



Strasbourg/Warsaw, 19 December 2011

Opinion No. 617 / 2011

CDL-AD(2011)043
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AND

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

JOINT OPINION
ON THE DRAFT ELECTION CODE
OF GEORGIA

Adopted by the Council for Democratic Elections
at its 39th meeting
(Venice, 15 December 2011)
and by the Venice Commission
at its 89th plenary session
(Venice, 16-17 December 2011)

on the basis of comments by
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I. Introduction

1. At the request of Georgian authorities, the European Commission for Democracy Through Law (“the Venice Commission”) of the Council of Europe and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (“OSCE/ODIHR”) have prepared the present opinion on the draft Election Code of Georgia (“the draft Code”)¹. The most recent previous joint opinion of the Venice Commission and OSCE/ODIHR is dated 9 June 2010 and contains comments on amendments up to March 2010.² This Joint Opinion contains commentary and recommendations on the Code as drafted through 22 November 2011 and based on draft revised amendments sent by the authorities to the Venice Commission on 8 December 2011.³ Additionally, the Venice Commission and the OSCE/ODIHR are aware that additional amendments were prepared on 10 December; these amendments, however, are not commented upon in this review.

2. This Opinion does not warrant the accuracy of the translated text that was reviewed, including the numbering of articles, paragraphs, and sub-paragraphs. Any legal review based on translated text may be affected by issues of interpretation resulting from translation. Further, while discrepancies in translation have been reconciled as best as possible, the accuracy of relevant terminology cannot be guaranteed.

3. This Opinion is offered for consideration by the authorities of Georgia, in support of their efforts to develop a sound legal framework for democratic elections. The extent to which any amendments to the draft Code can have a positive impact will ultimately be determined by the political will of state institutions and officials responsible for implementing and upholding the Code once adopted.

4. The OSCE/ODIHR and the Venice Commission have previously commented on the legal framework for elections in Georgia, including within the context of final reports of OSCE/ODIHR election observation missions to Georgia. This opinion should be viewed as complementary to earlier comments and recommendations provided by OSCE/ODIHR and the Venice Commission.

5. This Opinion is based on:

- An official translation of the Draft Election Code as of 1 September 2011 provided by the Parliament of Georgia (CDL-REF(2011)044rev);
- Draft amendments to the draft Election Code of Georgia (CDL-REF(2011)044add);
- Joint Opinion on the Election Code of Georgia as amended through March 2010, adopted by the Council for Democratic Elections at its 33rd meeting and by the Venice Commission at its 83rd Plenary Session (CDL-AD(2010)013, 9 June 2010);
- Joint Opinion of the Election Code of Georgia adopted by the Council for Democratic Elections at its 26th meeting and by the Venice Commission at its 77th plenary session (CDL-AD(2009)001, 9 January 2009);

¹ Draft Election Code of Georgia (CDL-REF(2011)044rev).

Source: [http://www.venice.coe.int/docs/2011/CDL-REF\(2011\)044-e.pdf](http://www.venice.coe.int/docs/2011/CDL-REF(2011)044-e.pdf).

² Joint Opinion on the Election Code of Georgia (CDL-AD(2010)013); see details in par. 5.

Source: [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)013-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)013-e.pdf).

³ Draft amendments to the draft Election Code of Georgia (CDL-REF(2011)044add).

Source: [http://www.venice.coe.int/docs/2011/CDL-REF\(2011\)044add-e.pdf](http://www.venice.coe.int/docs/2011/CDL-REF(2011)044add-e.pdf).

- Joint Opinion on the Election Code of Georgia adopted by the Council for Democratic Elections at its 16th meeting and by the Venice Commission at its 67th plenary session (CDL-AD(2006)023, 16 June 2006);
- OSCE/ODIHR Election Observation Mission Final Report Georgia Municipal Elections, 30 May 2010 (13 September 2010);
- OSCE/ODIHR Election Observation Mission Final Report Georgia Parliamentary Elections, 21 May 2008 (9 September 2008);
- OSCE/ODIHR Election Observation Mission Final Report Georgia Extraordinary Presidential Elections, 5 January 2008 (4 March 2008);
- Parliamentary Assembly of the Council of Europe, Report on the Parliamentary Elections, 21 May 2008;
- Parliamentary Assembly of the Council of Europe, Report on the Extraordinary Presidential Elections, 5 January 2008;
- Venice Commission Code of Good Practice in Electoral Matters. Guidelines and explanatory report, adopted by the Venice Commission at its 52nd session (CDL-AD(2002)023rev, Venice, 18-19 October 2002);
- Venice Commission Guidelines on an Internationally Recognised Status of Election Observers adopted by the Council for Democratic Elections at its 31st meeting (Venice, 10 December 2009) and by the Venice Commission at its 81st Plenary Session, Venice, 11-12 December 2009 (CDL-AD(2009)059);
- Guidelines on Media Analysis during Election Observation Missions by OSCE/ODIHR and the Venice Commission adopted by the Council for Democratic Elections at its 29th meeting and by the Venice Commission at its 79th plenary session, Venice, 12-13 June 2009 (CDL-AD(2009)031);
- Existing Commitments for Democratic Elections in OSCE Participating States (2003); and
- Regional and international documents as articulated by the United Nations, Council of Europe, and OSCE.

6. On 26-27 October 2011, the Venice Commission and OSCE/ODIHR conducted a joint expert visit to Tbilisi in light of the preparation of this opinion. Meetings were held with representatives of the governing majority in parliament, the drafting committee of the parliament, representatives of the parliamentary and extra-parliamentary opposition, of civil society, as well as the Ambassadorial Working Group. The information and views shared with the experts during and after the visit have been taken into consideration in this opinion.

7. An effective, fair, and duly stated electoral legislation in any country is of crucial importance for the development of orderly, transparent, and just electoral processes. The legal framework for such electoral processes must take into consideration issues such as: the definition of which persons are entitled to vote and the procedures for their registration as electors; the definition of which persons are entitled to hold office and the procedures candidates must follow in order to be elected; the manner by which political parties may select candidates to run for political office; the requirements for creating electoral districts and delineating them; the financing of elections; the role of the media in electoral processes; the way votes are cast, counted and recounted in an election; the definitions of electoral fraud and other legal violations of electoral procedures; and how voters, candidates, political parties, and citizens in general may file legal actions in a court of law or a competent institution in these matters. This opinion addresses how these matters are regulated by the draft Code.

8. The present Joint Opinion was adopted by the Council for Democratic Elections at its 39th meeting (Venice, 15 December 2011) and by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

II. Executive summary

9. The draft Code is generally a complete and methodical law conducive to the conduct of democratic elections. The draft Code includes the necessary elements for organising and administering elections and addresses some of previous recommendations of the Venice Commission and OSCE/ODIHR. The draft Code takes steps to ensure that:

- Elections are conducted in a transparent and open manner by providing rights for observers and public access to election materials and information;
- Registered candidates have access to broadcast and print media;
- Voting is accessible to persons with disabilities and persons who cannot vote in their designated polling station; and
- Ballots are available in minority languages.

10. It is important to note that it was recommended in the OSCE/ODIHR Election Observation Mission Report on the Parliamentary Elections in Georgia of 21 May 2008 and the Joint Opinion on the Election Code of Georgia (CDL-AD(2010)013), that the Georgian Parliament could enact a new Election Code at least one year ahead of the next federal elections, instead of adopting further amendments. It is therefore commendable that a new Code was drafted before the next parliamentary (2012) and presidential (2013) elections in Georgia. Nevertheless, several recommendations previously made by the Venice Commission and the OSCE/ODIHR still remain unaddressed. In particular, the authorities in Georgia should give additional consideration to issues concerning:

- Restrictions on the right to stand for election, including overly long residency requirements for candidates;
- The formation of electoral districts in a manner that undermines the principle of equality of suffrage;
- Lack of effective mechanisms to facilitate the participation of women in elections;
- Remaining shortcomings in the regulation of political party and campaign finances; and
- Shortcomings in the processes for resolving electoral complaints and appeals.

11. Additionally, election observers continue to note that some provisions of the draft Code, such as those regulating the use of administrative resources by government candidates, continue to be insufficiently implemented. These issues and other recommendations for improving the draft Code are discussed in the Joint Opinion.

III. General principles

12. Article 1 of the draft Code sets forth that the Code regulates the election of the President of Georgia, Parliament of Georgia, Mayor of Tbilisi, and representative bodies of local self-government (Sakrebulo). Article 1 also provides that the draft Code regulates referendums and plebiscites.

13. Voters elect members of 63 governing bodies of local self-government units (municipalities and self-governing cities), the Tbilisi city Sakrebulo and the mayor of Tbilisi. Except for the mayor of Tbilisi, who is directly elected, the chief executives of local self-government units are selected by the local council. No international standard imposes the

direct or indirect election of mayors. According to the European Charter of Local Self-Government, the local executive organs must be responsible to the local council.⁴

14. Article 3 of the draft Code states that elections are conducted on the basis of universal, equal and direct suffrage by secret ballot. The principle of universal suffrage requires that all citizens have the right to vote and stand for election, subject to reasonable restrictions that may apply. As noted in the Venice Commission Code of Good Practice in Electoral Matters, such restrictions are usually about age, nationality, and residency.⁵

15. Considering the issue of age, Article 3(a.a), of the draft Code provides that, with the exception of people have restricted suffrage by law, “any citizen of Georgia who by the elections/referendum has attained or is on the day of election/referendum attaining the age of 18 and who meets the requirements prescribed” by the draft Code shall enjoy the right to vote. This age limit is consistent with the practice in the majority of countries.

IV. Electoral system

Electoral Districts

16. According to the draft examined, the Parliament of Georgia consists of 190 members, elected under a mixed electoral system. One hundred-seven (107) members are proportionally elected based on lists of candidates presented in a single, nationwide constituency. Eighty-three (83) members are elected by majority vote in single-mandate electoral districts. All members are elected for a period of four years (Article 109). However, the Venice Commission and the OSCE/ODIHR were informed that, as a result of internal political debate, the increase of number of MPs from 150 to 190 will most likely not take place. However, the Georgian authorities also informed of their intention to engage in reform of the administrative system, which would lead to changes in the size of districts. The Venice Commission and the OSCE/ODIHR strongly recommend such redistricting.

