NDI COMMENTARY ON THE 2001 REPUBLIC OF GEORGIA DRAFT ELECTION CODE AND ALTERNATIVE DRAFT ELECTION CODE

June 11, 2001

Overview

At the request of political and civic leaders in Georgia, the National Democratic Institute for International Affairs (NDI) convened an international advisory group of comparative constitutional and election law experts to review the Draft Election Code of Georgia (Draft Code) and the attached the alternative draft provisions (Alternative Draft), which are expected to be discussed in mid-June 2001 by the Parliament of Georgia. This review sought to assess the draft election law in relation to internationally established criteria for genuine democratic elections and in light of Georgia's specific conditions for ensuring public trust in the electoral process.

NDI's international election law review group included the following experts: Matthew Frumin, with the law firm of Steptoe & Johnson and former Special Assistant to the U.S. Under Secretary of State for Global Affairs; Tara R. Gingerich, also with the law firm of Steptoe & Johnson; Scott Sinder, with the law firm of Collier Shannon Scott; Ann Colville Murphy, NDI Special Counsel on Electoral Programs; and Patrick Merloe, NDI Senior Associate and Director of Programs on Election and Political Processes. Each member of the group not with NDI contributed his or her time freely and in an individual capacity. NDI is grateful for this valuable assistance, which demonstrates the international community's interest in supporting efforts to build democracy in Georgia. NDI staff, knowledgeable about Georgia's political situation and about its election processes, also contributed to this review.

NDI is a nongovernmental organization working to strengthen and expand democracy worldwide. As part of its mandate, NDI conducts election programs that focus on constitutional and law reform efforts, international election assessments and observer delegations and election monitoring by domestic nongovernmental organizations and political parties. The Institute has provided election law commentaries in more than 20 countries around the globe, drawing on a worldwide network of expert volunteers and NDI staff. The Institute observed elections in Georgia in 1992, opened its office in Tbilisi in 1994 and has assisted Georgian political parties, the parliament, local governments and civic organizations through grants from the National Endowment for Democracy and USAID. The Institute is gratified by the request to review Georgia's proposed election law and is pleased to offer the following comments.

Introduction

The Draft Code, and the provisions proposed in the Alternative Draft, each provide a firm foundation for conducting democratic elections. Many of the provisions not only conform to international standards, but they incorporate noteworthy practices that have proven effective in organizing transparent and fair electoral processes. In particular, the provisions of Chapter VIII on the public nature of election processes, and corresponding provisions for oversight by representatives of the political contestants ("election subjects"), domestic observers from nongovernmental organizations, international observers and news media, are commendable, notwithstanding certain weaknesses discussed below.

Although the draft Election Code introduced into parliament did not specify the composition of the Central, District or Precinct Election Commissions, we have commented on the two alternative proposals originally suggested. International experience demonstrates that this is essentially a question requiring resolution by broad political agreement, rather than being treated simply as a technical matter. Election administration must command the trust of the political contestants; otherwise, one or more of them will have a disincentive to participate fully in the process. In addition, election administration must earn and maintain public confidence in its impartiality and effectiveness for organizing polls that accurately record and respect the will of the electorate. The decision about which method to utilize, therefore, should be made with these points in mind.

A number of concerns were identified regarding time frames in the proposed law that deserve further consideration in order to avoid potential problems of implementation. The draft law and various proposed alternatives call for many things to be accomplished in the period immediately before the elections. These provisions appear to be considered somewhat in isolation and with insufficient consideration of how the timing for one task might relate to other provisions in the law. One tool that has been very useful in other countries in the election law drafting process has been to develop a comprehensive timeline of when various events need to occur. With such a timeline in hand, the drafters can consider in an orderly way whether more time may be required to accomplish certain functions or whether key things have been done sufficiently in advance of the election to be effective. This may already have been done; however, it is usually wise to reconsider timing issues before final enactment of the law.

Of course, achieving genuine democratic elections depends upon more than a sound legal framework. Ultimately, the framework must be implemented properly, which requires the political will to do so, manifested in good faith efforts and broad participation by election officials, political contestants, election observers and the voters themselves.

Chapter I – General Provisions

The provisions on purpose, legal basis, basic principles, universality, equal suffrage, direct suffrage and secrecy of the ballot are excellent. We particularly commend the reference in

the draft law to the reliance on universally recognized principles of international human rights law.

The definition of terms provided in Article 3 of the Draft Code are intended to contribute to consistent application and clarity of interpretation of the law. It is therefore recommended that each term be cross-checked for usage in the text of the law, because certain terms appear somewhat differently in the context of later Articles than in the definitions.

Chapter II – Registration of Voters

The orderly and effective registration of voters is a key element of a successful election process. Provisions for such registration are central to the legal framework for elections. The proposed system under the draft law mandates that the voter lists are to be developed by the Government using existing sources and are subject to review and complaints from 30 days prior to the election until 15 days prior to the election. (Draft Code, Art. 13.) This is a very short window and is quite late in the process. Individual voters, political parties and certain civic groups concerned with electoral integrity and voter participation could and should wish to review the lists to make sure they are complete and do not include extra names or duplicate names on different lists. Consideration should be given to whether the time and proposed procedures to review the voter lists will be adequate to ensure their accuracy and completeness.

