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Thus Spoke the OSCE ODIHR – or What Does the Legal Review Say?



2020 has arrived and Georgia is moving towards a regular election phase. The election campaign season is looming and yet there is no consensus on the election system. Political parties have been engaged in endless political battles, instead of being focused on designing policy programs, creating a positive agenda and consolidating the community. Thematic discussions have been put on the back burner and personal arguments have prevailed. The series of negotiations between the ruling party and the opposition, moderated by the diplomatic corps, has not yet brought any tangible results. Occasionally, some third parties come up with the suggestion to refer to an unbiased arbitrator to review the negotiators' election offers. One example is the Georgian Public Defender's [request](#) to the OSCE ODIHR* to share an opinion on [draft amendments](#) to Georgia's election code. Many contradictory evaluations have been made regarding the conclusions of the OSCE ODIHR. The present article aims to discuss the key findings of the OSCE ODIHR's legal review and analyze the perspectives of the political negotiations between the ruling party and the opposition. However, the constitutionality of the initiated draft amendments will not be examined.

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Before studying the OSCE ODIHR's opinion, it is best to clarify briefly the [mandate](#) of the organization. The OSCE, founded in 1975, is the [union](#) that aims to maintain peace and security, strengthening justice and continuing development of friendly relations and co-operation among its member states. The predecessor of the ODIHR was the Office for Free Elections introduced by the [Paris Charter for a New Europe \(1990\)](#), aiming to facilitate contacts and exchange information on elections between participating states. The 1992 [Helsinki Summit](#) expanded the mandate of the Office for Free Elections and introduced the ODIHR, the leading branch of human rights and democracy - the main institution of the [Human Dimension](#). The ODIHR deals with the following topics: countering terrorism, democratization, education, elections, gender equality, human rights and fundamental freedoms, legislative support, migration, Roma and Sinti, rule of law, tolerance and non-discrimination. [The legislative support](#) means reviewing the conformity of the existing legislation or a draft amendment to a law of the member states with the international standards for the sake of improving the legislative framework.

The OSCE ODIHR's legal review highlights, in the beginning of the document, that it is national courts' competence to decide the constitutionality of the draft amendments to Georgia's election code. The institution's opinion does not go beyond the assessment of the draft amendments in the light of international obligations, OSCE commitments and international good practices. The ODIHR provides Georgia with recommendations which fills the gaps of the presented draft amendments. Taking the organization's mandate and the peculiarities of its work into account, it should have been obvious from the very beginning that the institution would not have been able to judge the constitutionality of the draft amendments. The expectation that the ODIHR's opinion would have been a milestone in the process of the negotiation between the ruling party and the opposition turned out to be wrong. The [public statements](#) of Georgia's ombudsman show that she was also expecting the document to cover the issues of constitutionality; however, it is unclear what her expectation was based on. The OSCE ODIHR has issued [hundreds of similar analyses](#) about many countries' internal legislation, which reveal that the organization's evaluations of domestic laws focuses on two aspects: the conformity of the document with the OSCE commitments and international standards for human rights protection on the one hand, and international good practices on the other hand. The subject of the disagreement between Georgian opposition and the ruling party has never been the conformity of the draft amendments (also referred as the German Model) with international standards, but the alleged unconstitutionality of the German Model. Despite all this, Georgia's Public Defender's attempt to mediate the negotiation has been positive.

ODIHR's legal review makes several important interpretations about the election systems and the decision-making process. Paragraph 8 confirms that the selection of an election system is a state's sovereign decision; however, the selected system should not contradict international legal standards. Additionally, ODIHR notes that no international norm defines the rules for the selection of an election system. Based on different historical, political, cultural, geographical and other backgrounds, different states prefer different models. Their democratic character is checked by the globally recognized principles such as universality, equal suffrage, secrecy of ballots, freedom and fairness. The core element for selecting an election model is universal consensus. A sustained election system is a mandatory precondition for the democratic and peaceful development of a state. It does not belong to any political party but benefits a whole society. In that context, the ODIHR's

review emphasizes the importance of the inclusivity of an election reform, including the engagement of many parties and reaching a national consensus.

According to OSCE ODIHR, the long-acknowledged problem of Georgia's election system is the nonexistence of a legal framework for constituency delimitation. Without a unified, precise, written standard, the risk of artificial merging or splitting of constituencies is high ([gerrymandering](#)). In the document, ODIHR recommends Georgia to review its electoral legal framework to specify parameters for determining constituency boundaries and set criteria for permitted deviations, whether or not multimandate constituencies are created. According to the institution, based on international good practices, it is undesirable to amend fundamental elements of an election system less than one year before an election. Remarkably, the review mentions that "The change would be implemented by amendments to the organic law, which according to the Constitution, can be changed by a simple majority of votes in the parliament." This statement allows readers to double-interpret the reasonability of amending the legislation in 2020. It is crucially important to clarify this notion before continuing the negotiations; if any fundamental change to the election system is against international good practice, perhaps the political parties should compromise by maintaining the current system.

In conclusion, the OSCE ODIHR considers the draft amendment compatible with international standards. The document intentionally avoids examining the constitutionality of the proposal. Several new proposals have been publicly made on changing the Election Code of Georgia and the discussions of their constitutionality also continue. However, the problem that Georgia's political establishment faces is more political than legal. The legal correctness of a document has a secondary importance in this process compared with political compromises. Without reaching a consensus, it will be difficult to ensure a healthy election environment.