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## **ODIHR OPINION ON DRAFT AMENDMENTS TO THE ELECTION CODE OF GEORGIA**

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## **I. INTRODUCTION**

1. By letter of 9 December 2019, Ms. Nino Lomjaria, Public Defender (Ombudsman) of Georgia, requested an opinion of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) on draft amendments to the Organic Law of Georgia “Election Code of Georgia”.
2. While acknowledging ongoing discussions with respect to the constitutionality of the proposed amendments as well as emphasizing that it is up to the national courts to make a final judgement on constitutionality of the legislation, this opinion covers the amendments submitted for review and analyses them against relevant international obligations and standards, including OSCE commitments, as well as international good practice with the aim to identify any shortcomings and make recommendations for consideration prior to the potential adoption of the legislation. This opinion is without prejudice to any written or oral recommendations or comments on related legislation that ODIHR may make in the future.
3. This opinion is based on a translation in English of the original amendments as provided by the Public Defender’s (Ombudsman) office of Georgia.

## **II. EXECUTIVE SUMMARY**

4. The principal changes introduced by the draft amendments relate to the electoral system for the upcoming parliamentary elections due to take place in 2020. The constitutional amendments of 23 March 2018 introduced fully proportional electoral system from 2024 parliamentary elections. Thus, the 2020 parliamentary elections are currently subject to transitional provisions of these amendments which maintain the existing electoral system and provides 77 members of the parliament to be elected through a proportional system and 73 members of the parliament to be elected through a majoritarian system for the term of four years.
5. Accordingly, the current Election Code provides for a mixed electoral system, which includes a majoritarian and a proportional component. In the majoritarian component, members are elected in single-mandate constituencies by an absolute majority of votes. If no candidate obtains the required majority of votes in the first round of voting, a second round is held between two candidates with the highest results. The proportional component is based on a closed list proportional representation system. The mandates distributed under the proportional component do not depend on the results of the majoritarian component.
6. Following the political agreement to amend the constitution and introduce a fully proportional system ahead of the 2020 parliamentary elections on 28 June 2019, the draft constitutional amendment was initiated by 93 members of parliament from the ruling party. However, in the vote on the constitutional amendments on 14 November a constitutional majority was not reached. On 4 December, a group of 29 members of parliament initiated a new proposal to amend the election code.
7. Draft amendments envision a system in which instead of the two-round system in single-mandate constituencies, 73 members of parliament would be elected from multi-mandate

constituencies. Voters would cast one vote and candidates with the most votes would obtain seats. The remaining 77 members of parliament would be elected through a closed list system. In contrast to the current mixed system, the distribution of seats in the proportional component would be linked to the performance in the multi-mandate constituencies. The stated aim of the proposed system is to deliver a more proportional outcome between the votes cast and the number of seats won.

8. The choice of the electoral system is a sovereign decision of the state, so long as the chosen electoral system is consistent with the state's obligations under international law. International standards do not prescribe the choice of electoral systems. The choice of an electoral system, whether it should be a majoritarian, proportional, hybrid, or alternative system, should be subject to a broad inclusive debate which allows relevant stakeholders to bring forward positive and negative effects of the reform. Any proposed changes have to be carefully considered, including their adoption by a large consensus among political parties.

9. Previous ODIHR election reports have noted that the legal framework for constituency delimitation does not safeguard against significant deviations in the number of voters per representative to be elected nor provides sufficient parameters for determining boundaries or set procedures for future review. The current deviations may be exacerbated in the creation of multi-mandate constituencies. ODIHR reiterates previous recommendations for review of the electoral legal framework to specify parameters for determining constituency boundaries and set criteria for permitted deviations.

10. In light of international standards and good practices, ODIHR makes the following recommendations to enhance the proposed amendments:

- A. Amend the provision on how voters are required to mark the ballot to ensure that ballots where the will of the voter is clearly expressed are not considered invalid;
- B. Reconsider the provision that disregards the votes for the party lists of voters who voted in favour of a winning independent candidate in the majoritarian race in that district;
- C. Ensure the deadline for the Central Election Commission (CEC) to summarize final election results does not go beyond the period necessary for this purpose and is in line with deadlines for election disputes; and
- D. Revisit the method for selecting the sub-district in which by-elections will be held to provide a politically neutral mechanism.
- E. Undertake analysis and, if necessary, include additional provisions to ensure as equal distribution of seats between the new multi-member constituencies as possible.
- F. Review the draft law to omit provisions which are not being amended, clarify which provisions are replaced, and ensure consistency of the amendments with the current provisions of the Election Code.

