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(VENICE COMMISSION)

**DRAFT JOINT OPINION
ON THE ELECTION CODE
OF GEORGIA
as revised up to July 2008**

**adopted by the Council for Democratic Elections
at its 26th meeting
(Venice, 18 October 2008)**

**on the basis of comments by
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I. Introduction

1. *At the request of the Georgian authorities, the Venice Commission was asked to provide the Parliament of Georgia with comments and recommendations on the Election Code of Georgia as amended through July 2008, in close co-operation with the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR).*

2. *Although this Opinion is based on the current version of the Georgian Election Code, it should be noted that the OSCE-ODIHR Final Report on the Georgian parliamentary elections of 21 May 2008 includes a recommendation that Parliament enact an entirely new Election Code as soon as possible, and in good time ahead of the next nationwide elections. The Final Report also recommends that the new Election Code be drafted with technical assistance from international organisations, and take into account past and present recommendations made by the OSCE/ODIHR and the Venice Commission, and involve an open and transparent process of consultation with key stakeholders that aims to reach a broad consensus.*

3. *This opinion is offered for consideration by the authorities of Georgia, in support of their efforts to develop a sound legal framework for democratic elections. It should be noted, however, that the election legislation itself only forms the basis for holding elections in accordance with democratic standards. The extent to which any Election Code can contribute to the holding of democratic elections will largely be determined by the political will of state institutions and officials responsible for implementing and upholding the Election Code. The education of civil society and political entities on the election law, effective training of election officials and adherence to the law by all election stakeholders also play an important role in the implementation of democratic elections.*

4. *This joint opinion is based on the unofficial English translation of the Georgian Unified Election Code, and its amendments, as provided by the OSCE/ODIHR. This joint opinion does not warrant the accuracy of the translation reviewed including the numbering of articles, paragraphs, and sub-paragraphs. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation. Also it must be noted that the legal acts adopted by the CEC have not yet been fully translated into English and thus they have not been taken into account in this joint opinion. In addition, this opinion does not reference every inconsistency and ambiguity found in the Election Code¹, as it is primarily intended to include recommendations to assist in the modification (or enactment) of the Election Code to bring it in line with international standards and best practice for democratic elections.*

5. *This study is based on the following documents:*

- *The Organic Law of Georgia Election Code of Georgia – as amended through 5 July 2008, CDL-EL(2008)016 (hereafter “the Election Code”).*
- *The Constitution of Georgia – as amended through 12 March 2008.*
- *Joint Opinion on the Election Code of Georgia – as amended through 24 July 2006 – by the Venice Commission and OSCE/ODIHR, CDL-AD(2006)037.*

¹ In 2008, at the request of the Georgian authorities, OSCE/ODIHR developed a non-paper outlining gaps, inconsistencies and ambiguities found throughout the Election Code. If the current Election Code is amended (as opposed to the enactment of a new Election Code), the Georgian Parliament or any relevant working group could take the aforementioned non-paper into consideration.

- *Joint Opinion on the Election Code of Georgia – as amended through 23 December 2005 – by the Venice Commission and OSCE/ODIHR, CDL-AD(2006)023.*
- *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990.*
- *Existing Commitments for Democratic Elections in OSCE Participating States, ODIHR, Warsaw, October 2003.*
- *European Commission for Democracy Through Law (Venice Commission) Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, CDL-AD(2002)023rev.*
- *OSCE/ODIHR Resolving Elections Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System, Warsaw, 2000.*
- *OSCE/ODIHR Georgia – Parliamentary Elections, 21 May 2008. Election Observation Mission Final Report.*
- *Venice Commission – Council of Europe – 2008 Georgia Extraordinary Presidential Elections & Plebiscites. Mission Report 8 December 2007 – 07 January 2008 Tbilisi-Georgia, Jerome Leyraud, Expert.*
- *OSCE/ODIHR Georgia – Extraordinary Presidential Elections, 5 January 2008. Election Observation Mission Final Report.*

6. *This draft opinion was adopted by the Council for Democratic Elections at its 26th meeting (Venice, 18 October 2008).*

II. The electoral law and previous joint opinions

7. The Constitution of Georgia of 1995, as amended, guarantees fundamental civil and political rights necessary for the conduct of democratic elections. The primary legislation regulating elections in Georgia is the Unified Election Code (hereinafter referred to as the Election Code). The Election Code was adopted on 02 August 2001 and since then it was amended numerous times². Other legal acts relevant to elections include the Law on Political Unions of Citizens, Law on Assemblies and Manifestations, Administrative Offences Code, Criminal Code, General Administrative Procedure Code, and decrees and ordinances adopted by the election administration.

8. While the Election Code is generally conducive to the conduct of democratic elections, following amendments of March 2008, it contains a number of provisions which fall short of OSCE Commitments and Council of Europe standards.³ Although previous recommendations of the Venice Commission and OSCE/ODIHR have been taken into account, a number of recommendations remain unaddressed, with areas

² Amendments to the Election Code since 2002: 2002 – 25 April, 2003 – 28 November, 2004 – 16 September, 12 October, 26 November and 24 December, 2005 – 22 April, 23 June, and 9-16-23 December, 2006 – 23 June and 24 July, 2007 – 22 November and 18 December, 2008 - 21 March and 5 July.

³ Set forth primarily in the 1990 OSCE Copenhagen Document and in the Venice Commission Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev) respectively.

of possible improvement. Some provisions of the Election Code have the potential to limit civil and political rights, and will require improvement to fully meet international commitments and standards for democratic elections. In addition, the Election Code is not well-organised and continues to include gaps, inconsistencies, and ambiguities which have resulted in uncertainties and varying interpretations among stakeholders, thus impeding effective implementation of the law. All of these concerns should be addressed in order to improve the legal framework for democratic elections.

9. Since 2002, the Venice Commission and the OSCE/ODIHR have regularly provided opinions on the Georgian Election Code (see the references of the last ones in the Introduction). In spite of changes introduced to the Election Code, including in 2007 and 2008, considering Venice Commission and OSCE/ODIHR recommendations, a number of recommendations remain to be addressed. Therefore, the Georgian authorities should continue with these commendable efforts to incorporate recommendations for improving the electoral framework. Consequently, this joint opinion should be viewed as complementary to earlier comments and recommendations provided by the OSCE/ODIHR and the Venice Commission.

10. Moreover, the Venice Commission and OSCE/ODIHR are aware of the recent Election Legislation Reform Project established by the OSCE Mission in Georgia jointly with the Council of Europe and UNDP upon the request of the Georgian authorities. The project is to be implemented in 2008 and 2009 and is aimed at facilitating drafting of a new election legislation that is consistent, comprehensive and comprehensible. We hope that this joint opinion, as well as previous recommendations by the Venice Commission and the OSCE/ODIHR will assist the work of the Election Legislation Reform Project.

III. General Background and Overview

11. Although the 2007 amendments generally brought improvements to the law and addressed a number of recommendations offered in the 2006 Joint Opinion of the Venice Commission and OSCE/ODIHR and in previous OSCE/ODIHR election observation reports, enacting significant modifications to election legislation so close to an election is generally inconsistent with good practice in electoral matters.⁴

12. A significant amendment introduced in 2007 party-appointed members to the Central Election Commission (CEC) as requested by the opposition. Then in March 2008, an amendment extended party-appointments to the District Election Commissions (DECs) specifically for the 2008 parliamentary elections (in July 2008, this provision was incorporated into the main body of the Election Code.) Consistent with Venice Commission and OSCE/ODIHR recommendations and European practice, the March 2008 amendments lowered the number of signatures required to register a party not yet represented in the Parliament to participate in presidential and parliamentary elections, from 50,000 to 30,000 (Article 95 par.10 & Article 129. 8 par.3; the latter now Article 95, par. 26.) The threshold for awarding Member of Parliament mandates was also modified from 7% to 5% (Article 105). In addition, provisions were introduced in the Election Code to draw the registration process of domestic and international observers closer together. With the revised Article 69 par. 3, a domestic monitoring organisation shall apply to the appropriate election commission 10 days before election day (rather than 30 days as required previously), while international organisations must register at the CEC the latest 7 days prior to

⁴ See the Venice Commission's Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), particularly Part II, section 2.

election day. Although the complaints and appeals procedures were simplified and clarified to some extent in the March 2008 amendments, and dual jurisdiction was eliminated, the procedures remain unnecessarily complex, contradictory and ambiguous, which continued to cause confusion and hinder due consideration. As a negative development, in March 2008, amendments were introduced permitting public officials to combine campaigning with public duties and for a variety of public resources to be used for campaign purposes. In addition, the Election Code was amended at that time to include substantial changes to the election system for parliamentary elections.