17. Article 14(1)(e) mandates the Central Election Commission (CEC) to establish electoral districts and to specify their boundaries. Likewise, Article 18 directs the CEC to establish, by resolution, electoral districts, “their boundaries, titles and numbers”. While the draft Code does not provide explicit criteria to be used in forming the majoritarian districts, the delegation visiting Tbilisi was informed that, in most cases, the boundaries of majoritarian districts coincide with those of municipalities. According to the legislators, this follows from Article 19(2) of the draft Code, which tasks the CEC to establish at least one District Election Commission (DEC) in each self-governing unit. The legislators have also stated the intention to further amend the current draft Code, possibly before its adoption, to require the division of the largest electoral districts into two; it is foreseen that 10 electoral districts in big cities with more than 100,000 voters would be split. In its present form, the draft Code does not require that electoral districts be of equal or comparable size, thus failing to guarantee one of the main principles of electoral rights, equality of the vote.⁶

18. Municipalities in Georgia are very unequal in terms of population size and numbers of registered voters. In the May 2008 parliamentary elections, the number of registered voters

⁴ ETS No. 122, Article 3.2.

⁵ Code of Good Practice in Electoral Matters. CDL-AD(2002)023rev, I. 1.1.

⁶ Paragraph 7.3 of the 1990 OSCE Copenhagen Document commits OSCE participating States to “guarantee universal and equal suffrage to adult citizens.” The United Nations Human Rights Committee has adopted a General Comment (General Comment No. 25) interpreting the principles for democratic elections set forth in Article 25 of the International Covenant on Civil and Political Rights. See *also* Code of Good Practice in Electoral Matters, I. 2.2. iv.

in electoral districts ranged from around 6,000 in some districts (in remote areas) to more than 160,000 voters. Such large variations in voting populations undermine equality of vote weight. The intention of legislators to split some of the biggest electoral districts in the draft Code would go in the direction of addressing this problem. This measure alone, however, is not sufficient as there will continue to be considerable differences (from about 6,000 to more than 90,000 voters) in the size of electoral districts. During the visit, legislators explained that it would be too difficult politically to carry out a complete redistricting and to move away from the confluence of district and municipal boundaries. In this context, it should be underscored that the principle of equality of voting weight is one of the key elements that should be ensured by any electoral system. If, as stated, it is not possible to ensure this relative equality of vote weight in the single-mandate districts, a revision of the electoral system could be envisaged (see below, para. 20).

19. As regards local elections, there were also wide differences in voter populations in electoral districts for the May 2010 municipal elections. Across the country, the number of registered voters in a single-mandate constituency varied considerably within the same local government unit; at times, by more than 1,000 per cent.⁷ Even in Tbilisi, where a large population of voters should make it easier to establish comparable electoral districts, there were deviations of up to 30 per cent. Such large deviations undermine the principle of the equality of the vote.⁸

20. Some deviation in the number of voters in each electoral district may be unavoidable due to geographic or demographic factors. The Venice Commission Code of Good Practice in Electoral Matters stipulates that the maximal departure from the distribution criterion should not be more than 10 per cent, and should certainly not exceed 15 per cent, except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity). While the legislators have stated the intention to somewhat reduce the discrepancies in the size of districts for future elections, these discrepancies would likely remain excessive throughout the country. **The Venice Commission and the OSCE/ODIHR recommend that the Code be amended to require single-mandate electoral districts to be of equal or similar voting populations. The Code should specifically address how electoral districts are to be established in all types of elections, including the specific criteria that must be applied and respected. The Code should require that those bodies responsible for creating electoral boundaries should be independent and impartial. The delimitation process should be transparent and involve broad public consultations. The Code should also foresee periodic boundary reviews that would take into account population changes.**⁹

Independent Candidacy

21. The draft amendments submitted to the Venice Commission on 8 December allow independent candidates to run for all types of election.¹⁰ These amendments are welcome as they respond to a previous Venice Commission and OSCE/ODIHR recommendation to allow independent candidates to stand.

⁷ For instance, in the municipality of Kvareli the number of registered voters per single-mandate constituency ranged from 665 to 8,204, in the municipality of Lagodekhi from 470 to 5,680, in the municipality of Baghdati from 311 to 4,299, and in the municipality of Kobuleti from 553 to 14,222. See OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 6.

⁸ In line with paragraph 7.3 of the 1990 OSCE Copenhagen Document, participating States undertake to guarantee universal and equal suffrage to adult citizens. Paragraph I. 2.2 of the Venice Commission Code of Good Practice in Electoral Matters recommends that the admissible departure from the norm “should seldom exceed 10% and never 15%, except in really exceptional circumstances”.

⁹ Code of Good Practice in Electoral Matters, I 2.2 v.: “In order to guarantee equal voting power, the distribution of seats must be reviewed at least every ten years, preferably outside electoral periods.”

¹⁰ Article 116(1) of the draft Code for parliament, Article 141 for election to a local self-government Sakrebulo, Articles 157 and 159 for election to the Tbilisi Sakrebulo and Article 167(2) for the Tbilisi mayoralty elections.

Electoral System Choice

22. The choice of an electoral system is the sovereign decision of a state, provided the system conforms with principles contained in OSCE commitments, the Venice Commission Code of Good Practice in Electoral Matters¹¹ and other international norms, including requirements for transparency, universality and equality of suffrage of voters and non-discrimination among candidates and political parties. The mixed electoral system chosen in Georgia, as such, is in line with international standards. However, it has hitherto not been possible to provide for constituencies of an approximately equal size in Georgia (see above, para. 16) and, thus, to guarantee the equality of the vote within the framework of the mixed system. **The Venice Commission and OSCE/ODIHR recommend that the electoral system for both parliamentary and local self-government elections be reviewed in order to ensure the equality of suffrage.**¹² The Parliament could consider the work of the Venice Commission on electoral systems,¹³ with a view to identifying an optimum relationship between genuine representation and stability of government, while respecting the principle of equal suffrage.

V. Candidacy and suffrage rights

Guarantee of Suffrage Rights

23. It is a universal civil and political right that every citizen can, on a non-discriminatory basis and without unreasonable restrictions: (1) take part in the conduct of public affairs, directly or through freely chosen representatives; (2) vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (3) have access, on general terms of equality, to public service in his or her country.¹⁴ The draft Code does not fully satisfy these basic principles as it contains certain provisions that unduly limit candidacy rights. These restrictions should be reconsidered.

Restrictions on the Right to Vote

24. The 2010 Joint Opinion on the Election Code of Georgia¹⁵ recommended amending the provisions that prohibit citizens who are in penitentiary institutions from participating in elections and referenda. This recommendation has been addressed in the draft Code following draft amendments of 8 December. Draft Article 3(a.c.) narrows the application of a restriction on voting rights of prisoners and stipulates that persons in penitentiary institutions, “except persons who have committed less grave crime and are sentenced not more than five years of imprisonment” do not have the right to take part in elections and referenda. This is a welcome amendment, in accordance with the case-law of the European Court of Human Rights.¹⁶

¹¹ Code of Good Practice in Electoral Matters, II, 4: “Within the respect of the above-mentioned principles, any electoral system may be chosen”.

¹² Code of Good Practice in Electoral Matters, II, 4.

¹³ Venice Commission, Report on Electoral Systems: Overview of Available Solutions and Selection Criteria adopted by the Venice Commission at its 57th Plenary Session (CDL-AD(2004)003, 12-13 December 2003); particularly Section 4.

Source: [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)003-e.pdf](http://www.venice.coe.int/docs/2004/CDL-AD(2004)003-e.pdf).

¹⁴ See, e.g., International Covenant on Civil and Political Rights (ICCPR), Article 25.

¹⁵ CDL-AD(2010)013.

¹⁶ ECtHR, *Hirst v. United Kingdom* (No. 2), Application no. 74025/01, 6 October 2005. See also *Frodl v. Austria*, Application no. 20201/04, 8 April 2010. See also Code of Good Practice in Electoral Matters, I, 1.1. d. It is also important to note that Article 10 of the ICCPR provides that “1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. [...] 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social

25. There appears to be an inconsistency in the draft Code as some text in the English translation suggests that prisoners can vote using mobile ballot boxes (Article 33(1)(b)).¹⁷ The Code in force specifies that a special list of voters would be compiled, among others, for voters who, on the election day, are in preliminary custody (former Article 10.c.). These citizens would thus be included in the mobile ballot box list (former Article 11.b.). Considering the current version of the Code and Article 3(a.c.) of the draft Code, it would seem that the term “in prison” refers to “preliminary custody” and that voters in a penitentiary institution are indeed deprived of the right to vote. This issue should be clarified, unless this stems from an imprecise translation.

Restrictions on the Right to be Elected

Residency requirements

26. In the draft Code as amended on 8 December, Article 96 provides a 5-year residency requirement for running for the presidential office with an additional requirement that a candidate must have lived in Georgia for 3 last years before the announcement of elections, Article 110 establishes a 5-year residency requirement for the possibility of being elected to Parliament, with the same additional requirement, and Article 134(1) stipulates a 3-year requirement for elections to local self-government. Amendments proposed on 8 December indicate that authorities undertook an effort to reflect the Venice Commission and OSCE/ODIHR recommendations to reduce the residency requirements. Nevertheless, the residency requirements in Georgia still appear long.

27. Although reasonable residency requirements may be imposed, such requirements should be in the pursuit of a legitimate aim and the means employed must not be disproportionate. The Code of Good Practice in Electoral Matters stipulates that, where local and regional elections are concerned, residency requirements may be imposed.¹⁸ It is recommended that these periods should only exceed six months to protect national minorities. For example, in the *Polacco and Garofalo v. Italy* case, only those persons who had been continuously living in the Trentino-Alto Adige Region for at least four years could be registered to vote for the regional council elections.¹⁹ The European Commission determined that this requirement was neither disproportionate nor unreasonable because it was intended to ensure a thorough understanding of the regional context so that the citizens' vote could take into account the concern for the protection of linguistic minorities. The residency requirements in Georgia, which are not aimed at protecting national minorities and are instituted not only for local elections, are overly long. Therefore, following the Code of Good Practice in Electoral Matters and the comments of the United Nations Human Rights Committee on residency requirements,²⁰ **the Venice Commission and the OSCE/ODIHR recommend that requirements on the length of residency should be further reconsidered and reduced for all elections.**

rehabilitation. [...]”. In addition, General Comment No. 25, adopted by the United Nations Human Rights Committee under Article 40 § 4 of the ICCPR concerning the political and electoral rights guaranteed under Article 25, states, *inter alia*: “14. In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.”