Provisions relating to the "Supplementary Lists" raise some concern. Even if a voter's name does not appear on the voter list, he/she may be placed on a supplementary voter list and vote using a Citizenship ID card or registration card. The mechanics of this provision are not spelled out. With a well publicized process that provides a real opportunity – with sufficient time and sufficient transparency for parties and nonpartisan monitors – for citizens to make claims and corrections to the voter lists, there should be little reason to employ supplementary lists. In such circumstances supplementary lists are usually eliminated to reduce the potential for double voting. Employing mechanisms such as “tendered ballots” or “challenged ballots” can help address isolated problems with citizens being omitted from the voter lists. Challenged ballots are used when a person is not on the voter list, but makes a credible claim that they belong on the list for that polling station. Tendered ballots are used when a person arrives at the polling station and someone else has signed the voter list and voted in his or her name. In both cases, the person is allowed to mark a ballot in secret and place in into an envelope; that envelope is placed inside a second, specially marked envelope, along with an affidavit or other documentation that states why they should be entitled to cast a ballot. The special envelope and its contents are either placed in the ballot box or other secure container and are reviewed by a higher authority, usually the day after the election. The person may be required to appear at that proceeding to establish that it is proper to count their vote. If that is established, all such ballot envelopes are mixed to establish ballot secrecy and are then opened and included in the vote count.

If supplementary lists are employed, limits as to where a voter can be placed on a supplementary list should be implemented, such as only being allowed to do so at the precinct shown on the voter’s ID card. Other safeguards, such as marking ID cards, should be employed

to ensure that a voter does not vote in one place where his/her name is on the list and then go to another place to be placed on a supplementary list.

General Timing Issues. The draft contemplates party registration being finalized as late as 25 days in advance of the election (Draft Code, Art. 97.12), election blocs registration finalized as late as 22 days before the election (Draft Code, Art. 98.10), and candidate lists finalized as late as 15 days before the election (Draft Code, Art. 101.11). Similarly, the Draft mandates that voters be informed of their polling station location just two days before an election. (Draft Code, Art. 14.1.(b).) These matters raise questions about whether voters will have time to learn about all the options presented to them, as well as whether the simple mechanics of the election process, including the orderly production and distribution of ballots, can be performed. Moreover, if lists of parties, blocs and candidates are not finalized until so late in the process, candidate and party access to advertising on state media, as contemplated under the law, may be too limited (Draft Code, Art. 78.8) and the campaign period could be truncated to the two to three weeks after the registration process is completed. A very careful, practical review of timing issues and their potential implications during the drafting process could avert serious unintended problems in the heat of the election season.

Chapter III – Election Districts and Precincts

The structure of forming election districts and the basic election precincts is sensible and consistent with standard practice. As discussed above, timing is quite important and the Precinct Election Commissions ("PECs") will be called upon to accomplish many important tasks. Therefore, further thought should be given to whether the precincts can be defined earlier than 55 days before the election. (Draft Code, Art. 16.2.) In general, it is advisable to separate the process of defining election districts as much as possible from the election date in order to divorce the process from partisan political considerations and thereby reduce political tensions in the run-up to the elections.

The draft code also calls for establishing precincts abroad, on ships on the high seas and at military bases not later than 5 days before the election. (Draft Code, Art. 16.3.) These provisions run the risk of creating serious difficulties with electoral transparency. Military voting can be conducted in barracks, by allowing military personnel to vote in adjoining civilian polling stations or by allowing military personnel to cast their ballots in their home precincts directly or by absentee ballot. If voting is to take place inside military installations: significant steps are required to be sure that adequate information about all candidates and parties is fairly presented to all military personnel; strict orders should be issued to ensure political neutrality of officers; measures should be established to ensure that voting takes place without the undue influence of military discipline; and voting should take place in the presence of party pollwatchers and other observers. It is difficult to establish these conditions on ships at sea, but efforts must be made to do so or to otherwise safeguard the integrity of such voting. Further thought should be given to whether and, if so, how such voters can be enabled to vote in a manner that will guarantee ballot secrecy and reduce possibilities for undue influence on voters.

Chapter IV – The Election Administration

The establishment of an effective and credible election administration is essential to any electoral process. This can be approached in many different ways. Two primary distinctive approaches are: (1) creating a framework for balance between competing political contestants (parties and candidates) and (2) creating a nonpartisan framework. The earlier draft provisions ("Draft Version") and the central proposed alternatives ("Alternative Version") explore each of the two main options. Broadly speaking, either option can be consistent with international standards. It is important to bear in mind however, in analyzing the specific proposals, that the goal of both options is to establish a framework that will secure the greatest degree of confidence in the election administration's impartiality and effectiveness among the broad spectrum of political participants. Moreover, like any governmental institution, the election administration should be given the powers necessary to accomplish its goal – impartial and effective administration of the election process – but not be provided excessive powers that could invite misuse or a lack of transparency of process.

A. The Draft Version

The Draft Version follows the "partisan balance" model for the Central Election Commission ("CEC"), providing for the President to appoint certain members, the Parliament to appoint others and qualifying political parties or coalitions to appoint still others. (Draft Code, Art. 27.) There also are a series of proposed variations on the Draft Version that would alter the mix and method of selection of CEC representatives, but would seek to keep the "partisan balance" approach. These proposals are discussed below.

The Draft Version sets forth complex formulas for calculating which parties or blocks qualify for representation on the CEC. A careful review of the text therefore is recommended to ensure that actual political balance is achieved. No matter what formula is ultimately adopted, the goal of impartiality and effectiveness must be achieved for the political contestants to have faith in the election process and for the public to have confidence that the political will of the electorate will be accurately recorded and respected. This is a matter of public perception, as well as establishing administrative reality. This challenge must be met in any country, and in particular in countries like Georgia, where dominance of the election commissions by the governing party has led not just to the perception of partiality but to examples of partiality itself.

Another proposal would call for the President to name two members, while each of the parties receiving more than 1 percent of the vote in the previous election would name one member. While this approach could enhance confidence in the process, particularly among smaller parties, it could also provide a disproportionate amount of power on the CEC to very small parties and create an unwieldy CEC. A similar proposed variation would allow parties securing 3 percent of the vote to appoint members to the CEC and to District and Precinct Commissions. The slightly higher threshold would lessen but not eliminate the risk of the creation of unwieldy Commissions with disproportionate power given to smaller parties.

