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

**JOINT OPINION ON THE ELECTION CODE  
OF GEORGIA**

As amended through 24 July 2006

by the Venice Commission  
and  
the OSCE Office for Democratic Institutions and Human Rights

Adopted by the Council for Democratic Elections  
at its 19<sup>th</sup> meeting  
(Venice, 16 December 2006)  
and the Venice Commission  
at its 69<sup>th</sup> plenary session  
(Venice, 15-16 December 2006)

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## **Introduction**

1. *The Venice Commission was requested on 3 October 2005 by the Parliament of Georgia to provide an Opinion on the Election Code of Georgia. The most recent joint opinion of the Venice Commission and the Organisation for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the Election Code is dated 16 June 2006 and addresses amendments through 23 December 2005.<sup>1</sup> Following adoption of additional amendments, the OSCE/ODIHR and the Venice Commission agreed on providing a revised joint opinion. The present legal review represents therefore an update to the June 2006 Opinion and covers the latest amendments of 23 June and 24 July 2006.*

2. *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. As previously stated by the OSCE/ODIHR and the Venice Commission of the Council of Europe, the extent to which any amendments to the Election 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 Election Code.*

3. *This joint opinion reviews and comments on the Election Code of Georgia. It is based on an unofficial English translation, incorporating amendments adopted on 28 November 2003, 16 September, 12 October, 26 November and 24 December 2004, 22 April, 23 June, 9, 16 and 23 December 2005, and 23 June and 24 July 2006 as reflected in 131 articles on 118 pages of text, provided by the OSCE/ODIHR. 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. The joint opinion should be viewed as complementary to earlier comments and recommendations provided by the OSCE/ODIHR and the Venice Commission.*

4. *The latest amendments of 23 June and 24 July 2006 do address some of the earlier recommendations of the Venice Commission and the OSCE/ODIHR. The authorities in Georgia should continue with these commendable efforts to incorporate recommendations for improving the electoral framework.*

5. *It should be noted that the amendments adopted in April and December 2005 changed the election system<sup>2</sup> for Members of the Parliament of Georgia. These amendments were adopted after Constitutional amendments were enacted on 23 February 2005, which changed the number of mandates for Parliamentary elections.<sup>3</sup> The constitutional amendments changed the number of Parliamentary mandates and the text requiring the election of some mandates by "a proportional system" and some by "a majority system" remained unchanged. The amendments to the Election Code, however, change the "majority system" from single member constituencies to multi-member constituencies where "bonus" mandates are awarded to the political party that secures at least 30% of votes in the multi-member constituency.*

6. *The choice of an electoral system is ultimately a sovereign choice. However, in light of the transitional nature of Georgia's democracy to date and its recent electoral history, whereby the public had refused to accept elections that were not perceived to be in accordance with OSCE commitments and Council of Europe standards for democratic elections, it is recommended that the Parliament considers in detail the appropriateness of all elements of this new electoral*

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<sup>1</sup> Joint Opinion on the Election Code of Georgia as amended up to 23 December 2005 (CDL-AD(2006)023; 16 June 2006).

<sup>2</sup> The formulae which transform votes cast in favour of parties and/or candidates into seats in the body elected by popular vote.

<sup>3</sup> 100 members of Parliament will be elected under the proportional electoral system and 50 members under the majoritarian electoral system, as described below.

system. The Parliament should also consider carefully the work of the Venice Commission on selecting an appropriate electoral system for an emerging democracy, with a view to identifying an optimum relationship between genuine representation and stability of government.<sup>4</sup>

7. The Venice Commission has previously commented on the changes made in the electoral system for local government elections.<sup>5</sup> Most concerns previously expressed by the Venice Commission concerning provisions regulating local elections remain.

8. The comments are based on:

- the Election Code of Georgia as amended up to 24 July 2006 (CDL(2006)080),
- the Draft Organic Law on "making amendments and additions into the Organic Law – Election Code of Georgia" (CDL-EL(2005)034),
- the Organic Laws of Georgia On Amendments to Organic Law of Georgia "Georgian Electoral Code" no. 2208, 2263, 2414 and 2441 (laws adopted on 9, 16 and 23 December 2005),
- the Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev),
- Report on Electoral Systems: Overview of Available Solutions and Selection Criteria (CDL-AD(2004)003),
- The Opinion on the Unified Code of Georgia (CDL-AD(2002)009),
- Elections in Georgia: Comments on the Election Code and the electoral administration (CDL-EL(2003)005),
- the Opinion on the Unified Election Code of Georgia, as amended on 14 August 2003 (CDL-AD(2004)005),
- The Opinion on the Draft Organic Law on "making Amendments and Additions into the Organic Law - Election Code of Georgia" (CDL-AD(2005)042),
- The Joint Opinion of the Election Code of Georgia (CDL-AD(2006)023, 16 June 2006),
- Report on the regional elections in Adjara, Georgia, CLRAE, 20 June 2004 (CG/BUR(11)40), and
- Resolution 224 (2006) and Recommendation 205 (2006), as well as Explanatory Memorandum (CG(13)32 PART2), on the local elections in Georgia of 5 October 2006 (CLRAE, 14-15 November 2006).

9. This joint opinion does not warrant the accuracy of the translation reviewed including the numbering of articles, paragraphs, and sub-paragraphs. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

10. This opinion has been adopted by the Venice Commission at its 69<sup>th</sup> plenary session (16 December 2006).

## 1. EXECUTIVE SUMMARY

11. This joint opinion is provided by the OSCE/ODIHR and the Venice Commission with the objective of assisting the authorities of Georgia in their endeavours to improve the legal framework for elections, to meet OSCE commitments and Council of Europe and other international standards for democratic elections, and to develop best practices for the administration of democratic elections. The Venice Commission and the OSCE/ODIHR continue to stand ready to support the authorities in their efforts.

12. The Election Code contains a number of positive features, including:

<sup>4</sup> Report on Electoral Systems: Overview of Available Solutions and Selection Criteria (CDL-AD(2004)003) (particularly Section 4 on Some Considerations on the Specific Situation of the Emerging Democracies).

<sup>5</sup> Opinion on Making Amendments and Additions into the Election Code of Georgia (CDL-AD(2005)042, 20 December 2005).

- Provisions for a degree of transparency and observation of election processes;
- Media provisions which establish adequate conditions of equitable access for candidates;
- Obliging the CEC to print ballots in languages other than Georgian where necessary for local populations;
- Provisions related to voting procedures;
- Provisions to facilitate polling station access and alternative voting methods for physically disabled voters;
- Inking of voters as a safeguard against possible multiple voting.

13. Nevertheless, a number of previous OSCE/ODIHR and Venice Commission recommendations have not been taken into consideration, and areas of possible improvement remain. The current text of the Election Code has shortcomings, and some provisions have the potential to limit civil and political rights. As a result, it requires significant improvement to satisfy OSCE commitments and Council of Europe standards,<sup>6</sup> as well as other international standards for democratic elections. There are also technical drafting concerns with the Election Code that have been noted in this joint opinion. All of these concerns should be addressed in order to create a sound legal framework for democratic elections. Further, the choice of the electoral system for the Parliament should be carefully considered in light of the transitional nature of Georgia's democracy and the public protests over the conduct of the November 2003 parliamentary election.

14. Important points to be addressed include:

#### **Implementation of the new election system for Parliamentary elections:**

##### Electoral Districts, Article 15

15. Article 15 of the Electoral Code provides that 50 parliamentary mandates are allocated in 19 multi-member electoral districts under a first-past-the-post (FPTP) "winner-takes-all" system. Article 15 identifies the administrative units that are included in each multi-member electoral district. However, there is no text in Article 15 that requires the number of mandates in each multi-member electoral district to be based on the principle of equal suffrage. In the absence of such text, it cannot be presumed that Article 15 related to multi-member districts for the majority component of the parliamentary elections respects the principle of equal suffrage. **It is recommended** that the Election Code include provisions that ensure the number of mandates per multi-member district is consistent with Council of Europe standards and OSCE commitments for universal and equal suffrage.<sup>7</sup>

##### Threshold, Article 105.6

16. Candidates lists need to receive more than 7 percent of "the votes of the voters" to qualify for the allocation of parliamentary proportional mandates, but the Election Code does not specify how the value of the threshold is calculated. **It is recommended** that the Election Code specifies the manner by which this number is calculated, and that only valid votes are taken into consideration for this purpose. Furthermore, and fundamental to this issue, European practice indicates that this threshold is usually in the range 3 – 5 percent.

##### Independent candidates

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<sup>6</sup> Set forth primarily in the 1990 OSCE Copenhagen Document and in the Venice Commission Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev) respectively.

<sup>7</sup> Code of Good Practice on Electoral Matters, II 2.2 and Paragraph 7.3 of the Copenhagen Document; Report on Electoral Systems: Overview of Available Solutions and Selection Criteria (CDL-AD(2004)003) (particularly Section 4 on Some Considerations on the Specific Situation of the Emerging Democracies).

17. The Election Code does not provide a possibility for independent candidates to run for parliamentary seats and for Tbilisi Sakrebulo. This challenges the principle expressed in paragraph 7.5 of the 1990 OSCE Copenhagen Document, and is at odds with the provisions of the Constitution of Georgia (article 50.1). **It is recommended** that the Election Code reinstates the possibility for independent candidates to run in both types of elections.

