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

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

**as amended up to 23 December 2005**

**Adopted by the Council for Democratic Elections  
at its 16<sup>th</sup> meeting  
(Venice, 18 March 2006)  
and the Venice Commission  
at its 67<sup>th</sup> plenary session  
(Venice, 9-10 June 2006)**

**on the basis of comments by**

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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 several organic laws of Georgia amending the Election Code of Georgia.*

2. *This opinion is provided with the goal of supporting the authorities in Georgia in 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 assessment reviews and comments on the Unified 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, and 9, 16 and 23 December 2005, and reflected in 131 articles on 116 pages of text, provided by the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (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 in Georgia. The assessment should be viewed as complementary to earlier comments and recommendations provided by the OSCE/ODIHR and the Venice Commission.*

4. *This assessment 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.*

5. *The amendments adopted in April and December 2005 aim inter alia at bringing the procedure of formation of the Parliament of Georgia in compliance with the Constitutional amendments enacted on 23 February 2005, namely to introduce a new election system for parliamentary elections under a mixed proportional and majoritarian system.<sup>1</sup>*

4. *The comments are based on:*

- *the Election Code of Georgia (CDL-EL(2006)009),*
- *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),*
- *The Opinion on the Unified Code of Georgia (CDL-AD(2002)009),*
- *Comments on the Unified Election code of Georgia as amended on 14 August 2003 (CDL(2003)100),*

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<sup>1</sup> 100 members of Parliament will be elected under the proportional electoral system and 50 members under the majoritarian electoral system.

- *Elections in Georgia: Comments on the Election Code and the electoral administration (CDL-EL(2003)005), and*
- *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” adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005) (CDL-AD(2005)042).*
- *Report on local elections in Georgia, Congress of Local and Regional Authorities of the Council of Europe, CLRAE (2 June 2002; CG/Bur(9)17), and*
- *Report on the regional elections in Adjara, CLRAE (Georgia; 20 June 2004; CG/BUR(11)40).*

5. *The December 2005 laws have already been debated before Parliament and adopted. In this regard, it would have been advisable to request recommendations from the OSCE/ODIHR and Venice Commission before any hearing and adoption before the Parliament. Both institutions hope that the current stage in the Parliamentary process will still enable the present recommendations to be implemented.*

6. *This opinion has been adopted by the Council for Democratic Elections at its 16<sup>th</sup> meeting (18 March 2006) and the Venice Commission at its 67<sup>th</sup> plenary session (Venice, 9-10 June 2006).*

## **1. EXECUTIVE SUMMARY**

7. This assessment is provided by the OSCE/ODIHR and the Venice Commission with the goal of assisting the authorities in Georgia in their endeavours to improve the legal framework for elections, meet international standards and OSCE commitments, and develop the best practices for the administration of democratic elections. The Venice Commission and the OSCE/ODIHR stand ready to assist the authorities in their efforts.

8. The Election Code was adopted on 2 August 2001. It was amended on 25 April 2002, twice in August 2003, and on ten occasions since the 2004 repeat parliamentary election.

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

- Provisions for a degree of transparency in the area of campaign finance that require disclosure of information on campaign funds during and after elections;
- Media provisions which establish basic conditions of equal access for candidates;
- Permitting the CEC to print ballots in languages other than Georgian where necessary for local populations;
- Provisions to facilitate polling station access and alternative voting methods for physically disabled voters;
- Inking of voters as a safeguard against possible multiple voting.

10. Nevertheless, a number of previous OSCE/ODIHR and Venice Commission recommendations have not been taken into consideration and areas of possible improvement remain. In its current shape, 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 and Council of Europe commitments,<sup>2</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 assessment. All of these concerns should be addressed in order to create a sound legal framework for democratic elections.

The most important points to be addressed are:

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

#### Constituencies, Article 15

11. The multi-member districts for the majority component of the parliamentary elections challenge the universal principle of equal suffrage. It is recommended that the number of mandates per multi-member district is brought in line with Council of Europe standards<sup>3</sup>.

#### Threshold, Article 105.6

12. 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 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, the European practice indicates that the value of this threshold is usually in the range 3 – 5 percent.

#### Independent candidates

13. 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 the Election Code reinstates the possibility for independent candidates to run for parliamentary mandates.

#### Turnout Requirements, Articles 86, 105.3 and 123.1

14. The Election Code establishes several turnout requirements for an election to be valid. This has the potential to create endless cycles of failed elections and invite electoral malfeasance. It is recommended that validity of elections does not depend on turnout.

### **Local elections**

#### Single-member constituencies, Article 112

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<sup>2</sup> Set forth in the 1990 OSCE Copenhagen Document and in the Venice Commission Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev) respectfully.

<sup>3</sup> Code of Good Practice on Electoral Matters, II 2.2.