1. ELECTION SYSTEMS

Parliamentary Election System

13. As a general remark, **it is recommended that all elements of a new parliamentary election system be negotiated among major political entities, including consultation with key civil society organisations, with the aim to reach a broad consensus.** In doing so, the Parliament could consider the work of the Venice Commission on selecting an appropriate electoral system for an emerging democracy, with a view to identifying an optimum relationship between genuine representation and stability of government.⁵

Threshold for Parliamentary Proportional Seats

14. In line with the previous Joint Opinion, in March 2008, the threshold to qualify for the allocation of parliamentary proportional seats was reduced from 7 per cent to 5 per cent (Article 105.6). The provision was also amended to clarify that invalid votes cast were not to be considered in the calculation of the threshold.

Electoral Districts

15. Article 15, par. 1 was substantially modified with the amendments in March 2008. It provides that 75 single-majoritarian election districts are formed for the parliamentary elections and that normally all self-governing units represent single mandate majoritarian election districts. The exception is Tbilisi (10 single mandates) as well as Eredvi and Kurta communities, which represent one majoritarian electoral district. The article specifies that the communities of Azhara and Tighvi do not compose independent majoritarian election districts. In the parliamentary elections held in May 2008, as ordered by the CEC and the courts, both communities were allowed to vote for another electoral units' majoritarian candidates and were attached to two different pre-existing districts to do so. For clarity, **it is recommended that the Election Code specify the arrangement by which these two communities are to vote in the majoritarian component of the parliamentary elections.**

16. Article 15, par. 6 and Article 29, par.1 (e) require the CEC to form electoral districts and define the boundaries. However, the law does not provide which criteria are to be used to form the electoral districts and it does not require single-mandate constituencies to be of equal or comparable size, thus failing to guarantee one of the main principles of electoral rights, namely the equality of the vote.⁶ To guarantee

⁵ See report on Electoral Systems: Overview of Available Solutions and Selection Criteria (CDL-AD(2004)003) (particularly Section 4 on Some Considerations on the Specific Situation of the Emerging Democracies).

⁶ Paragraph 7.3 of the 1990 OSCE Copenhagen Document commits OSCE participating States to "guarantee universal and equal suffrage to adult citizens."

equality in voting power, where elections are not being held in one single constituency, constituency boundaries are to be drawn in such a way that seats representing the people in Parliament are distributed equally among the constituencies, in accordance with a specific apportionment criterion. The same rule applies to regional and local elections. For instance, in the last Parliamentary elections, the number of voters in individual election districts, which as a rule coincided with the administrative districts, ranged considerably from approximately 6,000 to 140,000. Such large differences in numbers deny the equality of the vote in practice.

17. It is recommended that the Election Code require single-mandate constituencies to be of equal or similar size and that it specifically address how electoral districts are to be organised as applicable to local, regional and parliamentary elections. The Code should provide the frequency, criteria, and degree of public participation for the organisation of election districts, as well as the ultimate authority for choosing the final plan for the districts. The electoral units should be drawn in such a way that each unit has approximately the same number of voters. An appropriate combination of these criteria is conceivable. The delineation does not preclude taking into consideration convenience and accessibility for voters, including the delineation of pre-existing administrative boundaries. **The maximum admissible departure from the distribution criterion adopted should seldom exceed 10 per cent and never 15 per cent, except in very exceptional circumstances.⁷ The Code should also specify under what circumstances the size of the electoral unit might deviate from the established criteria. Ideally, the Code should provide that the persons or institutions drawing electoral boundary units are to be neutral, independent and impartial. The law should also provide that the final decision be based on a transparent proposal with maximum public input and participation in the process of drawing of electoral units.** The redrawing of boundaries must be performed well in advance of elections, and redrawing of boundaries before each election should be avoided, in order to avoid any risk of gerrymandering.

18. Democratic States should adopt simple criteria and easy-to-implement procedures for the delineation of election districts. As a best solution, **it is recommended that the CEC submit the problem in the first instance to a boundary delineation commission** comprised of independent members and preferably a geographer, a sociologist, a balanced representation of the parties, and where appropriate, representatives of national minorities. **The Election Code should provide that Parliament then make a decision on the basis of the commissions' proposals, with the possibility of an appeal.**

Voter Turnout Requirement

19. As recommended in the previous Joint Opinion, the minimum voter turnout requirement for any second round of elections for President was deleted from Article 87 in November 2007. This is a positive development, as the former minimum voter turnout requirement had created the possibility for an endless cycle of failed elections.

2. CANDIDACY AND SUFFRAGE RIGHTS

⁷ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I., 2.2.

General

20. It is a universal civil and political right that every citizen has the right, on a non-discriminatory basis and without unreasonable restrictions to: (1) take part in the conduct of public affairs, directly or through freely chosen representatives; (2) vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (3) have access, on general terms of equality, to public service in his or her country.⁸ The Georgian Election Code does not fully satisfy these basic principles as it contains provisions that unduly deny the right to vote, limit candidacy rights, and prevent an elected candidate from completing the mandate of elected office.

Denial of the Right to Vote

21. Article 5.2 provides, in part, that persons, who are in a penitentiary institution in accordance with a court judgement, are not eligible to take part in elections. Thus, the right to vote is denied based on any conviction regardless of the nature of the underlying crime. The right to vote is a fundamental Human Right, which means that only convictions on only serious criminal offences could lead to suspension of voting rights.⁹ **Thus, it is recommended that Article 5 be amended to exclude from voting rights only those persons who are in prison on a conviction for a serious criminal offence.** Consideration could be given to provide details regarding what constitutes a serious crime, such as length of sentence and gravity of offence.

Independent Candidates

22. The Georgian Constitution (Article 50) and the Election Code (Article 93) do not provide a possibility for independent candidates to run in parliamentary elections; only political parties and electoral blocs may nominate candidates. In contrast, an initiative group of at least 5 voters are permitted to nominate independent candidates to run in the Presidential and local elections (Articles 81 and 119 respectively.) Prohibiting independent candidates challenges the principle that countries must respect the right of citizens to seek political or public office, individually or as representatives of political parties or organisations, without discrimination.¹⁰ **It is thus recommended that the provisions on candidacy for Parliament, both in the Constitution and in the Election Code, be amended to allow for individual candidates to participate in Parliamentary elections.**

Limitations on Candidacy Rights

23. Regarding Articles 92 and 107¹ of the Election Code and as underlined in the previous Joint Opinion,¹¹ loss of mandate after election should not be based on a drug test and that a restriction based on health reasons, without proof that the individual cannot carry out his or her mandate, amounts to health-related

⁸ See, e.g., Article 25 of the International Covenant on Civil and Political Rights; and Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I.

⁹ The European Court of Human Rights held that such 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 of the European Convention on Human Rights. (*Hirst v. United Kingdom* (No. 2), Application no. 74025/01, 6 October 2005.)

¹⁰ OSCE Copenhagen Document, Par. 7.5.

¹¹ CDL-AD(2006)037, par. 25-26.

discrimination.¹² Moreover, candidates who obtain the necessary number of votes required by law should be duly installed in office and be 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.¹³ **It is thus recommended that these Articles of the Election Code be removed altogether.**

24. Article 111 creates an incompatibility between holding a mandate of a Member of Parliament and being nominated as a candidate for local self-government elections. As noted in the previous Joint Opinion, this restriction is excessive. While it is widely accepted that restrictions against cumulating elected mandates can oblige the holder of two mandates to surrender one, after he/she is elected, such a restriction should not be applied to candidacies. **It is recommended this provision be amended accordingly.**

Signature Requirements

25. As underlined in the previous Joint Opinion,¹⁴ it is recommended that the number of signatures required to nominate a candidate be reduced. In the March 2008 amendments, this recommendation was implemented for presidential candidates and for non-parliamentary parties participating in parliamentary elections (number reduced from 50,000 to 30,000), but not in local elections. **It is thus recommended that this threshold for local elections (Article 117.3) likewise be amended.**

26. The previous Joint Opinion also commented on the method by which supporters' signatures were inspected, and recommended that Article 42 be improved.¹⁵ In spite of the amendments made vis-à-vis the concerned provisions, **it is recommended that the signature verification process included in Article 42 be amended to address the concerns noted in the previous Joint Opinion.**

Pre-Election Candidate Withdrawal

27. Article 100 provides that candidates may withdraw from the parliamentary election, and that nominating parties can cancel their decision to nominate a candidate to the parliamentary election up to two days before election day. Article 84, par. 4 provides that presidential candidates can withdraw their candidatures as late as 12:00 of the day before election day. These deadlines are too short, due to the real possibility of human error or abuse in making amendments by hand to the ballots. **As recommended in the previous Joint Opinion¹⁶, a more realistic deadline should be set, one which expires before the ballots have been printed. Additionally, there should be a formal process for candidate withdrawal in all types of elections (Articles 84, 100, and 121) that clearly specifies what actions, including election commission decisions, must be taken for the withdrawal to be effective.**

28. In line with the previous Joint Opinion, Article 106.9 was amended in March 2008 to provide that in case of the withdrawal of a Member of Parliament elected for a

¹² Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I. 1.1.; explains the rules and exceptions for the right to stand for election.

