MEMORANDUM

on

the Unified Election Code of Georgia

by

ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

This Memorandum comments on the extent to which the legal framework for media coverage of elections as established by the Unified Election Code of Georgia's (the "Electoral Code") is in accordance with international law and standards of freedom of expression. This analysis has been completed at the request of Georgia's Liberty Institute.

While the law is generally consistent with international standards in the area of election administration, ARTICLE 19 has concerns regarding the Electoral Code's failure to sufficiently address the role of the media in the electoral process and to provide adequate protection for freedom of expression and the public's right to information. Specific issues include:

- The failure to guarantee the equitable allocation of direct access broadcast airtime to all political parties and candidates;
- Failure of the Code to impose balance and impartiality requirements on the broadcast media, including public broadcasters;
- Failure of the Code to clearly set out the powers of the CEC in relation to the mass media.

We also have a number of concerns regarding the general framework of the media in Georgia. These concerns, on which we have commented in previous memoranda,[1] include:

- The continued intimidation and harassment of members of the press;
- The lack of independence on the part of the public media, including public broadcasters; and
- The lack of independent regulation of private broadcasters, including in relation to licensing.

These issues should be addressed as a matter of urgency. The process to bring Georgia's broadcasting laws in line with international standards on freedom of expression has been on-going for some time now; we recommend that it be completed by the end of the current Parliamentary term (September 2003).

II. International and Constitutional Obligations

Under international law, political parties and candidates have a right to express their views freely through the mass media, the public has a right to hear those views, and citizens have a right to adequate and balanced information that will enable them to participate fully in the democratic process. These principles are based on the rights to freedom of expression and non-discrimination, as well as the right to political participation. Guarantees of these rights are found both in international law and the Georgian Constitution, as outlined below.

Two international standard-setting documents are of particular importance for their elaboration of the general rights to a specific articulation of standards on freedom of expression in the election process. The first is Recommendation No. R(99)15 of the Committee of Ministers of the Council of Europe on *Measures Concerning Media Coverage of Election Campaigns*[2] ("COE Recommendations") and the second is ARTICLE 19's *Guidelines for Election Broadcasting in Transitional Democracies*[3] ("ARTICLE 19 Guidelines"). While these documents lack the formal status of international law, they are widely regarded as authoritative interpretations of international standards in this area.[4]

A. Freedom of Expression

Freedom of expression, a fundamental human right, is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),[5] binding on all States as a matter of

[1] ARTICLE 19 Memorandum on two draft laws On Communication and Broadcasting, March 2003; ARTICLE 19 Memorandum on the Draft Broadcasting Law, December 2002; ARTICLE 19 Memo on Draft Changes to Communications Licensing, April 2001. All can be found on our website, at http://www.article19.org.

[2] Adopted September 1999.

[3] London: August 1994.

[4] E.g. Annual Report of the UN Special Rapporteur on Freedom of Expression, 28 January 1998, E/CN.4/1998/40.

[5] UN General Assembly Resolution 217A(III), 10 December 1948.

customary law.[6] It is also guaranteed by a number of legally binding international human rights treaties, including the European Convention on Human Rights (ECHR),[7] Article 10(1) of which states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

International law does permit limited restrictions on the right to freedom of expression and information in order to protect various private and public interests. Article 10(2) of the ECHR states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

This Article subjects any restriction on the right to freedom of expression to a strict three-part test. This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure this interest.[8] The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessity". Although absolute necessity is not required, a "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.[9]

Freedom of expression is also protected by Articles 19 and 24 of the Georgian Constitution, which state:

> Article 19
> 1. Every individual has the right to freedom of speech, thought, conscience, religion and belief.
> 2. The persecution of an individual for their thoughts, beliefs or religion is prohibited as is also the compulsion to express opinions about them.
> 3. These rights may not be restricted unless the exercise of these rights infringes upon the rights of other individuals.
>
> Article 24

[6] See, for example, Filartiga v. Pena-Irala, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[7] E.T.S. No. 5, in force 3 September 1953. Georgia ratified the ECHR on 20 May 1999.
[8] For an elaboration of this test see *Goodwin v. United Kingdom*, Judgment of 27 March 1996, Application No. 17488/90, 22 EHRR 123 (European Court of Human Rights), paras. 28-37.
[9] *Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Application No. 6538/74, 2 EHRR 245 (European Court of Human Rights), para. 62. These standards have been reiterated in a large number of cases.