15. The CEC should form electoral districts for the majoritarian component of local elections before elections are held. It is recommended that the Election Code establishes criteria for drawing district boundaries, and that redrawing these before each election should be avoided.

### **Election administration**

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

16. Overall, the new formula for the formation and composition of election commissions 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 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 Polling Station Election Commissions (PEC) Members, Article 21.1.i

17. Political parties and blocs have the right to "recall" their nominees on Precinct elections commissions. This has the potential to undermine the independence of election commission members and the stability of the election administration. It is recommended to reassess the issue.<sup>4</sup>

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

18. The Chairperson of a commission is given a decisive vote in case of a tie, and a monopoly on nomination for the position of Deputy Chairperson. It is recommended to review the special authority of the Chairperson of an election commission.

#### Possibility for Involvement of Observers in Administering the Election, Article 52.3

19. The Election Code provides for a possibility that observers are involved with administering the election at polling station level on election day. This possibility should be abolished, and the code should confirm that observers cannot interfere in the work of election commissions.

### **Candidates' rights**

#### Signatures Requirements, Articles 81.2 and 95.10

20. 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. It is recommended that the number of signatures does not exceed 1% of the electorate.<sup>5</sup>

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

<sup>4</sup> Code of Good Practice on Electoral Matters, II 3.1 f.

<sup>5</sup> Ibid., I 1.3.ii.

21. 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 Take Part in an Election, Article 5.4

22. Prisoners are denied the right to be elected 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>6</sup>.

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

23. 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 under international standards. These provisions should be reassessed or removed altogether.

24. The Election Code permits a party or bloc to cancel the registration of a candidate after he/she is elected. This contradicts both the Constitution of Georgia<sup>7</sup> and OSCE Commitments<sup>8</sup>. This possibility should be removed from the Election Code.

**Campaign provisions**

Limitations to the Right to Campaign, Article 73

25. Limitations to the right to campaign are excessive and should be reviewed in line with principles of freedom of expression and association. These limitations are in contradiction with the Venice Commission Code of Good Practice in Electoral Matters.<sup>9</sup>

Control on Campaign Funding, Article 48.6

26. 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

27. Sanctions for violation of campaign finance provisions, in particular those amounting to cancelling the votes of a contestant when consolidating the results are disproportionate and do not offer sufficient guarantees of a fair reviewing process. It is recommended these provisions are reviewed.

**Voting procedures**

Secrecy of the Vote, Article 54.2.f

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

<sup>7</sup> Article 52.1.

<sup>8</sup> Paragraph 7.9 of the 1990 OSCE Copenhagen Document.

<sup>9</sup> Code of Good Practice in Electoral Matters, I 2.3.

28. Part of the balloting procedure, in particular the stamping of ballot papers after the voter has marked the ballot, has the potential to undermine the secrecy of the vote. This procedure should be reviewed.

#### Ballot Paper for Parliamentary Elections

29. The Election Code should clearly specify whether voters will get one or two ballot papers for parliamentary elections.

#### 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 Precinct election commission members from fifteen to nine is unclear, especially since voting procedures are very detailed and the number of voters per polling station is high. It is recommended the adequacy between the number of Precinct election commission 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 Precinct election commission members from fifteen to nine, limits inclusiveness at this stage of the electoral process.

### **Results, validation of elections**

#### Detailed PEC Results, Articles 63 and 64.3

32. District Election Commissions (DEC) results 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.

#### Number of Copies for Observers, Article 60.8

33. The rationale for limiting to two the number of copies of Precinct election commission results protocols to be given to non-partisan domestic observers is unclear. For the sake of transparency, all domestic non partisan observer organisations should be entitled to receive a copy of PEC protocols.

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

#### Cases and Procedures for Invalidation, Articles 34.2.f, 38.2.e, 63.4, 105.12-105.17 and 125.1

34. The Election Code does not clearly specify which body is responsible for invalidating an election. It is recommended the procedure is clearly established. The provision according to which District elections commissions 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

35. Provisions according to which a “temporary parliamentary commission” is vested with the authority “to review the legality of election administration activities”, and “shall be authorised to file an appeal with the general court”, have the potential to undermine the standard mechanisms of judicial review and should be reassessed. The creation of “special groups” with a “defined authority” could also undermine rule of law principles.

Hearings Procedure, Article 77

36. Appeals procedures should be transparent, open to the public, and decisions on complaints and appeals should be delivered in writing and state the reasons for the decision. Possibility for appellants to choose the appeal body should be avoided as this creates potential conflicts of jurisdiction and inconsistent implementation of the law.<sup>10</sup>

37. These recommendations are made with the goal 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, in good faith, the Election Code in order to conduct elections in line with OSCE and Council of Europe commitments, as well as other international standards for democratic elections.

## **2. THE ELECTION SYSTEMS**

38. 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**

39. The President is elected by popular vote, by secret ballot, for a term of five years. A person cannot be elected consecutively to 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 2.3 million.<sup>11</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>12</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.