### **Local majoritarian districts for Local elections, Articles 112 and 115**

18. Although the 23 June 2006 amendments attempt to address concerns with regard to the formation of boundaries of the electoral districts for the plurality component of local elections, concerns remain. While Article 112 now provides that each independent self-governed unit constitutes one election district, this does not serve as a sufficient guarantee of equality of suffrage, since it does not address the issue of the formation of boundaries for local majoritarian election districts within an independent self-governed unit. Furthermore, the time period for the establishment and announcement of the election district boundaries remains short. **It is therefore recommended** that the Election Code establishes criteria for drawing district boundaries, and that redrawing of boundaries before each election is avoided. Further, the respective responsibilities of the Central Election Commission (CEC) and District Election Commissions (DEC) for the establishment of these boundaries should be clarified.

### **Election administration**

#### Composition formula and procedure for appointment, Article 27

19. Overall, the new formula for the formation and composition of election commissions<sup>8</sup> provides the President and the parliamentary majority with a dominant role in selecting all CEC members, giving them extensive control on the entire election administration. Provided that the President and the parliamentary majority have been elected on the ballot of the same political interest, such a solution has the potential to hamper the independence of the election administration. The legislation should provide more guarantees for inclusiveness, transparency and non-interference in election administration bodies' nomination and functioning.

#### Recall of Precinct Election Commission (PEC) Members, Article 21.1.i

20. The amendment introduced in June 2006 to the Article 21.5, which currently states that "recalling precinct election commission member during the last 15 days before the vote, is prohibited", attests to the legislator's intent to ensure the stability of precinct election commissions. Nevertheless, this amendment does not address the fundamental problem that gave rise to the recommendation.<sup>9</sup> The right granted to political parties and blocs to "recall" their nominees on PECs has the potential to undermine the independence of election commission members and the stability of the election administration. The Venice Commission and the OSCE/ODIHR previously recommended that this issue be reassessed.<sup>10</sup> The previous recommendation remains applicable.

#### Special Role of the Chairperson of an Election Commission, Articles 22.8 and 22<sup>1</sup>

21. The Chairperson of a commission is given a decisive vote in case of a tie, and a special role in the nomination for the position of Deputy Chairperson. It was previously recommended to review the special authority of the Chairperson of an election commission. An amendment of 23 June 2006 attempts to address this issue by requiring that a candidate for a "leading position in the election commission" must have the support of two nominators. However, the

<sup>8</sup> This new formula was introduced by amendments of April 2005.

<sup>9</sup> *Id.*

<sup>10</sup> Code of Good Practice on Electoral Matters, II 3.1 f.

amendment did not remove the text that a candidate for Deputy Chairperson is nominated by the Chairperson. Reading these two provisions together, it can be argued that one of the nominators must be the Chairperson. These articles require additional clarification.

### **Candidacy and suffrage rights**

#### Signatures Requirements, Articles 81.2, 95.10 and 117.3

22. The Election Code establishes that 50,000 signatures of voters are necessary for candidates to run for the presidential election, as well as for parties not represented in Parliament to run for parliamentary elections or local elections. This number is excessive. **It is recommended** that the number of signatures does not exceed 1% of the electorate within the respective electoral unit for which the elections are held.<sup>11</sup>

#### Verification of Signatures, Articles 41 and 42

23. The provisions for checking signatures by the CEC would benefit from additional procedural clarifications, as a safeguard against possible abuse.

#### Denial of the Right to Vote in an Election, Article 5.4

24. Prisoners serving a sentence following a court ruling are denied the right to vote regardless of the nature of the crime. **It is recommended** that this provision is brought in line with the latest jurisprudence of the European Court of Human Rights.<sup>12</sup>

#### Loss of Mandate after Election, Articles 92.3, 107<sup>1</sup> and 100.2

25. Provisions regarding the denial of the right of passive suffrage to “drug addicts”, and provisions relating to the obligation for elected Members of Parliament to undergo a “drug test” with a possible loss of mandate in case the test is failed, need more clarity, as they could be subject to possible abuse and appear to present concerns in relation to fundamental principles and international standards. These provisions should be reassessed or removed altogether.

26. Article 100.2 of the Election Code permits a party or bloc, under some circumstances, to cancel the registration of a candidate. While the formulation of this provision was somewhat improved by 23 June 2006 amendment, it remains unclear from the translated text whether the candidate’s registration could be cancelled after he/she is elected. If possible, this would contradict both the Constitution of Georgia<sup>13</sup> and OSCE Commitments.<sup>14</sup> The original official text of the law published in accordance with legal procedures should be checked to verify whether this concern arises due to translation.

### **Campaign provisions**

#### Limitations to the Right to Campaign, Article 73

27. Limitations to the right to campaign should be reviewed in line with principles of freedom of expression and association. These limitations conflict with Articles 1, 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). These limitations also are in contradiction with the Venice Commission’s Code of Good Practice in Electoral Matters.<sup>15</sup>

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<sup>11</sup> Ibid., I. 1.3.ii.

<sup>12</sup> Case *Hirst vs United Kingdom*, no. 74025/01 (6 October 2005).

<sup>13</sup> Article 52.1.

<sup>14</sup> Paragraph 7.9 of the 1990 OSCE Copenhagen Document.

<sup>15</sup> Code of Good Practice in Electoral Matters, I.2.3.

### Control on Campaign Funding, Article 48.6

28. **It is recommended** that campaign funding, after an election has been held, be audited by a state body rather than a private audit company.

### Sanctions for violation of campaign finance provisions, Article 48.8

29. Sanctions for violation of campaign finance provisions, in particular those amounting to cancellation of votes cast in favour of a contestant when consolidating the results, are disproportionate and do not offer sufficient guarantees for a fair reviewing process. Furthermore, once a vote is cast in the ballot box, and unless there is evidence of multiple voting verified by a court of law, it cannot be cancelled. **It is recommended** that these provisions are reviewed.

### **Voting procedures**

#### Marking of Voters' Fingers, Article 52<sup>1</sup>

30. Until the accuracy of the voters' lists is significantly improved, the inking of voters' fingers after they have cast their ballot should remain.

#### Number of PEC Members

31. The rationale for the reduction of PEC members from fifteen to nine is unclear, especially since voting procedures are not simple and the number of voters per polling station is high. **It is recommended** that the relationship between the number of PEC members, the number of voters and the number of steps to be performed in polling stations is improved. In addition, the reduction of the number of PEC members from fifteen to nine, limits inclusiveness at this stage of the electoral process. The amendment introducing "reserve" members appointed by political parties appointing "regular" members does not fully address these concerns.

### **Detailed PEC Results**

32. DEC result protocols should provide detailed results per polling station, and the Election Code should specify that the publication of *preliminary* results per polling station on the CEC website should be done immediately as these results are received from District elections commissions.

### **Complaints and appeals, invalidation of elections**

#### Cases and Procedures for Invalidation, Articles 34.2, 38.2, 63.4, 105 and 125.1

33. The Election Code must unambiguously specify which body is responsible for invalidating an election. **It is recommended** that the procedure is clearly established. The provision according to which DEC's can invalidate the voting in a precinct where the law has been "grossly" violated should be reviewed, as invalidation should not be based on a subjective appreciation.

#### Jurisdiction to Review Election Commissions Activities, Articles 17.7 and 29.1.f

#### Hearings Procedure, Article 77



34. Appeals procedures should be transparent, open to the public, and decisions on complaints and appeals should be delivered in writing, with a statement of the reasons for the decision. The possibility for appellants to choose the appeal body should be avoided, as this creates potential conflicts of jurisdiction and possible inconsistent implementation of the law.<sup>16</sup>

35. These recommendations are made with the objective of correcting shortcomings in the Election Code. However, it cannot be overly emphasised that it is crucial for state institutions and officials to fully implement the Election Code in good faith, in order to conduct elections in line with OSCE commitments and Council of Europe standards.

## 2. THE ELECTION SYSTEMS

36. The Election Code regulates elections for the following offices and institutions in Georgia: President, Parliament and representative bodies of local self-government - *Sakrebulo*.

### Election System for President

37. The President is elected by popular vote, by secret ballot, for a term of five years. A person cannot be elected consecutively for more than two terms. A candidate can be nominated by a political party or a group of at least five voters. All nominations must be supported by the signatures of no less than 50,000 voters. This requirement is contained in the Constitution as well as the Election Code. According to information available from the CEC, the number of registered voters is around 3.2 million.<sup>17</sup> The number of support signatures should be lowered from 50,000, as it is generally accepted that the number of required signatures for candidacy should not exceed one percent of the number of registered voters.<sup>18</sup> **It is recommended** that the number of signatures required to nominate a candidate for the Presidential election be reduced, which will require amendment of Article 70 of the Constitution as well as Articles 81, 83, and 84.

38. Article 86 provided, prior to the 2006 amendments, that elections are considered “to have been held, if a majority of the total number of voters takes part in them”. This requirement has been deleted. However, Article 87 still retains a minimum voter turnout requirement for a second round of elections, as well as a requirement for a minimum percentage of votes one of the candidates must receive in order to be elected. Under Article 87, the second round of voting is considered “to have been held, if at least one third of the total number of voters takes part in it”. In the second round of voting, the candidate, who “receives the most votes, but no less than 1/5 of the total number of voters is considered elected”. In case of a tie in the second round, the “candidate who receives more votes in the first round is considered elected”.

39. If the elections are not declared to have been held (or if only one candidate took part in the first round and he/she did not receive the required number of votes), by-elections are to be organised (Article 87.4). These must be scheduled by the Parliament of Georgia and take place within two months after the first round (Article 88).