1. Every individual has the right to receive freely and to disseminate information and to express and disseminate his opinion orally, in written or any other form.
2. Mass media is free. Censorship is prohibited.
3. Monopolisation of the mass media or the means of spreading information by the state, legal or natural persons is prohibited.
4. Points 1 & 2 of this Article can be restricted by law and by the conditions necessary in a democratic society for the guarantee of state and public security, territorial integrity, prevention of crime, and the defence of rights and dignities of others to avoid the revelation of confidentially received information or guarantee the independence and impartiality of justice.

Freedom of political debate has been recognized as an essential foundation of a democratic society by institutions and governments around the world. The European Court of Human Rights has stated: "[F]reedom of political debate is at the very core of the concept of a democratic society."[10] The fundamental importance of freedom of political expression rests in part on the importance of an informed electorate to the functioning of a genuine democracy. The European Court of Human Rights has recognized that media freedom is one of the most important mechanisms for developing an informed citizenry:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion: it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[11]

Governments are obliged to ensure media pluralism and to encourage a diversity of sources of information. The Committee of Ministers of the Council of Europe has declared that "states…should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions."[12] The European Court of Human Rights has also emphasized that "the State is the ultimate guarantor…of the principle of pluralism," and that pluralism is necessary if the media is successfully to accomplish its public functions: "This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely."[13]

The State's obligation to ensure pluralism in the media during election periods has been specifically addressed in CoE Recommendation No. R(99)15, which notes: "During election campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media."[14]

B. Non-Discrimination

[10] *Lingens v. Austria*, Judgment of 8 July 1986, Application No.9815/82, para.42.
[11] *Castells v. Spain*, Judgment of 23 April 1992, Application No.11798/85, para.43.
[12] Declaration on the Freedom of Expression and Information, adopted by the Committee of Ministers, 29 April 1982, para.6.
[13] *Informationsverein Lentia and Others v. Austria*, Judgment of 24 November 1993, Applications Nos. 13914/88, 15717/89, 15779/89 and 17207/90, para.38.
[14] Note 2, Section II(1).

The right of political parties and candidates to have equitable access to the public media receives powerful support from the strong prohibition against discrimination, including on grounds of political opinion, under international law. Article 14 of the ECHR states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, *political or other opinion*, national or social origin, association with a national minority, property, birth or other status. [Emphasis added]

Article 38 of the Constitution of Georgia states:

> 1. Citizens of Georgia are equal in social, economic, cultural and political life regardless of national, ethnic, religious or language origin. According to universally recognised principles and norms of international law all have the right to develop their culture freely without any discrimination and interference. They may use their language in private and public life.
>
> 2. In accordance with universally recognised principles of international law exercising of minority rights should not oppose the sovereignty, integrity and political independence of Georgia.

In relation to access to airtime during an election campaign, the European Commission of Human Rights has repeatedly stated:

> [T]he denial of broadcasting time to one or more specific groups may, in particular circumstances, raise an issue under Article 10 alone or in conjunction with Article 14 of the Convention. Such an issue would, in principle, arise for instance if one political party was excluded from broadcasting facilities at election time while other parties were given broadcasting time.[15]

C. Right to Political Participation

The right to political participation is guaranteed in both the UDHR and under the ECHR. Article 3 of the First Protocol to the European Convention on Human Rights states:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.[16]

Article 5 of the Constitution of Georgia states that:

> 1. The people are the only source of state power in Georgia. State power is only exercised within the framework of the Constitution.

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[15] *X and the Association of Z v. the United Kingdom*, Admissibility Decision of 12 July 1971, Application No. 4515/70, 38 *Collected Decisions* 86 (1971). See also the Commission's decisions in *Sundberg v. Sweden*, 15 October 1987, Application No. 12439/86 (inadmissible); *Stiftelsen v. Sweden*, 9 December 1988, Application no. 12734/87 (inadmissible); and *Alternatives Lokalradio Bern and ors v. Switzerland*, 16 October 1986, Application No. 10746/84 (inadmissible).