A third alternative would have the President appoint the Chairperson subject to consent by the Parliament, set the number of other members of the CEC at 10 and allow the parties and blocs that won at least 3 percent of the vote in the previous election to choose the 10 other members. The introduction of the concept of Parliamentary consent for the selection of the Chairperson is constructive. The Chairperson of the CEC will have substantial powers and will

play a key role in any electoral process. It is essential that the Chairperson have and keep the trust of a broad political spectrum. Securing Parliamentary consent to the selection of the Chairperson could serve to enhance overall confidence in the process.

Another proposal would have the CEC members choose their Chairperson and other officers. Depending on the method selected for choosing the CEC members, this could enhance confidence in the process, if such selection were likely to lead to consensus choices. On the other hand, if strong partisan factions emerged on the CEC, then having the CEC members choose the officers could lead to further polarization.

The proposal to set the number of CEC members at 10 and provide that they be selected by the parties and blocs which received 3 percent or more of the vote in the previous election, appears to address the danger of an unwieldy Commission. However, it is possible that more than 10 parties will secure 3 percent in an election, which could lead to scenarios allowing the smaller parties to hold a majority on the CEC.

Secret Versus Public Votes. Article 27 of the Draft Version called for the parliament to select members of the CEC by secret vote. Given that Members of Parliament are elected representatives, acting on behalf of their constituents, they should be accountable for their actions and their votes. Therefore, it is emphasized that should the law call for parliamentary selection of CEC members, the vote on CEC members should be public. Votes of the election commissions themselves also should be public, in keeping with the public trust placed in the commissions and the public nature of the election process noted in the law.

Conflicts of Interest. It was noted that the CEC members, other than the Chairperson, are exempt from the conflict of interest provisions of the "Law on Public Service." (Draft Code, Art. 23.1.) While the comment group did not review the referenced law, it noted that an unnecessary exemption from conflict of interest requirements is the kind of matter that could undermine confidence in an electoral process. Therefore, it is recommended that the provision be reviewed carefully to ensure that there is a sound explanation for its inclusion.

Legal Acts by CEC. The Draft Version describes three categories of acts by the CEC or Chairperson: resolutions (requiring a 2/3 majority); decrees (majority vote); and orders (issued by the Chairperson). (Draft Code, Art. 25.) This is an area where more detailed definitions might be helpful, given that the way in which an act is categorized has a major impact on what needs to be done to enact it. The current law defines a "resolution" as a "by-law" and a "decree" as an "individual legal act." (Draft Code, Art. 25) "Order" is not defined. Presumably, the distinction between resolutions and decrees relates to acts of general, as opposed to specific, application. However, in practice the line between the two is not always clear. Decisions about individual matters often become guidelines for decisions on other related matters. Moreover, while the supermajority requirement for resolutions is likely designed to protect minority factions, such requirements can lead to gridlock. It, therefore, is worth considering whether greater definition is needed for the key terms – "resolution," "decree" and "order." It should be stressed that promulgating resolutions, decrees and orders are necessary to give effect to some elements of the law but that all legal actions and activities of election commissions must be done in compliance with both the letter and the spirit of the law. Election administration requires

some degree of detailed instruction, but effective administration must be free of cumbersome requirements.

Terms of Office for CEC. The Draft Version calls for terms of varying length – members chosen by the President serve 5 years, and those chosen by Parliament and others serve 4 years. Experience demonstrates that the best practice is to employ a uniform length of tenure for CEC members and that terms might best be staggered to ensure continuity on the CEC.

Powers. The Draft Version appears to outline substantial and generally appropriate powers for the CEC. One of the key powers for the CEC is to elect certain members of the District Election Commissions ("DECs"). It is important that these elections not be conducted by secret ballot. (Draft Code, Art. 29.3.) Public bodies such as the CEC should not act in secret. It is essential that the CEC gain the confidence of, and face accountability to, the public. Shrouding the selection of DEC members in secrecy can only work to undermine confidence in the process, especially given the substantial powers enjoyed by the DECs. The other members of the DEC are appointed by the parties that qualify to name a member to the CEC. Therefore, if a satisfactory approach for allocating party seats is designed for the CEC, it will lead to a satisfactory approach for the DECs.

In general, the powers of the DECs contemplated in the current draft appear appropriate. The Draft Version also contemplates relatively standard responsibilities for PECs. Two issues however, arise from the Draft Version. The first is timing. The PECs are not defined until late in the process – 50 days before the election. (Draft Code, Art. 36) Nevertheless, they will have much to accomplish and will be the key interface between the public and the Election Administration. One provision calls for the PECs to inform voters about the time and place of the election no later than 3 days before the election. (Draft Code, Art. 14.1.(b).) If this, in fact, were the only definitive way that voters learned where and when they were to go to cast their ballots, it would be an invitation to confusion and would greatly undermine the credibility of any election. This provision alone underscores the need to construct a timeline to assess whether mechanically appropriate amounts of time have been allotted to accomplish necessary tasks in an orderly way.

Another issue raised by the provisions relating to the PECs is a reference to the PECs issuing voter registration cards. Yet, the draft does not provide an extensive discussion of voter registration cards. There is no reference to when the voter registration cards are to be issued. Given that the PECs are themselves not formed until 50 days before the election, the voter lists are not posted before 30 days before the election, and challenges are not through the appeal process until 15 days before the election, it would appear that they cannot be issued until quite late. This could create the possibility of substantial confusion.

B. Alternative Version

While the Draft Version includes a number of variations on political party representation on the Commissions, there is an alternative proposal that presents an approach that aims for “nonpartisanship”, as opposed to “partisan balance.” The alternative offers two key distinctions: (1) it proposes a radically different approach to the appointment of the various Commission

members and (2) it proposes the creation of new consultative bodies that advise and support the work of the Commissions. In addition, the Alternative Version addresses some of the points raised above regarding the Draft Version and raises a handful of other issues. Each of these matters is discussed below.