### III. ANALYSIS AND RECOMMENDATIONS

#### A. INTERNATIONAL STANDARDS ON ELECTORAL SYSTEMS

11. It should be emphasized that the choice of the electoral system is a sovereign decision of the state, so long as the chosen electoral system is consistent with the state's obligations under international law. The UN Human Rights Committee stated that:

A. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors.<sup>1</sup>

12. The European Court of Human Rights noted that:

B. There are numerous ways of organizing and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.<sup>2</sup>

13. The Venice Commission's Code of Good Practice in Electoral Matters states that "[w]ithin the respect of the above-mentioned principles, any electoral system may be chosen".<sup>3</sup> This provision refers to the principles of universal, equal, free, secret and direct suffrage, as well as periodic elections, which underlie "Europe's electoral heritage".<sup>4</sup> While choosing the electoral system often "there are two different interests at stake which have to be balanced: to honour as much as possible the representation principle (which is enshrined in the proportionality principle); or to favour the creation of majorities, letting the main political coalition govern. Both electoral principles, majoritarian and proportional, as well as their combination in a mixed system are legitimate choices".<sup>5</sup>

14. The choice of an electoral system should be subject to a broad and inclusive debate that allows relevant stakeholders to bring forward positive and negative effects of the reform. Any proposed changes have to be carefully considered, and should be adopted through a process that facilitates a large consensus among political parties.<sup>6</sup>

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<sup>1</sup> [UN Committee on Human Rights General Comment No. 25, paragraph 21.](#)

<sup>2</sup> European Court of Human Rights Judgment *Hirst v. United Kingdom (No. 2)*, [Application no. 74025/01](#), paragraph 61.

<sup>3</sup> Paragraph II.4. of the [2002 Council of Europe's Commission for Democracy through Law \(Venice Commission\) Code of Good Practice in Electoral Matters \(Code of Good Practice\)](#). Additionally, Paragraph 122 of the Joint ODIHR and Venice Commission Guidelines on Political Party Regulation states that "A country's choice of electoral system should be respected as long as it upholds a minimum standard for democratic elections."

<sup>4</sup> *Ibid.*, paragraph I.

<sup>5</sup> Paragraph 17 of the [Venice Commission Opinion on the electoral legislation of Mexico \(CDL-AD\(2013\)021\)](#).

<sup>6</sup> Paragraph 122 of the Joint ODIHR and Venice Commission Guidelines on Political Party Regulation states that "The variety of ways in which political parties are affected by different electoral systems means that the development of legislation related to political parties requires careful consideration of the state's system of governance."

15. The draft proposes changes in the fundamental elements of electoral law, including the electoral system. International good practice recommends that key aspects of electoral legislation not be open to amendment less than one year before an election. The change would be implemented by amendments to the organic law, which according to the Constitution, can be changed by a simple majority of votes in the parliament.<sup>7</sup>

16. Importantly, international standards do not offer definitions of electoral systems. Whether a particular system should be categorized as a majoritarian, proportional, hybrid, or better understood through another classification, is the subject of political and legal studies and scholarly opinion.

17. Proposed amendments do not introduce changes affecting compliance with the principles of universal, free, secret and direct suffrage, as well as periodic elections. Compliance with these principles has previously been analyzed in ODIHR's election observation reports and recommendations made with reference to such principles remain relevant.<sup>8</sup>

18. The changes introduced by the draft amendments relate to the electoral system for the upcoming parliamentary elections due to take place in 2020.<sup>9</sup> The constitutional amendments of 23 March 2018 introduced fully proportional electoral system from 2024 parliamentary elections. However, these elections are subject to transitional provisions of these constitutional amendments which maintain the existing electoral system for 2020 parliamentary elections. The Article 1.2 of the constitutional amendments reads as follows:

A. The Parliament elected at the next parliamentary elections based on universal, free, equal and direct suffrage shall consist of 77 members elected through a proportional system and 73 members elected through a majoritarian system by secret ballot for the term of four years. As a result of proportionally held elections, mandates of members of Parliament shall be distributed to those political parties and electoral blocs of political parties which receive at least 3 per cent of electoral votes. The rules and conditions for participation in the elections, as well the rule for distribution of the mandates of members of Parliament will be defined by electoral legislation.