[16] E.T.S. No.9, 20 March 1952.

2. Power is exercised by the people through referenda, through their representatives and through other forms of direct democracy.

Detailed statements of the implications of this right for the role of the media during elections can be found in various international agreements reached under the aegis of the Organisation for Security and Co-Operation in Europe (OSCE). For example, in the Copenhagen Document of June 1990, the participating States committed themselves to "ensure that the will of the people serves as the basis of the authority of government" by, among other means, ensuring "that no legal or administrative obstacle stands in the way of unimpeded access to media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process."[17]

III. Media and Elections: the Georgian Legal Framework

Generally, the Georgian Electoral Code is generally consistent with international standards on the conduct of elections.[18] However, the provisions dealing with media coverage of elections need to be improved and, in some instances, clarified. In addition, the Code fails to provide for a number of important matters, such the requirement that all broadcasters should be balanced and impartial in their coverage of the election. We are also concerned that the on-going process of reforming Georgia's broadcasting laws to bring them in line with international standards on freedom of expression should be completed by the end of the current Parliamentary term. In particular, a new, independent broadcast regulator should be set up, and the state broadcaster should be transformed into a true public service broadcasting system.

The following paragraphs will elaborate these concerns in detail, providing recommendations for improvement throughout.

A. Role and Independence of the Central Election Commission

The Electoral Code establishes the Central Election Commission (CEC) and bestows upon it significant responsibilities and powers over the conduct of elections in Georgia. These powers – the bulk of which are listed in Articles 29, 30 and 105 – include but are not limited to:

- Administration and control of the activities of the lower election commissions;
- Determination of the rules for nominating candidates for membership of the Precinct Election Commissions;
- Election of three of the seven members of the District Election Commissions;

[17] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, para. 7.8. The document was signed by the USSR, of which Georgia formed part at the time.

[18] See: Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Opinion on the Unified Election Code of Georgia*, Opinion No.182/2001_geo, Strasbourg, 24 May 2002. While the Opinion addresses an earlier version of the Code, the majority of its provisions – with the exception of those dealing with the appointment of the Central Election Commission, discussed below – are unchanged.

- Ensuring the equal exercising of the rights of participants or elections and election subjects;
- Accrediting the members of the media that will cover the elections (discussed below);
- Ensuring the production and distribution of ballots and special envelopes to the District Election Commissions;
- Determining new rules for the conduct of elections;
- Deciding on the allocation of election precincts;
- Declaring the results of the election;
- Registering parties taking part in the election;
- Announcing final election results, and;
- Declaring an election invalid.

Decisions of the CEC constitute binding legal acts (Article 25). In brief, the CEC has enormous control over the electoral process in Georgia and therefore, given the importance of its role, it is of utmost importance that the CEC – both in fact and appearance – be independent of the government.

As provided for by Article 27 of the Electoral Code, the CEC is to have seven members, nominated by a coalition of ten associations and/or foundations "whose goals include facilitation of building of democracy, protection of human rights and fair elections" (paragraph (2)). At least 14 potential members must be nominated by the coalition, and from these the Georgian Parliament will elect the CEC members "through roll-call vote, by no less than 2/3 of the listed composition of the members" (paragraph (6)). The Chairperson, Deputy Chairperson and secretary are elected from among the members of the newly composed CEC (Article 28(2)).

This manner of appointing the CEC was welcomed as a positive move towards enhancing Georgia's democratic process when it was adopted into law in 2002.[19] However, there have been recent reports that the Shevardnadze government may be planning to amend the Electoral Code in a manner that would re-politicise the composition of the CEC by stocking it with political appointees. These proposals have caused enormous controversy and protest within Georgia, but for the time being the law has not changed.[20]

Recommendation:
- The government should not amend the way in which CEC are appointed if to do so will result in the politicisation of this body, thereby compromising its independence.