Appointment. The proposal calls for the President to appoint the Chairperson of the CEC and Parliament to appoint 4 members – 2 from the majority and 2 from the minority. (Alternative on CEC - not numbered.) The proposal also calls for 6 members – the majority – to be elected by Parliament "from recognized representatives of civil society who have not participated in political activities." (Alternative, Art. 43.2.3.4.) Under such an approach, the majority of the CEC would be nonpartisan and, presumably, persons of stature in Georgian society. Attempts to pursue such a "nonpartisan" model are not unusual, and they can be successful. However, it is important to bear in mind that there can be pitfalls.

Given that the idea of democracy is for people to sort out the important issues that confront their community in a public, political forum, it may be difficult to identify active citizens who have remained entirely above the political fray. Further, the selection of the "nonpartisan" members is to be made by Parliament, which is a political body, and the guidelines for who qualifies –"recognized representatives of civil society" – are quite vague. This issue is complicated further, because the Alternative Draft calls for appointment of nonpartisan members by a simple majority in Parliament. This creates a risk that the majority appoints persons who favor its interest. This would result in a partisan CEC. It may, therefore, be better for nonpartisan CEC members to be appointed by a supermajority large enough to ensure that each appointee has the confidence of the majority and opposition parliamentary parties.

DECs. At the DEC level, the proposed alternative calls for 10 members – 6 from civil society and 4 from political parties (again 2 from the majority in the Sakrebulo and 2 from the minority). The DEC structure presents precisely the same issues as the proposed CEC structure, with some variation. In some Sakrebulos, for example, one party or faction may be in the majority. In others, or at the CEC level, another party or faction may be in the majority. The majority party in each Sakrebulo and in Parliament would theoretically be presented with wide power to appoint the "civil society" members of the Commission.

PECs. The proposed approach on the PEC level is also novel for the region, and while it is not subject to the same kind of problems described above for the CEC and DECs, it presents its own set of dangers. Under the proposal, the PEC Chairmen is selected by the PEC members, 6 members are selected randomly from voters' lists by the DEC and 5 members are chosen by the parties with the best results in last elections (it is not clear whether that is nationwide or in the precinct) and 5 are selected randomly by the DEC 30 days in advance of the election.

The logistics of this approach would be quite complex. First, the DEC selects 25 names randomly from the voter lists. (Recall that under the Current Draft, the voter lists are not posted for inspection until 30 days before the election. (Draft Code, Art. 13.) Then "election subjects" may each reject up to 5 of the selected 40. Then, by a method that is not clear, the figure will be reduced to 6. It is not stated whether selected persons may decline to serve or how the narrowing process will be completed, but it is difficult to see how it could be completed more than 29 days

in advance of the election, and at that stage the selected PEC members would have to be trained in election procedures. All this would need to happen at precisely the time that voter lists are to be posted and challenges heard. Again, this underscores the need to make a timeline to see how various provisions work together mechanically.

Chapter V – Registration of Election Subjects. Election Deposit

Requiring electoral candidates to obtain a certain number of signatures from supporters is a common method of preventing frivolous candidacies. Employing reasonable financial deposits as an alternative to signature lists or in combination with signatures is another method. Whichever system or mix of systems is chosen, the goal of the system should be to require a significant demonstration of support for parties and candidacies to discourage frivolous candidacies on the one hand, while not stifling potentially serious parties and candidacies.

Deposits. It is impossible to assess the propriety of election deposits without knowing the magnitude of the deposits. The current draft does not specify the amount of the proposed deposit. However, if the required deposit is very low, it could encourage (or at least not discourage) frivolous candidacies. On the other hand, if the required deposit is very high, the option to provide an election deposit rather than gain signatures would only help very well-funded candidates. Consideration should be given to who benefits from the deposit option and whether it advances the overall goals of encouraging ballot access to all serious candidacies and discouraging access for frivolous ones.

If the deposit option is employed, the Draft Code's commitment to returning election deposits within one week of the final results of the elections is impressive and commendable. (Draft Code, Art. 46.2.) If this is not a realistic deadline it should be set later so as not to set unrealistic expectations which, if unmet, could add tension to the post-election environment.

Signatures. It appears that the required number of signatures for Presidential candidates and parties is 50,000 and 1,000 for Parliamentary candidates. (Draft Code, Arts. 84.2, 100.4) These figures appear reasonable. The amount of time provided to collect signatures must be reasonable, and parties and candidates must be provided with notice, forms and other relevant material in a timely manner, so that they have an adequate opportunity to meet the signature requirements. As discussed below, however, the timetable for gathering and submitting such signatures may prove unduly tight.

It would also be useful to add a provision asserting the right of voters to sign more than one support list, which is an accepted international standard. Restricting citizens to signing only one support list increases potential for intimidation of voters and can undermine trust in the secrecy of the ballot. It also creates an unfair burden on parties and candidates, because they cannot know whether a citizen has or has not previously signed a support list, so they may inadvertently collect invalid signatures to their detriment.

Signature Verification. The provision requiring a check of 20 percent of the names on a list and then checking another 20 percent if more than 10 percent of the first 20 percent were

found to be invalid appears reasonable. (Draft Code, Art. 43.) However, consideration should be give to whether, if the second 20 percent sample also has an error rate of over 10 percent, that should lead to a full review to determine if sufficient valid signatures have been provided as opposed to automatic disqualification. Hopefully, the 10 percent error thresholds will be reached infrequently. Even if they are reached, however, it may still be possible for a candidate or party to have a sufficient number of valid signatures to qualify if a full verification is conducted. In fact, if citizens are limited to one valid signing of a support list, but are reluctant to tell a party that they signed for a competitor and therefore sign more than one, it may be unreasonable to disqualify a party or candidate with a 10 percent error rate.

Timing is also critical concerning verification of signatures. The Parliament should consider carefully whether requiring the commissions to verify 20 percent or more, if the error thresholds are met on any of the lists within 10 days, is practicable. The mechanics of this process need to be considered carefully, including the approach to verification. The draft law provides for verification in the presence of the candidate. (Draft Code, Art. 43.5.) This requirement is proper and could also affect time needed to complete the process.