¹³ *Inter alia*, according to article 7.9 of the Copenhagen Document.

¹⁴ CDL-AD(2006)037, par. 37-41.

¹⁵ CDL-AD(2006)037, par. 69-72.

¹⁶ CDL-AD(2006)037, par. 73.

majoritarian district, by-elections will be held.¹⁷ However, the opinion also recommended that Article 106, par. 7 be similarly amended to provide for a by-election but no such amendment has been enacted. **It is again recommended that Article 106, par. 7, be amended accordingly.**

3. VOTERS' LISTS

General

29. Accurate and regularly-updated voters' lists are of crucial importance for democratic elections. The missing or incorrect entries of some voters, as well as possible multiple registrations of others, would violate the principles of universal and equal suffrage. The CEC is responsible for the maintenance of the centralised and computerised voters' register (Article 9.4.) The Election Code provides that the general voters' list is compiled based on information regularly provided by a number of local and state bodies and institutions (Article 9.5 and 9.6.) Political entities, observers' organisations and voters are provided with an opportunity to publicly scrutinise the preliminary voters' list and request changes (Article 9.7) and the final general list of voters is made public (Article 9.13).

30. However, the apparent adequacy of legal provisions regulating the voters' lists has not resulted in a voters' list that can be considered sufficiently adequate. Despite efforts by the election administration to improve the voters' list in recent years, inaccuracies still remain to be addressed. During the 2008 parliamentary elections a number of voters were refused the right to vote because their names were not in the voters' list. There were also many claims by stakeholders, some of which were confirmed by the observers and the election administration, that the list was inflated with deceased persons, multiple records, and non-existing buildings as registration addresses. There were also apparent cases of persons changing registration addresses shortly before election day in closely-fought election districts. In practice, the registration process is insufficient due to the standing need of full commitment, capacity and coordination by the institutions involved in the compilation of the voters' lists. **It is again recommended that all relevant authorities in Georgia take all necessary efforts, according to an integrated approach, to compile an accurate list of voters.** It is advised that the relevant authorities obligated under the Election Code to provide updated voter information to the CEC, particularly the Civil Registry, install the proper software so as to provide such information through an integrated system.

Voters Abroad

31. Article 5 generally provides that all Georgian citizens of at least 18 years of age have a right to vote. There is no residency requirement, which means that even those Georgian citizens who are outside of Georgia, for any length of time, are entitled to cast a ballot. Allowing non-resident persons to vote in an election is not inconsistent with democratic standards and international practice. For presidential and parliamentary elections, election precincts are established outside Georgia by the CEC (Article 16).

32. In order to alleviate the potential problem of individuals voting in place of voters abroad and registered in the voters' lists, Article 9 par.2 (e) provides that "on consular registry" shall be marked for a person abroad or "is abroad" where such a

¹⁷ CDL-AD(2006)037, par. 75-76.

person is abroad but not on a consular registry. In practice however, the accuracy of the voters' list in this respect was apparently not sufficient. Thus, **it is recommended that the Election Code provide better safeguards against voting in place of voters abroad and that the CEC should ensure that the appropriate notations are made on the voters' list.**

Applications to Modify Voters' List

33. Article 9, paragraphs 7 – 10 establishes the procedures for a voter to apply to make changes to the voters' list. However, the procedure is not sufficiently clear. For instance, paragraphs 7 and 8 provide that “in case of any inaccuracy [in the voters' list]” the voter may “request changes in the data of voters and in the voters lists no later than 16 days prior to the election day” and “the election administration reviews the list of voters.” Although the DEC's are the apparent bodies to which such applications are to be submitted (paragraph 8), the provision does not expressly state so. Also, a shortcoming of the procedure is that paragraph 10 provides that the voter may appeal the DEC decision to court “within a day after its issuance.” Due process of law standards require that the deadline for filing an appeal start from the time of notification in writing (not issuance) of a decision. This would ensure that the right to appeal is not lost by a delay in delivering the decision to the applicant. **It is thus recommended that the procedure in Article 9 for submitting an application to change data in the voters' list, or to include or delete an entry in the voters' list, be clarified and amended as set out above.**

Publication of Voters' Lists.

34. Article 9 par.13 states that “The Central Election Commission and the appropriate election commissions shall ensure publicity and accessibility of the general list of voters under procedures established by Georgian legislation”. **It is recommended that for greater clarity, instead of general reference to the “Georgian legislation”, specific reference to the relevant numbered provisions be inserted in this provision.** In addition, to contribute to updating the voters' list, **it is recommended that Article 9 provides that the voters' list be placed on the election commission buildings for scrutiny (as required in Article 66, par. 2a) also in minority languages, particularly in those areas where other election materials are provided in minority languages.**

Election-Day Registration

35. The November 2007 amendments included a transitional provision (Article 129, prima 7), allowing for election day registration, which took place during the 2008 presidential election. In March 2008 amendments this provision was deleted and election-day registration did not take place during the 2008 parliamentary elections. **This is a positive change. Thus, it is recommended that continued and greater efforts to improve the voters' list be undertaken,** since accurate and up-to-date voters' lists contribute to the transparency of the voting process, **and that use of election day registration in future elections be avoided.**

4. ELECTION ADMINISTRATION

Composition, Appointment and Impartiality of Election Commissions

36. Currently, the CEC is comprised of 12 commissioners, plus the Chairperson. The Chairperson and 5 members are elected by the Parliament upon nomination of the

President of Georgia, while 7 members are appointed by political parties as prescribed by Article 26 par.1. The 7 political appointments were introduced in the law in November 2007 in response to demands by opposition parties. If the President and the parliamentary majority represent the same political interests (as at present), this methodology for the formation and composition of the CEC attributes to the ruling party a dominant role in selecting the majority of the CEC members (7 out of 13) with the potential to hamper the independence of the election administration. The vote of the session's Chairperson remains decisive in case of an equal division of votes (Article 22 par.8). The previous Joint Opinion¹⁸ had recommended to delete this provision as it gives the tiebreaking authority to the political party that controls the Chairperson's appointment and has the potential to undermine public confidence in the election administration when decisions are adopted in that manner. The management positions in all election commissions (except the CEC Chairperson) are elected by the majority of the full commission, with at least two members required to nominate the candidate (Article 22 prima 1, pars.1-2). As noted, the CEC Chairperson is elected by the Parliament upon nomination by the President.

37. Article 27 par. 3 states that the President of Georgia shall form a "competition commission" to process applications for the CEC Chairperson and 5 members. **It is recommended that for increased transparency, this provision be amended to provide detailed procedures for appointment of the competition commission, including the number of members of the commission, their background and the criteria for selection.**

38. In a welcome amendment of July 2008, the DEC composition now allows for political party representation. These amendments also provided a revision to Article 18, par. 5, which had required that members of the CEC and DEC's (except those party-appointed) have a certificate of an election administration official issued by the election administration. The amendment extended the certificate requirement to those members also appointed by political parties. This is a positive move toward professionalising the entire election administration. However, as noted in the previous Joint Opinion, **while the certification process can enhance professionalism, it also raises issues and requires guarantees of transparency and impartiality in the certification process. The certification process should thus be more transparent.**¹⁹

39. It should be emphasised that under international standards, there is no specific model composition of election commissions, at any level, including the central one. Rather, the importance of a broad political consensus on the model chosen for the composition at all levels of the administration is emphasised. Regardless of the composition of an election commission, the electoral law should guarantee that election commissions are established and operate in a manner that is independent and that its members act impartially.²⁰ Moreover, in practice, the commission and its members should abide by these standards. Although the Georgian Election Code provides the basics for such principles, in some respects the law can be improved to provide a greater assurance of these standards (see comments and recommendations below). Furthermore, in previous elections in Georgia, the guarantees of independence of the election administration and the impartiality of its members provided for in the law were not put into practice, despite the recent major changes to the composition of election commissions.

¹⁸ CDL-AD(2006)037, par. 91.

¹⁹ See into more details CDL-AD(2006)037, par. 85.

²⁰ Existing Commitments for Democratic Elections in OSCE Participating States, par. 4; Code of Good Practice in Electoral Matters, II. 3.1.

40. Article 17, par. 1 states that the election administration of Georgia is an independent administrative body and Article 19, par. 3 provides that members of the election commissions are not representatives of their appointing or electing subjects and must exercise their activities in an independent manner subordinate only to the Constitution of Georgia and the Law. The primary mandate of the CEC is to ensure the holding of elections and to control the implementation of the Election Code throughout the country and ensure its equal application in accordance with the Code (Article 29, par. 1a.)