40. Article 86 provides that elections are considered “to have been held, if a majority of the total number of voters takes part in them”. The article also provides that the candidate who “receives more than half of the votes of the voters taking part in the elections is considered elected”. If the election is declared to have been held, but no candidate received the number of votes required by Article 86, then a second round of

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<sup>10</sup> Ibid., II 3.3.c.

<sup>11</sup> OSCE/ODIHR Final Report on Georgia Parliamentary Elections, 28 March 2004, page 12.

<sup>12</sup> Code of Good Practice in Electoral Matters, I.1.3.ii

voting is held between the two candidates who received the largest number of votes in the first round. 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”.

41. 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 appointed by the Parliament of Georgia and take place within two months after the first round (Article 88).

42. Articles 86 and 87 require clarification as they do not state how voter turnout – “the votes of the voters taking part in the elections” – is determined for the purposes of applying the articles’ formula for election. **It is recommended** that Articles 86 and 87 be amended to clearly and consistently state the methods 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 affect of blank ballots, invalid ballots, and discrepancies between the number of ballot papers found in a ballot box and the number of signatures in the voters’ lists in polling stations.

43. Furthermore, the required turnout thresholds for an election to be considered held create possibilities for an endless cycle of failed elections. **It is recommended** that the validity of the election does not depend on the turnout. Additionally, the requirement set in Article 87 that in order to be elected a candidate must receive a number of votes amounting to at least 1/5 of the total number of voters, establishes a form of second turnout requirement. It is recommended to remove this provision.

### **Election System for Parliament**

44. The current Parliament comprises 235 members, 150 elected through a proportional-representation system in a nationwide constituency, and 85 elected through a majority first-past-the-post system based on single mandate electoral constituencies.

45. Following a constitutional referendum<sup>13</sup> held concurrently with the 2 November 2003 parliamentary election, 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 and after corresponding amendments have been passed to the Election Code. The next parliamentary elections are due in spring 2008.

46. 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 majoritarian contest, 19

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<sup>13</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?*”.

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.

47. 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.

48. 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 majoritarian contests. The law should provide the opportunity for 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).

49. 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.

50. Contrary to the new provisions regulating the election of representative bodies of local self-government – *Sakrebulo* (Article 122), the provisions on the election of members of Parliament do not clearly specify whether voters will be given two ballot papers, one for the majority contest and one for the proportional national context. Article 103, which provides that Precinct election commissions have to compile two results protocols, one for the majority contest and one for the proportional one, would suggest that two ballot papers would be handed to voters. However, **it is recommended** that the Election Code clarifies this aspect of voting procedures, as it impacts both on the overall election system and on voters’ rights.

51. 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 2.34 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.

52. For parliamentary elections to be valid, Article 105.3 requires that at least one third of registered voters must participate. The required turnout threshold for an election to be

considered valid creates possibilities for an endless cycle of failed elections. **It is recommended** that the validity of elections does not depend on the turnout.

53. 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 the number of the “votes of the voters” is determined be clearly stated in Election Code. This is necessary in order to clarify any doubt as to 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>14</sup>.

### Formation of Parliamentary Constituencies

54. 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>15</sup>, and noted that such variations were violating the principle of universal and equal suffrage, which is commonly understood as “one person – one vote”.

55. 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>16</sup>.

56. 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, 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>17</sup>, including the percentage of permissible deviations and grounds for such

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<sup>14</sup> See 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>15</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>16</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.

<sup>17</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

deviations. It is generally considered that a maximum deviation of 10% from the average is admissible.<sup>18</sup>

57. The amendments adopted on 23 December 2005 appear to maintain a paragraph 2 in Article 15 which establishes the former 85 single mandate districts. For the sake of clarity, **it is recommended** this paragraph be removed from Article 15.

58. 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 issuing 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**

59. The election system for local elections has been 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 an overhaul of the legislation pertaining to local government.

60. 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>19</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, with at least 2/3 of the votes (i.e. 25 out of 37), for a four-year term. These amendments were deposited with the Venice Commission for review. The OSCE/ODIHR did not participate in this review.<sup>20</sup>

61. On 23 December 2005, the Parliament adopted substantial amendments to the provisions regulating the election of representative bodies of local self-government,

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should preferably be redistributed without redefining constituency boundaries, which should, where possible, coincide with administrative boundaries.”

<sup>18</sup> Code of Good Practice in Electoral Matters, I 2.2 iv, more particularly paragraph 15 of the Explanatory Report.

<sup>19</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>20</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).

other than Tbilisi. These provisions constitute the new Chapters XV, XVI and XVII of the code.

62. 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 bodies 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 majority system within single member constituencies. In the case of ‘self-governing city’s *Sakrebulo*’, five members are elected through the majority system, while in the case of ‘municipalities’ *Sakrebulo*’, the majority system is used to elect “one member from each community and city on the corresponding territory of the given district” (Article 115).

