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Or. Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**GEORGIA**

**JOINT OPINION**

**ON DRAFT ARTICLE 79<sup>1</sup> OF THE ELECTION CODE**

**Approved by the Council for Democratic Elections at its 71<sup>st</sup> meeting  
(online, 18 March 2021)  
and adopted by the Venice Commission at its 126<sup>th</sup> Plenary Session  
(online, 19-20 March 2021)**

**on the basis of comments by**

**Mr Nicos ALIVIZATOS (Member, Greece)**  
**Mr Josep Maria CASTELLÀ ANDREU (Member, Spain)**  
**Mr Michael FRENDO (Member, Malta)**  
**Mr Don BISSON (Expert, OSCE/ODIHR)**

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## I. Introduction

1. By letter of 24 December 2020, Mr Archil Talakvadze, Chairperson of the Parliament of Georgia, requested an urgent opinion by the European Commission for Democracy through Law of the Council of Europe (hereinafter “Venice Commission”) and the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) on an amendment to the Election Code,<sup>1</sup> He asked for the Commission’s opinion to be available in the week of 18 January 2021.
2. The Bureau of the Venice Commission decided against the urgent procedure on two accounts: the lack of a compelling reason of urgency, as well as the impossibility – also owing to the holiday season – to examine the texts and to organise meaningful consultations within the requested timeframe. The opinion has therefore been prepared under the ordinary procedure. According to the established practice, the Opinion has been prepared jointly with the OSCE/ODIHR.
3. Messrs Nicos Alivizatos, Josep Maria Castellà Andreu and Michael Frendo acted as rapporteurs for the Venice Commission. Mr Don Bisson was appointed as a legal expert for the OSCE/ODIHR.
4. On 11-12 February 2021, a joint delegation composed of Mr Alivizatos, Mr Castellà Andreu and Mr Frendo on behalf of the Venice Commission, and of Mr Bisson on behalf of the OSCE/ODIHR, accompanied by Mr Pierre Garrone and Mr Gaël Martin-Micallef from the Secretariat of the Venice Commission and Ms Kseniya Dashutsina from the OSCE/ODIHR, participated in a series of videoconference meetings with members of the Central Election Commission, the Ministry of Justice, various political parties of Georgia, representatives of non-governmental organizations (NGOs) and other stakeholders. This Joint Opinion takes into account the information obtained during these meetings. The OSCE/ODIHR and the Venice Commission are grateful to the Council of Europe Office in Georgia for the excellent organization of the videoconferences.
5. This joint opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings held on 11-12 February 2021. Following its examination and approval by the Council for Democratic Elections at its 71<sup>st</sup> meeting (online, 18 March 2021), and an exchange of views with with Mr Hamazasp Danielyan, Member of Parliament and main Rapporteur on the draft amendments to the Electoral Code of the Republic of Armenia, it was adopted by the Venice Commission at its 126<sup>th</sup> Plenary Session (online, 19-20 March 2021).

## II. Scope of the Joint Opinion

6. The scope of this Joint Opinion covers only the legislative revisions officially submitted for review (“the amendment”). Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections and political parties in Georgia.
7. The ensuing recommendations are based on international standards, norms and practices, as for example set out in the United Nations’ International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and its additional protocols, as well as relevant OSCE human dimension commitments, and the Venice Commission’s Code of Good Practice in Electoral Matters. Where appropriate, they also refer to other reference documents

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<sup>1</sup> [CDL-REF\(2021\)002](#); see [CDL-REF\(2021\)009](#).

and sources as well as relevant recommendations made in previous legal opinions published by the OSCE/ODIHR and/or the Venice Commission.

8. This Joint Opinion is based on an unofficial English translation. Errors from translation may result.

9. In view of the above, the OSCE/ODIHR and the Venice Commission would like to make mention that this Joint Opinion does not prevent the OSCE/ODIHR and the Venice Commission from formulating additional written or oral recommendations or comments on the respective legal act or related legislation pertaining to the legal and institutional framework regulating political parties and electoral legislation in Georgia in the future.

### **III. Executive Summary**

10. The OSCE/ODIHR and the Venice Commission underline the importance of the stability of electoral law, which is a precondition to public trust in electoral processes and implies that electoral legislation, and especially its fundamental elements, should always be amended well before the next elections.

11. Moreover, the importance of legislation that meets international obligations and standards, addresses prior recommendations and is adopted by broad consensus after extensive public consultations with all relevant stakeholders needs to be borne in mind. The Venice Commission and the OSCE/ODIHR also recall the importance of the states' political commitments to fully implement electoral legislation in good faith.