41. As noted in the OSCE/ODIHR Final Reports on the 2008 presidential and parliamentary elections, **enhanced professional skills of election commission members**, regardless of their mode of appointment, **are crucial for the administration to effectively serve its mandate**. Election commissioners, whether party-appointed or not, must act impartially, and in accordance with the law. The Election Code should include safeguards (restrictions) against the dominance of any one political party in managerial positions of commissions at all levels, and that the CEC Chairperson be elected from among the CEC members (not by the President and Parliament) based on broad and inclusive discussions among the political forces. Consideration should be given to decreasing the number of appointments made by the President and Parliament so as to eliminate the *de facto* majority of the ruling party, and instead have several unaffiliated professionals appointed by consensus of all other members. The law should also stipulate that the CEC include at least one member of the judiciary. It should further stipulate that all CEC members, including those appointed by political parties, be qualified in electoral matters, such as judges, legal experts, political scientists, mathematicians or other people with a good understanding of electoral issues. The Election Code should provide that the CEC receive standard training on electoral law and electoral issues, including on the best practices for guaranteeing due process of law in the adjudication of complaints and appeals.²¹

Early Termination of Election Commission Members

42. As a rule, the terms of offices of election commission members should not be terminated on a discretionary basis, as it casts doubt as to the independence of the members.²² Termination for disciplinary reasons is permissible provided that the grounds for this are clear and restrictively specified in the law. Article 21, par. 1 and Article 21, par. 2, prima 1 (as amended in July 2008) provide that Parliament can terminate early the terms of office of non-party appointed CEC members, the upper level election commission can terminate early the terms of office of non-party appointed DEC and PEC members, and the courts can terminate early the offices of party-appointed commission members. These provisions, however, do not set out the grounds for such early termination. **It is thus recommended that the Election Code expressly protect election commission members from arbitrary removal – setting out under what grounds a removal is justified.**

5. ACCREDITED OBSERVERS

General

43. In order to increase the credibility of the electoral process and the public's trust in the results, it is in the best interests of a state to conduct elections in the most

²¹ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II. 3.1.

²² Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II. 3.1.

transparent manner possible. In this respect, it is fundamental to guarantee access to election commission meetings and polling stations on election day to accredited media and observers. Both national and international observers should be given the widest possible opportunity to participate in election observation. For the most part, the Election Code adequately addresses the issue of transparency by providing broad rights for observers and requiring election commissions to prepare and conduct elections in a transparent manner, as well as providing media access (Articles 65 – 72).

Accreditation Procedures

44. In a positive development, the March 2008 amendments brought the registration process of domestic and international observers more in line with each other. Article 69 stipulates that a domestic monitoring organisation shall apply to the appropriate election commission 10 days before election day (rather than 30 days as previously required), while international organisations must register at the CEC at least 7 days prior to election day.

45. Although the Election Code provides that domestic observers are permitted to observe at all levels of the election administration (Article 69, par. 7¹), the badges of domestic observers are to state the name and number of the election districts and precincts where the observer has reported he/she will observe (Article 69, par. 9). While it may be possible for domestic organisations to register for observation on the territory of the entire country, these provisions for reporting districts and precincts is an unnecessary requirement that could be applied in a restrictive manner and might hinder efficient observation. By contrast, international organisations do not have the obligation to specify where they intend to observe the elections and their badges specifically state that the observer has the right to observe any precinct of any district (Article 69, par. 10.) **It is recommended that that the Election Code be amended so that national organisations are not required to report in advance where they intend to observe the elections.** Electoral observation should be random and domestic organisations should be allowed to make their decision about locations where to observe the electoral process without any constraint. **Furthermore, the provision for procedure of registration as observers for national organisations should be aligned with the procedure applied to international organisations,** including their registration be made only at the CEC level, timelines for registration and decision consistent with that of international organisations, and no advance notice of locations to be observed. In addition, domestic observer badges should provide that they are permitted to observe at any PEC, DEC, or CEC. In addition, clear and objective observer registration criteria should be established.

Rights of Observers

46. It is important that the Election Code be clear and precise concerning the rights of observers. Article 70 provides a list of rights of observers. Although it provides the right to file complaints to the PEC regarding voting and counting procedures, and to a higher level commission or court regarding actions of an election commission, this provision does not expressly provide that observers have a right to file complaints regarding violations of the campaign-related regulations, such as restrictions on campaigning and media coverage, or any other violations of the election law that occur during the pre-electoral period. The provision also does not expressly provide that observers have a right to observe all aspects of the process taking place at DEC during the tabulation of results, which proved to be a problem in the 2008

presidential and parliamentary elections. **It is thus recommended that Article 70 be amended to expressly provide the above-noted rights to accredited observers.**

47. In addition, it is recommended that the Election Code expressly prohibit any type of obstruction by any individual or official of the authorised work of accredited observers and party proxies, including intimidation and pressure, hindering effective observation, or preventing filing of complaints. The Code should provide for specific sanctions for such violations or refer to sanctions in the Criminal Code.

6. ELECTION CAMPAIGN PROVISIONS

Right to Campaign

48. Article 73 par. 5 f) continues to expressly prohibit foreign citizens from engaging in election campaigning. The previous Joint Opinion cautioned that “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).”²³ It is for these reasons that Article 73.5 would appear to be in conflict with Articles 1, 10 and 11 of the European Convention on Human Rights. These are important concerns that were not addressed by an amendment. **It is thus recommended that Article 73, par. 5 f) be amended to address this concern.**

Vote Buying

49. Article 73, par. 9 prohibits what is commonly called “vote buying”, an important restriction which contributes to the guarantee of the democratic standard of free expression of the voters’ will. In the 2008 parliamentary elections, this vote buying provision was extensively interpreted by the courts, which ignored both the letter and spirit of the law and undermined this fundamental democratic standard. The courts offered broad latitude for candidates and campaigners to unduly influence voters through vote buying.²⁴ In light of these court judgements, **it is recommended that Article 73, par. 9 be revised in a manner which would more clearly and broadly reinforce a prohibition against vote buying by any individual, regardless of whether they are private citizens, public servants, officials or official campaigners, and which would stipulate a sanction if they engage in it.**

Use of Official Position and Administrative Resources

50. Firstly, Article 76 par. 1 allows use of administrative resources for campaign purposes – that is, the provision allows use of state-funded buildings, communication means, and vehicles provided that equal access is given to all election subjects. On the face of it, this provision appears to adhere to the equal opportunity principle. However, this provision could not be workable in practice due to easier access of the ruling party to various facilities and resources such as telephones, computers, vehicles, etc. Moreover, paragraph 2 of Article 76 allows public servants to use their official vehicles for purposes of campaigning.

²³ CDL-AD(2006)037, par. 99.

²⁴ For further details on the interpretations of such court judgments during the 2008 Parliamentary elections, refer to the OSCE/ODIHR Final Report on the 2008 Georgian Parliamentary elections.

51. Secondly, Article 76¹, par. 2, allows political officials²⁵ to combine campaign activities in support (or against) electoral subjects with the conduct of their official duties, thus blurring the line between the state and political parties. These provisions fall short of OSCE commitments²⁶. Although Article 76¹ prohibits public servants (not political officials) from using their official position for purposes of campaign activities, in the 2008 parliamentary elections, the election administration and courts took a very narrow view of what constitutes campaigning, thus permitting public servants to engage in some level of campaigning while conducting official duties. In addition, during the 2008 presidential and parliamentary elections there were instances of Government initiatives being combined with campaign activities.

52. It is thus recommended to reconsider the March 2008 amendment allowing political officials to combine campaigning with official duties. Similarly, Government initiatives should not be mixed with campaign activities. Such prohibitions are needed in order to avoid the violation of equality of opportunities among the contestants, and to ensure implementation of paragraph 5.4 of the 1990 OSCE Copenhagen Document.

53. The Election Code should also prohibit the direct or indirect use of all types of administrative resources – financial, material, technical, and human resources – for campaign purposes by election subjects, public officials, or other campaigners.

54. Moreover, it is recommended that the Election Code provide that all restrictive campaign provisions, such as vote buying and campaigning by public servants or political officials, take effect as of the announcement of elections.