B. The Role of Publicly Owned Media

Free direct access to airtime for political parties and candidates, at least in the public media, is highly advisable in transitional democracies as an essential means for ensuring that voters can make informed electoral choices. The ARTICLE 19 Guidelines state: "Government media must grant political parties or candidates airtime for direct access

[19] *Ibid.* para.26.
[20] As reported by Radio Free Europe, 3 June 2003: http://www.rferl.org.

programmes on a fair and non-discriminatory basis."[21] The Council of Europe Recommendation states:

> Member States may examine the advisability of including in their regulatory frameworks provisions whereby free airtime is made available to political parties/candidates on public broadcasting services in electoral time.
>
> Wherever such airtime is granted, this should be done in a fair and non-discriminatory manner, on the basis of transparent and objective criteria.[22]

Essential elements of the principle of direct access relate to the scheduling of broadcasts and the process for assigning time slots. As provided for by the ARTICLE 19 Guidelines:

> Direct access programmes should be aired throughout the campaign period and at times when the broadcasts are likely to reach the largest audiences. The government media violate their duty of balance if they air programmes of some parties or candidates at hours (such as past midnight or during the working day) when it is inconvenient for large segments of the population to view or hear them.
>
> Time slots for direct access programmes must be assigned to each of the registered political parties pursuant to an equitable process.[23]

The Georgian Electoral Code does provide for free airtime to political parties and/or candidates. Article 74 of the Electoral Code, paragraph (8) states that: "State Television and Radio of Georgia are obliged to allocate a daily three hours of free-of-charge airtime for the purpose of election agitation, which will be equally distributed among election subjects." However, the Code fails to provide sufficient detail to enable to this provision to be put in practice. Particularly, it does not specify whether the three hours mentioned apply to both radio and television, how or according to what criteria the airtime is to be divided, how slots for airtime will be assigned, and who will be responsible for supervising the process. We would also welcome elaboration on whether every single candidate for Parliament will be entitled to airtime on national TV or whether airtime will be granted to parties only.[24]

First, the Code should be specific on the question whether there will be three hours on radio as well as on television, or whether the three hours should be shared between the two. The Code also fails to specify the start date for free airtime for candidates. In deciding both these issues, it should be borne in mind that during election times, there is a large production of political messages and programmes, which can lead to the saturation of the electorate. A daily three hours of prime time election broadcasting on TV may well have the effect of turning voters off – particularly given that there are only two publicly-owned national TV channels. Needless to say, this would be counter-productive.

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[21] Note 3, Guideline 9.
[22] Note 2, Section II(4).
[23] Note 3, Guidelines 9.4 and 9.5.
[24] The term 'election subject' applies to both: Article 3(h).

Second, the Code should provide detailed guidance regarding how or according to what criteria the daily three hours is to be allocated amongst the different political parties. At present, no process, equitable or otherwise is provided for in the Code. The ARTICLE 19 Guidelines state that: "The amount of time allocated to the candidates must be sufficient for them to communicate their messages, and for the voters to inform themselves about the issues, party positions, and qualifications and character of the candidates."[25] The law must find a way to allow broadcast access to all the genuine political contenders, while recognizing that flooding the airwaves or dividing limited time between too many contenders may aversely affect the electorate's ability to make an informed choice. Qualification and allocation of time could be based on performance in prior elections, or as a result of a political agreement among the contending forces following round-table negotiations – for example.

Third, in addition to establishing a method for qualifying and allocating amounts of access time, it is necessary to select an equitable and impartial method for assigning specific time slots. The effect of direct access programmes may be diminished if they are shown at hours that are inconvenient for potential voters. The Electoral Code relies on the drawing of lots to resolve other issues and this approach may also be appropriate for awarding time-slots. Other governments have used an alphabetical rotating system, or a computer-generated random assignment method.

Fourth, the Code fails to specify who or which body will be responsible for supervising this process. The ARTICLE 19 Guidelines recommend that, "the allocation of air time be carried out by an independent body in consultation with, and with the agreement of, all the parties."[26] This could either be the Central Election Commission, or a new body created uniquely for this purpose.

Finally, a number of print media in Georgia are owned by the Government. The CoE Recommendation stresses that "print media outlets which are owned by the public authorities, when covering electoral campaigns, should do so in a fair, balanced and impartial manner … If such media outlets accept paid political advertising in their publications, they should ensure that all political contenders and parties that request the purchase of advertising space are treated in an equal and non-discriminatory manner." The Code does not address these issues.