Chapter VI – Financial Provision of the Elections

Financing Administration. The provisions in the draft code related to the financing of the administration of the election appear reasonable. It is important that the budget be set sufficiently in advance of the election so that the CEC can make the necessary preparations and distribute the appropriate funds to the district and precinct level commissions, in order that they make the necessary preparations prior to the election. The suggested revision stipulating that the CEC prepare the draft budget for submission to the Ministry of Finance not more than 58 days. The alternative suggests 4 months, which would appear to be the minimum time needed. (Alt. Draft Code, Art. 48.1.) The provision in Draft Code, Article 48.3, transferring funds to the CEC 55 days before the election, also appears to be a minimum amount of time, given the amount of time necessary for organizing various electoral tasks. Further consideration for expanding these times may be warranted.

Campaign Financing. The system for financing campaigns contemplates a mix of both public and private contributions. (Draft Code, Arts. 50-52.) While the provisions are generally sound, the Draft Code does not address some important issues. It does not indicate who will allocate the money to the campaign funds, how much they will allocate, how such allocations will be determined and whether there are any conditions for qualifying for such public financing. The Draft Code simply states that "[t]he amount allocated for the election campaign shall be transferred to the special account of the election subject." (Draft Code, Art. 50.2.) Moreover, these issues again implicate the timing of the election process. If parties, blocs and candidates are not registered until weeks before the election, then election funds cannot be issued until that time. If they are issued only weeks before the election, usefulness of the funding will be undercut. It is therefore recommended that further consideration be given to guaranteeing that registration and funding be provided far enough in advance for political contestants to be able to plan and conduct effective campaigns. There have been problems in prior elections in this regard, and specific steps should be taken to ensure that public funds are provided.

It appears that every party or candidate that qualifies for the ballot will be allotted funds on an equal basis. Assuming sufficient amounts of funds are allocated this would assist parties and candidates in projecting their message and informing the public of the choices they present. It is assumed that an amount will be provided that is sufficient to guarantee political contestants the minimum necessary to provide their message to the voters and that the contestants would be free to supplement this with private funding. An amount or a formula should be established to allow this without artificially encouraging frivolous contestants to seek qualification for public funds. Consideration should be given to spelling out the mechanics of such public financing to address by whom such funds are distributed, the magnitude of the funds involved, how they will be distributed and if there are any conditions for qualifying for access to such public financing.

The Draft Code also contemplates private financing. (Draft Code, Art. 51.2-.5.) The Draft does not appear to impose any caps on contributions. Moreover, it appears to contemplate that private Georgian commercial entities can contribute. Depending on the interplay between the level of public financing and the level of funds needed to mount a serious campaign, the private financing component could be very significant. Moreover, given the fact that there do not appear to be caps, a small number of private contributors could secure disproportionate influence. In many countries, contribution caps are imposed. It is, therefore, worth considering whether such caps would strengthen the integrity and confidence in the process in Georgia.

Disclosure. Another key element of most campaign finance systems is disclosure. The Draft Code appears to contemplate all contributions to the campaign fund being subject to disclosure. Moreover, there appears to be a requirement that all transactions be made through the campaign fund and that the records of such funds be open to the public. (Draft Code, Arts. 51-52.) However, there is also a provision that "[e]lection subjects shall have the right to manage finances gained through fundraising through bank transactions as well as cash payments." (Draft Code, Art. 50.6.) While there need not be a requirement that all contributions and expenditures pass through a "banking transaction", the allowance of cash payments should not become a vehicle to avert disclosure; a specific record of all cash payments should be required and should be public record.

The Draft Code requires a financial report on campaign accounts to the CEC no later than one month after the announcement of election results. (Draft Code, Art. 53.4.) While there are general provisions for the information about the accounts to be public, there are no specific reporting provisions. Given the practical problems with a person asking a party for such information, consideration should be given to requiring reports to the CEC at reasonable intervals before election day.

Chapter VII – Polling Day

The Draft Code provides a framework for election day that is extremely comprehensive in some respects. The provisions address important standards: secrecy of ballots; equality of the vote; minimization of opportunities for intimidation of voters; assistance for disabled voters; and fair and transparent procedures for counting and consolidating the votes cast. In order to

maintain voter confidence in the Georgian electoral system, it is crucial that the law be as transparent as possible and sufficiently detailed so that no "loopholes" are available for manipulation. Further detailed provisions appear necessary in this respect.

Voting. The suggested revisions included in the draft contained numerous positive suggestions with regard to the preparations for voting. These suggestions include the following: the clarification of the provision regarding when it is admissible to close a polling station during the vote (Draft Code, Art. 53.3); the suggestion that all individuals authorized to be present at the polling station wear identifying nametags (Draft Code, Art. 53); the suggestion that the code provide that the locations of polling stations meet the same requirements as those put forth for election commissions (Draft Code, Art. 54.2); and the addition of a provision stating that polling stations not be established in premises belonging to the police or Interior Ministry (Draft Code, Art. 54).

Mobile Ballot Box. The provisions regarding the procedures for the mobile ballot box are generally very sound. Nonetheless, voting by mobile ballot box requires a strict record of the number of ballots that leave with the box each time, the number of ballots used by voters and the number returned unused. A reconciliation should be conducted each time the mobile ballot box is returned to the polling station to ensure against ballot box stuffing. A second problem with voting by mobile ballot box is ensuring ballot secrecy and ensuring against undue influence over the voter. A screen should accompany the box to ensure balloting secrecy, and/or an independent observer or proxies from opposing parties should accompany the box to ensure the integrity of the voting process for each voter.