¹⁷ See also Articles 34(2)(d) and 66(9) of the draft Code.

¹⁸ Code of Good Practice in Electoral Matters, I. 1.1.c.iv.

¹⁹ See European Commission of Human Rights, *Polacco and Garofalo v. Italy*, no. 23450/94, decision of 15 September 1997.

²⁰ UNHRC General Comment No. 25, para. 15. See also Code of Good Practice in Electoral Matters, I.1.1.c.4.

“Health” requirement

28. Articles 2(f.a.), 110(3) and 132 deny the right of passive suffrage to “drug addicts” and “drug users”. They require elected members of parliament to undergo a “drug test” with a possible loss of mandate in case the test is failed. These articles are ambiguous and subject to abuse because they fail to (1) provide reference to the relevant legislation pertaining to what chemical compounds are considered as “drugs” under the law, (2) define what quantity of a particular chemical compound (“drug”) measured in the body of a tested person is indicative of “use” of a legally defined “drug”, and (3) specify how many positive “drug” tests during what period of time are equivalent to “drug addiction”.²¹ These provisions are problematic vis-à-vis the principle of universal suffrage and are not in line with paragraph 7.9 of the 1990 OSCE Copenhagen Document, which requires that “candidates who obtain the necessary number of votes required by law are duly installed in office.” **As recommended in previous Venice Commission and the OSCE/ODIHR opinions, these articles of the draft Code should be removed.**

Language requirement

29. Article 110.1, which deals with “passive electoral rights” for parliamentary elections, provides that “any citizen of Georgia, having the right to vote, may be elected as a member of parliament if she/he has attained the age of 25, has lived in Georgia for no less than 10 years, and knows the Georgian language.” Such a language requirement is not replicated for other levels of election. If retained, this provision should provide fair and objective standards for determining knowledge of the Georgian language so that candidates would know how it is measured, and so that voters and observers would be able to judge whether candidates have been treated fairly and in conformity with the objective standards stated in the law. This requirement may also be particularly disadvantageous for candidates from national minorities. The Venice Commission and the OSCE/ODIHR recommend that this matter be reviewed and the draft Code be amended accordingly.

Signature Requirements

30. In line with the draft Code, the number of support signatures that political parties are obliged to submit in order to be able to contest all types of elections, including presidential (Articles 97(2), 99(2), 100(b) and 107(6), parliamentary (Articles 113(9), and local self-government elections (Article 142(3)) has been reduced from 30,000 to 25,000. Following the 8 December amendments, there is also a provision requiring that independent candidates nominated by voter initiative groups be supported by 1 per cent (not less than 500)²² signatures of voters registered on the territory of the respective electoral district where the candidate is standing, except if the candidate was elected to the Parliament in the last elections. The reduction of signature requirements for political parties and institution of a reasonable requirement for independent candidates are welcome and address long-standing recommendations by the Venice Commission and the OSCE/ODIHR. Signature support requirements should, however, be clarified with regard to parliamentary and local elections in order to stipulate that these requirements apply countrywide.²³ As noted in the OSCE/ODIHR Final Report on 2008 parliamentary elections, in some cases it was possible for a parliamentary candidate to be elected with as few as 1,800 votes in a single-mandate electoral district. Also, as previously noted, many single-mandate electoral districts in certain

²¹ Such a prohibition on “drug addicts” might be considered discrimination and a violation of international standards protecting citizens with disabilities in the exercise of suffrage rights.

²² The Georgian authorities indicated that the minimum requirement of 500 signatures would be removed from the Code at a later stage.

²³ Code of Good Practice in Electoral Matters, I. 1.3. ii. The Code of Good Practice in Electoral Matters states that the number of required signatures should not exceed 1% of the electorate within the respective electoral unit for which the elections are held.

municipalities during the 2010 local self-government elections had fewer than 1,000 voters. In line with the Venice Commission's Code of Good Practice in Electoral Matters, **the Venice Commission and the OSCE/ODIHR recommend that Articles 113(9) and 142(3) be considered for further amendment to stipulate that the required signatures do not exceed one per cent of the number of voters in the respective electoral unit for which elections are held.**

31. In response to previous OSCE/ODIHR and Venice Commission recommendations, Article 38(2) of the draft Code was amended on 8 December in order to clarify the provisions for checking signatures by the CEC. The revised draft provision requires that signatures be checked in order to establish that there is a required number of valid signatures. The provision also gives parties and candidates two days to correct any identified mistakes and to submit additional signatures in case the number of signatures following the verification has fallen below the required minimum. These amendments are welcome.²⁴

Withdrawal of Candidacy

32. The draft amendments submitted to the Venice Commission on 8 December take into consideration the respective previous Venice Commission and OSCE/ODIHR recommendation by stipulating (in Articles 100(5) and 120(1)) more realistic deadlines for the withdrawal of candidacies from parliamentary and presidential elections - 10 days before election day. These are welcome amendments.

VI. Participation of women

33. Georgia has the lowest proportion of women in the lower house of parliament in the OSCE region (6.5 per cent).²⁵ In the 2010 municipal elections, only 10 per cent of elected councillors were women, which is a decrease from previous elections. Only 14 per cent of the elected councillors in Tbilisi were women.²⁶ This is well below the OSCE average of 22 per cent and significantly below the United Nations target of 30 per cent women in decision-making positions. Women have also been under-represented in election administration.²⁷ Women's under-representation in the legislature and political and public life, more generally, has been consistently noted in the election observation reports of the OSCE/ODIHR.²⁸

34. The draft Code does not establish any requirements that candidate lists or membership in election administration reserve a minimum number of positions for women. Although neither the Council of Europe nor OSCE require gender quotas, both recognise that legislative measures are effective mechanisms for promoting women's participation in political and public life.²⁹ Further, Article 4 of the Convention on the Elimination of all Forms of Discrimination Against Women emphasises that "adoption by States Parties of temporary

²⁴ The Venice Commission Code of Good Practice in Electoral Matters (I.1.3 iv and § 8) recommends that "[t]he signature verification procedure must follow clear rules, particularly with regard to deadlines, and be applied to all the signatures rather than just a sample; however, once the verification shows beyond doubt that the requisite number of signatures has been obtained, the remaining signatures need not be checked."

²⁵ See Gender Equality in the Elected Office: A Six-Step Action Plan, p.12 available at www.osce.org/odihr/78432 and the Inter-Parliamentary Union's Women in Parliament database available at <http://www.ipu.org/wmn-e/classif.htm>.

²⁶ See, e.g., OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 17.

²⁷ *Id.*

²⁸ *Id.*

²⁹ OSCE Ministerial Council, Decision No. 7/09 in Women's Participation in Political and Public Life, para. 2; Council of Europe, Parliamentary Report of 22 December 2009 on Increasing women's representation in politics through the electoral system.

special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination".

35. There are several areas where the draft Code could be improved to facilitate the participation of women in public life and the elimination of discrimination against women. **The Venice Commission and OSCE/ODIHR make the following recommendations in this regard:**

- The electoral system could be revised, either through the use of quotas or other recognised methods for facilitating the election of women candidates, so that current percentages of women who are elected is increased substantially;
- Minimum representation for both sexes in election administration, including in leadership positions, could be guaranteed;
- Some portion of public funding for political parties could be linked to the proportion of women nominated as candidates by political parties and/or included on party lists.

VII. Election commissions

General Comments

36. Although there is no standard model for the composition of election commissions, the electoral law should guarantee that election commissions are established and operate in an independent manner and that commission members act impartially.³⁰ Moreover, in practice, a commission and its members should abide by these standards. Although the draft Code provides the basics for such principles, in some respects the draft Code can be improved to provide a greater assurance of their implementation.

37. It should be noted that the provisions for the appointment of the election administration have been improved with amendments over the last several years. The draft Code attempts to establish an element of pluralism in the election administration and transparency in the activities of election commissions. These are positive features of the draft Code.

38. Article 7 of the draft Code establishes the status, system, and composition of the election administration in Georgia. The election administration is composed of the CEC, High Election Commissions of the Autonomous Republics of Abkhazia and Adjara, DEC and Precinct Election Commissions (PECs) (Article 7.2).

Central Election Commission

39. The CEC is the highest body of the election administration of Georgia. It oversees the work of election commissions at all levels and ensures the implementation of the election law throughout the country (Article 7.3). The CEC is composed of a chairperson and 12 members: 5 members of the CEC shall be appointed by the Georgian parliament upon submission of the President of Georgia and 7 other members are appointed by political parties (Article 10.1). As noted in previous Joint Opinion on the Election Code of Georgia,³¹ it is a positive improvement that amendments have been made so that the chairperson of the CEC is elected by commission members appointed by parties, except the members appointed by the party with the best results in the previous parliamentary elections (Article 10.5).

³⁰ Existing Commitments for Democratic Elections in OSCE Participating States, par. 4; Venice Commission Code of Good Practice in Electoral Matters, II. 3.1.

³¹ CDL-AD(2010)013, par. 27.

40. In a welcome measure and in response to recommendations from domestic civil society, the draft Code requires that half of the membership of the competition commission, which is mandated to review the applications and suggest candidacies for CEC membership, be composed of representatives of civil society. This measure helps enhance the inclusiveness of the process.

41. Under Article 14.1(c), “in exceptional cases,” the CEC is “entitled under its resolution to determine the election activities and terms of the forthcoming election/polling” if the requirements and terms stated in the law are “impossible to meet”. This text should be clarified.