19. The current Election Code provides for the implementation of these constitutional provisions through a mixed electoral system, which includes a majoritarian and a proportional component. In the majoritarian component, 73 members are elected in single-mandate constituencies by an absolute majority of votes (Article 125.3 of the Election Code). If no candidate obtains the required majority of votes in the first round of voting, a second round is held between two candidates with the highest results (Article 126 of the Election Code).

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<sup>7</sup> See paragraph II 2b of the [Venice Commission Code of Good Practice in Electoral Matters](#).

<sup>8</sup> See [previous ODIHR election observation reports on Georgia](#).

<sup>9</sup> The issue of electoral systems was previously commented in the [2018 Venice Commission Opinion "On the Draft Constitutional Amendments adopted on 15 December 2017 at the second reading by the Parliament of Georgia" \(CDL-AD\(2018\)005\)](#). In this Opinion, the Venice Commission reiterated its previous general positive assessment about the constitutional reform, but regretted the postponement of the entry into force of the proportional election system to October 2024, which it considered a major obstacle to reaching consensus among all the stakeholders.

20. The proportional component is based on a closed list proportional representation system (Articles 125.5-125.8 of the Election Code). The mandates distributed under the proportional component do not depend on the results of the majoritarian component.<sup>10</sup>

*Proposed electoral system for the 2020 parliamentary elections*

21. Draft amendments envision 73 members of parliament to be elected from multi-mandate constituencies, where voters would cast one vote and candidates with the most votes would obtain seats.

22. The remaining 77 members of parliament would be elected from closed lists in proportional component. In contrast to the current system, the distribution of seats in the proportional component would be linked to the performance of the party/bloc in the multi-mandate constituencies. For the proportional distribution, the votes obtained by the party/bloc lists are used to calculate the number of mandates that the party/bloc would be entitled to if all parliamentary seats were to be distributed proportionally between the lists (excluding seats won in multi-mandate constituencies by independent candidates and candidates nominated by parties/blocs which did not cross the 3 per cent threshold).

23. If the party/bloc participating in the proportional distribution already reaches or exceeds this entitlement in the multi-mandate constituency races, it retains all seats won in these races and does not receive more seats from the proportional component. If party/bloc receives fewer seats in multi-member constituencies than its proportional entitlement, its list obtains additional seats from the proportional component to reach its entitlement.

**B. OVERVIEW OF THE OTHER MAIN CHANGES INTRODUCED BY THE DRAFT**

24. Draft amendments change the definition of “elections held under the majoritarian system” in Article 2(e) of the Election Code from the current provisions on single-mandate districts for the election of members of the parliament of Georgia to multi-mandate electoral districts. Provision (o) of the same article is amended to include party lists in the definition of “electoral registration”. The “majoritarian electoral district” is defined in the new wording of Article 2(z) as a multi-member electoral district established for the election of parliament, while a new “majoritarian electoral sub-district” is introduced in Article 2(z<sup>1</sup>), defined as a part of majoritarian electoral district established for parliamentary by-elections.

25. Powers of the Central Election Commission (CEC) in Article 14.1(e) and Article 18.2 are amended to add the authority to establish electoral sub-districts and specify the number and boundaries of the sub-districts by ordinance of the CEC. Under the proposed amendments multi-mandate districts will still be formed on the basis of the districts established for the last local elections.

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<sup>10</sup> The initial distribution is made according to the simple quota. The number of votes obtained by the list is multiplied by the total number of seats (77) and divided by the total number of the votes cast. In case of remaining undistributed seats the second distribution follows a variation of the largest remainder method, where the remaining seats are given to the lists with the highest numbers of remaining votes.

26. The design of ballot paper in Article 63.12 is amended to include the names and serial numbers of candidates nominated in majoritarian electoral districts by electoral subjects, including groups of voters, as well as the names of the electoral parties and blocs for the proportional component of parliamentary elections. Paragraph 21 of the same article is accordingly amended to enable voters to cast two votes: one for a candidate in the multi-mandate electoral district and one for a party or bloc in the proportional component of the parliamentary elections.

27. A new paragraph 3<sup>1</sup> is added to Article 69 dealing with the counting of votes, allowing ballots for parliamentary elections to be determined as invalid entirely or only in one part related to either of the two components of the elections.