Protocols. Draft and Alternative Provisions on election protocols and other election documentation are generally sound and deserve further consideration. (Draft Code, Art. 64, 67 and 68) Based on best practices noted in NDI's international experience, detailed protocols should be maintained to ensure ballot security from the time of their printing to delivery to the CEC, and the process should be witnessed and verified by party proxies who sign the protocols to indicate their agreement that security has been maintained. Copies of such protocols should be provided to the proxies and should be made publicly available. The process of ballot printing, packaging, destruction of printing plates and delivery of ballots to the CEC should also be open to observation by accredited observers. An accounting of ballots should be recorded on protocols at each step of their distribution from the CEC to District Election Commissions (DECs) to the Precinct Election Commissions (PECs) and back from PECs to DECs to the CEC. These steps should also be witnessed by proxies and accredited observers who accompany the ballots and related materials. At each step, protocols should be signed by proxies to indicate agreement that ballot security has been maintained, and copies should be given to proxies and be made publicly available. In addition, there should be provisions for lodging complaints about lack of ballot security at each step of the process, along with an expedited process to evaluate such complaints and provision of appropriate and effective remedies.

The provisions set forth in Article 64 of the Draft Code and in any corresponding articles in the Alternative Draft should be expanded to include entry on protocols and the Election Record Book – at the time of preparing for the opening of the polling station – the total number voters on the primary and supplemental voter lists, the total number of ballots received at

the polling station and other required information. The Alternative Draft's provision that, every two hours during the polling, the number of signatures on the voters' list be counted and recorded could add important safeguards against illegal voting and ballot box stuffing.

The provisions of Article 64 would be strengthened significantly by four additions, requiring that: 1) a copy of the protocol be posted publicly for approximately one week, to raise public confidence and allow verification if questions arise about the vote; 2) copies of protocols to accredited observers present at the polling station (PEC) or that PEC officials sign and place an official stamp on "observation protocols" provided by such observers, thus verifying that the vote counts on such protocols correspond exactly with the counts on the official protocols; 3) vote consolidation protocols at the DECs and PEC indicate precinct-by-precinct results as well as cumulative results for the district and country, and that all computer consolidations to the same, so that proxies and observers can spot-check precinct results above the precinct level; and 4) precinct vote counts used to calculate a preliminary election result must be released simultaneously with the announcement of that preliminary result. Further, the official election result protocol described in Draft Code Article 64 should indicate that the sum of unused ballot papers, plus spoiled ballot papers, plus ballot papers found in the ballot box equal the number of ballot papers received and on hand at the beginning of the voting process. If this is not the case, it should be so noted on the protocol as an indicator of possible irregularities.

Safeguards contained in the Draft Code and Alternative Draft would be further strengthened if provision is made that upon completion of the official election result protocol and the signatures by officials and proxies, clear plastic tape be affixed covering the numbers indicating the official results and the signatures, so that they cannot be tampered with thereafter. The election results of each polling station and at each commission level should be publicized as soon as possible. This allows political parties and election monitors to verify the results and encourages voter confidence in the integrity of the election process.

Complaint Mechanism. The Draft Code's provisions regarding the complaint mechanism are generally positive. Procedures for filing emergency complaints concerning election law violations during election day that could be processed and immediately remedied would strengthen the Code.

The provisions of Draft Code Article 58.6 take up consequences of commissions determining that the seal on a ballot box was tampered with, violating the integrity of its contents. Adding illegal ballots (ballot stuffing) or illegally removing ballots may be accomplished after breaking the seal of a ballot box, but can be accomplished without doing so as well. Should a PEC become aware of circumstances that indicate the integrity of the ballot box has been violated, action is required. The provisions of Article 58.6, however, may not adequately address the matter and could create conditions for serious electoral manipulation. For example, if all ballots in the box at the time of discovery of tampering with the seal are automatically invalidated, someone near the end of the polling day could break a ballot box seal in order to invalidate many votes for an electoral opponent – knowing in advance that a precinct is a likely stronghold of that opponent.

While there is no simple or single way to address such problems, it might be possible to: temporarily halt the voting at the polling station upon discovery of ballot box tampering; remove and secure the ballots from the box, count them and enter the number on a special emergency protocol; count the number of signatures on the voter list at that point and enter it on the emergency protocol; and seal the ballots in a special envelope. Then the ballot box could be resealed and voting completed. The box would be opened, ballots reconciled and votes cast after the box was resealed. This would be entered on a protocol that would follow normal consolidation procedures. The ballots removed when tampering was discovered would then be removed from the special envelope and would be examined to determine if the number of ballots matched the number of signatures on the voter list at the time of discovery of tampering and whether each ballot has the required signatures and stamp. Ballots that appeared to be illegal would be segregated and placed in a special envelope. Apparently valid ballots would be counted and entered on a special protocol. All of these materials would be placed in a special emergency envelope and transmitted to the DEC or CEC. A hearing could then be conducted within two days to determine whether the apparently valid ballots should be consolidated in the PEC's count, whether they should be excluded and only the votes cast after the ballot box was resealed should be consolidated; or whether re-voting should be ordered for that polling station. A similar approach could be taken for ballots that are challenged during the normal counting process, if there is a reasonable basis to suspect that they were illegally cast.

Chapter VIII – Publicity in the Process of Preparation and Conduct of Elections

The provisions of Chapter VIII on transparency of the election process are in many ways exemplary. The detailed approach of the articles embraces a significant number of best practices for opening the electoral process and thus increasing public confidence. A few steps should be taken to remove problematic provisions and to further strengthen the Chapter.