63. Article 112 of the code vests the CEC with the responsibility to form local election districts for the majoritarian contest, and to inform about the districts “within five days from calling of elections”. This provision is problematic because it gives way to instability in local election districts’ boundaries from one election to the other, and does not indicate which criteria the CEC should use in order to draw the boundaries. In addition, five days from the announcement of the election seem rather short for potential candidates to, first, know in which district they can run, and secondly, familiarise with the electoral districts. **It is recommended** this provision is reassessed taking into consideration the above mentioned concerns.

64. While Article 108 specifies that the election shall be called by the President “no later than 45 days before the expiry of the authority of *Sakrebulo*”, some transitional provision inserted in the Code specify in Article 129<sup>1</sup>, that “The Georgian president shall determine the date for holding the 2006 elections of a representative body of local self-government - *Sakrebulo*. The date of the elections shall be determined 45 days before the elections”. This provision leaves an extraordinary discretion to the President of Georgia in setting the date of the forthcoming local elections and is at odd with the universal principal according to which elections have to be held at regular intervals<sup>21</sup>.

65. For the proportional component of local elections to be valid, Article 123.1 requires that at least one third of the voters must participate. The required turnout threshold for an election to be considered valid creates possibilities for an endless cycle of failed elections. **It is recommended** that the validity of elections does not depend on the turnout.

### 3. CANDIDACY RIGHTS

66. It is a universal human rights principle 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>22</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

<sup>21</sup> See Code of Good Practice in Electoral Matters, I 6

<sup>22</sup> See, e.g., Article 25 of the International Covenant on Civil and Political Rights.

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>23</sup>

### **Article 5 Denial of the Right to Vote**

67. 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>24</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 European Convention for the Protection of Human Rights and Fundamental Freedoms. The *blanket prohibition* in Article 5 would appear to be contrary the principles stated in the *Hirst* case. **It is recommended** that Article 5 be accordingly amended.<sup>25</sup>

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

68. 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>.3).

69. These two articles are unclear and can be 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 durational 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.

70. 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.

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<sup>23</sup> Code of Good Practice in Electoral Matters, I. 1.1 d.

<sup>24</sup> Application no. 74025/01 (6 October 2005).

<sup>25</sup> Article 28.2 of the Constitution of Georgia should also be amended.

71. These articles are uncommon by international comparison.<sup>26</sup> Articles 92 and 107<sup>1</sup> present concerns under 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**

72. 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 restriction should not be applied to candidacies. **It is recommended** this provision is amended accordingly.

### **Signature Provisions**

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

74. 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.

75. 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 signature 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>27</sup>

76. An example shows why this method of verification is not appropriate. Article 97.6.a requires a candidate for a single mandate parliamentary constituency to obtain signature support of 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

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<sup>26</sup> It is not clear why these articles refer only to elected members of Parliament and not also to the elected Presidential candidate.

<sup>27</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.”

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 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.

77. Lists submitters should be granted proper protection of their right in cases when candidates’ lists registration is denied by the CEC. From the provisions of Article 98 it is not clear to whom, party or election block whose list of candidates was not accepted can appeal<sup>28</sup>. Article 98 should stipulate that the right to appeal a CEC decision to dismiss a candidates list can be appealed under the provisions of Article 77.

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

78. 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>29</sup> Additionally, there should be a *formal process* for candidate withdrawal that clearly specifies what actions, including election commission decision, must be taken for the withdrawal to be legally effective.<sup>30</sup> **It is recommended** that Article 100 and Article 121.2 be amended to address these concerns.

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

79. The Election Code permits cancellation of the registration of an elected candidate. Article 100.2 allows a party or bloc to cancel the nomination of a candidate even “after the authority of the elected MP is recognised.” This amounts 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

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<sup>28</sup> In its Chapter 3.3, the Code of Good Practice in Election Matters prescribes that a body for appeals should either be electoral commission or a court, but in any case there must be a possibility for a final appeal to the court. The appealing body must be competent in order to provide legal remedies for protecting the right to vote, including voters’ lists and acquisition of the right to vote, correctness of the candidacy, following the rules for the election campaign and the election results.

<sup>29</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>30</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.

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 is not in conformity with democratic parliamentary and constitutional procedures.<sup>31</sup> Democratic principles require that the will of the electorate be respected. The withdrawal of mandates of elected Members of Parliament by parties that nominated them runs counter to democratic principles and OSCE Commitments. **It is recommended** that Article 100 be amended to prevent parties/blocs from recalling Members of Parliament, especially after they have been elected by voters.

80. 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 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".

81. 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. **It is recommended** the provisions of Article 106 are reassessed in order to take these concerns into consideration.

#### 4. ELECTION COMMISSIONS

##### Composition

82. 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.

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<sup>31</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).

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>32</sup> However, the main opposition parties were entitled to nominate members to the CEC, District elections commissions 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.