28. Provisions of Article 71 dealing with the drawing up of the protocols of voting results by the precinct election commissions are amended to replace the current requirement of two separate protocols for the results of multi-mandate and proportional components of parliamentary elections with one results protocol including both. Separate results protocols for the multi-mandate and proportional elections are drawn up by the district election commissions (DECs), with the procedure detailed in the new paragraph 1<sup>1</sup> of Article 75.

29. Provisions of Article 110 dealing with the establishment of multi-mandate electoral districts for the parliamentary elections are amended to introduce 2 six-mandate, 3 seven-mandate, and 5 eight-mandate electoral districts based on the current 73 single-mandate electoral districts. The municipalities included in each multi-mandate district are specified in the amended Article 110<sup>1</sup>.

30. Previous ODIHR election reports have noted that the legal framework for constituency delimitation does not safeguard against significant deviations in the number of voters per representative to be elected nor provides sufficient parameters for determining boundaries or sets procedures for future review. The draft amendments may potentially further challenge the principle of equal suffrage, as the number of voters per elected representative from the multi-member constituencies may differ.<sup>11</sup> The draft amendment of Article 110.3 preserves the approach of the current provision and states that “[t]he number of registered voters in majoritarian electoral districts, as well as in majoritarian sub-districts in majoritarian electoral districts, shall comply with international standards and ensure that voters in these electoral districts/sub-districts are distributed as evenly as possible”. This provision is positive, but the explanatory note accompanying the draft amendments does not elaborate on how evenly seats should be distributed among the new multi-member constituencies. ODIHR reiterates previous recommendations for review of the electoral legal framework in this regards to specify parameters for determining constituency boundaries and set criteria for permitted deviations.

*If a decision is made to further develop this draft it is recommended that analysis is undertaken and, if necessary, additional provisions are included to ensure as equal distribution of seats between the new multi-member constituencies as possible.*

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<sup>11</sup> According to the [Code of Good Practice](#), seats must be evenly distributed between the constituencies. The permissible departure from the norm should not be more than 10 per cent, and should not exceed 15 per cent except in special circumstances such as protection of a concentrated minority, or a sparsely populated administrative entity (see paragraph I.2.2.iv).

31. Article 116, dealing with the nomination of candidates is amended to allow political parties and blocs to nominate as many candidates in the multi-mandate electoral district as there are mandates, while groups of voters may nominate one candidate per district.

32. Provisions of Article 124 on summarizing election and voting results by the DEC are detailed to provide for establishing voting results in the multi-mandate electoral districts. Candidates with the highest numbers of votes are considered elected in these districts. For the proportional component, the votes cast for a party or a bloc are counted, excluding ballots cast by voters who gave their first vote to an independent candidate who won a seat in the district, which appears to be discriminatory.

*It is recommended to reconsider the provision that disregards the votes for the party lists of voters who voted in favour of a winning independent candidate in the majoritarian race in that district.*

33. Procedures on summarizing election results at the CEC in Article 125 are also amended. According to the draft, the number of seats obtained by a party/electoral bloc is equal to the sum of the number of seats of members of parliament elected in different multi-mandate districts that were nominated by a party/electoral bloc and the number of seats assigned to its party list in proportional contest. The number of seats of the party/election bloc that crossed the electoral threshold is calculated by the following formula:  $Mp = Np \times (150-K) / \text{Integer part of } N$ .<sup>12</sup>

34. The deadline for summarizing the results of the proportional component of parliamentary elections is extended from the current 19 days to 30 days. The rules for distributing mandates under the proportional system for the parties/blocs which crossed the 3 per cent national threshold are specified in the amended paragraphs 3 to 12. Provisions on declaring voting results invalid in a multi-mandate electoral district are specified in paragraph 13 of the same Article, while paragraph 14 is revised to provide that if voting results are declared invalid in two multi-mandate districts or in more than one-fifth of polling stations, the entire election shall be invalidated and re-run.

35. The procedure of by-elections in case of early termination of a parliamentary mandate in Article 129 is revised, allowing remaining members of parliament from the same multi-mandate district to determine the sub-district in which the by-election will be held. It is noteworthy, that not all but only some voters in a given district would then participate in the by-election of a representative for the district.