Election Day Campaigning

55. It is unusual that the Election Code does not include any general campaigning curfew or any prohibition against election-day campaigning in and around polling stations. The only time ban on campaign activities is in Article 73 par.3 which prohibits the transmission of free and/or paid electoral advertisements through television within 24 hours prior to the election date. Undue influence in the last 24 hours before an election can take place in various contexts, such as agitation at the actual polling place or its vicinity and door-to-door campaigning on the day of voting. Generally, a ban on campaigning near to the election allows voters to more easily reflect on the political choice to be made. In the 2008 parliamentary elections, campaigning activities and materials were, in fact, observed on election day both inside and in the vicinity of polling stations. **It is thus recommended that the Election Code include a general prohibition against any type of campaign activity during the last 24 hours prior to elections.** Interestingly, the Administrative Offences Code (Article 174⁵), sets out a fine for campaigning on election day, without, however, a corresponding substantive provision in the Election Code that prohibits campaigning on election day. **At a minimum, campaigning and**

²⁵ Under the Election Code, political officials include, among others, the President, ministers, deputy ministers, members of Parliament and heads of local self-government bodies. Beyond these, there are varying interpretations among stakeholders as to which other public officials are legally considered to be political officials.

²⁶ Paragraphs 5.4 and 7.6 of the 1990 OSCE Copenhagen Document; the former calls for a clear separation between the State and political parties and the latter commits the state to "provide...necessary legal guarantees to enable [political parties] to compete with each other on the basis of equal treatment before the law and by the authorities."

campaign materials in and around polling stations on election day should be banned.

7. MEDIA PROVISIONS

Right to Equal Treatment in Media Coverage

56. Provisions regulating the media during election campaigns are found in Articles 73 and 73¹. As noted in the previous Joint Opinion, although these provisions appear to provide an adequate framework for fair campaign conditions for election contestants, they are problematic as electoral contestants must satisfy certain conditions before they can have the right to equal treatment in the allocation of media time. The recommendations set out in last Joint Opinion to address these problems have not yet been implemented through revisions to these provisions. Therefore, the following analysis and recommendations from the previous Joint Opinion are repeated.²⁷

57. Campaign conditions are determined by Article 73¹, which provides special rules for “qualified subjects”. According to these provisions, it is up to the broadcasters to determine whether an electoral contestant is qualified for free airtime or not. It is advisable to establish legal criteria, rather than leave the decision to the broadcasters, as it might result in undue refusals and inconsistencies in implementation. **It is recommended that Article 73, prima 1, be thoroughly reviewed to address these concerns.**

58. Articles 73 and 73¹, could also be improved as they are currently limited to providing conditions for contestants to convey messages and do not extend to coverage of contestants in the news or other programs. Further, the media should be more proactive in providing information on the election campaign and processes. **It is recommended that Article 73 be amended to require the state-funded media to provide comprehensive information on all aspects of the election process through a variety of programs, outside the current free-of-charge slots, in order to create a forum of discussion for all contestants.**

Electoral Advertising in the Media

59. In November 2007, Article 73¹, paragraphs 2-3, which set out the obligations on broadcasters regarding provision of time for electoral advertising, were amended in an apparent attempt to address an issue raised by the previous two joint opinions.

60. In the earlier joint opinion, it was recommended that this article be amended to clearly state whether obligations regarding “public media” are applicable to media at both local and national levels, and to stipulate more clearly which media can be considered “public media.”²⁸

61. The last joint opinion noted that although the June 2006 amendments attempted to provide clarification, the new terms used to describe the various types of broadcasters were still not sufficiently clear. Likewise, the latest version of this provision does not seem to provide clarification.²⁹ The current provision uses the terms “general broadcaster”, “broadcaster”, “public broadcaster” and “community

²⁷ Previous Opinion, CDL-AD(2006)037, par.100-103.

²⁸ CDL-AD(2006)023, par. 109.

²⁹ CDL-AD(2006)037, par. 103.

broadcaster” without explanation of any of those terms. **It is again recommended that this provision be amended to address this issue.**

62. The standard of equality of campaign conditions for all electoral contestants includes the right to have access to the same commercial rate for electoral ads offered to all political parties and candidates, and that the times and locations of the advertising be on similar terms. This guarantee does not appear in the Georgian Election Code or media-related laws. Furthermore, during the 2008 presidential and parliamentary elections, the commercial rates for electoral ads were increased so astronomically (approximately ten times the rates for non-electoral ads) that the less economically well off parties and candidates apparently did not have any opportunity to use paid political advertising. These huge increases in advertising prices for electoral spots in effect created unequal campaign conditions for the contestants. **It is thus recommended that the Election Code include a right for all electoral contestants to have access to the same commercial rate for electoral ads, and that the times and locations of the advertising be on similar terms.**

Media Monitoring and Sanctions for Violations

63. Article 73¹, par. 11, added to the Election Code in November 2007, which introduced media monitoring to oversee the allocation of free air time for election campaigning, is a positive improvement; however, the media monitoring commissioned by the CEC during the 2008 parliamentary elections did not sufficiently identify unfairness in the media coverage. **The Election Code should provide that the media monitoring results be used for prompt identification of any inequitable and preferential news coverage of candidates and parties, and that prompt corrective actions be taken by a specified body (CEC or the Georgian National Communications Commission) when necessary.**

64. **The Election Code should also provide or refer to the types of corrective actions that may be imposed for various violations of the media-related provisions.**

65. **The Election Code should also expressly provide for the right of electoral contestants to file complaints and appeals concerning unfair or illegal media activities during an election, and establish clear procedures for receiving and acting on such complaints.**

8. ELECTION FUNDING

Funding of Electoral Administration

66. Article 43 par. 1 was amended on 22 November 2007 so as to provide explicitly State funding for the electoral administration with a possibility for the CEC to file a complaint with a City Court in case of funds not transferred (same article, par. 4). This is a welcome development enhancing clarity with regard to the CEC funding for organising the whole electoral process.

67. Nevertheless, **it is recommended that this provision expressly indicate that the City Court decision can be appealed to the relevant Court of Appeal and that Court of Appeal decision is the final decision and cannot be appealed. The provision should also stipulate the timeframe during which the City Court decision can be appealed and the timeframe in which the Court of Appeal must**

consider and release its decision in order not to delay the organisation of the electoral process.

Campaign Funding

68. Articles 43-48 of the Election Code regulate election funding.

69. For enhancing transparency in funding, as well as in sources and contributions, political parties and independent candidates should be required to disclose and report periodically during the electoral period on their funds.³⁰

70. Article 46 par. 1 was amended on 21 March 2008 so that “the election fund” is no longer defined just as “*all the funds intended for the electoral campaign of an electoral subject*”, but as “*the sum of money resources [...] and also all types of goods and services obtained free of charge [...] except the cost of free air time obtained by the rule defined in the Law*”. This change prevents the possibility of circumventing the old provision and should thus be welcomed.

71. Article 46 par. 2, amended on 21 March 2008, provides that “*it is obligatory for the electoral subject to open the election campaign fund*”, whereas opening of an elections campaign fund of majoritarian candidates in local elections “is voluntary”. Moreover, this paragraph now also states that the “*candidate nominated by election subject uses the mentioned [obligatory] fund*”.

72. This last part simplified a previous rule (as amended on 22 November 2007) which provided that, for the purpose of the candidate using the fund, “*the relevant election commission shall submit written consent to the election subject*”. This is a useful simplification; this amended provision is in alignment with the earlier joint opinions of the Venice Commission and the OSCE/ODIHR.³¹

73. Article 46 par. 3 changed (on 22 November 2007) the date by which the campaign account must be opened at a bank. It replaced the old deadline of “*no later than 35 days before the vote*” with “*within 5 days of registration of the election subject at the relevant election commission*”. This is a welcome amendment.

74. Article 46 par. 7 states that “*funds received by the election campaign fund are considered to be the funds deposited to the account of the election campaign fund, as well as any goods or services received free-of-charge (at market prices)*”. This provision is old and was not amended. **It is nonetheless recommended that it be reconsidered whether the provision is still needed.** It seems that it has become redundant now that the new amended provision in Article 46 par. 1 states as well this same exact definition of what the election fund consists of.

75. Regarding Article 47, par. 1, **it is recommended that this paragraph likewise be deleted as it repeats the same definition once again** (as previously described). It is only slightly different in that it stresses explicitly that contributions by “natural persons” as well as “legal entities” are to be considered contributions to the campaign fund. However, this clarification becomes redundant since the next paragraph (Article 47 par. 2) actually prescribes, in some detail, the regime for natural-persons contributions as well as, explicitly, for those made by legal-entities. Therefore, there can be of course no doubt that both types of contributions count as campaign funds.

³⁰ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II. 3.5.

³¹ CDL-AD(2006)023, par. 110-114; CDL-AD(2006)037, par. 104-108.

76. Article 47 par. 2, as amended on 8 June 2007, prescribes the information that legal entities and natural persons, respectively, must provide when making their contributions through a bank. These requirements do not apply to contributions of natural persons that are not higher than 300 lari. The regulation is reasonable and the exemption of 300 lari (approximately 150 euros) not too excessive.