Recommendations:

- The Electoral Code should be amended to provide a process for allocating broadcast time amongst the political parties and/or candidates.
- A method for assigning specific broadcast time slots should also be provided for in the Electoral Code.
- The allocation of broadcast time and specific time slots should be carried out by an independent body such as the CEC.
- Article 74(8) should be amended to clarify whether direct access is granted to both radio and television, or only one or the other. Political parties and candidates should

[25] Note 3, Guideline 9.3.
[26] *Ibid.*, Guideline 9.2.1

not be granted access to only one but not the other.
- The Electoral Code should require all publicly owned media, including newspapers, to be fair and balanced in their coverage.
- The Electoral Code should ensure that all political contenders are able to purchase advertising space in publicly owned print media, if they so wish.

C. The Role of Private Broadcasters

In Georgia, private broadcasters command a sizeable audience and exert a sizeable degree of influence over public opinion. It is generally accepted that, while the print media have freedom in their reporting of elections, broadcasters should follow a number of obligations. Most importantly, private broadcasters should be required to respect the need for balance and impartiality during election periods. Particular care should be taken with regard to news and current affairs programs, including discussion programmes such as interviews or debates, and no privileged treatment should be given to any of the candidates.[27]

First, the Code omits to impose any requirements of balance and impartiality on private broadcasters. This is an important issue which should be addressed either in the Electoral Code, or in the new broadcasting law.

Second, in addition to being subject to a general requirement of balance and impartiality, private broadcasters should not discriminate in the allocation of advertising time. This is recognised in the Electoral Code. Paragraph (9) of Article 74 states that:

> Private TV and radio companies determine an equal price for airtime for election subjects and submit to election commissions the information on allocation and distribution of airtime.

However, the Electoral Code fails to provide how this provision will be enforced. It does not state what action, if any, election commissions are to take based on the pricing and allocation data submitted to them by private television and radio broadcasters. This highlights the need for the CEC or another body to have an explicit monitoring and complaints resolution function,[28] which should include the power to ensure that the "equal price" alluded to in the provision is not prohibitive to smaller parties and/or candidates, and that the available air time is not purchased in disproportionate amounts by the wealthier parties and/or candidates. Finally, the provision could be further elaborated by stipulating that access to the private broadcasters be on the same terms, generally – not just at the same price.[29]

Recommendations:
- The Electoral Code should impose a duty on private broadcasters to provide fair,

[27] CoE Recommendation, note 2, Section II.
[28] This is elaborated in further detail, below.
[29] Note 2, Section 3.4.

balanced and impartial information in their reporting of news and current affairs during election campaigns.
- Article 74(9) should be amended to state that access to private broadcasters will be granted on both equal terms and equal price to all political parties and candidates.

D. Accreditation of the Media

Article 72(1) of the Electoral Code states that: "[r]epresentatives of the press and other mass media, accredited at the relevant election commission, have the right to attend election commission sessions and to be present in the polling station on polling day." Paragraph (2) provides that accreditation of media covering several election districts will be carried out by the Chairperson of the CEC, whereas media covering only one election district will be accredited by the Chairperson of the relevant District Election Commission. The relevant Chairperson has three days to decide the issue of registration and to issue the relevant "licenses" to the press (paragraph (4)). On election day itself, no media organization may have more than 3 "representatives" in an election precinct at the same time. Decisions of the election commissions regarding accreditation may be appealed to the district court within three days of being issued, and the court will make its final decision within three days of receiving the appeal (Article 77(14)).

The accreditation of the media is a subject of controversy. Where the information that must be submitted by the media in order to obtain accreditation is purely technical in nature, and where the issuing body has no discretion to refuse accreditation once the requisite information has been supplied, then there will generally be no unwarranted restriction on freedom of expression. However, where a body has the ability to refuse accreditation on non-technical, substantive grounds, then the accreditation system will most likely run afoul of the requirements of international law. A refusal to grant accreditation is tantamount to denying a person his or her right of expression, thus the reason for doing so must satisfy the three-part test for the legitimacy of restrictions on freedom of expression.[30]

In this regard, Article 72 of the Electoral Code requires elaboration, most importantly by stating the criteria for accreditation. These criteria should be technical and administrative in nature, limited to supplying personal details such as the name of the media representative and the name and address of the publication for which s/he works, or whether s/he is a freelance journalist. The Code should stipulate that the relevant electoral commission has no discretion to refuse accreditation where the applicant has supplied the relevant details.

