to electoral violations should be accumulated in the Election Code.
- **Precincts created in exceptional cases** – The Election Code should provide strictly defined criteria for cases when special election precincts can or cannot be created, when the number of voters in a military unit or in a medical facility exceeds 50, in order to prevent manipulation with the decision whether to create or not to create the precinct.
- **Election precincts created in military units** - The Election Code should clearly stipulate that special election precincts are created solely for military servicemen who are serving at that time and who are unable to leave the place of dislocation due to their work duties, in order to avoid participation of non-military citizens or police officers employed by the Defense Ministry or the Interior Ministry by means of special precincts; as for participation of military servicemen in majoritarian elections (as well as their participation in local elections), we believe that they should

be associated with his/her registration address; namely, unlike other individuals included in the special voters' list, military servicemen should not enjoy the right to vote in majoritarian or local self-governance elections when they are outside the district where they have been registered.

- **Participation of employees of penitentiary department in elections** - employees of the penitentiary department should be subject to the same rule that should apply to military servicemen according to our recommendation.

### *Liability measures for violation of election legislation*

The current Election Code contains norms that provide for disciplinary liabilities for members of precinct election commissions (PECs). We believe that it is necessary to insert norms providing disciplinary liability of members of district election commissions (DECs) and the CEC; it is also necessary for the Code to clearly stipulate procedures for enforcement of these norms.

- In order to improve regulation of activities of the election administration members, in consideration of individual characteristics of the election-related activities, general rules of conduct for the administration members should be established. The CEC should ensure adoption of the rules of conduct in the field of elections.
- In order to avoid repeated participation of an offending member of the Commission in election commissions, we believe that 1) the CEC and its subordinate commissions should maintain a database of the commission members that have violated election legislation confirmed by the court. Furthermore, they should also maintain a database of individuals who have been dismissed by the election commission or court from the office they occupied in the election administration; 2) the CEC and its subordinate commissions should maintain a list of members of the election commission who have been sentenced to disciplinary punishment for violation of election legislation.

Repeated offenders who have been subject to disciplinary punishment for the second time should be deprived of the right to be appointed/elected to a position within the election administration for the second time. His/her appointment to an office in election administration should also be prohibited to relevant authorities. The commission of the noted action should be subject to administrative liability. Furthermore, a disciplinary liability imposed on an individual should be considered as revoked if the individual concerned does not commit a new offence during 2 consecutive election periods.

- In order to respond to disciplinary violation and select/appoint an individual who corresponds to criteria prescribed by the law as a member of the election administration, the term of authority of PEC members should be extended in cases when a complaint has been lodged against them until a final decision about their disciplinary liability is delivered. It should be noted that extension of the term of authority for the noted purpose will not result in remuneration for a longer period of time.

As we have initially noted, this document briefly reviews all important issues related to improvement of the election legislation in Georgia. Later we intend to submit a more detailed and comprehensive description of the noted issues to the Parliament.