### C. OTHER CHANGES

36. The proposed new version of Article 63.21 specifies that “voters shall express their choice by circling the serial number of one candidate in the multi-mandate electoral district and one party/electoral bloc”. The requirement of marking the ballot only by circling the serial numbers appears to be overly prescriptive and may lead to invalidation of votes even in cases when the voters’ choices are clearly expressed.

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<sup>12</sup>  $Mp$  is the number of members of parliament,  $Np$  is the number of votes received by the party/electoral bloc,  $K$  is the number of members of parliament elected through the majoritarian system nominated by entities that failed to cross the electoral threshold, and  $N$  is the sum of votes received by entities that crossed the threshold.

*It is recommended to amend the provision on how voters are required to mark the ballot to ensure that ballots where the will of the voter is clearly expressed are not considered invalid.*

37. In the proposed version of Article 125.1, the deadline for the CEC to summarize final election results is extended from the current 19 days to 30 days. This change is not commented on in the explanatory note accompanying the draft amendments. While it may be warranted, such extension should be linked to electoral dispute resolution deadlines and not go beyond the period strictly necessary for the CEC to process the results.

*It is recommended that the deadline for the CEC to summarize final election results is aligned with the election dispute resolution deadlines and does not extend beyond the period strictly necessary to process the results.*

38. According to the proposed Article 129.1, in case of by-elections, the members of the parliament elected from the respective multi-mandate electoral district select the sub-district in which the by-election should take place. Initially this right is given to the member of parliament with the best result, then with the next best result, etc. This approach carries potential risks, including room for misuses, and may be perceived as giving undue partisan advantage. Alternative solutions could be considered, such as, for example, determination of the sub-district by lottery held by the CEC. It is also noteworthy, that not all but only some voters in a given district would then participate in the by-election of a representative for the district.

*It is recommended to consider alternative, more politically neutral mechanisms, which are better protected from potential misuses for the choice of the sub-district to hold by-elections.*

#### **D. TECHNICAL REMARKS**

39. While it is understood that the reviewed version of the draft law may not yet be final, attention should be drawn to certain technical shortcomings that should be corrected. As a matter of precise legislative drafting, provisions that remain unchanged should not be reproduced in the draft law. Where only the paragraph number changes, this change should be specified: e.g. “paragraph 6 becomes paragraph 7”. Where only a part of the paragraph changes, it should be specified which sentences are replaced with the draft amendments and which sentences remain. In the current draft, these rules are not always followed. In particular:

- Paragraph e) of Article 2 appears to be the same in the draft law as in the current Election Code.
- It is unclear whether the current paragraph z) of Article 2, defining the “electoral district” would remain after the amendments.
- Paragraph 14 of Article 63 appears to be the same in the draft law as in the current Election Code.
- Paragraph 2 of Article 71 in the draft law contains only one sentence. It is unclear whether the remaining sentences of this paragraph in the current Election Code remain.
- In paragraph 3 of Article 71, it is not clear whether the subparagraph “l” or “k” is being replaced with the new provision.
- Paragraph 7 of Article 71 appears to be the same in the draft law as in the current Election Code.

- Paragraph 1 of Article 75 in the draft law would appear to replace the current provision which covers different types of elections with a new provision which applies only to parliamentary elections.
- In paragraph 2 of Article 75, from among provisions a) to n) the draft law appears to modify only provision b); the other provisions appear to be the same in the draft law as in the current Election Code.
- Paragraph 8 of Article 75 appears to be the same in the draft law as in the current Election Code.
- In paragraph 2 of Article 76, only provisions f) and g) appear to be amended in the draft law, while provisions a) – e) appear to be the same in the draft law as in the current Election Code.
- Paragraph 11 of Article 78 appears to be the same in the draft law as in the current Election Code.
- Paragraph 1 of Article 124 in the draft law would appear to replace the current provision which covers different types of elections with a new provision which applies only to parliamentary elections.
- Paragraph 2 of Article 125 appears to be the same in the draft law as in the current Election Code.
- In Article 129, following the amendments the current paragraph 1 will become paragraph 2, the current paragraph 2 will become paragraph 3, the current paragraph 3 will become paragraph 4, and the current paragraph 4 will become paragraph 5.
- Article 185<sup>25</sup> in the draft law is either incomplete or the translation supplied is partially missing.

*It is recommended to review the draft law to omit provisions which are not being amended, clarify which provisions are replaced, and ensure consistency of the amendments with the current provisions of the Election Code.*