Observers. It is internationally recognized that the oversight of the election process by nonpartisan domestic and international observers, and party/candidate representatives and news media are integral parts of an open election that increases public confidence in the process and encourages citizen participation in government. Monitors should be given full access to the electoral process, and the Draft Code appears to grant them such access. Read together, Articles 69-76 accomplish this. However, a few inconsistencies and ambiguities should be addressed. Draft Code Articles 69.3, 74.1, 75.5 and 76.1 all mention voting but should be expanded to also include counting and consolidation of results at PECs, DECs and the CEC. Copies of the voter lists are to be publicly available (Draft Code, Art. 70.2); provisions should state explicitly that parties and observers have the authority to inspect and receive copies of the voter lists for independent verification. (Draft Code, Arts. 70.2, 70.4, 74.1 and 75.) International experience demonstrates that restrictions on the number of observers, proxies and news media are not necessary for orderly election administration; in fact, observation has proven best accomplished in teams of two, so that various processes can be observed simultaneously. The restrictions contained in Art. 72, Alternative, Art. 73, Alternative and Art. 74.4 therefore should be eliminated.

Also, the restriction in Draft Code Article 72.2 that organizations must be registered two years before elections is unnecessarily restrictive. Citizens may decide to exercise their freedom of association to protect, promote and defend electoral-related rights as elections come into public focus, certainly in the year of the election. Any registered organization should be considered for accreditation as an observer group. As a technical matter, the provision concerning submitting a list of observers contained in Draft Code Article 73.3 should be separated from the application and registration process and moved to Article 73.7 related to issuing observer certificates. Organizations apply for registration, and individual observers should not be part of decisions about registration.

Representatives of Election Subjects. Draft Code Article 75 should state that all of the rights and responsibilities granted to observers set forth in Article 74 apply to party and candidate representatives, or a specific listing of proxy rights and responsibilities should be set forth. As noted above, the provisions should also state explicitly that proxies have the right to monitor pre-election and post-election elements of the process as well as voting, counting and consolidation of results at PECs, DECs and the CEC.

Pre-Election Campaigning. Provisions of the Draft Code on pre-election campaigning are sound. Those pertaining to political neutrality of government officials, government employees, buildings, communications facilities and transportation vehicles are very good. The Draft Code provides that the Commissions are to publicize information, including by means of the press and mass media, regarding candidate and party programs and platforms. (Draft Code, Arts. 71.3 and 79.1.) The Draft Code indicates that such materials will be distributed "X days prior to the elections. (Draft Code, Art. 79.1.) If such materials are produced only weeks in advance of the elections, it is not clear that they can be optimally helpful to voters in assessing their choices. It is urged that production and distribution be required as far in advance of the elections as possible.

It is also worth noting that the Draft Code requires samples of pre-printed campaign materials be presented to the relevant Commission. (Draft Code, Art. 79.5.) The Draft does not indicate the purpose of such filing. If it is merely ministerial – to keep a record of all materials – it would not present a serious issue. If, however, the purpose is for the Commissions to vet such materials that would present a serious problem of prior restraint on political speech, which could chill such speech. It is therefore recommended that Article 79.5 be amended to state that the submission is only for the election Commission's records.

Media. The media is one of the most important methods through which the candidates and parties can communicate with the public. The two crucial issues with respect to media coverage of a campaign are: whether the media is free to convey information about the campaign so that the public is prepared to make an informed choice; and whether the media carries out its mandate in a fair and accurate manner. The provision in the law requiring equal access to private media is quite positive. (Draft Code, Art. 78.9.) Not only should the state television and radio be obliged to provide a certain amount of free broadcast time to candidates, but detailed provisions requiring state controlled media to communicate fairly the views of political contestants via balanced and accurate reporting should be provided in the law. There should also

be a complaint mechanism regarding violations of these regulations. Private media should be called upon to follow the provisions as a voluntary exercise of journalistic ethics.

Chapter IX – Rule of Adjudication

Draft Code Article 81 provides an important framework for complaint mechanisms and timely decision-making on complaints. The proposed alternative regarding adjudication of disputes relating to voter lists is also useful in that it presents a detailed framework in order to accomplish an important task. However, the process of review, like the voter list compilation process generally, raises practical timing issues. The contemplated completion of the process as late as 10 days before the election could invite difficulty. (Draft Code, Art. 81 (alt.10).) The timing issues relating to voter list production therefore warrants further consideration. Draft Code Article 81 calls for resolution of disputes three days after a complaint is filed in many cases. Given the need for time to file reply submissions, such a timetable would afford very little time for review and consideration. In cases, such as definition of precinct boundaries, allegations of election fraud and whether electoral outcomes are valid, more than three days from the filing of a complaint may be needed to reach a decision. In such cases, a mechanism for minimum time extension might be advisable (for example upon agreement of the parties).

Chapter X – Election of the President of Georgia

The Draft Code provides that the first round of the election for president be on the second Sunday of April each five years (Draft Code, Art. 82.1) and that parties and voter initiative groups must nominate their candidates no later than 43 days before that date. Nominations may be earlier and indeed would have to be if the 50,000 signatures supporting a nomination are to be collected and submitted no later than 40 days before the election date, as required by Article 86. It is recommended that the law require full cooperation by the CEC with early nominations in order to provide a reasonable opportunity to collect supporting signatures.

Chapter XI – Second Round of Election, New Election, Extraordinary Election of the President of Georgia

The provisions for the second round of elections are quite sufficient and well planned. However, Article 89.2 should state that the second round should take place within two weeks of *the announcement of results of the first round of elections* rather than "within two weeks after the election." Given the time provisions for consolidation of results listed in Draft Code, Article 88, the results from the first round may not be finalized in two weeks. If an election is very close, it may not be clear that a second round is necessary for some time. Moreover, consideration should be given to whether two weeks is sufficient time even after the announcement of results to organize a second round. In many places, second rounds are conducted in such a timeframe. In others, more time is allotted, for example 30 days. The goal is to allow sufficient time for proper administration of the elections and for voters to focus attention sufficiently on the run-off

candidates to make an informed choice, without expanding the process into two separate elections.

