Comments on Amendments to Election Legislation

On September 19, 2011the draft of the new Election Code was initiated to the Parliament of Georgia. The document envisages vast number of amendments, yet, the primary novelties 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 election environment. In contrast, some times Articles of the Code even worsen the situation or unspecified norms complicate understanding of various formulations.

The process of draft preparation should be emphasized 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 that definitely deserves negative evaluation.

In the submitted document we would briefly evaluate all major issues linked to development of election legislation in Georgia. Afterwards we would propose to the Parliament 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, it means that such facilities will not be installed in the commissions anymore;
- No marking procedure will be applied and nor was any other alternative means for implementing control proposed so far.

It is true, that neither marking procedure nor records of video surveillance turned to be effective in practice; nevertheless, it was necessary to improve the past defective practice or in case of marking procedure substitute it with more efficient one. Records of video surveillance should have been of utmost importance in the process of examining election disputes, yet they were never used in practice. We consider that it was appropriate 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 consider that it is of a vital importance to return this norm in the Code.

Voter lists

According to the draft amendments to the current election code of Georgia, commission created on the basis of presidential order, comprised by the representative of the NGOs, opposition parties and government representatives, should be in charge of forming voter lists. We consider that it is absolutely incorrect to impose such an obligation on NGOs or even on representatives of political parties. Specific state agency, in particular, the Civil Registry Agency, which has relevant resources and experience, should take responsibility on formation of voter lists, while the commission may possess only effective levers to monitor the lists. Especially for the last years 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 high probability that its work will be ineffective. We suppose that the commission should only be limited to monitoring function and should possess special access to all necessary information, while public register should be in charge of developing and specifying voter lists.

New draft introduces amendment on including a voter on a mobile ballot box list. "Number of voters entered in the mobile ballot list shall not exceed 3% of total number of voters in the election precinct". In case voters number in such list exceed 3 percent, or when there are less than 2 days remaining before the voting, relevant decision is made by the 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 the health condition or incapability in fact hinders a given individual to arrive at the polling station, etc. Under such circumstances, fixing the 3% threshold is completely unreasonable. Court procedure seems completely ineffective in case when less than 2 days are remaining before the voting day. When there are less than 2 days remaining before the voting, it is impossible to apply to court and conclude rather lengthy procedures.

Election system

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

Besides, the initiative cannot 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 can it safeguard equality principle of the value for each elector's vote according to administrative precincts. Pursuant to international standards, maximal deviation in number of electors among election districts shall not overcome 15-20%.

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 campaign without limitation, is broadened. In particular, State Envoy - Governor was added to the list.
- The draft does not envisage definition of the term "agitation", which makes the process of carrying out pre-election campaign vaguer.

We evaluate mentioned amendment negatively, since instead of decreasing the number of persons who are entitled to participate in pre-election campaign without limitation, their number has increased even more that comes in conflict with all recommendations made by local or international organizations with a view to improving 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 campaign 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 Gamgeoba/Mayor's office - Rtsmunebuli; Head of the Chamber of Control; Public Defender of Georgia shall be added to this list;
- Application of all kinds of administrative resources shall be limited during pre-election campaign, 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 campaign. (Including agitation during such events, distribution of goods procured from the state or local budget with their participation.)

Election Funding

- The draft introduces new norm, according to which, Election Administration is entitled to implement state procurements in a simplified manner during election/referendum period with

a view to conduct elections in an organized way. Furthermore, during pre-election/election period any appeal of CEC or tender commission's actions/decisions does not cause suspension of the procurement procedures.

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

- The draft envisages doubling of limits of contributions to the election campaign funds, set up by law. Namely, the right to receive contribution from the 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 doubling of applied limits. Limits on contributions are introduced for preventing political corruption, while we should be more careful in granting freedom to legal entities and parties by raising these limits. Existing thresholds are high enough and in respect to high contributions Georgia is one of the leaders.

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

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

- According to the draft, representatives of the election subjects in a 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 also possible not to have any representatives in election commission. So it is strange why money should be wired to the 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 project donation is allowed for legal enterprises where state share is less than 50%.

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

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

- Establishment of the independent controlling body – obliged to inspect 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 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 election campaign fund shall be issued not only after the elections, but also prior to the polling day.
- Contributions from legal entities that were winners in state procurements – it is desirable to ban contributions from the enterprises that were winners in state procurements during the election year or the previous year and to prohibit participation in state procurements during the election year and the following year for the enterprises that funding political parties at the elections.
- It should be strictly defined, that the limit of contributions comprises the total of parties account and the amount that was transferred by it to the account of the submitted election subject.

Election Administration

- The draft Election Code decreased transparency of procedures for selection and appointment of the CEC Chairperson and members; namely, information about identity of candidates and their experience are no longer required as mandatory documents for submission.

We consider it wrongful as we believe that the noted information should be accessible to public, including information (a) about all candidates that are 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 decision. We disapprove of the noted initiative, 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 votes.

- 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 consider that 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 alternative mechanism for appealing when a dispute involves violations committed during the procedures for vote count and tabulation. Claim/appeal on 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 election commission shall be handed over to the higher district election commission by the precinct election commission within 2 calendar days of the election day. 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 review the appeal according to the rule prescribed by this law.

We consider 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 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 by calculated by indicating a specific time.

- The draft Election Code offers 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.

- 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 complaint, while the draft proposes decrease of the term to a single calendar days, 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 to be 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. 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 he or she is outside the district where he/she has 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

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 commission, 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 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 the 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. 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 propose more detailed and comprehensive description of the noted issues to the Parliament.