Protection from Termination

42. Termination of terms of office of election commission members for disciplinary reasons is permissible provided that the grounds for this are clear and exhaustively specified in the law. However, the draft Code does not clearly outline the grounds for possible termination. Article 12(12) provides that parliament can terminate early the terms of office of non-party appointed CEC members. Article 13(5) specifies that a CEC member’s mandate may be terminated if the party that nominated the member loses eligibility to receive state funding or if another party starts receiving more funding from the state. In such case, the position will be filled from the party that receives more funding. Article 29(1)(f) provides that the authority of an election commission member is terminated if the party, which appointed the member, “recalls” the member. Article 29(8), which prohibits “recalling members of elections commission 15 days before the election,” attests to the legislators’ intent to ensure the stability of PECs. Nevertheless, Article 29(8) does not address the fundamental problem of vesting discretionary recall authority with the appointing party. In addition, Article 28(1) sets out the potential forms of disciplinary action that DEC’s can employ against PECs, including termination of authority.

43. In light of Article 8(22), which states that members of election commissions are independent and are not representatives of the body that appoints them, the rationale for recall is therefore questionable. The terms of office of election commission members should not be terminated on a discretionary basis, as it casts doubt as to the independence of the members and undermines the impartiality, independence and stability of the whole election administration. While the above-mentioned provisions list relevant sanctions, they should do more to ensure that the sanction of termination is not abused and is only applied with careful consideration to proportionality. **The Venice Commission and the OSCE/ODIHR recommend that the Code protect election commission members from arbitrary removal by setting out on what grounds a removal is justified as compared to what grounds require a lesser sanction.** This is necessary to enhance the ability of election commission members to perform their duties independently, impartially, and professionally.³²

Majority Voting Requirements

44. Article 30(3) provides that decisions on resolutions of the CEC are taken by a 2/3 vote of the whole membership. The issues that may be the subject of a CEC resolution are defined in Articles 14 and 30. The requirement of a 2/3 vote of the whole membership is a positive measure, especially in cases of decisions on such important issues as the annulment of election results or the possibility to recount the ballots.

³² Code of Good Practice in Electoral Matters, II.3.1.f.

Training for Commissioners

45. Article 17 establishes the Election Systems Development, Reforms, and Training Center (the “Training Center”), which is tasked, in part, with training election commission members. This has the potential of enhancing the professionalism of the election administration and helping standardise the training received by commission members. The Training Center was created as the result of amendments to the Code in 2009. It will only be possible to assess the full impact and the role of the Training Center in the course of next elections as it is still a relatively new institution. During the 2010 municipal elections, OSCE/ODIHR election observers assessed training provided to election commission before election day positively, overall. However, problems observed on election day suggest that in the future, this training should especially focus on counting procedures and the completion of results protocols.³³

Terminology

46. The English translation of the draft Code uses both the terms “Precinct Election Commission” and “Polling Station Commission”. If this is not an issue of translation, it is recommended that the use of these terms be harmonised in the Code and only one term be used to describe the election commission that administers elections at the lowest level.

VIII. Lists of voters

47. The CEC is responsible for the maintenance of a centralised and computerised voter register in accordance with Article 31(4). Article 31(5), which provides that various government agencies – including the Ministry of Justice, local self-government units, Ministry of Refugees, Ministry of Probation and Legal Assistance, Ministry of Internal Affairs, Special Services of Foreign Intelligence and State Security – are responsible for providing the CEC with updated voter information. Article 31(6) requires the CEC to update the electronic database of registered voters every quarter during the calendar year. Under Article 31(8), the lists of voters must also be “considered and resolved” by the DEC’s no later than fourteen days prior to the elections. Article 31(12) also provides for the registration of those “who were not able to register within the timeframe specified by law...” DEC’s should review applications from such citizens “within 2 days of receipt, or immediately, if there are less than two days left before election day.” Individuals identified in this article include returning expatriates, released patients, and paroled prisoners.

48. Although not specifically identified in the draft Code, OSCE/ODIHR election observation mission reports have noted that the Civil Registry Agency (“CRA”) is the body within the Ministry of Justice that provides the basic electronic database of voter records to the CEC. This electronic database is based on the civil register managed by the CRA. It has been positively noted by observers that the quality of voter lists has improved in recent elections.³⁴ However, one issue identified by observers is that the law allows civil registration without a specific address and that such persons cannot be assigned to a specific precinct. In the 2010 municipal elections, these voters could only vote in the proportional elections and not in the majoritarian elections. Consideration should be given to reviewing aspects of the civil registration system, such as the possibility to register without providing an address, in order to ensure that voting rights of those entitled to vote are guaranteed. Particularities and shortcomings in the civil registration system should not impact voting rights of citizens.

³³ OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 7.

³⁴ OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 8.

49. The Venice Commission and the OSCE/ODIHR recommendation that voter lists be published in relevant minority languages was taken into account by a draft amendment submitted on 8 December (Article 14(1) w), which is welcome.

50. Article 184 of the transitional provisions of the draft Code provides for the establishment of a temporary commission for the verification of voter lists ahead of the 2012 elections, regulates its composition and outlines its authority. This commission is to be formed of representatives of the government, non-governmental organisations, and political parties. The establishment of such commission as a measure aimed at involving political parties and the civil society in the review of voter lists is generally a welcome step. However, the impact of this commission in practice will have to be assessed more precisely and, in particular, in the context of the next elections due to be held in 2012.

IX. Observers

General Comments

51. The presence of international observers from OSCE participating States to observe elections is provided for in the 1990 OSCE Copenhagen Document.³⁵ Election observation can enhance the integrity of an electoral process, promote public confidence, encourage electoral participation, and mitigate the potential for an election-related conflict.³⁶ In addition, it is recognised that domestic observers should also be allowed to observe an electoral process. In general, the draft Code adequately addresses these requirements, granting observers broad rights and requiring election commissions to prepare and conduct elections in a transparent manner. However, the draft Code could be improved to further facilitate observation efforts.

Application Procedures

52. Article 39(2) of the draft Code as revised on 8 December provides that accreditations will only be issued to those domestic observer organisations that have been registered under Georgian law “no later than one year before polling day”. This rule is still restrictive. **The Venice Commission and the OSCE/ODIHR recommend that the limitation of one year in Article 39(2) be reduced to a shorter period to facilitate the accreditation of domestic observer organisations.**

53. Regarding application procedures, it should be noted that there is a differentiated treatment of national and international observer organisations. Articles 40(3) and 40(4) specify that, to be registered, a domestic organisation shall apply no later than 10 days before polling day while international organisations have to apply no later than seven days before election day. While the distinctions between the aforementioned registration periods were reduced by the previous amendments to the Election Code in force, the remaining differences do not seem to be justified. Articles 40.6 and 40.7 also stipulate different periods for the submission of lists of observers to the respective election commissions – two days before polling day for international observer organisations and five days before that day for domestic organisations. The above-mentioned differences could be reviewed with the view to bringing the requirements for international and domestic organisations closer to each other.

³⁵ 1990 OSCE Copenhagen Document, para. 8.

³⁶ United Nations, Declaration of principles for International election observation and Code of conduct for International election observers, commemorated on 27 October 2005, New York, pp. 1-2.

54. Article 40(3) of the draft Code also states that the domestic organisation's "application shall include the name of the election district (districts) where the organisation will conduct the observation." Therefore, consistent with past Venice Commission and OSCE/ODIHR recommendations, the draft Code could be amended to remove the requirement for domestic observers to report in advance where they are going to observe. In addition, the badge that has to be worn by the observer (Article 40.9) could indicate that the observer is permitted to observe at any election commission.³⁷

55. Under Article 40(4), an international organisation must submit with its application for registration a copy of its "constituent document", while a domestic organisation must submit a copy of its statute under Article 40(3). What constitutes a "constituent document" for an international organisation could be subject to different interpretations. It is recommended that the term "constituent document" be clarified in Article 40(4).

Rights of Observers

56. Article 41 provides a list of the rights of observers. Previous election observation mission reports of the OSCE/ODIHR have noted that some observers have encountered limitations of their rights during the counting of ballots and tabulation of results. Even the most recent election observation mission report from the 2010 municipal elections notes that the Code "should clearly state that PEC members, observers and proxies have the right to scrutinise the validity of ballots and the correctness of counting and tabulation procedures."³⁸ Article 41(1)(f) of the draft Code allows observers to "attend the procedures of counting of votes and summing up of results." Furthermore, draft Article 41(5) obliges election commissions to create all the necessary conditions for election observers to perform their duties. Such provisions are welcome.

57. By amending Article 41(n) on 8 December, the draft Code positively responds to the Venice Commission and the OSCE/ODIHR recommendation that this Article be reformulated to specifically state that observers have the right to obtain copies of all protocols completed by election commissions.³⁹ More widely, the Code should ensure that observers be able to follow all elements and stages of an electoral process, including such aspects as the delimitation of electoral districts and the financing of electoral campaigns.⁴⁰

58. Article 41(4) provides for sanctions against observers, as well as electoral subjects and mass media representatives, for violating the conduct requirements set forth in Article 41(2)(a & d). Article 92 provides for a fine of 500 GEL for violating these provisions. Article 91 provides for a fine of 500 GEL for restricting the rights of an observer, electoral subject or representative of mass media. Failure by an election commission to provide copies of summary protocols on elections, referendum or plebiscite, or to deny access to observers, shall lead to the fining of the commission chair and/or secretary with a 1000 GEL fine (Article 89). The possibility to impose sanctions can potentially have positive impact on the conduct of those following an electoral process and enhance the implementation of the law.

³⁷ Guidelines for an internationally recognised status of election observers, III. 1.4 vi.

³⁸ OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 28.

³⁹ Guidelines for an internationally recognised status of election observers, III. 1.7 v.

⁴⁰ Guidelines on an internationally recognised status of election observers, pp. 3-4.

X. Election campaign provisions

Freedom of expression

59. According to Article 45(3), “[t]he election program must not contain propaganda of war and violence, of overthrowing the existing State and social system or replacing it through violence, of violating the territorial integrity of Georgia, of calling to foster citizen hatred and enmity, religious and ethnic confrontation.” This prohibition could constitute infringement on freedom of expression and could be reconsidered to ensure the right of people to advocate change through peaceful means. Furthermore, the draft Code does not stipulate what sanctions apply in case of violation of this provision.