There are provisions within Chapters X, XI and XII regarding the timelines for nomination and registration of candidates and party lists for both the presidential and parliamentary elections. The timelines are all slightly different but not so much so that standardizing the dates would be impossible. For instance, instead of having nominations for presidential candidates due no later than 43 days before the election (Draft Code, Art. 85), for extraordinary elections no later than 40 days before the election (Draft Code, Art. 91) and for parliamentary candidates no later than 50 days before the election (Draft Code, Art. 97), it would seem reasonable to establish a standard deadline of no later than "X days" before the elections as a nominating deadline for all types of elections. By the same token, the deadlines for submission of voter support signature lists could be standardized at no later than "X days" before the election. The deadline for the Central Election Commission to register candidates could also be standardized. This would limit a great deal of potential deadline confusion on the part of parties and/or candidates. As stressed above, in considering standardized times for such deadlines, serious consideration should be given to placing those deadlines considerably more in advance of election day.

Chapter XII – Election of the Parliament of Georgia

Draft Code, Article 96 addresses potential conflicts of interest for parliamentary candidates very specifically. However, in the interest of fairness, it may be advisable to mandate that candidates be granted leave from their current positions for the duration of the campaign rather than requiring resignation. It is emphasized, however, that no international standard exists on this issue. If the candidate is elected, resignation is appropriate at that time. Further, it would seem that there should be a list of prohibited positions for the office of President as well as the Sakrebulos similar to that for parliamentary candidates.

Chapter XIII – Registration of Election Subject Participating in the Parliamentary Elections

In the current Draft Code, parties must apply for registration no later than 50 days before an election, must gather and submit support signatures no later than 45 days before the election and are then to be registered by the Central Election Commission no later than 30 days before the election. As noted throughout this commentary, the timeline is quite condensed and deserves further consideration to ensure manageability and fairness. It might, as mentioned previously, also be advantageous to standardize the deadlines across all different types of elections, be they presidential, parliamentary or local.

Draft Code, Article 98.8, prohibits parties that have joined election blocs from dropping out and running independently. Consideration might be given to establishing a deadline for dropping from an election bloc that is reasonably close to the election date and yet logistically feasible in terms of ballot preparation. This could preserve freedom of expression and freedom

of association of the parties that choose to disassociate themselves from their original election bloc.

With regard to Draft Code, Article 98.10, consideration should be given as to whether it is feasible for the CEC to adequately review submitted documents and decide on registration of the proposed election bloc within the allotted two days.

As with other sections of the Draft Code, the biggest issue with provisions relating to nominating candidates and parties for the Parliamentary elections relate to timing. Under the proposed system, the full outline of the choices presented to voters will not be completed until quite late. The registration of parties may not be completed and publicized until 25 days before the elections (Draft Code, Art. 97.12), blocs until 22 days before the election (Draft Code, Art. 98.10), party, bloc and majoritarian district candidate lists 15 days before the election (Draft Code, Art. 101.11). In the meantime, the Draft Code allows for candidates and lists to be disqualified as late as two days before the election. (Draft Code, Arts. 101.5 and 102.) Backing the processes up so close to the elections may limit voters' ability fully to assess their choices.

Gender Considerations. The proposed alternative for Draft Code, Article 99.3, creates a laudable attempt to encourage gender balancing. Such minimum requirements are employed elsewhere.

Chapter XIV – Consolidation of the Results of the Parliamentary Elections of Georgia

As described above, there may be an interplay between the timing of the finalization of election results and the required timing of second round elections. Given the timetable for consolidating and finalizing results, it may not be immediately clear whether and where second round election will be necessary. Therefore, the requirement that such elections take place no more than two weeks after the election may not be realistic.

The system for allocating seats in the Parliament appears reasonable and consistent with international standards. (Draft Code, Art. 105.9-14.)

Part IV – Elections of Local Self Governance Representative Body – Sakrebulo (Council)

The NDI election law comment group did not conduct an extensive analysis of Part IV of the Draft Code. The conduct of local elections, however, are subject to many of the same issues as the national elections described above. In this setting, timing is still a problem. Candidate lists are not finalized until 30 days before the elections. (Draft Code, Art. 119.3.)

The different requirements and deadlines for party lists versus independent candidates seem to favor the parties. Independent candidates and parties generally should operate under the same requirements regarding application, voter support lists, deposits and registration, unless there is a compelling reason to treat them differently.

Draft Code, Article 120, dictates that candidates for the Sakrebulo be allowed to withdraw until 6:00 p.m. the day before the election. This does not appear to provide adequate time for the election commission to make this information public in an effective manner, nor does it appear that the commission would have adequate time to make the necessary adjustments on the ballots or within the polling station. Consideration, therefore, should be given to extending the deadline for withdrawal to a more manageable period before the election day.

Experience indicates that the Draft Code should list in more detail the circumstances that would result in an election being deemed invalid. Declaring invalid elections in precincts "in which this law is seriously violated" (Draft Code, Art. 123.11.) leaves open the possibility of arbitrary invalidation. In fact, this has been a serious problem in some countries, with arbitrary invalidations invoked to change electoral outcomes. The general standard to consider is whether the electoral irregularities or legal violations rendered it uncertain whether the will of the voters was expressed and respected. Inclusion of a non-exclusive list of possible causes for invalidation therefore may be worthy of consideration. In addition, it may be advisable to provide that invalidation orders be subject to an appeals process to the CEC and perhaps upon specific conditions to the highest court.

Conclusion

NDI would like to emphasize that the Draft Code and the provisions offered in the Alternative Draft provide a sound basis for conducting democratic elections in the Republic of Georgia. There is no single way to craft an election law that meets international standards and international commitments and obligations for genuine elections. Moreover, once the legal framework for democratic elections is agreed upon through a broad political dialogue and enacted, the challenge of proper implementation becomes crucial. In this respect, the provisions for impartial and effective election commissions and for transparency and confidence-building through observers, party proxies and news media are central to organizing a credible election process. These elements provide the basis for a true democratic mandate for government that is based on respect for the will of the people expressed through elections. NDI remains committed to assisting those in Georgia working to advance democracy through genuine elections, citizen participation and democratic governance.