40. Article 87 requires clarification as it does not state how voter turnout – “the votes of the voters taking part in the elections” – is determined for the purposes of applying the article’s formula for election. **It is recommended** that Article 87 be amended to clearly and consistently state the method for determining voter turnout and the fractional component of voter turnout needed to elect a candidate. This is necessary in order to clarify any doubt as to the legal effect

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<sup>16</sup> Ibid., II.3.3.c.

<sup>17</sup> OSCE/ODIHR Interim Report, Limited Election Observation Mission, Municipal Elections in Georgia, 5 October 2006, page 3.

<sup>18</sup> Code of Good Practice in Electoral Matters, I.1.3.ii.

of blank ballots, invalid ballots, and discrepancies between the number of ballots found in a ballot box and the number of signatures in the voters' lists in polling stations.

41. Furthermore, the required turnout threshold in the second round, for an election to be considered successfully held, creates possibilities for an endless cycle of failed elections. **It is recommended** that the validity of the election does not depend on the turnout and that these voter participation requirements are removed.

### **Election System for Parliament**

42. Following a constitutional referendum<sup>19</sup> held concurrently with the 2 November 2003 parliamentary elections, amendments were made to Articles 49 and 58 of the Constitution of Georgia. According to these, the Parliament of Georgia "*shall consist of 100 members [...] elected by a proportional system and 50 members elected by a majority system ...*". The amendments would only come into force after the expiry of the mandate of the Parliament elected in 2004. The next parliamentary elections are due in spring 2008.

43. On 23 December 2005, the Parliament substantially amended the provisions governing the election of members of Parliament. The Election Code now provides that 100 Members of Parliament are elected by proportional representation in a nationwide constituency, while 50 are elected through a majoritarian "winner-takes-all" system based on multi-member districts. For the purpose of the multi-member plurality contests, 19 multi-member districts have been drawn up and are listed in an amended Article 15, which specifies which administrative units they include. The number of seats per district varies from five (ex: in Tbilisi) to two.

44. Mandates within multi-member constituencies are awarded through a "winner-takes-all" system, whereby the multi-name list which "received more votes than others, but not less than those of 30% of the election participants" (Article 105.5) wins all the seats in the district. This multi-member district "winner-takes-all" system was first introduced in Georgia for the election of the Tbilisi City council in mid-2005. It is an unusual system for parliamentary elections.

45. Although the constitutional amendments changed the number of Parliamentary mandates, they did not change any of the text requiring the election of some mandates by "a proportional system" and some by "a majority system". In light of the transitional nature of Georgia's democracy and its recent electoral history, whereby the public had refused to accept elections that were not perceived to be in line with OSCE commitments and Council of Europe standards for democratic elections, **it is recommended** that the Parliament carefully consider the appropriateness of this electoral system at this stage of Georgia's democratic development. In this regard, the Parliament should consider the work of the Venice Commission on selecting an appropriate electoral system for an emerging democracy.<sup>20</sup>

46. The December 2005 amendments to the Election Code also removed the possibility for independent candidates to run. Even though the mixed proportional - multi-mandate system does not facilitate the participation of independent candidates, it does not *per se* require their exclusion, and it would be possible for an allocation formula to provide for independent candidates as well as political parties and blocs, both in the proportional and in the plurality contests. The law should allow an independent candidate to seek office in the national Parliament of the country. Paragraph 7.5 of the OSCE Copenhagen Document recognises the right of citizens to seek political office, individually or as representatives of political parties or organisations, without discrimination. The exclusion of independent candidates also appears to be at odds with provisions of the Constitution of Georgia (Article 50.1).

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<sup>19</sup> The question put to electors was "*Do you agree to reduce the number of members of Parliament and define the number at no more than 150?*"

<sup>20</sup> Report on Electoral Systems: Overview of Available Solutions and Selection Criteria (CDL-AD(2004)003) (particularly Section 4 on Some Considerations on the Specific Situation of the Emerging Democracies).

47. The proportional component of parliamentary elections is based on a list system. Each political party or electoral bloc participating in an election submits one candidate list for the whole country.

48. Article 95.10 requires that a political party, which has no representative in Parliament, must obtain signatures in support of its list of no less than 50,000 voters. This requirement is contained in the Constitution as well as the Election Code. As noted above, the number of registered voters is around 3.2 million. The number of support signatures should be lowered from 50,000, as it is generally accepted that the number of required signatures should not exceed one percent of the number of registered voters. **It is recommended** that the number of signatures required to nominate a candidate for the proportional component of the parliamentary elections be reduced, which will require amendment of Article 50 of the Constitution as well as Article 95.10.

49. In order to qualify for the allocation of mandates, Article 105.6 requires that a candidate list must “receive no less than 7% of the votes of the voters”. However, the Election Code does not state how the number of the “votes of the voters” is determined. **It is recommended** that the manner in which the number of the “votes of the voters” is determined be clearly stated in the Election Code. This is necessary in order to clarify the legal effect of blank ballots, invalid ballots, and discrepancies between the number of ballots found in a ballot box and the number of signatures in the voters’ lists in polling stations. **It is recommended** that only valid votes are taken into consideration, since it is only the valid votes that disclose a clear political choice.<sup>21</sup>

### Formation of Parliamentary Constituencies

50. The OSCE/ODIHR elections observation missions’ reports have repeatedly noted the wide variation in the size of parliamentary constituencies under the previous single-mandate constituencies’ electoral system,<sup>22</sup> and noted that such variations were violating the principle of universal and equal suffrage. This principle is commonly understood as “one person – one vote” and for the issue under consideration it would imply that the number of citizens represented by each member of Parliament be approximately the same.

51. The establishment of a new multi-member district system did not address this issue. To the contrary, as specified in the amended Article 15, the number of mandates allocated to each of the newly created 19 districts appears to maintain these discrepancies, with a particularly striking under-representation of the urban population.<sup>23</sup>

52. The Election Code should state objective legal criteria for the establishment of constituencies in order to avoid this problem. The Election Code should also state the legal limit for deviations from the ideal constituency size, between the largest and smallest constituencies,

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<sup>21</sup> Resolution 1477 (2006), Parliamentary Assembly of the Council of Europe, *Assembly debate* on 24 January 2006 (3<sup>rd</sup> Sitting) (see Doc.10779, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Co-Rapporteurs: Mr Eörsi and Mr Kirilov). *Text adopted by the Assembly* on 24 January 2006 (3<sup>rd</sup> Sitting):

“10. The Assembly therefore calls on the Georgian authorities to:  
(...)10.2. with regard to the functioning of democratic institutions:  
(...) 10.2.3. before the next parliamentary elections, lower the 7% electoral threshold so that it is not higher than 5% and ensure that the composition of the electoral committees at all levels guarantees their proper and impartial functioning”.

<sup>22</sup> For example, in the parliamentary elections of 2003, the Kazbegi constituency had 5,400 registered voters while Kutaisi had 116,000 registered voters. Each received one majoritarian mandate. As a result, a voter in Kutaisi had 1/20 of a vote compared to a voter in Kazbegi. See also OSCE/ODIHR Final Report on Georgia Parliamentary Elections, 2 November 2003, page 23.

<sup>23</sup> For example, one seat in Tbilisi is allocated to more than 200,000 citizens, while one seat in Svaneti – to some 11,000 citizens (population data are from the 2002 Census), with an average number of citizens per seat being approximately 93,000.

and when such deviations are permissible. **It is recommended** that the Election Code state clear and objective legal criteria for the establishment of constituencies,<sup>24</sup> including the percentage of permissible deviations and grounds for such deviations. It is generally considered that a maximum deviation of 10% from the average is admissible.<sup>25</sup>

53. Consideration could be given to establishing a boundary delimitation commission, which would include specialists in different areas, particularly in geography, sociology and demography, as well as, possibly, civil servants knowledgeable of administrative boundaries and specifics.<sup>26</sup> Such factors as history, geography, roads, communication possibilities as well as proximity to regional centres make the setting of boundaries a difficult task.

54. Article 16 is not clear as to how voters from outside of Georgia are attributed to parliamentary constituencies. Article 16.6 states “the Central Election Commission decides the issue of attributing these precincts to election districts. These electoral precincts shall be assigned to Electoral District No. 01.” This could be interpreted to mean that all voters from outside Georgia are attributed to Electoral District No. 1 only, which could result in violation of the principle of equal suffrage. This provision also undermines the concept of linkage between voters and the elected parliamentarian as there is no linkage but an arbitrary assignment of these voters to Electoral District No. 1. **It is recommended** that this text in Article 16 be clarified.

### Systems for Local Elections

55. The election system for local elections was substantially amended on 9 December 2005 (for Tbilisi City Council) and on 23 December 2005 (for other ‘Representative bodies of local self-government – *Sakrebulo*s’). These amendments have been adopted in the wider context of a reform of the legislation pertaining to local government.

56. Parliament first adopted amendments to the Law on Tbilisi City (1 July 2005). In late June and early July 2005, the Parliament held two readings of amendments to the Election Code concerning the composition of the Tbilisi City Council. These amendments were finally adopted on 9 December 2005. They foresee a 37-member Council with 25 members elected in 10 constituencies, and 12 seats distributed proportionally among those parties which gained at least 4% of votes<sup>27</sup> in all ten of Tbilisi’s constituencies. The 25 seats elected in the constituencies are awarded through a block party list, “winner-takes-all” system, whereby the list which comes first in the constituency takes all the seats allocated to that constituency. The City Council would then elect the Tbilisi Mayor from among its members by a simple majority vote. The Venice Commission has reviewed and commented on these amendments.<sup>28</sup>

57. On 23 December 2005, the Parliament adopted substantial amendments to the provisions regulating the election of representative bodies of local self-government, other than Tbilisi. These provisions constitute the new Chapters XV, XVI and XVII of the election code.