Use of Public Resources

60. Article 48(1) allows the use of administrative resources for campaign purposes – that is, the provision allows the use of state-funded buildings, communication means, and vehicles provided that equal access is given to all election subjects. On the face of it, this provision appears to adhere to the equal opportunity principle. However, in practice such equality may quickly be undermined as political parties in government have easier access to such resources (government facilities, telephones, computers and vehicles). Moreover, Article 48(2) allows civil servants to use their official vehicles for purposes of campaigning, provided the fuel costs are reimbursed.

61. OSCE/ODIHR election observation mission reports from past elections have consistently identified the use of administrative resources in Georgian elections as a significant problem. This problem is due in part to the lack of clarity and specificity in the legislation, as reproduced in the draft Code. The draft Code provisions blur the line between the state and political parties and fall short of OSCE commitments.⁴¹ **The Venice Commission and the OSCE/ODIHR recommend revising the provisions on the use of administrative resources.** Additionally, the last Evaluation Report by the Council of Europe Group of States against Corruption (GRECO) on transparency of party funding in Georgia raises similar concerns and “recommends to take further measures to prevent the misuse of all types of administrative resources in election campaigns.”⁴²

Officials campaigning

62. Article 49(1) prohibits persons “holding offices in state or local authorities” from combining campaign activities in support (or against) electoral subjects with the conduct of their official duties, specifically by using subordinates in campaigning, gathering signatures during an official business trip, or conducting “pre-election agitation.” Persons “holding offices in state or local authorities” are not listed in Article 49 and there are varying interpretations among stakeholders as to which public officials are legally considered to be persons “holding offices in state or local authorities”. Further, the matter is complicated by Article 2(z⁵), which provides a list of “public officials”. Although it is not clear how exhaustive this list is, it should include those persons specifically listed in Article 45(4) as being prohibited from engaging in the election campaign. It is also recommended that this list

⁴¹ Paragraphs 5.4 and 7.6 of the 1990 OSCE Copenhagen Document; the former calls for a clear separation between the State and political parties and the latter commits the state to “provide...necessary legal guarantees to enable [political parties] to compete with each other on the basis of equal treatment before the law and by the authorities.”

⁴² GRECO, Evaluation Report on Georgia on Transparency of party funding, Third Evaluation Round, Strasbourg, 27 May 2011, Adopted by GRECO at its 51st Plenary Meeting (Strasbourg, 23-27 May 2011; Greco Eval III Rep (2010) 12E), paragraph 69.

include governors and mayors. Considering the current overall dominance of one party in various elected bodies, the State and local public structures may be too easily confused with the dominant party. **The Venice Commission and the OSCE/ODIHR recommend that the draft Code be amended to provide clearer and more explicit provisions defining “public officials” and “persons holding office”. The Code should further prohibit such individuals from directly or indirectly using administrative resources and from engaging in electoral campaign activities on behalf of any party/candidate, in order to ensure a level playing field for all contestants.**

63. The Venice Commission and the OSCE/ODIHR commented positively in the last Joint Opinion on the introduction of Article 49(3) of the Election Code in force, which stipulates that state and local governments, between the day of announcement of the elections and the day of determining the election results, are not allowed to launch any special programs apart from those envisaged in their annual budgets. The same provision is included in the draft Code. The previous Joint Opinion advised that, although a positive provision, implementation should be “assessed in practice during the next elections”.⁴³ During the 2010 municipal elections, observers noted that this provision was violated by some local governments.⁴⁴ **The Venice Commission and the OSCE/ODIHR recommend that authorities in Georgia make a more concerted effort to enforce laws governing the abuse of administrative resources during election campaigns.**

Campaigning by religious and charitable organisations

64. Article 45(4) of the draft Code prohibits charity and religious organisations from participating in pre-election agitation. It would appear that this is intended to prevent undue influence by religious and charitable organisation and to prevent improper influence through charitable donations. However, this may be overly restrictive. Although this might seem like a logical provision, this provision violates the principles of freedom of religion and non-discrimination. **The OSCE/ODIHR and the Venice Commission recommend that Article 45(4) be amended to conform to international standards protecting freedom of religion and the right to non-discrimination in the exercise of speech through campaigning.**

Prohibition of campaigning for foreign citizens

65. Article 45(4) of the draft Code prohibits aliens from participating in election campaigns. This prohibition is also problematic. The rights of freedom of expression and association, according to Articles 10 and 11 of the European Convention of Human Rights, belong to all persons within the jurisdiction of a member State. Even if non-citizens (stateless and alien residents) do not have the right to vote, they do have the right to freely express their opinion, associate and participate in political debates during election campaigns. Such a clause limits fundamental rights of non-citizens residing in Georgia and conflicts with the basic human rights protected by the regional and global international conventions recognised by Council of Europe member states and OSCE states. **The OSCE/ODIHR and Venice Commission recommend that this prohibition be deleted from Article 45(4).**

Prohibition of election-day campaigning

66. The draft Code does not include any general campaigning curfew or any prohibition against election-day campaigning in and around polling stations. The only limitation is contained in Article 51(12), which prohibits “any pre-election paid and/or free advertising on TV or radio”. Undue influence in the last 24 hours before an election can take place in

⁴³ Joint Opinion on the Election Code of Georgia, CDL-AD(2010)013, 9 June 2010, para. 45.

⁴⁴ OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 13.

various contexts, such as agitation at the actual polling place or its vicinity and door-to-door campaigning on the day of voting. During the 2008 parliamentary elections and 2010 municipal elections, campaigning activities and materials were, in fact, observed on election day both inside and in the vicinity of polling stations. **It is recommended by the Venice Commission and the OSCE/ODIHR that consideration be given to including a general prohibition against any type of campaign activity during the last 24 hours prior to elections. Campaigning and campaign materials in and around polling stations on election day should be prohibited.**

XI. Media

General Comments

67. Provisions regulating the media during election campaigns are found in Articles 50 and 51. According to the Council of Europe's and the OSCE/ODIHR's reports on the 2008 parliamentary and extraordinary presidential elections, Georgia has a free and a diverse media environment, which offers the citizens access to a wide range of political views. The Ad Hoc Committee of the Parliamentary Assembly of the Council of Europe observed that during the extraordinary presidential elections "both print and broadcast media offered a wide and diverse coverage of the election campaign, enabling the voters to become familiar with the platforms of different candidates."⁴⁵

68. Article 51(1) of the draft Code stipulates that the requirements of equitable treatment apply only to "qualified" electoral subjects. In order to be granted the status of a "qualified electoral subject" status, the contestant must establish a level of "popular support" through either prior electoral success (3 per cent of the vote in the last local elections or 4 per cent of the vote in the last parliamentary elections) or 4 per cent in not less than five public opinion polls held during the election year, or in an opinion poll held no later than a month before the elections. Although the legal provisions appear to provide an adequate framework for fair campaign conditions for electoral contestants, a problematic element remains. New political parties, which should have equal opportunity with political parties that have participated in previous elections, are limited to "qualifying" through the usage of opinion poll results. This potentially limits the ability for new political parties to compete on an equal basis in elections.

69. The methodological requirements for opinion polls for obtaining "qualified electoral subject" status appear strict, as does the requirement about the number of times (five times in a year or once not less than 30 days before election day) that a poll must yield a certain result in order to qualify a particular subject for free airtime. Moreover, it is not entirely clear who is the appropriate body for assessing and enforcing these requirements as the final decision seems to be left to the broadcaster. **It is recommended that Article 51 be amended to address these concerns. In accordance with the Venice Commission Code of Good Practice in Electoral Matters and the Venice Commission and OSCE/ODIHR Guidelines on Media Analysis during Election Observation Missions, public media "should provide parties and candidates in elections with equal access and fair treatment."**⁴⁶ This should be reflected in Article 51.

⁴⁵ Council of Europe, Parliamentary Assembly, Report on the observation of the Extraordinary Presidential Elections in Georgia (5 January 2008), Doc. 11496, 21 January 2008), p. 6, paragraph 34; OSCE/ODIHR, Election Observation Mission Final Report on the Parliamentary Elections in Georgia of 21 May 2008, Warsaw, 9 September 2008, pages 14-17 and OSCE/ODIHR Election Observation Mission Final Report on the Extraordinary Presidential Election in Georgia of 5 January 2008, Warsaw, 4 March, pages 12-15.

⁴⁶ Code of Good Practice in Electoral Matters, I. 2.3. a and Guidelines on Media Analysis during Election Observation Missions, par. 57. Source: [http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)031-e.pdf](http://www.venice.coe.int/docs/2009/CDL-AD(2009)031-e.pdf).

Common Advertising Rates

70. The standard of equality of campaign conditions for all electoral contestants includes the right to have access to the same commercial rate for electoral ads offered to political parties and candidates and that the times and locations of the advertising be similar. Such equality is guaranteed in print space (Article 50(2)) and with the revision of Article 50(1)b on 8 December this requirement also seems to apply to TV and radio public broadcasters. The latest revision is welcome and corresponds to a previous Venice Commission and OSCE/ODIHR recommendation.

News Coverage and Other Programs

71. Articles 50 and 51 could also be improved as they are currently limited to providing conditions for contestants to convey messages through free airtime and do not extend to coverage of contestants in the news or other programs. The Council of Europe's Committee of Ministers has recommended that "Where self-regulation does not provide for this, member states should adopt measures whereby public service media and private broadcasters, during the election period, should in particular be fair, balanced and impartial in their news and current affairs programmes, including discussion programmes such as interviews or debates."⁴⁷ **It is recommended by the Venice Commission and the OSCE/ODIHR that Articles 50 and 51 be amended to require that public media provide comprehensive information on all aspects of the election process through a variety of programs, outside the current free-of-charge slots, in order to create a forum for discussion for all contestants. It is also recommended that these articles be amended to require that public media should be obliged to treat all contestants on equitable terms, not only in special election programs, but also during all other programs, including its news broadcasts. It is further recommended that private broadcasters be encouraged to produce informative and discussion programmes involving parties and candidates. Where they do so, they should comply with the same conditions as public broadcasters.**

XII. Campaign finance

General Comments

72. Article 52 of the draft Code provides that the costs incurred by the election administration regarding the preparation and conduct of elections and referenda, as well as the activities carried out by the election administration, shall be financed from the State Budget of Georgia. Each year the CEC has to submit budget estimates to the Ministry of Finance for the election administration of the subsequent year.