Recommendations:
- The Electoral Code should be amended to include the criteria for accrediting members of the press, which should be limited to supplying essential personal details.
- The Code should stipulate that the electoral commissions have no discretion to refuse accreditation once the requisite information has been supplied.

[30] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995 (UN Human Rights Committee).

E. Voter Education

During the period preceding an election, it is crucial that the public are properly informed about voting processes and other matters relevant to the election, including through the public media. On the important question of how to provide for voter education, the ARTICLE 19 Guidelines state:

> Guideline 11
> Government media are obliged to broadcast voter education programmes unless the government has undertaken other information initiatives which are likely to reach as many voters as would the broadcast programmes.
>
> Guideline 11.1
> The programmes must be accurate and impartial and must effectively inform voters about the voting process, including how, when and where to vote, to register to vote and to verify proper registration; the secrecy of the ballot (and thus safety from retaliation); the importance of voting; the functions of the offices that are under contention; and similar matters.

The Electoral Code provides that election campaigning may be carried out through the mass media (Article 73(6)), and assigns the CEC various powers and responsibilities to publish information regarding election districts, the registration of candidates and the results of the election (Article 29). Article 34(1)(h) states that one of the duties of the District Election Commission is to "[f]acilitate meetings of election subjects with voters". Finally, Article 75(1) states that:

> District Election Commissions, together with relevant State agencies, no later than 15 days before polling, ensure publication and dissemination of information materials, dissemination of party lists, candidates nominated to the election district, biographical data of the candidates and election programmes.

Even taken together, these provisions do not provide an adequate voter education programme, because the specific obligations are both too vague – it is not clear what is meant by "information materials" in Article 75, for instance – and are too limited in scope. Moreover, since the means of dissemination are not specified, it is debatable whether the responsible election commissions will be able to more effectively inform voters of the important issues than the media.

Recommendations:

- The Electoral Code should require the CEC to ensure that the electorate are properly informed about voting processes and other relevant matters, including through publicly owned media.

F. Day of Reflection and Opinion Polls

It is often considered that, in the day(s) immediately before the election, voters should have some time to 'digest' all the information that they have received during the election campaign. In recognition of this consideration, the CoE Recommendation suggests that:

> Member States may consider the merits of including the provision in their regulatory frameworks to prohibit the dissemination of partisan electoral messages on the day preceding voting.[31]

The Recommendation also warns that material that is published in the media other than partisan electoral messages may have an implicit political message or content.[32] This is true of editorials, but also of data that is presented as 'factual', such as polls and projections commissioned or conducted by a source that is not impartial. The impact of polls is greatest in the days immediately preceding election day. For instance, a prediction that one candidate will win by a large margin may incline voters who are primarily concerned about that one candidate to stay home and not participate in other votes on the same ballot. Consequently, many governments have adopted laws or regulations that control the reporting of electoral opinion polls by the media. In Canada, for example, the *Canada Elections Act, 2000* prohibits the transmission of new election survey results to the public on polling day and before the close of all the polling stations in the electoral district. The Czech Republic and Montenegro both prohibit the publicly owned media from publicising electoral survey results for the entire week preceding election day and exit polls are also interdicted.

The Electoral Code does not provide for a day of reflection, nor does it restrict the publication of election polls and projections on the day(s) immediately preceding the elections.

Recommendation:

- The government should consider the inclusion of a "day of reflection" provision in the Electoral Code.
- The government should consider restricting the publication of pre-election surveys and exit-poll results on the day(s) immediately preceding the elections.