77. Article 47 par. 3, as amended on 8 June 2007 provides that *“the funds deposited without indication of the data provided for by the paragraph 2 of this article shall be considered anonymous”*, and shall thus *“be transferred immediately to the State budget of Georgia”*. This measure runs the risk of being disproportionate: it curtails the right to property (First Protocol to the European Convention on Human Rights) in an excessive way in order to prevent improper deposits while, at the same time, there seem to be far less drastic means to achieve the same end with no lesser level of efficacy.

78. Article 47 par. 3¹, as amended on 21 March 2008, stipulates the amounts of donations to candidates by individuals and legal entities. The old provision only included financial donations, not the material ones, which is what the new article now corrects. This is a welcome amendment.

Reporting Campaign Funds and Expenditures

79. Article 48 par. 4, as amended on 8 June 2007, prescribed various duties of the election campaign fund manager, such as monthly reporting to the CEC of the source and amount of contributions. This contributes to transparency and should be welcomed. It also follows the last Joint Opinion.³² However, the provision requires the financial reporting only on a monthly basis, which has proven inadequate in practice during the 2008 elections, given that the registration deadline for electoral blocs is only slightly over one month before the election. Thus, **it is recommended that this provision be revised to ensure that the financial report is submitted and published some time in advance of election day. This provision should also include an obligation to report on expenditures (not only contributions) in the pre-election period (not only post-election.)**

80. Article 48 par. 6 addresses post-election reporting which contributes to transparency and legality of elections. It has not, however, been amended in line with recommendations in the previous Joint Opinion.³³ The current provision still only states that it is an “audit company” that issues the audit report. Moreover, there are currently no provisions as to whether the audit report is to be made public. **It is therefore recommended that this provision be amended as noted. Furthermore, it is recommended that this provision require that the post-election financial reports be audited, including checks to ensure that the reports are complete and include all receipts and expenditures. It is further recommended that the obligation to make the audit report public be written into the Election Code.**

81. **It is also suggested that all final reports be sent to the CEC, not simply to the “relevant election commission”**, which is currently stated in Article 48. This way all the reports would be considered by the same body, which would ensure the application of the same standard/stringency of final review. It is also not clear whether “the relevant election commission” (to which the report should be sent) means various DEC’s or the CEC. **Furthermore, it is recommended that electoral**

³² CDL-AD(2006)037, par. 106.

³³ CDL-AD(2006)037, par. 28.

subjects be required to clearly specify in the reports the original donor of the funds.

82. Article 48 par. 7 providing for a sanction to be imposed by court for non-submission of funds accounts, is an improvement as amended on 21 March 2008 since it mentions the relevant institution deciding to impose a sanction. This has to be welcomed.

83. The November 2007 amendment to Article 48 par. 8 foresees an initial warning by DEC's or the CEC to electoral subjects for failing to meet regulations on campaign fund management. This is a welcome amendment since it addresses a previous recommendation.³⁴ However, the reference in the provision to the "legislation of Georgia" determining the responsibility of the election subject and campaign fund managers in case of inaccurate data is too vague. **It is recommended that there be direct reference to the applicable legislative provisions.**

84. Article 48, par. 10¹, amended in March 2008, requires the CEC to establish a financial monitoring group, tasked with monitoring the financial reports which all election subjects are required to submit during the election period to election commissions. In the 2008 parliamentary elections, the effectiveness of this monitoring group was limited, due to the fact that its mandate is not defined in the Election Code, with the result that there was internal confusion about the scope of its responsibilities. **It is recommended that the Election Code clearly define the role and responsibilities of this financial committee that oversees compliance with the rules laid down for campaign financing.**

9. VOTING AND TABULATION OF RESULTS

Military Voting

85. Article 16, par. 3 addresses the establishment of special polling stations, including at military units. While it is commonly acceptable for the electoral framework to have special provisions ensuring that a member of the military is able to exercise the right to vote while on active duty, this provision must be written carefully, as voting by the military can be subject to abuse. **While the Code can permit special polling stations to be set up within military units located in remote areas, far from the inhabited areas, the provision should be accompanied by an express indication that this is strictly exceptional and that, whenever possible, military voters should vote either at their place of residence or in civilian polling stations (located near to their base.)³⁵**

86. On a related point, during the 2008 presidential and parliamentary elections, the election administration and courts interpreted Article 16, par. 3 to permit special polling stations to be established at police compounds, although this article does not specifically allow for that. **For clarity, legislators should consider whether or not police compounds are permissible places for special polling stations to be established, and if so, Article 16 should be clarified in this respect.** If special polling stations are to be permitted in resident police compounds, the concerns regarding military voters and recommendations thereof would equally apply to police voters.

³⁴ CDL-AD(2006)037, par. 29.

³⁵ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I. 3.2.2.

Mobile Voting

87. Article 11 provides for the compilation of a supplementary voters' list for persons who are not able to cast their ballots at a polling station. Mobile voting should only be allowed under strict conditions, avoiding all risk of fraud. Although Article 11 is clear that it is only those persons who are physically unable (for health or other reasons) to travel to the polling station that can be included on the mobile voters' list, Article 56.2 provides a very lax procedure for individuals to include themselves on the list. This method of including oneself on the mobile list is susceptible to abuse. **It is thus recommended that the Election Code contain stricter provisions for the inclusion of voters in the mobile voters' list. Furthermore, it is recommended that for clarity the procedures for voters to follow to be included on the mobile ballot box list be detailed in this provision (i.e. moved from Article 56 to Article 11.)**

88. It should be noted that Article 11 contradicts itself; while par. 1 clearly states the various categories of voters allowed to vote by mobile box, not all of which are "incapacitated", par. 2 stipulates: "*the Supplement [Mobile Ballot Box List] shall include only those incapacitated voters who are unable to come to the election commission independently*". **It is thus recommended that par. 2 be deleted.**

89. In November 2007, Articles 52, par. 1 d) and Article 56, par. 4 were amended, apparently to address a recommendation included in the last Joint Opinion, suggesting that two, instead of one, PEC members nominated by different political parties accompany a mobile ballot box.³⁶ These are welcome amendments.

90. Nevertheless, although the amended Article 56 par. 4 does allow for observation of mobile voting, **it is recommended that Article 56 state that all procedures for identifying a voter, issuing a ballot, marking a ballot, etc. are applicable to the mobile voting procedure.**

Voter Information

91. Article 49, par. 2, as amended in November 2007, expands the PEC's duty to notify voters of the time and location of voting. The old requirement that "*the PEC notifies voters of the time and place of voting not later than 2 days prior to election-day*" was thus expanded, enhancing the right of voters to be informed, which is a positive development.

92. Article 51, par. 1, provides that the ballot may be published "in any other language understandable for the local population." Positive developments in the law include amendments in November 2007 to Articles 51¹, par. 10 and Article 51², par. 1¹, which address a recommendation from the last Joint Opinion to provide that various election materials be printed in minority languages.³⁷ **Nevertheless, it is recommended that these provisions obligate the publishing and distribution of election materials in minority languages supplementary to the ones in Georgian language, and not having them as discretionary.**

93. Also, to further enhance the participation of minority groups in elections, it is recommended that additional amendments be made to the Election Code to legally require the publishing of the Election Code, instructions, voters' lists and training manuals in other languages.

³⁶ CDL-AD(2006)037, par. 110.

³⁷ CDL-AD(2006)037, par. 111.

Voting Procedures

94. Article 53 par. 3, as amended in March 2008, deleted the part in the old provision which stated that *“when issuing (a) ballot paper(s), the voter’s Personal Number shall be specified in the relevant columns of the voters list”*. This may have been deleted because in practice the voters’ list is compiled with the Personal Numbers of voters already included. However, in the 2008 elections, there were cases of voters not being allowed to vote because their Personal Number on the voters’ list was incorrect and did not coincide with the Personal Number of the identification shown by the voter. To avoid disenfranchising voters, **it is recommended that a solution be sought to allow voters to correct such errors in time to enable them to cast their vote afterwards.**

95. Article 50 par. 6 was added in November 2007 and provides that *“for the purpose of enhancing secrecy of the ballot, photo and video shooting shall be forbidden in the polling-booth”*. The contribution of the provision towards securing free and fair elections is obvious and welcomed.

96. Article 54 par. 2, c), as amended in March 2008, includes the technical process of registering and handing out of ballot papers, the registrar affixing his/her signature on the back side of the ballot paper. It is noted that signing and stamping of ballot papers should not take place at the point when the ballot paper is presented to the voter, as this procedure can undermine the secrecy of the vote if abused by the registrar. **It is thus recommended that this provision provide that the registrar affix his or her signature/stamp prior to knowledge of which voter will receive the ballot. A better solution would be to eliminate all signing and stamping of ballots,** since other safeguards in the voting process should ensure sufficient protection against ballot fraud.