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<sup>24</sup> Code of Good Practice in Electoral Matters, I.2.2.ii : Equal suffrage entails inter alia “a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged.”

See also, Code of Good Practice in Electoral Matters, I.2 2.2.vi : “With multi-member constituencies, seats should preferably be redistributed without redefining constituency boundaries, which should, where possible, coincide with administrative boundaries.”

<sup>25</sup> Code of Good Practice in Electoral Matters, I.2.2.iv, more particularly paragraph 15 of the Explanatory Report.

<sup>26</sup> Code of Good Practice in Electoral Matters, I.2.2.vii.

<sup>27</sup> Since there are only 12 seats to distribute, the 4% threshold appears to be rather theoretical. In order to gain one seat, a list would in effect need to obtain more than 8.33% of the votes.

<sup>28</sup> Opinion on the Draft Organic Law on “making amendments and additions into the Organic Law – Election Code of Georgia” adopted by the Council for Democratic Elections at its 15<sup>th</sup> meeting (Venice, 15 December 2005) and the Venice Commission at its 65<sup>th</sup> plenary session (Venice, 16-17 December 2005) (CDL-AD(2005)042).

58. According to the new provisions, elections of representative bodies of local self-government – *Sakrebulo*s are held every four years. The code establishes a mixed electoral system whereby in each representative body of local self-government – *Sakrebulo* throughout the country, 10 members are elected through a proportional representation system, and a certain number of members are elected through a plurality system within single member constituencies. In the case of ‘self-governing city’s *Sakrebulo*’, five members are elected through the plurality system, while in the case of ‘municipalities’ *Sakrebulo*’, the plurality system is used to elect “one member from each community and city on the corresponding territory of the given district” (Article 115).

59. Article 112.3 of the Election Code has been amended to vest the DEC with the responsibility to form local election districts for the plurality contests within two days of the calling of elections, and to publish information on the districts within three days of the calling of elections. However, Article 115.2 suggests that the CEC also has some authority regarding formation of these districts. In the previous joint opinion, the Venice Commission and the OSCE/ODIHR recommended that Article 112 be reassessed due to concerns with instability in local election districts’ boundaries from one election to the other and the absence of criteria the CEC should use in order to draw the boundaries. In addition, the time period for announcement of the election district boundaries was rather short for potential candidates to, firstly, know which district they can run in, and secondly, to familiarise themselves with the electoral districts. Article 112 was amended by the 23 June 2006 amendments. Article 112 now provides that each independent self-governed unit constitutes one election district. However, this does not address the issue of the formation of boundaries for local majoritarian election districts within an independent self-governed unit that the election administration must determine under Articles 112.3 and 115.2. **It is recommended** that both Articles 112 and 115 be amended to address these concerns and clarify the respective responsibilities of the CEC and DEC for establishing the boundaries of majoritarian election districts and for ensuring the equality of suffrage.

60. While Article 108 specifies that the election shall be called by the President “no later than 40 days before the expiry of the authority of *Sakrebulo*”, a transitional provision inserted in the Code specifies in Article 129<sup>1</sup>, that “Elections of a representative body of local self-government – *Sakrebulo* – shall be called by the Georgian president no later than 40 days before the elections”. This provision left an extraordinary discretion to the President of Georgia in setting the date of the 2006 local elections.

61. Article 117.3 requires that a political party, which has no representative in Parliament, must obtain signatures in support of its list of no less than 50,000 voters in order to participate in local elections. This number effectively bars locally or regionally based political parties from participating in local elections, which is unacceptable. The number of support signatures should be lowered to a reasonable number, which should not exceed one percent of the number of registered voters in the respective unit for local elections. If such a census for participation in local elections remains at all, **it is recommended** that the number of signatures required by Article 117.3 be significantly reduced.

### 3. CANDIDACY AND SUFFRAGE RIGHTS

62. It is a universal civil and political right that every citizen has the right, on a non-discriminatory basis and without unreasonable restrictions to: (1) take part in the conduct of public affairs, directly or through freely chosen representatives; (2) vote and to 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.<sup>29</sup> The Election Code does not fully satisfy this basic principle as it contains provisions that impermissibly deny the right to vote, limit candidacy rights, and prevent an elected candidate from completing the mandate of elected office. These impermissible limitations are considered in the order in which they appear in the Election Code.<sup>30</sup>

### Article 5 Denial of the Right to Vote

63. Article 5.4 provides that a person who “is being placed in a penitentiary institution in accordance with a court judgment is not eligible to take part in elections and referendum”. This provision denies prisoners the right to vote. Under Article 5.4, the passive right of suffrage is denied based on any conviction, regardless of the nature of the underlying crime. In *Hirst v. United Kingdom (No. 2)*,<sup>31</sup> the Grand Chamber of the European Court of Human Rights held that a blanket restriction on the voting rights of prisoners, “irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances”, was a violation of Article 3 of Protocol 1 to the ECHR. The *blanket prohibition* in Article 5 would appear to be contrary to the principles stated in the *Hirst* case. **It is recommended** that Article 5 be accordingly amended.<sup>32</sup>

### Articles 92 and 107<sup>1</sup> Limitations on Candidacy Rights

64. Article 92.3 provides that “a drug-addict or drug-user shall not be elected as a member of the Parliament of Georgia”. Under Article 107<sup>1</sup>, each person elected as a Member of Parliament must undergo a test for drugs. Parliamentarians who fail the test are barred from Parliament and “such person shall lose the passive election right until such person submits to the CEC documentary evidence that such person is healthy” (Article 107<sup>1</sup>.2).

65. These two articles are unclear and are subject to abuse as they fail to (1) provide reference to the relevant legislation pertaining to what chemical compounds are “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”, or (3) specify how many positive “drug” tests during what period of time are equivalent to “drug addiction”. The possibility for a person to establish that he or she is “healthy” is not sufficient as the burden of establishing “drug addiction” rests with the State and cannot be based on a single test. A single test does not establish “addiction”; it merely establishes the one time presence in the body of a chemical compound.

66. In addition to the problems noted above, “addiction” to a particular chemical compound would have to be considered a disability, either physical, mental, or a combination of both. It would be unlawful for the legislature to discriminate against “drug addicts” in the exercise of their suffrage rights without first establishing a factual foundation that the prohibition of the candidacy of “drug addicts” is *strictly necessary in a democratic society*. Further, such a prohibition might be considered a violation of international standards protecting citizens with disabilities in the exercise of suffrage rights.

<sup>29</sup> See, e.g., Article 25 of the International Covenant on Civil and Political Rights.

<sup>30</sup> Code of Good Practice in Electoral Matters, I. 1.1 d.: “Deprivation of the right to vote and to be elected:  
i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:  
ii. it must be provided for by law;  
iii. the proportionality principle must be observed, conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;  
iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.  
v. Furthermore, the withdrawal of political rights or funding of mental incapacity may only be imposed by express decisions of a court of law.”

<sup>31</sup> Application no. 74025/01 (6 October 2005).

<sup>32</sup> Article 28.2 of the Constitution of Georgia should also be amended.

67. These articles are uncommon by international comparison.<sup>33</sup> Articles 92 and 107<sup>1</sup> present concerns as to their compliance with international standards as it is not apparent why prohibiting the candidacy of “drug addicts” is strictly necessary in a democratic society. Nor is it clear how one test proves “addiction”. **It is recommended** that Articles 92 and 107<sup>1</sup> be amended to address *all* of the concerns stated above. It may be that the only satisfactory solution is the removal of these provisions from the Election Code.

### **Article 111 Limitations on Candidacy Rights for local elections**

68. Article 111 creates an incompatibility between holding a mandate of a Member of Parliament and being nominated as a candidate for membership of *Sakrebulo*. This restriction is excessive. While it is widely accepted that restrictions against cumulating mandates can oblige the holder of two mandates to surrender one, after he/she is elected, such a restriction should not be applied to candidacies. **It is recommended** this provision is amended accordingly.

### **Signature Provisions**

69. Articles 41 and 42 regulate the handling of signature lists of supporters in support of candidacy. Article 42 requires improvement.

70. Article 42.2 requires that signatures be checked at random and “in an inconsistent manner”. The phrase “in an inconsistent manner” should be improved. Although this phrase may intend to emphasise that signatures are to undergo a “random” check, it literally means that there are no uniform rules to be used when checking lists. Thus, inconsistent rules may be applied, and a list rejected for one reason where another list was accepted for the same reason. **It is recommended** that this text be improved (unless it is a problem of translation).

71. The signature verification procedure in Article 42.2 is also of concern. Article 42.2 can be used to *invalidate* a sufficient minimum number of valid signatures if accompanied by a certain percentage of invalid signatures. This is not the purpose of the verification process. The verification process is intended to check for a sufficient number of valid signatures in order to establish a minimum level of electoral support. It is not intended to punish or disqualify sufficient signatures offering electoral support just because it also contains a certain percentage of invalid signatures. This can lead to abuse where an election commission may have the goal of finding enough invalid signatures for the sole purpose of rejecting a candidacy, instead of finding enough valid signatures to register the candidacy.<sup>34</sup>

72. An example shows why this method of verification is not appropriate. Article 97.7.a requires a candidate in a multi-member parliamentary constituency to be supported by at least 1,000 signatures to meet the requirements for candidacy. Article 42.2 provides that “the election commission shall [...] check the authenticity of 20% of the number of listed supporters” and requires invalidation of the entire list if the number of invalid signatures (of the 20% that were checked) is “not less than 10%”. Assume that Candidate A obtains 1,500 signatures of support. However, 34 of the signatures are not valid. The remaining 1,466 signatures are still valid. In the first signatures checked (20%, which is here 300), there happen to be the 34 invalid signatures, which is more than 10% percent of the checked signatures. The result is that a candidate, who had 1,466 valid signatures, when only 1,000 were needed, is prohibited from

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<sup>33</sup> It is not clear why these articles refer only to elected members of Parliament and not also to the elected Presidential candidate.