73. Articles 54 through 57 of the draft Code regulate campaign contributions and election campaign funds. These articles are generally positive steps for transparency and accountability in elections. However, there remain areas in these articles that should be improved.

74. Article 56(1) establishes a legal threshold of five per cent of valid votes cast as a barrier for receiving public campaign funds. Some funding should be extended to all political parties and electoral contestants who receive a minimum level of citizen support in order to promote political pluralism and provide voters genuine election choices. This is particularly important in the case of new political parties, who must be given a realistic opportunity to compete with

⁴⁷ *Ibid.*, para. II 2.

existing political parties in elections. Consideration should be given to lowering the threshold for the allocation of public campaign funds.⁴⁸

75. In addition to general party funding, Article 56(1) of the draft Code grants political parties, which receive over five per cent of votes in the parliamentary elections, additional funding in reimbursement of election campaign expenses, including those related to pre-electoral advertising on television. The article stipulates that reimbursements will be disbursed based on the financial statements on actual expenses incurred. These provisions are welcome as they could help create equitable minimum campaign conditions for electoral contestants and encourage accountability. However, Article 56(1) could be strengthened to make reimbursements more clearly conditional on the fulfilment of all reporting and audit requirements established by Article 57(6). **The Venice Commission and the OSCE/ODIHR recommend that Article 56(1) be amended to condition disbursement of public funding upon fulfilment of all reporting requirements established by Article 57(6).**

76. The provision in Article 55(6), which exempts “the sums given by parties from their resources for the election fund of their election subject”, is of concern. This provision effectively removes the limits established in Article 55(4) & (5) on contributions to election campaign funds. Not only does such a provision give unfair advantage to wealthier political parties, it will also encourage contributions to be made in a manner that circumvents the very limits established by Article 55(4) & (5), as well as preventing the timely disclosure before the elections of the name of the person who originally made the donation.⁴⁹ **The Venice Commission and the OSCE/ODIHR recommend that the exemption provided in Article 55(6) be deleted from the draft Code. Further, in order to enhance transparency, general reports of political parties, which are required on an annual basis by existing law, should also be filed within a reasonable period of time before the elections so that voters know the identities of contributors to political party funds.** In this context, as recommended by GRECO in the Third Evaluation Report on transparency of party funding in Georgia, the authorities should “establish a standardised format for the annual financial declarations to be submitted by political parties, seeing to it that financial information (on parties’ income, expenditure, assets and debts) is disclosed in an appropriate amount of detail and (ii) to ensure that information contained in the annual financial declaration (including donations above a certain threshold) is made public in a way which provides for easy access by the public.”⁵⁰

77. Another concern is the distinction established in Article 55(4) & (5) related to campaign contributions of natural persons and “legal persons” or “legal entities”. “Legal” persons or entities, which are presumed to include companies formed under Georgian law, can contribute three times as much to a campaign fund as a regular citizen. Not only does this provision discriminate against citizens, it will also encourage some contributors to create legal entities in order to at least triple the amount of a campaign contribution. **The Venice Commission and the OSCE/ODIHR recommend, absent an articulated and justifiable basis for this discrimination, that these provisions be amended to provide the same contribution limit for natural persons as is applicable to “legal persons”.**

78. Article 55(8)f of the draft Code tightened the rules regarding the contributions to campaign funds by legal entities in which the State is a shareholder. The article has been

⁴⁸ See paragraphs 188 and 190 of the Guidelines on Political Party Regulation by the OSCE/ODIHR and the Venice Commission, 2011; available at www.osce.org/odihr/77812.

⁴⁹ Observers noted in the 2010 municipal elections that, in the case of one particular political party, a significant proportion of donations to its campaign funds came from the party itself. See OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 13. This is especially problematic because general reports on political party accounts are not due until February of the following year, which is several months after the elections. *Id.*

⁵⁰ GRECO, Evaluation Report on Georgia on Transparency of party funding, Third Evaluation Round, para. 81. ii.

clarified compared to its previous version in the Code currently in force (Article 47(5)f), which states that “it is prohibited to accept donations in the election campaign fund from (...) Georgian entrepreneurial legal entity partially owned by the state” (Article 47(5)f). While the language in the current Code may be subject to interpretation as to what “partially owned” means, the draft Code makes it clear that any degree of state participation in a legal entity disqualifies it from making contributions to campaign funds.

79. In the framework of this section, it should be noted that the OSCE/ODIHR and the Venice Commission are also due to publish a Joint Opinion on the draft Law on Amendments and Additions to the Organic Law of Georgia on Political Unions of Citizens. In this context, it should be pointed out that the amendments to the Law on Political Unions of Citizens prohibit all legal entities from financing general activities of political parties. If both laws are adopted as drafted, legal entities would be prohibited from financing political parties, but would be permitted to contribute to their election campaign funds. Such differences in the sources of funding of political parties during and outside of campaign periods raise questions as to the objectives pursued and may also be counterproductive from the perspective of a prohibition included in the Law on Political Unions of Citizens.

80. Initiative groups of voters are able to participate in elections and present candidates. However, there are no provisions in the draft Code on the funding of initiative groups of voters or their candidates in elections. Nor are there any provisions requiring that the principle of equal access to media be applied to candidates presented by initiative groups of voters. **The Venice Commission and the OSCE/ODIHR recommend that the draft Code be amended to provide funding mechanisms and access to media for candidates presented by initiative groups of voters.**

81. The draft Code fails to address how political activities in referenda and plebiscites are to be funded. There are no provisions specifying how groups in support or opposed to referenda and plebiscite proposals are funded in these types of processes. **The Venice Commission and the OSCE/ODIHR recommend that the draft Code be amended to include regulations on funding and media access during referenda and plebiscites.**

Election Campaign Funds

82. Articles 54(1) and 55(1) specify that goods and services given “free of charge” come within the definition of a campaign contribution and are subject to limitations and legal obligations for financial reporting. These articles should be strengthened by including goods and services provided at a discount or below market value in the definition of a campaign contribution.

83. Article 55(3) provides that “the funds deposited without indication of the data provided for by the paragraph 2 of this article shall be considered anonymous”, and shall thus “be transferred immediately to the State budget of Georgia”. This measure runs the risk of being disproportionate. It curtails the right to property (First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms) in an excessive way in order to prevent improper deposits while, at the same time, there seem to be far less drastic means to achieve the same end with no lesser level of efficacy. For instance, the law could simply prohibit both, the attempt of making a deposit as well as the actual processing (by bank officials) of such requests. They could be characterised as a criminal offence according to the Criminal Code and thus left to the courts to apply the prescribed sanction for such acts in accordance with the principle of proportionality. **The Venice Commission and the OSCE/ODIHR recommend that Article 55(3) be accordingly amended.**

84. Article 56 would benefit from explicitly stating that leaders and members of political parties are prohibited from applying or converting campaign funds, received from both public

and private sources, for personal use. The lack of such a provision opens the possibility for abuse and corrupt activities by political party leaders or members who have access or control of campaign funds.

Accountability, Reporting and Audit Requirements

85. Article 57(4) states various duties of the election campaign fund manager, such as monthly reporting to the CEC on sources and amounts of contributions. These measures contribute to the transparency and are positive. However, the provision requires financial reporting only on a monthly basis, which was seen to be inadequate in practice during the 2008 parliamentary elections and 2010 municipal elections. **It is recommended by the Venice Commission and the OSCE/ODIHR that this provision be revised to ensure the financial report is submitted to the Financial Monitoring Group of the CEC and published in a timely manner in advance of election day. This provision should also include an obligation to report on expenditures (not only contributions) in both the pre-election and post-election periods.**

86. Article 57(6) outlines post-election reporting requirements related to campaign funds, which contributes to the overall transparency of campaign financing. Also Article 55(13) requires that the final audit report submitted by election contestants be “open, public and available to everyone.” The CEC is compelled to give this information and all such reports are accompanied by relevant supporting documentation (apparently “mentioned information”) and posted on the CEC website within two (2) business days of its adoption.

Monitoring Body

87. Article 57(12) requires the CEC to establish a Financial Monitoring Group, tasked with reviewing and auditing the financial reports that all election subjects are required to submit during an election period. This provision defines the role and responsibilities of this Financial Monitoring Group. The group is composed of “social representatives, lawyers and licensed financial auditors” who study the information provided in reports and present it to the CEC.

88. Observers noted in the 2010 municipal elections that the Financial Monitoring Group’s effectiveness was limited by the lack of clarity about its mandate and the limited instruments at its disposal. According to group members, they were not authorised to check the accuracy of financial statements provided by electoral subjects.⁵¹ The group did not have access to the source documents, i.e. electoral subjects’ accounting records, which supported the supplied financial statements. **The Venice Commission and the OSCE/ODIHR recommend that Article 57(12) be amended to clearly define the role and responsibilities of the Financial Monitoring Group overseeing the implementation of campaign finance provisions. The Finance Monitoring Group should be empowered to carry out its own checks of the supporting documentation provided by electoral subjects. The Financial Monitoring Group should also have the authority to issue subpoenas to compel the production of receipts, invoices, bank statements and other documentation in order to verify the completeness and accuracy of all financial reports.**

89. In the context of this section, it should be pointed out that while the draft Election Code tasks the Financial Monitoring Group of the CEC with the monitoring of election campaign

⁵¹ OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 13.

finances, Article 34¹ of the draft amendments to the Law on Political Unions of Citizens stipulates that “monitoring over legality and transparency of financial activities of a political party shall be carried out by the Chamber of Control of Georgia.” While the provisions of these two laws, which vest two different institutions with authority over related tasks, are not necessarily contradictory, the legislators are encouraged to take these differences into account when finalising both pieces of the legislation. Consideration should particularly be given to ensuring that there is no overlap or conflicts of jurisdiction between the two bodies.