97. Article 54, par. 2 e) provides that after marking the ballot, the voter should collect an envelope for the ballot from the commission member next to the ballot box. To increase measures to protect the secrecy of the vote, **it is recommended that the Election Code be revised to provide that the special envelope be handed to the voter at the time of handing over the unmarked ballot to the voter.**

98. It is also important to note that secrecy of voting is not only a right of the voter but also a duty. Thus, **it is recommended that the Election Code includes a provision that prohibits voters from revealing their marked ballot paper to other persons or announcing their vote while in the polling station.**

Tabulation and Announcement of Results

99. Article 58 par. 4, requiring that all ballots in a mobile box are invalidated if the number of ballots in the mobile ballot box exceeds the number of signatures in the supplementary voters’ list, was not amended as recommended by the previous two Joint Opinions.³⁸ **It is therefore reiterated that consideration be given to amend Article 58 to address this concern.**

100. Article 60, par. 3 and Article 63, par. 2, list the information that must be included in the summary protocols at PEC and DEC levels. **It is recommended for enhanced**

³⁸ CDL-AD(2006)023, par. 130; CDL-AD(2006)037, par. 119.

transparency and to eliminate problems with reconciliation that these provisions provide that the summary protocols include all important data, such as the number of voters in the supplementary voters' list and the number of ballots found in the ballot boxes.

101. Article 63, as noted in the last joint opinion,³⁹ does not expressly require that the DEC summary protocols providing information for each polling station within the DEC, with reference only to “consolidation based on the PEC summary protocols.” **It is recommended that Article 63 be amended to provide clear instructions for election-day DEC procedures and provide, as well, that the tabulations process be carried out in a continuous manner. The Code should provide expressly that DEC summary protocols include a breakdown of results by PEC, thereby enabling parties and observers to audit the results.**

102. Article 64, par. 3¹, provides that “the CEC shall ensure that the data from [polling station] protocols is placed on the web-site.” **As recommended in the last joint opinion,⁴⁰ this article should be amended to oblige the CEC to publish the preliminary results per polling station immediately after they are received from DEC.**s.

Invalidation (Annulment) of Results

103. For fairness and transparency, provisions regulating the invalidation of election results (and changes to results protocols) must be clear and consistent, including which bodies are authorised to invalidate results for which elections and provision of explicit grounds for invalidation. The Election Code does not provide such clarity and consistency (for instance: Article 105, par. 12; Article 34, par. 2 f). Annulment of elections should occur only if irregularities may have influenced the outcome, i.e. affected the distribution of seats.⁴¹ Furthermore, while it appears that the DEC is responsible for invalidating election results from PECs (Article 34, par. 2 f, as amended in March 2008, 38, par. 2, and 63, par. 4), references to the CEC invalidating such results are also in the Code (Article 105, par. 13.) **It is recommended that all articles which relate to invalidation of election results be thoroughly reviewed and amended to ensure their clarity and consistency, particularly which bodies are responsible for invalidating which elections and clear criteria for invalidation of results.**

104. It is also important that the Election Code provides that in cases of invalidation of results where no repeat election will take place, the number of voters (participants) as well as the number of votes should be subtracted from the final results in all relevant protocols. This is necessary since invalidating polling station results can affect a party near the representation threshold.⁴²

³⁹ CDL-AD(2006)037, par. 122.

⁴⁰ CDL-AD(2006)037, par. 123.

⁴¹ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II. 3.3.

⁴² Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II. 3.3, par. 101:

“The powers of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.”

105. It is also recommended that the Election Code expressly provide that decisions of election commissions on invalidation of results can be appealed to a competent court.

Recount of Ballots

106. Provisions regulating recounts of ballots should also be clear and consistent, regarding the authorised bodies, the circumstances requiring recounts, and the timing and procedures to govern recounts. The Georgian Election Code does not provide such clarity and consistency. **It is recommended that the Election Code be revised to include detailed procedures and grounds for ordering and conducting recounts. The law should also require that notice of the recount be provided to accredited observers in a timely manner.**

10. COMPLAINTS AND APPEALS PROCEDURES

Requirement for Simple and Clear Procedures

107. The Election Code includes an extremely detailed framework for the adjudication of electoral disputes. Although the complaints and appeals procedures were recently simplified and clarified to some extent by the March 2008 amendments, they remain overly complex, contradictory and ambiguous.⁴³ The applicable provisions – primarily in Articles 61, 62, 77, and 77¹ – are not consolidated and are difficult to access. The provisions are also very difficult to understand, and caused confusion for complainants and decision-makers, and hindered due consideration during the 2008 parliamentary elections. A significant number of complaints were found to be inadmissible on various grounds, which is an indication that the law is too complex or formalistic. Procedures for submission of complaints related to vote buying were particularly unclear as regards the authorised venue for submission. The law is also unclear as to what remedial measures can be ordered by adjudicative bodies and regarding which body is authorised to deregister a candidate or political entity and under which circumstances. A positive feature of the March 2008 amendments, in line with previous Venice Commission and OSCE/ODIHR recommendations,⁴⁴ was the elimination of dual jurisdiction of the courts and election administration in considering complaints and appeals.

108. OSCE Commitments and Council of Europe Standards exist for procedures in the adjudication of election-related complaints and appeals.⁴⁵ **Firstly, as recommended in the previous Joint Opinions,⁴⁶ the complaints and appeals procedures should be simplified and clarified, and that any inconsistencies be addressed. All relevant procedural and evidentiary rules should be expressly included or specifically referenced in the Election Code 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.**

109. Secondly, it is recommended that complainants be provided with the option of using special complaint/appeal forms throughout the election period. It is necessary to eliminate formalism in the Election Code, so as to avoid

⁴³ Article 77, prima 1, par. 19 is one obvious example of a conflicting provision (versus Article 61).

⁴⁴ CDL-AD(2006)023, par. 138-141; CDL-AD(2006)037, par. 128-132.

⁴⁵ Part 1, paragraph 10 and Part 2, paragraph X of the Existing Commitments for Democratic Elections in OSCE Participating States; Venice Commission's Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II. 3.3. Also refer to the OSCE-ODIHR document "Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System, Warsaw 2000.

⁴⁶ CDL-AD(2006)023, par. 138-141; CDL-AD(2006)037, par. 128-132.

decisions of inadmissibility. Any flexibility built into admissibility provisions should be clear and not based on subjective decisions, and apply as broadly as possible.⁴⁷

110. Thirdly, it is recommended that the Election Code include a provision that adjudication bodies at all levels are permitted to duly consider all election-related cases (pre-election day, election day, and post-election day) on their own initiative despite any particular admissibility requirements not being met. Including in the Code, exceptions to the regular procedures for filing complaints and appeals should be avoided as much as possible to avoid confusion among stakeholders. It is vital that the procedure be clear enough so as to avoid positive or negative conflicts of jurisdiction or ambiguity as to the authorised decision-maker.

Time Limits for Filing and Consideration

111. Although time limits for lodging and deciding on complaints and appeals during an election period must be short and appeal bodies must make their rulings as quickly as possible, time limits must be long enough to develop as effective an appeal as possible, to guarantee the exercise of rights of defence and a well considered decision. The current 1-2 day timelines for lodging and consideration of complaints and appeals by election commissions and courts (some of which were shortened in March 2008 amendments) are certainly too short to consistently meet these guarantees. Moreover, the time limit for filing against decisions of the courts and election commissions starts from the time of issuance of the decision, and not the time of notification, which shortens the timeframe and is subject to abuse. **It is recommended that the Election Code be amended to provide 3-5 days, particularly at the first instance, both for lodging appeals and making rulings, as a reasonable timeline for decisions to be taken before the elections. For further appeals, a minimum of 2-3 days should be allowed for submitting and hearing of appeals.**

Access to Justice

112. Article 77, par. 1 provides for appeals against decisions of an election commission, but does not provide for appeals against actions or inactions of commissions. The code also does not provide private citizens with the right to file complaints to the election administration and courts on breaches of the Election Code or against decisions of the election administration (except regarding applications to make changes to the voters' list.) Even on election day, voters do not have a right to file complaints regarding violations of the polling procedures or to challenge the election results. **It is recommended that the Election Code be amended to allow appeals against all decisions, actions and inactions of election commissions.**

113. Moreover, voters should be given the right to file complaints concerning violations of the Election Code by campaigners, election officials, public servants, politicians, etc., in particular those that directly affect them (e.g. intimidation, vote buying, denial of the right to vote etc.) as well as the right to lodge complaints and appeals on the adoption and implementation of CEC instructions and other CEC decisions and actions.