<sup>34</sup> The Code of Good Practice in Electoral Matters recommends (I.1.3, § 8) that “The 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.”

being a candidate because of 34 invalid signatures. An invalid signature should not invalidate other signatures or the signature list. **It is recommended** that Article 42.2 be amended accordingly.

### **Pre-Election Candidate Withdrawal**

73. Article 100 provides that candidates may withdraw from the election, and that nominating parties can cancel their decision to nominate a candidate to the election up to two days before election day. This deadline is too short. A more realistic deadline should be set, one which expires before the ballots have been printed. No amendment to ballots should be made by hand due to the real possibility of human error or abuse.<sup>35</sup> Additionally, there should be a *formal process* for candidate withdrawal that clearly specifies what actions, including election commission decisions, must be taken for the withdrawal to be legally effective.<sup>36</sup> While it should be noted that Article 121.2 has been improved somewhat with a 23 June 2006 amendment, which increased the deadline for candidate withdrawal in local elections from two to ten days, **it is recommended** that Article 100 and Article 121.2 are further amended in order to fully address these concerns.

### **Post-election Cancellation of Candidate Registration/Mandate Forfeiture**

74. Article 100.2 of the Election Code permits a party or bloc, under some circumstances, to cancel the registration of a candidate. It is not clear from the translated text whether the candidate's registration could be cancelled after he/she is elected. If cancellation after election is possible, then this would amount to a system of imperative mandate and appears to conflict with the constitutional provision that an elected Member of Parliament cannot be recalled (Article 52.1 of the Constitution) and directly contravenes the 1990 OSCE Copenhagen Document. Paragraph 7.9 of the 1990 OSCE Copenhagen Document requires that "candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures". Article 100.2 would not be in conformity with democratic parliamentary and constitutional procedures if it permitted withdrawal of the elected candidate's mandate.<sup>37</sup> The withdrawal of mandates of elected Members of Parliament by parties that nominated them runs counter to democratic principles and OSCE Commitments. While the formulation of this provision has been somewhat improved by the 23 June amendment, **it is recommended** that the original official text of the law published in accordance with legal procedures be checked to verify whether this concern arises due to translation and to avoid any possible misinterpretation.

75. Equally unusual are two provisions, as amended on 23 December 2005, which provide that:

Article 106.7: "If a Member of the Parliament who resigns, was elected through the party list of a party participating independently in the elections, the seat of such MP shall be occupied by the candidate for Parliament named next in the

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<sup>35</sup> Article 51.13 provides "If any of the election subjects is removed from the elections, at the time of issuing the ballot paper, the stamp "Removed" shall be affixed opposite the name of such election subject". Article 84.4 provides "If a candidate withdraws their candidacy for the Presidency of Georgia, the name of this withdrawn candidate shall be stamped with the round seal "Withdrawn" on the ballot paper".

<sup>36</sup> Article 100.3, which governs parliamentary candidacy, does require an application for withdrawal to be filed with the relevant election commission. However, no other details are provided. A similar provision is found in Article 121.2 concerning candidate withdrawal in local elections.

<sup>37</sup> See, e.g., Article 52.1 of the Constitution of Georgia; See also *Sadak and Others v. Turkey*, Application Nos. 25144/94, 26149/95, 26154/95, 27100/95 and 27101/95, European Court of Human Rights (11 June 2002) (post-election forfeiture of a mandate is incompatible with the very essence of the right to stand for election and to hold parliamentary office, and infringes the unfettered discretion of the electorate to exercise free and universal suffrage).



same list within a period of 1 month, [...]. If there is no other candidate named in the party list, this mandate of MP shall be deemed cancelled.”

Article 106.9: “In the case of the withdrawal of a Member of Parliament elected for a multi-mandate election district, the aforementioned MP in a term of 1 month is succeeded by the next sequential candidate in the appropriate reserve list, [...]. If there no longer is a selectable candidate in the majoritarian list, the aforementioned MP mandate shall be deemed abolished”.

76. These provisions result from the abolishment of interim elections in case a mandate becomes vacant. They are problematic in several respects: Applied to the proportional seats, the cancellation of a mandate alters the representation of votes in Parliament from the day of the cancellation of the mandate until the end of the legislature. In addition to altering the translation of votes into seats, when applied to the district seats, cancellation of mandates would diminish the representation of the corresponding district in Parliament and challenges the principle of territorial representation which constitutes the basis for the creation of district electoral constituencies. Further, should a number of mandates be cancelled during the four-year term of the Parliament, the Parliament could consist of members elected by a minority of citizens. **It is recommended** that the provisions of Article 106 be reassessed in order to take these concerns into consideration.

#### 4. ELECTION COMMISSIONS

##### Composition

77. The composition of the election administration, in particular the CEC, has been a contentious issue for a number of years. In previous elections, the ruling party enjoyed a dominant position in the election administration through the system of appointments. The OSCE/ODIHR and the Venice Commission have previously expressed concern that the composition of election commissions gave a clear advantage to the pro-presidential parties, were politically imbalanced, and overall did not act independently.<sup>38</sup> However, the main opposition parties were entitled to nominate members to the CEC, district and precinct elections commissions. Until recently, the CEC was composed of a Chair and 14 members, of whom five were Presidential nominees and nine were nominees of political parties.

78. Amendments to the Election Code adopted in April 2005 have introduced changes in the formation of election commissions, which do not address previous OSCE/ODIHR and Venice Commission concerns about the formation of election commissions. To the contrary, these changes have the potential to further diminish transparency and inclusiveness. The amendments were presented as an attempt to ‘professionalize’ the election administration. The new CEC is composed of a Chair and six other members, who the Election Code requires to be “non-party” persons<sup>39</sup> (Article 27.4). Significantly, the President was given a central role in deciding the composition. According to the new rule, the President proposes to the Parliament a short list of 12 nominees to fill the six member positions, and nominates the Chairperson.

79. A ‘Competition Commission’ is set up in order to process applications for CEC membership. The appointing process for the ‘Competition Commission’ is unclear and should

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<sup>38</sup> See OSCE/ODIHR Final Reports on the November 2003 parliamentary elections, and on the January 2004 presidential elections; also CoE – Venice Commission: Opinion on the Unified Election Code of Georgia as amended on 14 August 2003 (CDL-AD(2004)005).

<sup>39</sup> The OSCE/ODIHR’s Final Report on the flawed November 2003 parliamentary elections noted that: “Achieving genuine political consensus on the composition of the election administration has been one of the hardest challenges faced by parliament in recent years. Attempts to secure an impartial and independent election administration have foundered due to the death of candidates in whom all parties have confidence”.

be specified in Article 27.3. This article provides no guidance as it merely states that a 'Competition Commission' for the CEC chairperson and members shall be formed. While Article 27.3 provides that the 'Competition Commission' is founded upon an order of the President of Georgia, it is not clear how and according to which criteria the members are chosen and appointed. This important commission controls the gateway for CEC membership, as it is this commission that decides on the short list (at least two but no more than three names) for the President of Georgia to choose from for subsequent submission to Parliament. Arguably, the 'Competition Commission' has the greatest influence in the nomination process as it can limit the pool of nominees for the entire CEC to sixteen names, all of which could be from the same political force. Thus, the appointing process for the 'Competition Commission' is of sufficient importance to require that it be stated in the Election Code.<sup>40</sup> **It is recommended** that the Election Code be amended to state the process for appointing the 'Competition Commission' and that this process be politically inclusive and transparent.

80. Through their central role in selecting CEC members, the President and parliamentary majority can exercise, in effect, an extensive influence and potential control of the election administration. **It is again recommended** that the Election Code be amended so that the nomination and appointment process for CEC members is inclusive and ensures their independence and impartiality. Further, **it is recommended** that safeguards be included in the Election Code to ensure that no party or bloc has a preponderance of managerial positions in election commissions. The Code of Good Practice in Electoral Matters touches upon the question of election commissions' composition and can provide some guidance in this regard.<sup>41</sup>

81. Article 71.2 states that participants in elections (a party, election block, voter initiative group - in the case of the Presidential elections only), shall be entitled to appoint two representatives at every election commission, while a voters initiative group representing a candidate in single or multi-mandate election districts for the local self-government elections, shall have the right to appoint two representatives only in each of the appropriate districts and subordinate PECs, not the CEC. It is not clear why such a distinction between different kinds of participants is established, since all participants in the election process should be treated equally. If the role of the representatives of the election subjects is to observe the work of the commissions and to express their opinion, then all participants should be equally represented.

82. The amendments affected the composition of District elections commissions as well. All DEC members are chosen by the CEC. DECs are now composed of five members selected on the basis of 'open competition'. Members must be 'non-partisan', possess 'high education' and have a "certificate of an election official" (Art 33.5). This latter certification process raises serious issues to be discussed below. Due to the fact that their members are directly nominated by the CEC, the composition of DECs raises the same concerns regarding transparency and independence as is the case for the CEC.