Sanctions

90. Article 57(8) of the draft Code provides that a court ruling can restrict an electoral subject “from participation in future elections” if the electoral subject did not “represent fund account” to an election commission. This article does not provide any limitation on the length of the restriction and does not require that the court ruling define the period of time for the restriction. An indefinite restriction, which is a permanent forfeiture of political rights, for violating campaign reporting requirements would appear to be excessive. **The Venice Commission and the OSCE/ODIHR recommend that Article 57(8) be accordingly amended.**

91. Article 57(9) of the draft Code foresees that if an electoral subject violates campaign finance regulations, the appropriate DEC or the CEC can “apply to the court with the request of consolidation of the results of the elections without taking into account the votes received by these election subjects”. The election commission’s application must be based on a violation that is “substantial” and which “could affect the results of the election”. This text will be extremely difficult to apply and provides a disproportionate remedy for a campaign finance violation. “Could affect the results” is hard enough to apply when considering physical ballots that are contained in ballot boxes. Applying this phrase to events occurring outside of the polling station and without reference to mathematical probabilities that can be applied to quantitative measures such as physical ballots will be extremely difficult.

92. The above sanction is also disproportionate. Such a sanction, amounting to cancellation of votes received by a contestant when consolidating the results, on the mere basis of a late delivery of campaign accounts, is disproportionate and could easily be abused in order to “cancel” an electoral subject once the results are known. It is also not clear how courts, which are normally not in charge of consolidating the results, would handle such cases. The draft Code does not seem to indicate that the contestant, whose votes are cancelled, would benefit from the same type of protection as he/she would in a fully-fledged court process. Finally, the draft Code does not specify whether courts could act on their own motion or whether election commissions would have to submit evidence and present expert opinion on how the alleged violation “could affect the results of the election”. **The Venice Commission and the OSCE/ODIHR recommend that the provisions of Articles 57(9) be reviewed to address the above concerns.**

93. The Venice Commission Code of Good Practice in Electoral Matters notes that the principle of transparency in campaign funding consists of two “levels”.⁵² While the requirement of opening campaign accounts and filing reports represents the first level of the principle, the second level consists of the additional requirement of enforcement mechanisms after elections. The withholding of public funds until compliance is established, as noted above, is one such mechanism. Another mechanism, which is the form of a sanction, is the forwarding of monitoring documentation to the public prosecutor’s office for criminal prosecutions. Consideration should be given to amending the Code to require that the Financial Monitoring Group be required to forward relevant information to the prosecution authorities where the campaign finance provisions are deemed violated.

⁵² Venice Commission Code of Good Practice in Electoral Matters, II.3.3.

XIII. Voting and tabulation of results

Special Provisions for Disabled Voters and Minority Voters

94. The draft Code contains positive provisions to assist disabled voters and voters with limited physical abilities. Article 23(4) requires the establishment of election precincts at hospitals and in-patient institutions. Subparagraphs (a) and (c) of Article 33(1) provide that voters with limited physical abilities or medical conditions that require hospitalisation be included in the mobile ballot box list. As for the location of the polling stations, Article 58(3) contains special provisions to facilitate polling station access for disabled voters upon application no later than 25 days prior to voting day. With regard to the preparation of ballot papers for the election precincts, Article 63(2) stipulates that the CEC shall ensure the use of technology that will enable voters with vision problems to fill in the ballot papers independently. Article 65(3) entitles a person who is unable to vote independently “to ask any person for help in the voting booth”, except for those personnel listed in subparagraphs (a-d). These are positive features that address the specific needs of persons with physical disabilities. However, Article 65(3) could be further clarified to specify the physical arrangements that must be in place in a polling station to enable illiterate or physically disabled persons to vote and the specific steps to be undertaken by the polling station election administration to ensure the exercise of voting rights by disabled and illiterate voters.

95. Articles 62(2) and 63(1) suggest that the ‘book of records’ in a polling station and ballots be printed in languages other than Georgian where necessary for local populations. Article 63(1) expressly identifies the Abkhazian language as necessary for ballots in Abkhazia. Article 70(10) directs that the final minutes of an election commission be printed in Abkhazian or other local minority languages. These are positive provisions. However, the English translation of Article 62(2) uses the word “might” instead of “shall”. **In order to further facilitate the participation of all societal groups in elections, the Venice Commission and the OSCE/ODIHR recommend that consideration be given to amending the Code to require that all elections materials in areas with significant national minority populations be printed in minority languages.**

Military Voting

96. Articles 23(4) and 23(6) address the establishment of special polling stations for military units, military commands and on ships. Article 66(9) also provides for voting by a mobile ballot box “on territory of which there is a military base” if it meets the requirements of Article 33(1)(d) of being “located far away from the electoral area.” While it is acceptable for the electoral law to have special provisions ensuring that a member of the military is able to exercise the right to vote while on active duty, these provisions must be written carefully, as voting by the military can be subject to abuse. There may also be confusion as to which electoral district the military voter should receive a ballot from. This recommendation has been included in previous opinions, but still not adequately addressed in the draft Code.

97. Voting by the military and police personnel have proved to be controversial in past elections in Georgia due to the failure of the legislation to provide sufficient clarity on arrangements for these types of voters. The draft Code continues to be ambiguous in defining the conditions under which these voters can vote for the majoritarian component of elections if their place of service is away from their residence. In the 2010 municipal elections, the Tbilisi city court ruled that 17,000 servicemen registered by the Ministry of

Interior could only vote in the proportional component of local self-government elections.⁵³ However, prior to this court ruling, the CEC held the view that these servicemen would be able to vote in both the majoritarian and proportional elections.⁵⁴ Thus, the confusion over military and police voting remains unaddressed by the draft Code. **The Venice Commission and the OSCE/ODIHR again recommend that the Code clearly stipulate all the requirements in an unambiguous manner, and state how these requirements are to be applied, including in determining which majoritarian ballot a member of the police or military should receive in elections.**

Mobile Voting

98. Mobile voting should only be allowed under strict conditions, avoiding all risk of fraud.⁵⁵ Article 33(3) states that “only handicapped electors are included into the list for a mobile box, who are not able to independently visit the electoral commission”. Article 33(1), however, expands the list to electors in prison, hospitals, those in military service, and those “on territory of the electoral district, but in a place if difficult to access”. Further, Article 33(2) expands the list to voters who cannot “visit the voting premises” if the voter applies for mobile voting not later than two days prior to election day. Article 33(2) also provides that an application to vote by the mobile ballot box can be made by telephone. Thus, it would appear that the opportunities for mobile voting are very broad and not limited to those voters who have no opportunity to vote except through the use of the mobile ballot box. **It is recommended by the Venice Commission and OSCE/ODIHR that Article 33 be revised to insure that mobile voting is available only to those in a hospital or who have illnesses or physical disabilities, which prevent them from visiting a polling station. Further, the Code should require that all applications for mobile voting be in writing, except in case a physical disability prevents the voter from writing.**

99. Article 66, which regulates the process of mobile voting, provides that a single mobile ballot box is used by a precinct election commission. Article 66 does not address the possibility that one ballot box may not be sufficient to accommodate all special voters who may need to vote by mobile voting. It is recommended that Article 66 be amended to address this possibility and specify when more than one mobile ballot box may be used by a precinct election commission.

100. Article 66(4) requires that two PEC members, who are chosen by ballot, conduct voting at the addresses of eligible mobile voters. This follows in part the recommendation from the previous Venice Commission and OSCE/ODIHR opinions on the matter, which recommended that “there should be two members of the PEC for administering mobile voting”. However, it does not follow another part of that same recommendation which stated that the two selected members “should not have been appointed to the PEC by the same appointing authority.”⁵⁶ Article 66 also does not reflect the third part of the recommendation from that opinion: “Article 56 [now 66] should expressly state that all procedures for identifying a voter, issuing a ballot, marking a ballot, and for observation and transparency are applicable to the mobile voting procedure.”⁵⁷ Improvements along the described lines would clearly add important safeguards to minimise the possibilities for fraud in the process of voting by means of a mobile ballot box. **The Venice Commission and the OSCE/ODIHR recommend that Article 66 be amended to incorporate these safeguards for mobile voting.**

⁵³ OSCE/ODIHR Election Observation Mission Final Report Municipal Elections, 30 May 2010 (13 September 2010), page 10.

⁵⁴ *Id.*

⁵⁵ Code of Good Practice in Electoral Matters, I. 3.2. vi.

⁵⁶ Joint Opinion of the Election Code of Georgia (CDL-AD(2006)023), page 24.

⁵⁷ *Id.*

Voting Procedures

101. An amendment to the Code in 2009 introduced the possibility for video surveillance and recording in polling stations for the purpose of recording violations of the law. Article 58(6) of the draft Code provides that “it is restricted to take photos or video films within the cabin for voting.”⁵⁸ The Venice Commission and the OSCE/ODIHR previously recommended the deletion of this provision as it could result in some voters being intimidated by the recording of activities in the polling station even though the stated intention is to create more transparency and control. Despite the prohibition included in draft Article 8(18) to conduct photo and video recording inside voting booths, **the Venice Commission and the OSCE/ODIHR reiterate previous recommendations to remove the provisions for video surveillance in polling stations altogether.**

Determination of Election Results

102. Articles 67 through 71 contain detailed provisions on opening of ballot boxes, determination of results of voting, compilation of summary protocols of voting, and the consolidation of election results. Provisions for how the ballots in mobile ballot boxes are accounted for are of concern.

103. Article 68(4) requires that all ballots (special envelopes containing ballots) in a mobile ballot box be invalidated if the number of ballots in the mobile ballot box exceeds the number of signatures in the list of voters using the mobile ballot box. It would go against the principle of proportionality for one hundred legitimate and valid mobile ballots to be invalidated just because one extra ballot is found in the mobile ballot box. A better practice may be to note any discrepancy in the number of mobile ballots in the protocol, thereby preserving an evidentiary basis for later consideration should there be a mathematical possibility that an extra ballot in the mobile box could have affected the result. Furthermore, since similar provisions do not exist for invalidating ballots in regular ballot boxes, this provision amounts to unequal treatment of voters using a mobile ballot box. **It is recommended by the Venice Commission and OSCE/ODIHR that this requirement in Article 68(4) be removed from the draft Code.**

Publication of results

104. Article 71 outlines the procedures for the completion of summary protocols on voting results by election commissions in an electoral constituency. Article 71(9) as revised on 8 December 2011 requires that the DEC “hand over” signed and certified “photocopies of the Precinct Electoral Commission summary protocols...(these protocols shall have the same legal power of the Precinct Electoral Commission summary protocols).” This Article further stipulates that a representative/observer receives a photocopy of a PEC protocol and confirms the receipt by signing the DEC book of registration. Article 71 does not expressly require the DEC to complete its own protocol summarising the results from individual PECs within the district. However, Article 21(1)(f) indicates that a “summary protocol of DEC voting results shall be drawn up.” This would be consistent with previous Venice Commission and OSCE/ODIHR recommendations that the DEC complete a protocol, which includes results from individual PECs within the district as an integral part of the DEC protocol, thereby enabling parties and observers to audit the results. The Venice Commission and the OSCE/ODIHR recommend that Article 71 include text similar to that in Article 21(1)(f), which requires that “summary protocol of DEC voting results shall be drawn up.”