83. 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>33</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.

84. 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 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>34</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.

85. Through their central role in selecting CEC members, the President and parliamentary majority can exercise in effect an extensive control of the election

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<sup>32</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>33</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”.

<sup>34</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.

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 DEC and PEC managerial positions. 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>35</sup>

86. 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 Precinct elections commissions, not the CEC. It is not clear why such a distinction between different kind 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 his/her opinion, than all participants should be equally represented.

87. The amendments affected the composition of District elections commissions as well. All DEC members are chosen by the CEC. District elections commissions 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 District elections commissions raises the same concerns regarding transparency and independence as is the case for the CEC.

88. The composition of Precinct elections commissions (Articles 36 and 37) was also varied by the 22 April 2005 amendments. The number of PEC members was reduced from fifteen to a maximum of nine. Of these, District elections commissions 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 New Rights, and the Labour Party) each have the right to appoint two PEC members. The concerns expressed above regarding District elections commissions 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).

89. Through the nomination mechanisms adopted for District elections commissions and Precinct elections commissions, the potential control by the Presidential and parliamentary majorities – when these are of the same political force – on the CEC, spills down to lower level election commissions, potentially amounting to an extensive oversight over the whole election administration structure.

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<sup>35</sup> See in particular, II 3.1, §§ 70 to 76.

90. 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), a DEC or a PEC.<sup>36</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 based on ‘tests’ or ‘professional experience’ can be easily manipulated and requires to 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 must be noted that this process has the potential to reduce the significance of the already limited participation of political parties to PEC members’ nomination.
- 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.

91. It must be noted that members of the international community in Tbilisi and domestic NGOs had strongly criticised these provisions when they passed first reading in Parliament in November 2004, for their potential to undermine the independence of the election administration<sup>37</sup>.

### **Legal Status and Jurisdiction**

92. 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”. It is not clear how the entire election administration can be considered collectively as one single legal entity. Regardless, 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.

93. Another provision that raises concern is Article 17.7, which provides:

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<sup>36</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).

<sup>37</sup> Ad hoc Committee to observe the repeat parliamentary elections in Georgia (28 March 2004) Doc. 10151 26 April 2004, Report

“The authority to review the legality of the election administration’s activities is vested with a temporary parliamentary commission, where the number of the parliamentary majority representatives shall not be more than half. In the absence of such majority, the commission shall be equally represented by members of the parliamentary coalitions and factions, which are not united into a coalition and the number of which is not less than 10. Where electoral law offences are detected, the commission shall be authorised to file an appeal with the general court, while in cases where the elements of crime are found, the commission shall refer the case to the Prosecutor-General’s Office of Georgia.”

94. The above text raises several concerns. First, does this text diminish the jurisdiction (authority) of bodies, which under Article 77 are competent for the adjudication of election-related disputes (Courts and election commissions)? Secondly, is the Prosecutor-General prevented from taking legal action until the “commission refers the case”? Thirdly, if the parliamentary commission investigates and makes a finding of no wrongdoing and exonerates the “election administration”, is this finding binding on courts (assuming Article 17.7 does not prevent independent actions in court under Article 77)? It is of particular concern that the Prosecutor-General may be required to wait for a “referral” from parliamentarians whose mandates depend very much on the activities of election administration. **It is recommended** that these concerns be addressed.

95. This article underscores 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.

96. 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:

“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.”

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

98. Article 21.1.i provides that the authority of a commission member terminates if the party, which appointed the member, “recalls” the member.<sup>38</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 discretionary recall will undermine the impartiality and independence of commission

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<sup>38</sup> Article 21.5 prevents “recall” of a precinct election commission member during the seven days before voting. Article 37.6 uses the term “withdrawal” of the member instead of “recall”, but the concept is the same.

members. **It is recommended** that the Election Code should be amended to provide legal protections 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>39</sup>

99. 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.

100. Article 22<sup>1</sup> is also problematic when making certain nominations for positions within the election administration. Article 22<sup>1</sup>.2.b gives the chair of a commission a monopoly on nominations for deputy chair. Under Article 22<sup>1</sup>.2.c, the chair can nominate a secretary, but it requires two ordinary commission members acting together to make a nomination. There is no legal rationale that justifies the commission chair having twice the nomination power of an ordinary commission member. **It is recommended** that the undemocratic provisions in Article 22<sup>1</sup>.2 be removed.

## 5. VOTERS' LISTS

101. Regularly updated information on voters' list is of crucial importance for democratic elections.<sup>40</sup> The missing of some voters as well as possible multiple registrations of others would violate the principles of universal and equal suffrage.

102. 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, reports of observers indicate that the quality of the voters' lists has not improved and voters' lists remain a key problem of elections in Georgia.

103. According to Article 9.5, various Government agencies (Ministry of Justice, local self-government units, Ministry of Refugees etc.) are responsible to furnish 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

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<sup>39</sup> See Code of Good Practice in Electoral Matters, II 3.1 f.