83. The composition of PECs (Articles 36 and 37) was also changed by the 2005 and 2006 amendments. The number of PEC members was reduced from fifteen to a maximum of nine.<sup>42</sup> Of these, DECs appoint three persons as 'non-partisan' members. District elections commissions selected PEC members where the persons were known to the District elections commissions and based on applicants' qualifications and electoral experience. In addition, the three top-scoring parties in the last parliamentary election (currently the National Movement, the

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<sup>40</sup> However, the Competition Commission (and President) can be ignored by the Parliament, under Article 28.2, by "voting down" the nominees. This requires new nominations by the President, without the involvement of the Competition Commission. If the Parliament again "votes down" the President's nominees, the Competition Commission is resurrected and the process starts anew. It is not clear whether there is a new Competition Commission for this new process.

<sup>41</sup> See in particular, II.3.1, §§ 70 to 76.

<sup>42</sup> However, each appointing party also appoints two "reserve" members who participate in PEC activities on election day only.

New Rights, and the Labour Party) each have the right to appoint two PEC members. The concerns expressed above regarding DEC's independence are also valid as regards PEC composition. Out of the nine PEC members, majorities can be formed that *de facto* exclude opposition parties appointees from the decision making process and from managerial position on Precinct elections commissions (PEC Chair, Deputy-Chair and Secretary are elected by PEC members from among themselves).

84. Through the nomination mechanisms adopted for DEC's and PEC's, the potential control by the Presidential and parliamentary majorities – when these are of the same political force – on the CEC, extends to lower level election commissions, potentially amounting to an extensive oversight over the whole election administration structure.

85. According to Article 18.5.a of the code, only those who have received from the CEC a 'certificate of election administration official' can work on the CEC (members and staff) or a DEC.<sup>43</sup> The CEC establishes the rule for certification and ensures the conduct of the certification process for all election commission members and staff. While the certification process can enhance professionalism, it also raises several issues and requires guarantees of transparency and impartiality; in particular:

- Such a certification process must be impartially implemented. The CEC will have to establish in advance clear and objective criteria for certification. Ideally, the CEC should seek to establish these criteria through an inclusive consultation process.
- The modalities of the certification process must be transparent and should enable political parties and observers to verify the objectivity of the criteria and the impartiality of their implementation.
- It should be clear whether or not the CEC is entitled to withdraw certificates. If it were, the withdrawal would amount to a dismissal and should be properly regulated as such, in order to avoid abusive withdrawals.
- It should be clearly established whether the duration of the validity of certificates would be limited. If it were, rules for renewing or not renewing a certificate should be specified.
- The certification process should not be viewed as relieving the election administration from the necessity to train polling station commission members.

### **Legal Status and Jurisdiction**

86. Some of the provisions could be applied to impede impartiality and accountability in the election administration. Article 17.1 states that "the election administration of Georgia is a legal entity of public law". This text could be interpreted to mean that accountability is based on the "collective" conduct of the election administration, as opposed to individual acts of commissioners. **It is recommended** that it be verified that this text does not affect the right to maintain legal actions by or against individual commissions or commissioners.

87. There is a general concern that the Election Code contains some provisions that may hamper rule of law principles. Examples are found in Article 29.1.f, where "special groups" with specially "defined authority" are deputised to engage in certain missions. The concern is also due to the fact that the Election Code empowers election commission chairpersons to issue ordinances on the same level as the commission. See Articles 25, 29, 34, and 37.

88. Article 21.1.h provides that the authority of a commission member terminates if the party, which appointed the member, is "banned or liquidated". The rationale for this provision is not clear and contradicts the principle stated in Article 19.3 according to which:

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<sup>43</sup> Pursuant to Article 129.2 of the code, the certification requirement would only enter into force on 1 January 2006 for CEC and DEC members and on 1 July 2006 for PEC members. CEC members appointed in 2005 are exempt from certification requirement (Article 129.5).

“A member of the election commission is not a representative of his/her appointing/electing subject. In his/her activities such person shall be independent and subordinate only to the Constitution of Georgia and the Law. Any influence on the election commission member or interference with his/her activities is prohibited and punishable by law.”

89. **It is recommended** that Article 21.1.h be deleted from the law.

90. Article 21.1.i provides that the authority of a commission member terminates if the party, which appointed the member, “recalls” the member.<sup>44</sup> In light of Article 19.3, the rationale for recall is questionable. In fact, there is no justification for allowing discretionary recall of an election commission member because the possibility of such recall will undermine the impartiality and independence of commission members. The amendment introduced in June 2006 to Article 21.5, which currently states that “recalling of a precinct election commission member during the last 15 days before the vote, is prohibited”, attests to the legislator’s attempts at ensuring stability of precinct election commissions. Nevertheless, this amendment does not address the fundamental problem that gave rise to the recommendation. **It is recommended** that the Election Code should be amended to provide legal protection to members of election commissions in order to prevent their wrongful removal by political parties, and to enhance their ability to perform their duties independently, impartially, and professionally.<sup>45</sup>

91. Article 22.8 provides that, in case of a tie vote on an election commission, the vote of the chairperson of the election commission is decisive. Although deadlock should be avoided, giving the chairperson a weighted vote effectively gives tie breaking power to the political party that controls the appointment process for the election commission chairperson. In addition, this rule has the potential to undermine public confidence in election administration where a decision is adopted solely on the power of appointment that a particular political force had in choosing the chairperson. Where election administration is already lacking in political pluralism, this unfortunate situation is compounded by giving a weighted vote to the chairperson. **It is recommended** that consideration be given to applying the principle of one person-one vote to the decision making process in election commissions.

92. Article 22<sup>1</sup> is also problematic when making certain nominations for positions within the election administration. The Chairperson of a commission is given a special role on nomination for the position of Deputy Chairperson. It was previously recommended to review the special authority of the Chairperson of an election commission. An amendment of 23 June 2006 attempts to address this issue by requiring that a candidate for a “leading position in the election commission” must have the support of two nominators. However, the amendment did not remove the text that a candidate for Deputy Chairperson is nominated by the Chairperson. Reading these two provisions together, although the nomination requires the support of two nominators, it can be argued that one of the nominators must be the Chairperson. **It is recommended** that Article 22<sup>1</sup>.2 be clarified.

## 5. VOTERS’ LISTS

93. Regularly updated information on voters’ lists is of crucial importance for democratic elections. The missing entries of some voters as well as possible multiple registrations of

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<sup>44</sup> Article 21.5 prevents “recall” of a precinct election commission member during the fifteen days before voting. Article 37.6 uses the term “withdrawal” of the member instead of “recall”, but the concept is the same.

<sup>45</sup> Code of Good Practice in Electoral Matters, II.3.1.f.

others would violate the principles of universal and equal suffrage. The voters list in Georgia has increased from 2.3 million (2004) to 3.2 million (2006) voters. In a country with an estimated population of just over 4 million persons that could raise questions with regard to the accuracy of the voters' lists. Thus, regardless of the apparent adequacy of provisions regulating the voters list, their application has yet to result in a voters' list that can be considered as sufficiently accurate.

94. However, it should be acknowledged that the Parliament has enacted a number of detailed provisions attempting to legislate procedures that could ensure the accurate recording of all persons eligible to vote. In an apparent recognition of the need for action, the Parliament enacted articles creating "special groups" to conduct door to door checking for voters prior to the 2006 local elections. While the effectiveness of the work of these "special groups" was limited due to the reduced term of their operation, the Parliament should be commended for recognising that the commitment of adequate human resources, and not simply improved legal provisions, is critical for creating accurate voters' lists. Political will and commitment remain crucial for the establishment of accurate voters' lists.

95. The Election Code provides for a centralised, regularly updated national voters' list. Under Articles 9 and 29, the CEC is responsible for preparing the general list of voters; for the computer processing and updating of the electronic database of the general voters' list; and for its publication on the Internet. These are positive provisions which meet prior international recommendations. Yet, although these provisions have been in the law since 2003, the voters' lists require significant further updating and appear to remain a key problem of elections in Georgia, *a fortiori* with reports of observers underlining that such weaknesses were again observed during the 2006 local elections.

96. According to Article 9.5, various Government agencies (Ministry of Justice, local self-government units, Ministry of Refugees etc.) are responsible for furnishing the CEC with updated data. This is done twice per year (1 February and 1 August) and the CEC is obliged to amend the electronic database of registered voters (Article 9.6). In addition, for a three-week period prior to the elections, PECs are tasked with making additions and corrections to voters' lists. However, it appears unclear what the format of the data provided to the CEC should be. Thus, the CEC may face insurmountable technical problems in the close run-up to the election day.

97. Past OSCE/ODIHR election observation reports have pointed out the poor quality of voters' lists. They have indicated that while the Election Code can provide an adequate legal basis for an accurate, centralised voters list, if applied with enough time, effort, and capacity,<sup>46</sup> in practice, the registration process is insufficient due to the standing need of full commitment, capacity and coordination by the institutions involved in the compilation of the voters' lists. This tends to undermine the basic principle of universal and equal suffrage. **It is again recommended** that all relevant authorities in Georgia take all necessary efforts, according to an integrated approach, to compile an accurate list of voters.