105. Article 76(4) stipulates that the CEC “ensures upload of the final minutes of the election results on the web site of the commission in parallel with the receipt of the final minutes”.

⁵⁸ See also Article 8(18).

Article 76(7) directs the CEC to “publish on its web site the information about election results according to each election precinct” and deliver this information to the press and other media. Article 76(8) directs the CEC to “publish it (PEC summary protocols) immediately on its web site.” These transparency mechanisms are welcome as they allow both observers and political parties to check the accuracy of the results and of their consolidation. These provisions are in line with previous opinions of the Venice Commission and OSCE/ODIHR that recommended publication by the CEC of the results per polling station.

Invalidation of Results

106. Provisions regulating the invalidation of election results should be clarified. Indeed, the inadequacy in the area of invalidation of election results has been shown by the experience of past elections.⁵⁹ As noted in previous Joint Opinions, there is an inconsistency in the draft Code between Articles 21(1)(e), 72(3), 75(3), and 78(21), which give the authority to invalidate election results to DEC’s, and Articles 14(1)(k) and 78(22), which appear to extend some invalidation powers to the CEC as well. It is recommended by the Venice Commission and the OSCE/ODIHR that all articles which relate to invalidation of election results be thoroughly reviewed and amended to ensure their clarity and consistency, and that they expressly state the authority of the CEC in regard to invalidation of results. The 8 December amendments, by suppressing the possibility for election commissions to cancel election results *ex officio*, go against the Code of Good Practice in Electoral Matters, which provides that, “[w]here the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions”.⁶⁰ Such discretion must of course be exercised in conformity with the principle of equality.

107. Article 150(1) provides: “A district electoral commission may annul vote results in an electoral precinct where this law was grossly violated.” This provision amounts to granting DEC’s an extraordinary discretion in annulling the election in a precinct since judging whether the law has been “grossly” violated is a question of subjective appreciation. The 8 December amendment to Article 150(2), if it were to be understood as applying to cases when irregularities may influence the results of the elections and were introduced into Article 150(1), would be welcome. **The Venice Commission and the OSCE/ODIHR recommend that Article 150(1) be reviewed in this sense.** The Venice Commission Code of Good Practice counsels that an election commission “should have authority to annul elections, if irregularities may have influenced the outcome, i.e. may have affected the distribution of seats,”⁶¹ including significant deviations from campaign finance regulations.⁶²

⁵⁹ OSCE/ODIHR Final Report on Georgia Parliamentary Elections, Part 2, 28 March 2004, page 23, for a detailed explanation of the CEC’s decision concerning the Khuol and Kobuleti constituencies. See the following case: *The Georgian Labour Party v. Georgia*, Application no. 9103/04, 8 July 2008: “141. (...) the Court concludes that the CEC’s decision of 2 April 2004 to annul the election results in the Khulo and Kobuleti electoral districts was not made in a transparent and consistent manner. The CEC did not adduce relevant and sufficient reasons for its decision, nor did it provide adequate procedural safeguards against an abuse of power. Furthermore, without resorting to additional measures aimed at organising elections in the Khulo and Kobuleti districts after 18 April 2004, the CEC took a hasty decision to terminate the country-wide election without any valid justification. The exclusion of those two districts from the general election process was void of a number of rule of law requisites and resulted in a *de facto* disenfranchisement of a significant section of the population (see, *mutatis mutandis*, *Matthews v. the United Kingdom* [GC], no. 24833/94, §§ 64-65, ECHR 1999-I). There has accordingly been a violation of the applicant party’s right to stand for election under Article 3 of Protocol No. 1 on account of the *de facto* disenfranchisement of the Khulo and Kobuleti voters.”

⁶⁰ Code of Good Practice in Electoral Matters, II.3.3.i.

⁶¹ Code of Good Practice in Electoral Matters, II.3.3.e. See also European Court of Human Rights, *Namat Aliyev v. Azerbaijan*, Application no. 18705/06, 8 April 2010, about cases of gross violations; para. 74: “it is first necessary to separately assess the seriousness and magnitude of the alleged election irregularity prior to determining its effect on the overall outcome of the election.”

⁶² Code of Good Practice in Electoral Matters, II.3.5, par. 109: “In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled.”

Recount of Ballots

108. Following the 8 December draft amendment, Article 14(1)(k) grants the CEC the power to order a recount of ballots from a polling station only on the basis of a complaint and not anymore on its own initiative. However, neither Article 14(1)(k), nor any other provision in the draft Code provides any criteria for when a recount is required. **It is recommended that the Code be amended to state what circumstances justify a recount. Further, it is recommended that the Code specify the procedures to be used during the recount. It is also recommended for the Code to provide that reasonable notice of the recount be given and that this notice be given to relevant stakeholders, including accredited observers.**

XIV. Legal protections

General Comments

109. Previous joint opinions and final reports of election observation missions have commented extensively on shortcomings in the legislation related to the resolution of election complaints and appeals. Recommendations have been made to adopt simple, understandable, and transparent procedures that will ensure both effective remedies and the adjudication of electoral disputes before an impartial tribunal in a fair and public hearing. Articles 72-74 and Articles 77-78 of the draft Code make changes to previous legal provisions, but do not introduce any significant improvements. Thus, the draft Code continues to require improvement in the area of election complaints and appeals.

110. During the 2010 municipal elections, a number of shortcomings related to the complaints and appeals procedures were evident. The OSCE/ODIHR Final Report stated that “there was an apparent lack of understanding of provisions regulating election disputes among commissions and complainants alike. More than half of the appeals that were filed at the CEC were submitted after prescribed deadlines.” It was also noted that complaints and appeals were frequently filed with non-competent bodies and that the DEC’s and CEC inconsistently determined which complaints to adjudicate.⁶³ Observers have noted that the “lack of understanding of procedures and of competences of commissions and courts was even more evident in the post-election period than before election day. Several complaints and appeals were submitted to the CEC instead of competent DEC’s and courts. The CEC took an inconsistent approach and examined some of these complaints on their merits, overstepping its competence as it was not the competent body to examine them.”⁶⁴ Yet, despite these inadequacies in the Code currently in force, the lawmakers have only made minor adjustments in the relevant articles when drafting the new Code. Thus, the election dispute resolution system remains complex and vague. **The text of the draft Code provisions regulating complaints and appeals must be improved.**

“Forum Shopping”

111. The draft Code contributes to the existing confusion over the competencies of different bodies involved in the review of complaints and appeals by creating a parallel complaint system. Separate complaints, based on the same alleged violation but filed by different complainants, can proceed independently of each other in election commissions as well as in courts. Instead of specifying where a complaint must be filed, the draft Code only

⁶³ *Id.*

⁶⁴ *Id.*, at page 24.

contributes to the confusion and leaves the possibility for the complainant to “shop” for his/her forum. **The Venice Commission and the OSCE/ODIHR recommend that consideration be given to specifying in the Code where a complaint must be filed based on the nature of the complaint and not on the personal, subjective preference of the complainant.**⁶⁵

112. As noted above, the draft Code provisions for the resolution of election disputes are complex and at times ambiguous. These provisions should be clarified and streamlined so as to eliminate inconsistencies, ambiguities, and gaps. Most importantly, the competence of all bodies involved in the review of complaints and appeals should be clearly defined.

Administrative Sanctions

113. Articles 79 – 92 of the draft Code establish administrative sanctions for violations of the law. These articles set out monetary fines between 500 GEL and 5,000 GEL imposed for a range of election offences. While these provisions attempt to ensure objectivity and transparency in the punishment of electoral violations, it is recommended that each sanction be periodically reviewed to ensure that proportionality in punishment is maintained.

XV. Concluding remarks

114. Overall, the draft new Election Code is conducive to the conduct of democratic elections and has many positive features. Efforts have been made through a package of additional amendments submitted on 8 December 2011 by the Parliament of Georgia, aiming at implementing recommendations made in the draft Joint Opinion. Nevertheless, concerns remain due to the fact that the text of the draft Code is ambiguous or lacks clarity in certain areas. Among these issues are: restrictions on the passive suffrage rights of citizens; the formation of electoral districts that undermines the principle of equality of suffrage; long residency requirements for candidates; lack of effective mechanisms to facilitate the participation of women in elections; remaining shortcomings in the regulation of political party and campaign finances; and shortcomings in the complaints and appeals process.

115. The most important among these issues is the notable inequality in the size of electoral districts, which according to the lawmakers is due to the fact that the boundaries of districts correspond to those of municipalities, which range in size. Hitherto, election districts in parliamentary elections ranged between some 6.000 some 160.000 registered voters. The Georgian authorities informed of their intention to engage in reform of the administrative system, which would lead to changes in the size of districts. The Venice Commission and the OSCE/ODIHR strongly recommend such redistricting.

116. Relevant public authorities should be fully informed of their obligations under the Code, once adopted. Public servants and officials at all levels should also be fully informed of the restrictions related to an electoral campaign that apply to them. Enhanced enforcement of election-related laws by all levels of the election administration, the Ministry of Interior, the General Prosecutor, and the courts is also required. Therefore, as in former opinions, the Venice Commission and the OSCE/ODIHR reiterate that apart from improving the legal framework itself, full and effective implementation of the law is necessary in order to ensure conduct of elections in line with international standards.

⁶⁵ Cf. Code of Good Practice in Electoral Matters, II.3.3.c last sentence.