12. While the right to vote and stand for election may be subject to a number of conditions, *inter alia* the respective individuals' nationality, and while the aim to prevent potential foreign interference in domestic political life may justify restrictive provisions, clear parameters need to be established in law. In particular, it is the view of the OSCE/ODIHR and the Venice Commission that the restrictions of aliens to participate in domestic political life could be limited to the establishment of political parties, but not to their membership.

13. Furthermore, the sanction of deregistering a party list due to the foreign nationality of a person acting as its political leader appears to be a disproportionate measure as it would unduly restrain the right to be elected for candidates of the party's list targeted and limit the right of voters to choose.

14. Additionally, the OSCE/ODIHR and the Venice Commission raise concerns with regard to the lack of clear and objective criteria of the notion of "political leader", which may lead to an overly subjective and ambiguous interpretation of this term and thus to legal uncertainty.

15. The Venice Commission and the OSCE/ODIHR also raise concerns regarding the complaints and appeals procedure of Article 79<sup>1</sup>, in particular about the categories of applicants and the time limits for appeals. On the latter, the OSCE/ODIHR and the Venice Commission question the shortness of the time limits and the possibility that the votes obtained by a party or an election block that would be deregistered risk not being counted, which as a consequence would waste and nullify the votes of voters having exercised their suffrage rights in good faith.

16. Finally, the Venice Commission and the OSCE/ODIHR are of the opinion that the amendment could be perceived as *stricto sensu ad hominem* legislation, a legislative technique previously criticized by the Venice Commission.

17. With a view to ensuring political pluralism and the proper functioning of democratic institutions, the OSCE/ODIHR and the Venice Commission therefore make one **main recommendation**, which is to reconsider adopting the proposed amendment.

#### IV. Analysis

18. Article 1 of the draft Organic Law amending the Election Code of Georgia provides for a new provision in the Code, which reads as follows:

**“Article 79<sup>1</sup>. Liability of an election subject for the participation in its pre-election agitation by the person acting as the party leader, who does not meet the criteria established by the Constitution of Georgia for the exercise of active suffrage**

1. If a person, who does not meet any of the criteria established by the Constitution of Georgia for the exercise of active suffrage, participates in the pre-election agitation of a party or election block as its political leader, the election registration of the relevant party or election block shall be revoked by the decree of the Central Election Commission (CEC).

2. A party or election block or a registered local observer organization has the right to appeal to the CEC on the issue specified in paragraph 1 of this article. It is inadmissible to file a relevant complaint with the CEC if more than 2 calendar days have elapsed since the voting day. The CEC shall review the complaint within 2 calendar days.

3. The decision to revoke the election registration of a party or election block in accordance with the first paragraph of this article may be appealed by the same applicant to the Tbilisi City Court within 2 calendar days after its receipt. The court shall hear the appeal within 2 calendar days. The decision of the Tbilisi City Court may be appealed by the relevant applicant within 2 calendar days after court ruling, to the Court of Appeals, which shall hear the appeal within 2 calendar days. The decision of the Court of Appeals is final and cannot be appealed.

4. The decision of the CEC to revoke the election registration of a party or election block shall enter into force upon the expiration of the term for appealing against this decision in the city or appellate court or from the moment of the publication of the appellate court decision.

5. If the election registration of a party or election block is revoked after its placement in the ballot paper or after the voting day, the election results shall be summarized without taking into account the votes obtained by this party or election block.”

19. Paragraph 1 of new draft Article 79<sup>1</sup> would establish liability – its deregistration – for a political party having allowed a person acting as its political leader, who does not meet the criteria established by the Constitution for the exercise of the right to vote, to participate in its electoral campaign.

20. The Venice Commission and the OSCE/ODIHR wish to recall at the outset the principle of the need for stability of electoral law. This principle is crucial to ensure public trust in the electoral process and to exclude any suspicion of manipulation of the electoral legislative framework, as

underlined by the Venice Commission's Code of Good Practice in Electoral Matters and as developed in the Interpretative declaration on the stability of electoral law.<sup>2</sup>

21. Furthermore, they recall that any successful changes to electoral legislation should be built on at least the following three elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) the political commitment to fully implement the electoral legislation in good faith. In particular, the OSCE/ODIHR and the Venice Commission stress that an open and transparent process of consultation and preparation of the draft increases the confidence and trust in the adopted legislation and in the state institutions in general.