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<sup>46</sup> Over two years ago, the OSCE/ODIHR recommended that "The CEC must immediately commence data entry and initial consolidation of the voter register. Immediately after the election cycle, authorities should give priority to the development and implementation of a comprehensive strategy for management of all personal data and records, including voters' lists." See Recommendation Number 10, at page 21 of the Final Report of the OSCE/ODIHR Election Observation Mission to Georgia Extraordinary Presidential Election (4 January 2004). See as well observations (extract) provided by a Venice Commission's expert in his report realised in the framework of an assistance mission to the Central Election Commission of Georgia (27-28 July 2006): "*The preliminary voter register was concluded by CEC based on database delivered by the Ministry of Justice, namely by the Agency for civil register. The preliminary voter register is found to have a great number of duplicates, which the CEC in a certain part updated, namely it erased them. Nevertheless, deceased persons still can be found in the voter register due to the lack of record on deceased persons in certain regions of Georgia, as well as due to nonexistence of the electronic database on those persons.*"

98. The Venice Commission and the OSCE/ODIHR have previously recommended that consideration be given to whether the Election Code currently provides sufficient time for public display and scrutiny of the new voters' lists. Comprehensive amendments adopted on 23 June 2006 appear to provide sufficient opportunities for voters to check their personal data. The Parliament is to be commended for these efforts. Timely and systematic input of corrections made during the public scrutiny period, however, has to be ensured.

## 6. ELECTION CAMPAIGN PROVISIONS

99. Article 73 defines permissible activities during an election campaign. By defining permissible activities, it might be implied that other legitimate activities, that are not specifically included in Article 73, are not permissible. This is problematic as election campaign activities are almost invariably a manifestation of the individual's rights to freedom of expression and/or association, which are rights protected every day of the year under the ECHR. Any restrictions on these rights must be strictly necessary in a democratic society. Further, Article 73.5 expressly prohibits foreign citizens from engaging in election campaigning. Foreign nationals, and stateless individuals have rights to free expression and association, which could include manifesting an opinion "for or against an election subject" (election campaigning). Thus, Article 73.5 would appear to be in conflict with Articles 1, 10 and 11 of the ECHR. **It is recommended** that Article 73 be amended to address these concerns.

## 7. MEDIA

100. Provisions regulating the media during election campaigns are found in Articles 73 and 73<sup>1</sup>. Although these provisions appear to provide an adequate framework for fair campaign conditions for election contestants, they are problematic as electoral contestants must satisfy certain conditions before they can have the right to equal treatment in the allocation of media time. Conditions have been created by Article 73<sup>1</sup>, which provides special rules for "qualified subjects". However, before an electoral contestant is granted "qualified subject" status, s/he must establish a level of "popular support" through either prior electoral success or sufficient opinion poll results. New political parties, which should have equal opportunities with political parties that have participated in elections previously, are limited to "qualifying" through the usage of opinion polls' results. This is not consistent with good practice. Validity/correctness of opinion poll results and the methodology used are difficult to verify, and can be manipulated. Furthermore, it might mean that if no, or not enough, opinion polls are conducted, election subjects that did not take part in previous elections would be prevented from receiving free airtime.

101. According to these new provisions, it is up to the broadcasters to determine whether an electoral contestant is qualified for free airtime or not. It is advisable to establish legal criteria, rather than leave this decision to the broadcasters, as it might result in undue refusals and inconsistencies in implementation. **It is recommended** that Article 73<sup>1</sup> be thoroughly reviewed to address these concerns.

102. Articles 73 and 73<sup>1</sup> could also be improved as they are currently limited to providing conditions for contestants to convey messages and do not extend to coverage of contestants in the news or other programs. Further, the media should be more proactive in providing information on the election campaign and processes. **It is recommended** that Article 73 be amended to require the state-funded media to 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 of discussion for all contestants. **It is also recommended** that Article 73 be amended to require that state-funded 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.

103. The Venice Commission and the OSCE/ODIHR previously recommended that Article 73 be amended to clearly state whether obligations regarding public media are applicable to media at both local and national levels, and stipulate more clearly which media can be considered "public media". Although the 23 June 2006 amendments attempt to provide further clarifications, the terms used are still not sufficiently clear and it is not stipulated what is implied by a "public broadcaster", "local broadcaster" and "community broadcaster". It is again recommended that the Election Code be amended to address this issue.

## 8. CAMPAIGN FINANCE

104. Articles 46 through 48 regulate campaign contributions and election campaign funds. These articles are positive steps for transparency and accountability in elections. Article 47 requires the submission of reports on campaign funds to relevant election commissions. As amended on 16 December 2005, Articles 46 and 48 bring additional regulation. Only candidates running for membership "of local self government of a community or village – *sakrebulo*" (Article 46.2) are now exempted from the obligation to set up a campaign fund. Previously, majoritarian candidates for Parliament were also exempted.

105. In addition, the 16 December 2005 amendments introduced an obligation for the campaign fund manager to report on a monthly basis to the relevant election commission and to have the campaign fund audited by an external auditor after the end of the electoral process. Article 48.6 provides that the audit be "carried out by an auditor (audit company) functioning on the territory of Georgia". **It is recommended** that campaign funding, after an election has been held, be audited by a state body rather than a private audit company.

106. One of the 23 June 2006 amendments improved Article 48 by requiring disclosure of campaign finance information by the CEC in a variety of ways, including publication on the CEC website. However, these articles could be further improved. In order to provide timely and relevant campaign finance information to the public, the Election Code should require full disclosure, *before* and after elections, of sources and amounts of financial contributions and the types and amounts of campaign expenditures. **It is recommended** that Articles 48.6 and 48.11 be amended to require disclosure of campaign finance reports both before and after elections. The disclosure before elections must be sufficiently in advance of the election to provide relevant and timely information to voters. Further, **it is recommended** that Articles 48.6 and 48.11 be amended to clearly specify that the information disclosed includes the types and amounts of campaign expenditures.

107. Sanctions related to violations of campaign finance regulations seem disproportionate, and potentially problematic. In particular Article 48.8 as amended on 16 December 2005:

"Election subjects who receive the necessary number of votes determined by this Law and do not submit an election campaign fund report within the established deadline, or in violation of the requirements of paragraphs 2, 3, 4, 5 and 7 of Article 46 of this Law, paragraphs 4 and 5 of Article 47, paragraphs 4, 5 and 6 of this article, is proven, the relevant district/municipal court considers and decides the issue of the consolidation of the results of the elections without taking into account the votes received by these election subjects."

108. Such sanction, amounting to cancelling the 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 results, would handle such cases. The 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 code does not specify whether courts could act on their own motion, or whether election commissions would have to submit cases to them. **It is recommended** that the provisions of Article 48.8 are reviewed to address the above-mentioned concerns.

## 9. VOTING AND TABULATION OF RESULTS

### Special Provisions for Disabled Voters and Minority Voters

109. The Election Code contains positive provisions to assist disabled voters and voters with limited physical abilities. Article 11 provides that voters with limited physical ability or medical conditions might be included in the mobile ballot box list. As for the location of the polling stations, Article 50.2 contains special provisions to facilitate polling station access for disabled voters. With regard to the preparation of ballot papers for the election precincts, Article 51.2 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 66.5 requires that the public TV broadcaster shall, when publishing information by the election commission, take account of the problems of those persons with limited ability in respect of their diminished hearing through the use of gesture-translation and/or using appropriate special technology. These are positive features that address the specific needs of some persons with physical disabilities.

110. Article 56 regulates mobile voting. Article 56 should contain some additional safeguards to minimise the possibilities for fraud during the use of the mobile ballot box. Of particular concern is the fact that following 2006 amendments, Article 56 now provides that mobile voting is administered by only one member of the PEC. **It is recommended** that consideration be given to amending Article 56 to include the following safeguards: (1) there should be two members of the PEC for administering mobile voting and they should not have been appointed to the PEC by the same appointing authority, and (2) Article 56 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. The Parliament has improved Article 56 by amending the deadline for submission of requests for mobile voting, as previously recommended by the Venice Commission and the OSCE/ODIHR, from 18 hours to two days before election day. The two recommendations above would be consistent with the Parliament's efforts to improve Article 56.

111. Article 51 obliges the CEC to print ballots in languages other than Georgian where necessary for local populations. This meets a prior recommendation. Similarly, Article 129<sup>3</sup> provides for printing of voters' lists in minority languages. This is a positive amendment. The Parliament should also consider, as it enacts legislation, to facilitate the participation of all societal groups in elections, by introducing a requirement that other election materials, such as PEC manuals, the Election Code, and protocol forms are also printed in minority languages.

### Observer Rights

112. Articles 65 through 72 provide broad rights for observers and require election commissions to prepare and conduct the elections in a transparent manner. These provisions have been improved by 2006 amendments which incorporate previous recommendations for enhancing transparency.



113. The rights of observers have been strengthened with an amendment to Article 51<sup>1</sup>-.2, which provides that protocols and their copies have equal legal status. This is a positive amendment as it allows for the protocol given to an observer to be used as evidence in any court cases or any appeals related to election results.

114. Article 69.9.c contains a requirement for observers to indicate in the accreditation application the name and the number of the election district and precinct (1) where the observation will be conducted. While in practice during the 2006 municipal elections it was possible to register for observation on the territory of the entire country, this provision could be applied in a restrictive manner and might hinder efficient observation. This provision should be deleted.

### **Voting Procedures**

115. Article 16.2 provides that a polling station may have up to 2,000 voters. During the 2006 municipal elections, observers noted that in a number of polling stations the number of voters exceeded 2,000. This number is high and places an administrative burden on the PEC. **It is recommended** that the number of voters allocated to a polling station be decreased to a more manageable number, such as between 1,000 and 1,500.

116. Article 52<sup>1</sup> requires the marking (inking) of all voters. This is a positive feature as voter marking (inking) is an important safeguard against possible multiple voting and assists in building public confidence. This provision should be maintained for the foreseeable future, until accurate voters' lists are compiled, and steps should be taken to ensure uniform implementation of voter marking regulations. PEC training and public information campaigns should underscore the importance of voter marking and address some specific concerns such as ink quality and reluctance to be marked with ink due to cultural or religious reasons.