G. Content Restrictions

It is essential during an election that parties be given wide scope to present their views and programmes to the public and that the media be free to disseminate these to the public without interference. The ARTICLE 19 Guidelines state that:

> It is strongly recommended that the media be exempted from legal liability for unlawful statements made by candidates or party representatives and broadcast during the course of election campaigns, other than those which constitute clear and direct incitement to violence. The parties and speakers should be held solely responsible for any unlawful statements they make.[33]

Since laws of general application, for example relating to defamation, remain in force during election periods, and since these laws often provide for liability not only of the

[31] Note 2, Section III(1).
[32] *Ibid.*, Explanatory Memorandum.
[33] Note 3, Guideline 6.

author of statements but also of those who publish or broadcast the statements, it is recommended that the media be granted some form of immunity for statements made by parties and candidates, at least during direct access programmes. This will prevent the media from being required to screen election programmes for actionable or illegal content – a process in which they would be likely to err on the side of caution.

Recommendation:

- The media should be protected against indirect liability for statements made in direct access programmes, throughout the duration of the election campaign, outside of limited circumstances that are explicitly provided for in the law.

H. Non-Interference and Protection Against Harassment

The general situation regarding freedom of expression is an important factor in considering the quality of election coverage. All media should be free to report on the elections without being hindered, harassed or subjected to violence or threats. It is disturbing in this regard that new reports of violence continue to surface and that past cases do not appear to be pursued as vigorously as they should.

In September 2002, the Council of Europe Committee of Ministers published a report on the situation of the media in Georgia that identified significant limits on media freedom within the country, including the ongoing harassment and intimidation of journalists.[34]

According to the report:

> It is quite clear that those who criticise established interests in Georgia do so at considerable personal risk…Provincial journalists complained [to us] that local governors use a variety of weapons against investigative journalists including verbal attacks at press conferences, police interventions, warnings from local prosecutors, tax inspections and power shortages.[35]

The report specifically mentions attacks on the Liberty Institute, Georgia's principal human rights organisation, and two armed attacks on the private broadcaster Rustavi 2 in 2002, following the murder of a presenter in July 2001.[36]

It is important that the authorities should take all steps necessary to prevent such incidents. As the CoE Recommendation states:

> Public authorities should refrain from interfering in the activities of journalists and other media personnel with a view to influencing the elections.

[34] *Compliance with member States' commitments – Freedom of Expression and Information,* Experts report on the situation in Georgia, CM/Monitor (2002)17 ("COE Report"). The report was only declassified in February 2003.
[35] *Ibid.*, paras.52-53.
[36] *Ibid.*, para.52.

> Public authorities should take appropriate steps for the effective protection of journalists and other media personnel and their premises, as this assumes a greater significance during elections. At the same time, this protection should not obstruct them in carrying out their work.[37]

The ARTICLE 19 Guidelines similarly urge governments to make special efforts to investigate all acts, or threatened acts, of violence, intimidation or harassment directed against the media, or property belonging to a media organization.[38]

Although the Electoral Code prohibits armed persons from entering polling stations (Article 55(3)), there are no provisions specifically directed at protecting the media from interference or harassment. In any event, we would stress that while protection through the law is important, it is equally important that these laws are enforced and that in practical terms, the authorities do all they can to end harassment and violence against media professionals – including bringing to justice those responsible for past violations.

Recommendation:

- The Electoral Code should include provisions that explicitly protect the media from interference by public officials and that impose an obligation on the government to investigate attacks against the press.
- The government should take all steps necessary to end violence against and harassment of media professionals and bring to justice those responsible for attacks in the past.

I. Monitoring and Complaints Body

Both the CoE Recommendation and the ARTICLE 19 Guidelines underline the necessity of access for candidates, parties, members of the public and media workers to a complaints system as a means of ensuring that the obligations discussed in this Memorandum are respected.[39] This body must be impartial and must act promptly and fairly, and its decisions must be subject to prompt review by the courts. It should be able to hear complaints from media workers, for example relating to alleged incidents of harassment, as well as from election candidates, for example relating to allegations of incorrect reporting. This body could also exercise the function, referred to above, of enforcing the direct access provisions in the Electoral Code.

As currently structured (see Section A of this Chapter) the CEC could potentially carry out this function. However, proposed amendments to the composition of the CEC would re-politicise the body and undermine its perceived independence and legitimacy in the eyes of the public, thus preventing it from carrying out any monitoring without facing accusations of unlawful interference with the media and the democratic process.