<sup>40</sup> In its previous opinions, the Venice Commission already appointed that the provisions of Article 9 and related clauses on voter registration "have been amplified and reworded with a view to stating clearly that there will be a general and centralized register or list of voters established by the CEC which is to be regularly updated (with reference to February and August of each year)." [...] "As a general remark it can be said that the provisions of the Chapter as amended clearly provide a sufficient basis for a satisfactory register if properly implemented" (CDL-AD(2004)005).

for a three-week period prior to the elections, Polling Station elections commissions are tasked with making additions and corrections to voters' lists. However, it would appear unclear what should the format of the data provided to the CEC be. Thus, the CEC may face insurmountable technical problems in the close run-up to the election day.

104. Past OSCE/ODIHR election observation reports have pointed out the poor quality of voters' lists and indicated that while the Election Code can provide an adequate legal basis, in practice, the registration process is completely insufficient due to a lack of commitment, capacity and coordination by the institutions involved in the compilation of the voters' lists. This situation undermines the basic principle of universal and equal suffrage. Nevertheless, the Election Code can serve as a legal basis for an accurate, centralised voters' list, if applied with enough time, effort, and capacity.<sup>41</sup> **It is recommended** that the authorities in Georgia take all necessary efforts to compile an accurate list of voters.

105. The question of allowing voters not on the lists to register on election day has been a debated issue over the past electoral processes. Amendments to the Election Code were made in August 2003 bringing about, *inter alia*, a prohibition to modify voters' lists "within the last 10 days prior to Election Day" (Article 9.12), hence making election day registration illegal. The whole Article 9 was challenged in the Constitutional Court after the November 2003 election, and the legal effect of Article 9 was suspended by the Constitutional Court until it could hear the challenge and rule. The suspension of the effect of Article 9 created a legal vacuum, which the CEC felt empowered to fill with a decision dated 30 December 2003 allowing registration on election day for the 4 January 2004 presidential election.

106. Finally, in January 2005, the Constitutional Court ruled that, except for Article 9.12, Article 9 was constitutional. While election day registration can be justified in very specific circumstances,<sup>42</sup> it cannot constitute a viable long term solution to address the shortcomings of voters' lists. It raises concerns of possible abuse, and multiple registrations, among others, and is not in line with the Code of Good Practice, if taking place at the polling station.<sup>43</sup> **It is recommended** the prohibition of election day registration is retained. Additionally, consideration should be given to whether the Election Code currently provides sufficient time for public display and scrutiny of the new voters' lists. **It is recommended** that the Parliament consider amending the Election Code to provide for additional time for public display and scrutiny if this would improve the quality of the voters' lists.

## 6. ELECTION CAMPAIGN PROVISIONS

107. Article 73 defines permissible activities during an election campaign. By defining permissible activities, it might be implied that other legitimate activities, that are not

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<sup>41</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).

<sup>42</sup> See the OSCE/ODIHR Final Reports on the 4 January 2004 presidential election, and on the 24 March parliamentary elections.

<sup>43</sup> See in particular I 1.2, § 7.iv.

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 European Convention for the Protection of Human Rights and Fundamental Freedoms. Any restrictions on these rights must be strictly necessary in a democratic society. Article 73 contains restrictions which are not acceptable. Article 73.2 would appear to limit the right to campaign to "voters, candidates, election subjects and their representatives". This limitation is too broad. Citizens who are not registered to vote, minors, 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). Further, Article 73.5 expressly prohibits foreign citizens from engaging in election campaigning. Thus, Articles 73.2 and 73.5 would appear to be in conflict with Articles 1, 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. **It is recommended** that Article 73 be amended to address these concerns.

108. Article 73.5.b prohibits "heads of bodies of State executive authority" from campaigning. The lack of a definition of "heads of bodies of State executive authority" has proved problematic in past elections as the following have campaigned but not been considered as covered by Article 73.5.b: President of Georgia, Speaker of Parliament, Imereti Governor, Kutaisi Mayor, and Imereti Regional Chief of Police.<sup>44</sup> Article 76, similarly, forbids the use for campaign purposes of "material and technical resources of organisations which are funded from the State budget." However, it is not clear whether this article is applicable to campaign appearances of leading State officials and their associated travel costs. **It is recommended** that Articles 73 and 76 be amended to provide clear definitions in order to ensure that these articles can be applied effectively.

## 7. MEDIA

109. Provisions regulating the media during election campaigns are found in Article 73. Although these provisions provide a basic framework for guaranteeing equal campaign conditions for election contestants, they could be improved as they currently are limited to providing equal conditions for contestants to convey messages and do not extend to coverage of contestants in the news or other programs. Further, the State 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 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 media should be obliged to treat all contestants on equal terms, not only in special election programs, but also during all other programs, including its news broadcasts. Further, **it is recommended** that Article 73 be amended to clearly state whether obligations regarding State media are applicable to local media as well as the national level, and stipulate more clearly which media can be considered "State media".