22. The Venice Commission and the OSCE/ODIHR have therefore consistently recommended that amendments to the electoral legal framework be adopted well before the next elections, as well as through a public and inclusive process that respects the principles of legality and the rule of law and that allows for a meaningful discussion and facilitates consensus of key stakeholders.<sup>3</sup>

23. Moreover, the guarantee of universal suffrage is recognized as a founding principle for the conduct of democratic elections, as enshrined in Article 3 of Protocol No 1 to the European Convention on Human Rights and Article 25(b) of the ICCPR.<sup>4</sup> The Code of Good Practice in Electoral Matters underlines in this respect that “[u]niversal suffrage covers both active (the right to vote) and passive electoral rights (the right to stand for election). The right to vote and stand for election may be subject to a number of conditions [...]. The most usual are *age and nationality*.”<sup>5</sup>

24. Article 33 (“Rights of aliens and stateless persons”), paragraph 2, of the Constitution of Georgia stipulates that “[t]he State shall be entitled to impose restrictions on the political activities of citizens of other states and stateless persons.” In addition, the Election Code of Georgia states in Article 45.4 (f) that “[a]ny individual may conduct and participate in election campaigning, except for: [...] f) aliens and foreign organisations [...]”. The penalty for participation in election campaigning in violation of the law is set at GEL 2,000 (around €497) under Article 79 of the Election Code.

25. As underlined in the OSCE/ODIHR and Venice Commission Joint Guidelines on Political Party Regulation,<sup>6</sup> “Article 16 of the ECHR enables states to restrict aliens further than nationals in relation to their political activities under Articles 10 and 11 ECHR, such as establishing of and participating in political parties.” However, the Grand Chamber of the European Court of Human Rights has argued that Article 16 reflects an outdated understanding of international law [...] in the specific context of the *Perinçek* case, which concerned the right to freedom of expression guaranteed under Article 10 ECHR “regardless of frontiers” and that consequently “no distinction

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<sup>2</sup> Venice Commission, Code of Good Practice in Electoral Matters ([CDL-AD\(2002\)023rev2-cor](#)), II.2; Interpretative declaration on the stability of the electoral law ([CDL-AD\(2005\)043](#)).

<sup>3</sup> Paragraph 5.8 of the [1990 OSCE Copenhagen Document](#), which requires “legislation, adopted at the end of a public procedure.” See Venice Commission, Rule of Law Checklist ([CDL-AD\(2016\)007rev](#)), II.A.5, page 13, and II.B.4, page 16.

<sup>4</sup> [ICCPR](#), Article 25(b).

<sup>5</sup> Venice Commission, Code of Good Practice in Electoral Matters ([CDL-AD\(2002\)023rev2-cor](#)), I.1.1, Explanatory Report, I.1.1.

<sup>6</sup> OSCE/ODIHR – Venice Commission Joint Guidelines on Political Party Regulation - Second edition ([CDL-AD\(2020\)032](#)), Part IV, 7 c, para. 149.

could be drawn between its exercise by nationals and foreigners.”<sup>7</sup> At the same time, the Court also held that Article 16 should be construed as only capable of authorising restrictions on “activities” that directly affect the political process. Furthermore, the Parliamentary Assembly of the Council of Europe in its Recommendation 799 (1977), recommended that that the restrictions at present authorised by Article 16 with respect to political activity by aliens should be excluded.<sup>8</sup> Although these recommendations are not legally binding, the Venice Commission and the OSCE/ODIHR take the view in the Joint Guidelines that while the possibility of aliens to establish political parties can be restricted under Article 16, it should not be applied in order to restrict the membership of aliens in political parties.”<sup>9</sup>

26. While provisions aiming to prevent potential foreign interference in domestic political life may thus be justifiable with regard to the political and regional context of a country, they may not hinder the right of foreign individuals to participate in political parties per se. More targeted restrictions that hinder the “activities” that *directly* affect the political process”<sup>10</sup> are possible, but require the establishment of clear parameters, in order to abort the temptation of distorting the spirit of such rules by isolating opposition movements, parties or coalitions from domestic political life, which would not be justifiable in a democratic society.

27. On the issue of granting Georgian citizenship according to the Organic Law of Georgia on Georgian Citizenship,<sup>11</sup> a distinction has to be made between a foreigner who is granted Georgian citizenship through naturalization on the one hand, and a former Georgian citizen who has been deprived of his/her citizenship and who is hence deprived of his/her right to be elected, on the other. The procedure to obtain Georgian citizenship goes through the Public Service Development Agency under the Ministry for Justice of Georgia with the assistance of the Citizenship Commission. Both bodies are composed of public servants<sup>12</sup> and have an important role, though not a decisive role,<sup>13</sup> as “the final decision on granting, retaining, refusing to grant or terminating Georgian citizenship shall be made by the President of Georgia”,<sup>14</sup> without judicial review *in fine*, except for the decision on termination of Georgian citizenship.<sup>15</sup> One can therefore question the objectivity of the process, which allows for potential political considerations to weigh in on the decision of granting Georgian citizenship, without providing additional safeguards, e.g. the right to appeal.