117. It should be noted that a previous recommendation, concerning the secrecy of the vote due to the stamping of the rear side of the ballot after it was marked by the voter, has been addressed. Further, other positive safeguards have been included by amendments enacted after the last Joint Opinion. These include: (1) requiring that voters place their ballot into the envelope themselves and (2) requiring all PEC members to have individual stamps so that in cases of irregularities, it would be possible to connect the irregularity with the PEC member who issued the ballot.

### **Determination of Election Results**

118. Articles 57 through 64 contain detailed provisions on opening the ballot boxes, determining the results of voting, compiling the summary protocol of voting, and the consolidation of the election results. However, there is a concern with how the ballots in mobile ballot boxes are evaluated.

119. Article 58.4 requires that all 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 supplemental list of voters using the mobile ballot box. It is questionable whether the existence of one extra ballot is a sufficient justification for invalidating all mobile ballots. The 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 the mathematical possibility that an extra ballot in the mobile box could have affected the result. **It is recommended** that consideration be given to amending Article 58 to address this concern. One hundred legitimate and valid mobile ballots should not be invalidated just because one extra ballot is found in the mobile ballot box.

120. In a welcome development, previous recommendations for elimination of the voter turnout requirement for all types of elections have been adopted. As noted in paragraph 36, (*check number in final version*) some inconsistencies with this latest amendment remain in Article 87.

121. The Election Code does not provide a possibility for “against all” voting. This is a positive feature. Since elections are about representation, the “against all” option offered to voters in some countries is difficult to reconcile with a standard definition of representative democracy - “against all” implies that voters may choose not to be represented at all. Choosing not to participate in the election, or choosing to cast an invalid ballot, should be considered indication enough of a voter’s discontent with the choice of candidates offered. However, Articles 60.3, 63.2 and 64.3 related to the completion of result protocols maintain a requirement to include the number of votes cast against all election subjects, while the “against all” option is not presented on a ballot, and there are instructions on what constitutes an “against all” vote. **It is recommended** that the requirement to include the number of votes cast “against all” election subjects be removed from the above-mentioned articles.

### Publication of results

122. Article 63 regulates the DEC protocol on the voting results in the electoral constituency. The text of Article 63 does not expressly require that the DEC protocol provide information for each polling station within the DEC. However, an amendment adopted on 23 June 2006 would appear, although not clear in the English translation, to partially address this issue by requiring the DEC to provide copies of PEC protocols. **It is recommended** that Article 63 be reviewed and amended as necessary to ensure that the DEC completes a protocol which includes all individual PEC results within the district (in spreadsheet format) as an integral part of the DEC protocol, thereby enabling parties and observers to audit the results.

123. Article 64.3<sup>1</sup> provides that “the CEC shall ensure the data from [polling station] protocols is placed on the web-site”. This transparency mechanism is welcome as it allows both observers and political parties to check the accuracy of the results and of their consolidation. This article, however, should be further amended to oblige the CEC to publish the *preliminary* results per polling station immediately after they are received from DEC’s.

### Invalidation of Results

124. The 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.<sup>47</sup> Some of this confusion derives from the fact that the power to invalidate appears to be within the authority of the DEC due to Articles 34.2, 38.2, and 63.4. However, Article 105 appears to extend some invalidation powers to the CEC as well. Further, there remains text referencing single member election constituencies instead of the new election system. **It is recommended** that *all* articles which relate to invalidation of election results be thoroughly reviewed and amended to ensure their clarity and consistency, that they expressly state the authority of the CEC in regard to invalidation of results, and that they specifically identify whether they apply to the plurality contests or the proportional election. **It is also recommended** that these articles clarify the circumstances in which elections, or part of an election, can or should be repeated in the proportional contest. In addition, while cases of possible invalidation may be heard by election commissions in first instance, **it is recommended** that the proceedings offer possibilities to appeal to the competent court.<sup>48</sup>

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<sup>47</sup> 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.

<sup>48</sup> Code of Good Practice in Electoral Matters, II.3.3.

125. When invalidation of results occurs, the number of voters (participants) as well as the number of votes should be subtracted from the final results in all relevant protocols, unless polling is repeated. This is necessary since invalidating polling station results can affect a party near the representation threshold. Thus, **it is recommended** that if PEC or DEC results are annulled and polling is not repeated, the number of both voters (participants) and votes be subtracted from the final results in all relevant protocols. The terms “invalidated” (annulled) voting results and “invalid” ballots might be confused when protocols are completed. **It is recommended** that the Election Code be thoroughly checked and, if necessary, amended to ensure that the correct terminology is used in the original Georgian text when addressing issues related to “invalid votes” and “invalidated votes” (annulled election results).

126. Article 125.1 provides: “A district electoral commission may annul vote results in an electoral precinct where this law was grossly violated.” This provision amounts to granting District elections commissions an extraordinary discretion in annulling the election in an election precinct, since judging whether the law has been “grossly” violated is a question of subjective appreciation. **It is recommended** that this provision, as well as similar text in Article 105, be reviewed. The Code of Good Practices contains a recommendation to this effect and states that the corresponding commissions “should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats.”<sup>49</sup>

### **Recount of Ballots**

127. Article 29.1.m grants the CEC the power to order a recount of ballots from a polling station. However, neither Article 29.1.m nor any other provision in the Election Code provides any criteria for when a recount is required. **It is recommended** that the Election Code be amended to state what grounds justify a recount and which ballots should be recounted after election day. Further, **it is recommended** that the Election Code specify the procedures to be used during the recount and require that notice of the recount shall be provided to observers in a timely manner. It is preferable for the notice to provide a specific minimum number of hours sufficient to allow for any necessary travel to observe the recount.

## **10. LEGAL PROTECTIONS**

128. The protection of electoral rights should be precisely determined by law. The decisions of the election commissions must be issued expeditiously. Decisions must also be clear, precise and provide legal stability.<sup>50</sup>

129. Article 77 regulates the procedures for adjudicating election disputes. Although it provides a detailed framework for adjudicating election disputes, it could be improved significantly as it currently does not provide sufficient guarantees of transparency and consistency in the adjudication of election disputes. Of particular concern are the complexity and inconsistency in Article 77 that result from defining 22 separate procedural processes, depending on the nature of the act or omission giving rising to the complaint or appeal. Further, some processes, such as challenges to candidate registration decisions, incorrectly reference the body making the decision on candidate registration. The current text of Article 77, therefore, does not appear to provide a procedure for such challenges. **It is recommended** that Article 77 be thoroughly revised to provide a straightforward, understandable and consistent procedure for protecting electoral rights.

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<sup>49</sup> Cf. Code of Good Practice in Electoral Matters, II.3.3.e.

<sup>50</sup> Report on “Legal Remedies in the Electoral Processes in the Republic of Macedonia” by Ms Mirjana Lazarova Trajkovska, CDL-EL(2005)050.

130. Hearings and proceedings on complaints and appeals must be transparent and open to the public and observers. Decisions on complaints and appeals should be written and provide an explanation of the supporting law and facts. Article 77 fails to include these requirements in the law. The closest that Article 77 comes to incorporating these minimum legal safeguards is through references to other laws in Georgia. This is not sufficient. In fact, reliance on other laws in adjudicating past election disputes has resulted in hearings closed to the public.<sup>51</sup> **It is recommended** that Article 77 be amended to require that all hearings and proceedings on election disputes be open to the public, observers, and the media. **It is also recommended** that Article 77 be amended to establish simple and accessible procedural and evidentiary rules for the adjudication of election disputes so that citizens and electoral subjects can protect their rights without having to be knowledgeable of the various aspects and nuances of different Georgian laws. Further, **it is recommended** that the Election Code be amended to require that decisions on complaints and appeals should be written and provide an explanation of the supporting law and facts.

131. In connection with the recommendations above, consideration should also be given to amending Article 51<sup>2</sup>. Article 51<sup>2</sup> grants person the right to be in the polling station “the right to enter their claims, complaints and remarks made in connection with election procedures” in the polling station record book. This is a provision common to many countries. However, it has been observed in previous elections that some courts have incorrectly interpreted such a provision as operating to bar valid complaints and appeals where a person omits to enter a remark or is prevented from entering a remark in the polling station record book. **It is recommended** that Article 51<sup>2</sup> be amended to expressly state that failure to memorialise an alleged event in the polling station record book does not bar a complaint or appeal and does not conclusively establish that the event did not occur.

132. Article 77.1 provides that an appeal may be filed with an election commission or court. This can be a problem if the same issues are being decided by different election appeals bodies at the same time. It also creates the possibility of “forum shopping” and inconsistency in decisions. The appeals process should promote a more uniform process of deciding on election complaints. As uniformity and consistency in decisions is important, **it is recommended** that challenges to decisions be filed in only one forum designated by the Election Code – either a court or higher election commission. If the forum designated by the Election Code is an election commission, then the Election Code must provide that the right to appeal to a court is available after exhaustion of the administrative process.<sup>52</sup>

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<sup>51</sup> OSCE/ODIHR Final Report on Georgia Parliamentary Elections, Part 2, 28 March 2004, page 23, where it was note that the Tbilisi District Court conducted a closed hearing in a case and justified this lack of transparency based on Article 408 of the Civil Procedure Code.

<sup>52</sup> Code of Good Practice in Electoral Matters, II.3.3.a and c.