## 8. CAMPAIGN FINANCE

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<sup>44</sup> See OSCE/ODIHR Final Report on Georgia Parliamentary Elections, Part 2, 28 March 2004, at page 13.

110. 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.

111. 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.

112. However, these articles could be 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 Article 48.6 be amended to required 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, and that Article 48.11 be amended to require the CEC to publish this information on its website and ensure that the information remains on the website for future access by voters and the public.

113. 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.”

114. Such sanction, amounting to canceling 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** 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

115. 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 broadcasting 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.

116. 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. Article 56.2 permits “any voter unable to come to the polling station on Election Day” to request for mobile voting “no later than 18:00 of the day prior to Election Day”. **It is recommended** that consideration be given to amending Article 56 to include, among others, the following safeguards: (1) changing the deadline for a request to vote by the mobile ballot box to two days before election day in order to allow observers time to make appropriate plans for observing mobile voting, (2) the two members of the PEC who administer mobile voting should not have been appointed to the PEC by the same appointing authority, and (3) 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.

117. Article 51 permits the CEC to print ballots in languages other than Georgian where necessary for local populations. This meets a prior recommendation.

### Observer Rights

118. Articles 65 through 72 provide broad rights for observers and require election commissions to prepare and conduct the elections in a transparent manner. However, these provisions could be strengthened, in particular specific rules clearly spelling out observers’ rights and duties could be introduced with the aim to enhance the transparency of the work of the election administration on all levels.

119. Article 67.1 provides that “The right to attend the election commission session shall be given to [...] one representative from each election subject, one representative from each international organisation (with translator) and domestic observing organisation...” This limitation is not appropriate where there is sufficient space for more than one observer from each organisation. In accordance with their observation methodology, observer organisations often deploy observers in teams of two persons. **It is recommended** that Article 67.1 be amended to include additional language that states

the limitation is not applicable where there is sufficient space to accommodate a two person observer team.

120. Article 60.8 limits the number of copies of results protocols to be given to non-partisan observers to two in total. The presence of many observer groups could create competition over access to results protocols and lessen the ability of credible established observer groups to conduct parallel vote tabulation. **It is recommended** that Article 60.8 be amended to address this concern as well.

### **Voting Procedures**

121. Article 16.2 provides that a polling station may have up to 2,000 voters. 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.

122. 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 that 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.

123. The amended electoral code reduced the number of PEC members to nine (from 15 previously), but kept untouched the provisions on voting procedures which comprise 13 different steps. There is a possibility that given the tasks to be performed, nine members might be insufficient to conduct polling.

124. In preparation for the 1 October 2005 interim and repeat parliamentary elections, the CEC adopted a decree<sup>45</sup>, providing that in the event the number of PEC members would be insufficient to carry out all the tasks, party and non-partisan observers could be drafted as 'auxiliary' PEC members.

125. On this specific issue, the Election Code is inconsistent as some contradiction exists between Article 52.3 as amended on 22 April 2005: "...Commission chairperson has a right to determine a person responsible for performing any other function of a commission member from among the observers, who have a right to be at the polling station, in case they want so, by casting lots...", and Article 70.2.a, , which provides that observers do not have the right to "to interfere in the functions and activities of election commissions".

126. This practice is particularly problematic as it blurs the important distinction between observers and election commissioners and creates an obvious conflict of interest for observers when it comes to reporting independently on a process which they have been drafted to become involved in. Moreover, this practice raises the question of the status of the observers when they act as PEC members. It is not clear whether they

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<sup>45</sup> CEC Decree #5, dated 8 August 2005.

are submitted to the same rules as the other PEC members, or if they can be held accountable for wrongdoing while performing as PEC members. **It is recommended** that this practice is clearly abolished in the Election Code, and that the Election Code is amended in order to improve the adequacy between the number of PEC members and the amount of tasks to be performed.

127. Part of the balloting procedure raises concern regarding the secrecy of the ballot: Article 54.2.f provides that after the voter has marked his/her ballot in secret,

“the voter shall carry the folded ballot paper(s) to the table placed separately in a conspicuous place, where the PEC member authorised to certify the ballot papers by affixing the special seal thereto, shall verify the signatures on the back of the ballot paper(s) and, if such signatures are valid, shall certify the same by affixing the special seal thereto, hand the voter the special envelope with the same special seal affixed thereon, and ensure marking (inking) of the voter; Only the voter is authorised to fold the certified ballot paper and place it in the special envelope. The commission member doesn't have the right to open the certified ballot(s) and/or violate the secrecy of vote in any other way.”