28. With regard to the introduction of an additional sanction in Georgian legislation by draft Article 79<sup>1</sup>, it is noted that the candidature of a foreign national for positions in Parliament would not be in conformity with the Constitution. However, electoral deregistration of a political party, which allows a foreign citizen acting as its political leader to participate in its pre-election campaign appears to be a disproportionate measure, which additionally targets the party rather than the alien in question. As a consequence, this provision may constitute an interference with the right

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<sup>7</sup> ECtHR, [Perinçek v. Switzerland](#) (Grand Chamber), application no. 27510/08, 15 October 2015, para. 121. One can note additionally that the ICCPR does not contain an exceptional provision such as Article 16 ECHR.

<sup>8</sup> Council of Europe’s Parliamentary Assembly, [Recommendation 799 \(1977\)](#) on Political rights and position of aliens.

<sup>9</sup> OSCE/ODIHR – Venice Commission Joint Guidelines on Political Party Regulation - Second edition ([CDL-AD\(2020\)032](#)), Part IV, 7 c, para. 149. See also the United Nations’ Declaration of the Human Rights of Individuals who are not national of the country in which they live, adopted by General Assembly resolution 40/144 of 13 December 1985 ([link](#)).

<sup>10</sup> Ibid.

<sup>11</sup> [Organic Law of Georgia on Georgian Citizenship](#).

<sup>12</sup> Ibid., Article 24.1 and .2.

<sup>13</sup> Ibid., Articles 24.9 and 25.1.

<sup>14</sup> Ibid., Article 25.1. See also Article 21<sup>1</sup>.1 and 24.8.

<sup>15</sup> Ibid., Article 29.1.

to be elected of any candidate who is on that party's list and may unduly limit the voters of the right to choose.

29. There should be a spectrum of sanctions available for different breaches of the law, depending on their gravity and effect, which would ensure respect for the principle of proportionality. On the contrary, the proposed amendment would be a sanction with serious consequences with regard to the political pluralism of the country during elections. The aim of preventing foreign intervention in political activities could also be reached by imposing hefty fines on the respective foreigner him/herself, and/or on the party, without removing the party from the electoral process.

30. Furthermore, the draft amendment does not clearly define which criteria would be used to determine who is considered to be an electoral list's or party's "political leader", which creates legal uncertainty and hence difficult for the party or "leader" to foresee the consequences of their conduct. Such unclear terminology may lead to inconsistent, possibly even conflicting, applications of the law. Moreover, this would leave the definition of key criteria in the hands of the Central Election Commission (hereinafter "CEC"). While courts would have judicial control over the matter, there is no option of an ultimate review by the Supreme Court or the Constitutional Court.

31. The complaint and appeals procedure is as follows. First, a political party, electoral block or registered local observer organization has the right to appeal to the CEC to consider the deregistration of a party or electoral block; the decision of the CEC can be appealed to the Tbilisi City Court in the first instance; and the decision of the Tbilisi City Court can in turn be appealed to the Court of Appeals. As appeals for the deregistration of a party or electoral block can be made up to two days after the elections,<sup>16</sup> the decision may be taken after the votes have been cast.<sup>17</sup> This is worrying, since voters might in good faith vote for a party which may then end up being deregistered. Moreover, the appeals deadlines for the deregistered parties (two days at each instance) are excessively short, whereas the Code of Good Practice in Electoral Matters provides for three to five days at first instance.<sup>18</sup>

32. Moreover, the majority of the interlocutors met during the videoconference meetings were convinced that the new rule is directed not against foreigners in general, but against a certain Georgian citizen, historical leader of the main opposition's party in Georgia, who lost his nationality and in consequence is no longer able to exercise any political rights in Georgia. The draft amendment could, therefore, be perceived as *stricto sensu ad hominem* legislation, i.e. legislation directed against a particular individual or group of individuals, a legislative technique previously criticized by the Venice Commission.<sup>19</sup> The adoption and use of such legislation would be highly problematic from a rule of law perspective.

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<sup>16</sup> Article 79<sup>1</sup>.2.

<sup>17</sup> Article 79<sup>1</sup>.2.

<sup>18</sup> Venice Commission, Code of Good Practice in Electoral Matters ([CDL-AD\(2002\)023rev2-cor](#)), II.3.3.g.

<sup>19</sup> See e.g. Turkey, Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016 ([CDL-AD\(2016\)037](#)), para. 86, 91 and 227, point 3. See also Hungary, Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education ([CDL-AD\(2017\)022](#)), para. 22.