⁴⁷ In March 2008, an amendment to Article 62 was introduced that obligated DEC's to allow complainants to correct particular technical errors in election day related complaints within a "reasonable time." The time period for correction was not included in the provision, and an equivalent provision was not provided for the filing of pre-election day complaints or complaints filed at PECs.

114. The Election Code should also permit citizens to challenge the election results on grounds of irregularities in the voting procedures, although a reasonable quorum of voters may be imposed for such appeals.

115. The relatively high cost of filing court cases was reported by complainants as a deterrent to lodging election-related complaints and appeals (approximately 45 euros to first instance courts and approximately 70 euros to appeal courts.) Due to the importance of holding democratic elections, obstacles to challenging the democratic nature of the elections should be eliminated as much as possible, which may be of particular relevance in a newer democracy,. It is **recommended that the cost of filing complaints and appeals to the various courts be drastically reduced or eliminated altogether in order to facilitate access to justice on election-related matters.**

116. The Election Code does not include some important procedural safeguards necessary to guarantee complainants and appellants due process of law in consideration of their cases by the election administration and courts. **It is recommended that procedural safeguards⁴⁸ be referred in the legislation on judiciary (if it is not the case) and that the Election Code refer to this piece of legislation and relevant provisions. The election administration and courts must respect all due of process of law guarantees while considering complaints and appeals.⁴⁹**

117. For enhanced transparency, it is **recommended that the CEC develop detailed standard operating procedures that describe step-by-step its internal process and procedures by which it will register, review, investigate, consider, adjudicate, and publish complaints and appeals and decisions related thereto.**

Remedies and Sanctions

118. The Election Code provides sanctions for only a few specific violations of the provisions, but not for most. **It is recommended that the Election Code expressly provide for the specific sanctions that may be imposed by the CEC and/or courts** for violations of the provisions of the Election Code, for instance, violations of all campaign regulations, media coverage regulations, and rules for the election administration. Sanctions should apply to all violations of election-related law, be they committed by campaign participants, authorities at all levels, or voters. If particular violations or sanctions are included in the Criminal Code or Administrative Offences Code, they should be expressly referred to in the Election Code, and at a minimum the particular articles in those laws should be referenced in the Election Code. Where the appeal body is a higher level election commission, the law must provide that it can "*ex officio*" rectify or set aside decisions taken by lower level election commissions.

⁴⁸ Procedural safeguards to consider: the minimum information required to file a complaint or appeal, the right to an open hearing, advance notification of the hearing date and location to complainant and respondent, if any, the right for both sides to present legal arguments and defence, the right to present all forms of evidence in support or defence of claim, explanation of the nature of the legal act to adopt a decision (number of votes required), the right to an impartial decision based only on the facts, law and evidence, the right of both sides to be notified in writing of the decision, with factual and legal reasoning, the right to be notified of the procedures and deadline to appeal the decision, and publication of the decision, i.e. on CEC website.

⁴⁹ Further elaboration of the principles and guidelines for election dispute resolution can be found in the OSCE/ODIHR document "Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System", Warsaw 2000.

Election Day Complaints and Appeals Procedures

119. The procedures for filing election-day related complaints and appeals as regards voting, counting and tabulation of results - throughout Articles 61, 62, 77 and 77 prima 1 - are overly complicated, and ambiguities and inconsistencies exist. There was confusion and varying interpretations of these provisions by complainants and election commissions during the 2008 presidential and parliamentary elections. There were widespread and significant irregularities in the handling of such complaints by the PECs and DEC, with inconsistent practices throughout the country. Some PECs refused to register complaints and some DEC, based on varying interpretations of the law, did not consider complaints directly submitted to them or, in the alternative, did not consider complaints forwarded to them by PECs.⁵⁰ Some of the confusion appears to result from Article 61, par. 6, which allows complaints related to counting and tabulation to be submitted to either the PEC or DEC.

120. It is recommended that the provisions setting out the election day complaint and appeal procedures be simplified and clarified. The Election Code should not allow complainants to have a choice as to which election commission to submit a complaint – it should clearly provide to which one body the complaint is to be submitted.

121. Moreover, the Election Code should simplify and clarify the jurisdiction of the PECs and DEC in the election day complaint process. The law should expressly state that complaints do not need to be recorded in the PEC Record Book or filed in duplicate to PECs and DEC in order to be considered validly filed complaints.

122. Finally, the Election Code should provide for specific sanctions to be imposed on election commission members who fail to accept or consider complaints and appeals, without valid legal reason.

123. Article 61, par. 5 stipulates how a complaint on violations regarding any aspect of the electoral process shall be drawn up before compiling the summary protocols. It is not clear how such a complaint could be drawn up prior to the compiling of the summary protocol since some of these complaints would relate to the summary protocol itself. **It is thus recommended that this provision be revised to allow for the filing of such complaints subsequent to the drawing up of the summary protocol.**

124. Complainants are not permitted to provide witness testimony in civil and administrative proceedings, according to general court interpretation of the Georgian Civil Procedures Code. Thus, accredited observers and party proxies who file complaints on incidents they witness are not allowed to provide supporting testimony in the case. Since observer organisations and political entities are not entitled to file complaints related to election day (only individual observers and proxies), as set out in Article 77, prima 1, par. 18, it is very difficult to prove witness-based cases if the complainant is not authorised to testify, especially if other witnesses abstain from testifying due to intimidation (as occurred in the 2008 parliamentary elections). Thus, **it is recommended that the Election Code expressly provide that accredited domestic observers and party proxies can serve as witnesses in complaints**

⁵⁰ For further details on the problems encountered in the filing and consideration of election-day related complaints and appeals, please refer to the OSCE/ODIHR Final Report on the observations of the 2008 Parliamentary Elections.

filed by voters and other persons involved in the electoral process or in the alternative, it should allow an individual accredited domestic observer or party proxy to file a complaint on election day on behalf of the relevant domestic observer organisation or political party, thus allowing the domestic observer/proxy to provide witness testimony in support of the complaint.

Use of Video Camera Recordings

125. As noted earlier, both the OSCE/ODIHR and the Venice Commission do not recommend use of video cameras in polling stations due to possible intimidation of voters, even if video cameras are not directed at polling booths.

Tracking and Monitoring Complaints and Appeals

126. During the 2008 parliamentary elections, the CEC made some efforts to consolidate information on complaints and appeals lodged at the various levels of the election administration. However, the information was not adequately consolidated into a usable database (for instance, relevant information for understanding the issues and reasoning of decisions was not included) nor was it updated on a timely basis or made public for increased transparency. Furthermore, the information did not include cases lodged in the various courts.

127. To enhance transparency in the complaint and appeal process, consideration could be given to requiring publication of aggregated information on complaints and appeals, as well as reasoned decisions rendered, on the CEC website.

128. Following an election, the CEC and courts should be required by law to provide a detailed report to Parliament on all complaints and appeals filed at all levels of the election administration and courts (Article 17, par. 6 can be amended to address this latter point).

Concluding remarks

129. The amendments made to the Election Code of Georgia clearly constitute an overall improvement. Nonetheless a number of provisions in the current law remain issues of concern, or raise questions due to the fact that they are not sufficiently specific. Among these issues is the number of voters in each single mandate constituency, which should be comparable. In addition, there is the question of political officials combining campaigning with official duties, as well as the issue of the use of administrative resources for campaign purposes, both of which should be prohibited.

130. As it is recommended in the OSCE/ODIHR Final report on the 21 May 2008 parliamentary elections in Georgia, the Georgian Parliament could, rather than adopting further amendments to the current Election Code, constructively enact a new Election Code in the near term, and at least one year ahead of the next nationwide election, taking into account past and the present recommendations made by the OSCE/ODIHR and the Venice Commission. This would be best accomplished according to an open and transparent process of consultation with key stakeholders that aims to reach a broad consensus.

131. Substantial efforts still need to be undertaken to enhance public confidence in the electoral system, and further political will could be demonstrated by the

authorities in this regard to address outstanding issues. Large-scale voter education should be encouraged not only vis-à-vis electoral procedures and rules, but also focused on the importance of citizens' civil and political rights.

132. Particular emphasis should be given to the need for appointing an independent Central Election Commission as enshrined in Article 17 of the Election Code, able to ascertain control at all levels of the electoral administration, to control the implementation of the election legislation in the whole of the country, and to ensure its equal application, as required by law (Article 29.) Election officials should be offered appropriate training.

133. Relevant public authorities should be fully informed of their obligations under the Election Code, and public servants and officials at all levels should be fully informed regarding the restrictions on campaigning that apply to them. Enhanced enforcement of the election-related laws by all levels of the election administration, Ministry of Interior, General Prosecutor, and the courts is also required. Therefore, as in former opinions, the Venice Commission and OSCE/ODIHR reiterate that good faith implementation of electoral legislation remains crucial.