128. This practice, presented as a means to prevent possible multiple voting, has in past elections, created a possibility for PEC members to see for whom voters have cast their ballot.<sup>46</sup> The procedure clearly has the potential to undermine the secrecy of the vote and is in contradiction with the Venice Commission's Code of Good Practice, according to which “*the voter should collect his or her ballot paper and no one else should touch it from that point on.*”<sup>47</sup> Measures should be taken to enhance the secrecy of the vote. **It is recommended** that, while necessary safeguards against possible multiple voting or so-called “carousel voting” should be present, Article 54 be amended to address this concern. For example, the procedure would better ensure the secrecy of the vote if the envelope were given to the voter before entering the polling booth, and if no one else but the voter would touch the ballot paper once it is issued.

### **Determination of Election Results**

129. 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.

130. 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. Two practical considerations should be noted on this issue. First, the possibility should not exist to invalidate all mobile ballots by simply dropping

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<sup>46</sup> OSCE/ODIHR Final Report on Georgia Extraordinary Presidential Election, 4 January 2004, page 17.

<sup>47</sup> Code of Good Practice in Electoral Matters, I 3.2.2, §§ 34 and 35.

an extra ballot in the mobile box or because a single voter failed to sign the voters' list used for mobile voters. Secondly, if it is logically sound to have a legal presumption of fraud based on one extra ballot in the mobile ballot box, then it is logically sound to have a presumption of fraud based on one extra ballot in a regular ballot box. In fact, there may be a greater risk of affecting election results through possible fraudulent use of regular ballot boxes simply due to the number of regular ballots as opposed to the number of mobile ballots. **It is recommended** that consideration be given to amending Article 58 to address these concerns. One hundred legitimate and valid mobile ballots should not be invalidated just because one extra ballot is found in the mobile ballot box.

### **Publication of results**

131. While the Election Code contains detailed provisions on the summary protocol of voting and the consolidation of the election results, there are no provisions on the prompt publishing of preliminary results at precinct level. Though representatives of election subjects are given copies of the precinct election commissions' summary protocol of voting (Article 60.8), there is no provision in the law stipulating that preliminary election results have to be published by the Precinct elections commissions. **It is recommended** that Article 60.8 be amended to require that the protocol shall also be posted at the polling station for public scrutiny.

132. Article 63 regulates the DEC protocol on the voting results in the electoral constituency. However, the protocol does not provide information for each polling station within the DEC. **It is recommended** that Article 63 be amended to require the DEC to complete 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.

133. 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. In addition, the immediate publication of polling station results by the CEC should also be ensured by the law.

### **Invalidation of Results**

134. 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>48</sup> Much of this confusion derives from the fact that the

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<sup>48</sup> In the 2004 partial repeat of Parliamentary Elections, the CEC adopted a decision to annul the constituency election results in Khulo and Kobuleti and order repeat polling. The CEC based its decision on Articles 105.13 and 105.12. While Article 105.13 grants the CEC the right to examine the PEC documentation, re-count ballots and sum up results based on PEC protocols, the Election Code does not specifically grant the CEC the authority to annul the results in an entire constituency. The CEC's decision raises questions of legal interpretation, as it appears that Article 105.12 relates to majoritarian elections rather than the proportional contest. The citing of this article rather than Article 105.16 (which specifically mentions its applicability to proportional elections) raises the question as to whether Georgia is a single electoral unit for the proportional election or 75 "fragments." This issue is not adequately defined in the Election Code. See 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.

power to invalidate appears to be within the authority of the DEC due to Articles 34.2.f, 38.2.e, and 63.4. However, Articles 105.12 through 105.17 appear to extend some invalidation powers to the CEC as well. Further, it is not clear whether the proportional contests can be repeated in some precincts but not all precincts. **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 majoritarian 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>49</sup>.

135. 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, then the number of voters (participants) as well as the number of votes are 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).

136. A new provision on the consolidation of the results for local elections provides that (Article 125.1): “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** this provision be reviewed.

### **Recount of Ballots**

137. 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 timely provided to observers. 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**

138. The protection of electoral rights needs to be more precisely determined by law. The decisions of the election commissions must be given on short time. They must also

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<sup>49</sup> Code of Good Practice in Electoral Matters, item 3.6.

be clear, precise and provide legal stability.<sup>50</sup> The right to appeal decisions of the electoral administration before a court should be clearly stated. Article 77 regulates the procedures for adjudicating election disputes. Although it provides a basic 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.

139. Proceedings on complaints and appeals for violations of electoral rights, including within election administration and in the courts, should be transparent. 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.

140. In connection with the recommendations above, consideration should also be given to amending Article 51<sup>2.8</sup>. Article 51<sup>2.8</sup> grants persons with the legal 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>2.8</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.

141. 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

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<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.

<sup>51</sup> OSCE/ODIHR Final Report on Georgia Parliamentary Elections, Part 2, 28 March 2004, page 23, where it was noted 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.

Code must provide that the right to appeal to a court is available after exhaustion of the administrative process.