[37] Note 2, Section IV(1) and (2).
[38] Note 3, Guideline 4.
[39] *Ibid.*, Section II(2) and Note 3, Guideline 13.

A monitoring and complaints body could also be given the power to order a right of reply or correction – the alternative would be through expedited court proceedings. Because of to the particular power of defamatory statements to cause injury during campaign periods, redress for such statements should be available in a timely fashion. An opportunity to reply, or to a correction or retraction, can provide a particularly timely and effective remedy in these circumstances.[40] The CoE Recommendation states:

> Given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply under national law or systems should be able to exercise this right during the campaign period.[41]

Recommendation:

- The governments should either empower the CEC – as currently composed – or create a new independent body, with powers to monitor and hear complaints regarding violations of freedom of expression during the conduct of an electoral campaign.
- The Electoral Code should provide for the timely exercise of any right of reply arising during an election campaign.

J. Additional Restrictions on Freedom of Expression

Article 75(2) of the Electoral Code states that the election programme of a political party or candidate "must not contain propaganda of war and violence, of overthrowing the existing State or social system or replacing it through violence, of violating territorial integrity of Georgia, of calling to instigate national strife or enmity, religious and ethnic confrontation."

Article 74(3) of the Code restricts freedom of expression and freedom of association – the latter protected by Article 11 of the ECHR – in the following terms:

> It is inadmissible to forbid and stop gatherings and manifestations, except for cases when there are slogans calling to violate human rights and liberties, independence, and the territorial integrity of the country, to instigate national, ethnic, provincial, religious, and social strife, to overthrow the constitutional system and replace it through violence, as well as to propagate war and violence.

While both provisions pursue legitimate aims, we are concerned at the considerable potential for abuse of these provisions. We welcome the 'positive' formulation of Article 74 – the starting point of which is that election gatherings should be allowed to take place without hindrance – but the Electoral Code should make it absolute clear that election rallies should only ever be prohibited or broken up as a last resort, when it is absolutely clear that the participants are calling for a violent overthrow of the democratic order.[42]

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[40] Note 3, Guideline No.7.
[41] Note 2, Section III(3).
[42] E.g. *Yazar and Others v. Turkey*, judgment of 2 April 2002, Application Nos. 22723/93, 22724/93 and 22725/93.

Even then, unless there is an imminent danger of violence, the discretion to break up a rally should not be left to individual police officers or other law enforcement agencies. Rather, a judicial order should be obtained and an opportunity should be given for both sides to be heard.

Second, the prohibition in Article 75 on the overthrow of the constitutional order should properly be placed in a law of general application, such as the criminal code. By repeating the prohibition in a sector-specific law such as the Electoral Code, a 'double warning' is sent to participants in the political process that their conduct must at all times be irreproachable. In view of the importance in democratic society of all election processes, this is particularly unfortunate.

Recommendation:

- Election rallies should only be broken up or prohibited by judicial order, when it is absolutely clear that the participants are calling for a violent overthrow of the democratic order.
- The prohibition on the use of materials calling for the overthrow of the constitutional order should be placed in a law of general application, such as the criminal code.

K. Reforming Broadcasting Legislation

To ensure independent, impartial and balanced broadcast coverage of the elections, it is imperative that the process to reform Georgia's broadcasting laws is completed as soon as possible. Diverse and balanced coverage of parties and candidates is not possible in the absence of an independent media sector, including a thriving and independent public service broadcaster.

ARTICLE 19 has commented on several versions of the draft broadcasting laws that have been produced over the last few months.[43] We welcome the progress that has been made in successive drafts, particularly in relation to ensuring the independence of both the broadcast regulator and the public service broadcaster. However, we are concerned at the various delays in this crucial process. The current broadcasting laws do not provide the guarantees necessary to ensure independence and pluralism in the broadcasting sector. For example, there is significant scope for government interference with the current regulator. Where the media is subject to government or political interference, it is unlikely that the guarantees recommended in the preceding sections will be effective.

Recommendations:

- As a matter of urgency, the process to bring Georgia's broadcasting laws in line with international standards on freedom of expression should be brought to a conclusion.

[43] Note 1.