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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

INTERIM JOINT OPINION ON THE DRAFT AMENDMENTS TO THE ELECTORAL CODE OF ARMENIA version of 19 April 2005

by the Venice Commission and OSCE/ODIHR

Adopted by the Council for Democratic Elections at its 13th meeting (Venice, 9 June 2005) and the Venice Commission at its 63rd plenary session (Venice, 10-11 June 2005)

on the basis of comments by

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I. INTRODUCTION

1. This Joint Opinion follows the previous opinions on the Electoral Code of the Republic of Armenia provided by the Venice Commission and OSCE-ODIHR. This opinion is specifically based on the most recent previous opinion and on the draft law amending the Electoral Code, namely:

- *The Preliminary Joint Opinion on the Revised Draft Amendments to the Electoral Code of Armenia by OSCE/ODIHR and the Venice Commission from 30 March 2005 (CDL-AD(2005)008; further referred to as Preliminary Joint Opinion);*
- *Draft Revised Joint Opinion on the Revised Draft Amendments to the Electoral Code of Armenia, from 31 March 2005 (CDL-EL(2005)010);*
- *The unofficial English translation of the Draft Law on Amendments and Additions to the Electoral Code of the Republic of Armenia, version of 19 April 2005;*
- *The version of the Electoral Code of 3 August 2002 (CDL(2003)052).*

2. These comments also take into consideration a letter from the Head of the Legislation Analysis and Development of the National Assembly to Ambassador V.F. Pryakhin that states there are three additional changes in the text of the draft amendments. It is assumed that the changes stated in the letter will also appear in the final text of the draft amendments.

3. The draft amendments implement several of the recommendations contained in the Preliminary Joint Opinion and other previous joint OSCE/ODIHR and the Venice Commission opinions and constitute positive improvement in the legal framework for elections. Authorities in Armenia are to be commended for making these improvements.

4. The Electoral Code could still be improved, particularly in the areas of election administration, voter lists, transparency, and the processes for filing election related complaints and appeals. Of particular concern are the provisions for election complaints and appeals, which fail to create a sound legal framework for the adjudication of disputes and protection of suffrage rights.

5. Additionally, although the draft amendments reviewed constitute overall improvement of the Electoral Code, good faith implementation of the Code remains crucial for the conduct of genuinely democratic elections.

6. These comments reflect previous joint opinions and other written documents provided by the OSCE/ODIHR and the Venice Commission to the authorities in Armenia. However, prior opinions, considerations, comments and recommendations of the Venice Commission and the OSCE/ODIHR should also be considered as they do provide additional supportive analysis of the comments made herein.

II. DRAFT AMENDMENTS TO THE ELECTORAL CODE

A. FORMATION OF CENTRAL AND TERRITORIAL ELECTION COMMISSIONS

7. The draft amendments constitute improvement as they increase political pluralism in the formation of the Central Election Commission (CEC) and Territorial Election Commissions (TECs). The OSCE/ODIHR and the Venice Commission have previously recommended that these election commissions be established in a pluralistic manner, minimizing the undue influence of the executive branch government or a single political force over these commissions.[1] The draft amendments constitute a positive movement to achieve a greater degree of political pluralism in election administration. As no law can guarantee the impartiality in the real functioning of the electoral commissions, the OSCE/ODIHR and Venice Commission once more stress that the good faith implementation of the provisions on electoral commission formation remains crucial.

8. Both appointment models[2] require judicial membership on the CEC and TECs. The OSCE/ODIHR and the Venice Commission have encouraged involvement of the judiciary in the appointment process for election commissions. However, neither institution has suggested that elections in Armenia should be administered by judges. Considering that the draft amendments regulating election complaints and appeals permit judicial review of election commission decisions, actions, and inaction, it would be advisable to add safeguards in the law to address the situation where members of the judiciary are also serving on election commissions.[3] It should be explicitly specified that a judge must not sit in review of a decision in which he or she participated as a commission member.[4]

9. The draft amendments do present three questions which should be addressed:

- what will be the potential effect on the independence of the judiciary,
- what effect will this arrangement have on public perception and confidence in the judiciary as well as in election administration, and
- will judges be placed in the potential conflict situation of participating in making a decision as well as reviewing the decision.

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[1] *Political pluralism is a foundational OSCE commitment that is stated or reaffirmed in no less than eight OSCE documents. See 1990 Copenhagen Document, 1990 Paris Document, 1991 Moscow Document, 1992 Helsinki Decisions, 1994 Budapest Summit Declaration, 1994 Budapest Decisions, 1996 Lisbon Summit Declaration, and 1999 Istanbul Charter for European Security.*

[2] *The draft amendments present two alternative models for establishing the CEC and TECs. The concerns raised in these comments are applicable to some degree to both models.*

[3] *Draft Article 40, regulating complaints against election commissions, specifies that first instance courts and appellate courts will review decisions of the CEC and TECs.*

[4] *An independent judiciary is indispensable to justice in any society. A judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judicial duties of a judge take precedence over all the judge's other activities. A judge should conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties.*

10. These comments should not be interpreted as suggesting that there can be no involvement of judicial institutions in the appointment process for the CEC and TECs, but the questions should be considered when determining the role of the judiciary in election administration. As noted, there is a distinction between judicial involvement in appointments and the administration of election processes by judges.

11. Draft Article 20 (amendment to Article 38 paragraph 3) grants the President of Armenia appointment powers over vacancies on the CEC and TECs during the 20 days before an election, if the minimum number of commission members would not be otherwise present. There appears to be no reason why the original appointing body could not convene immediately and appoint a replacement. This especially applies to the TECs, whose members are appointed by the members of the CEC. Consideration should be given to providing at least a minimum amount of time for replacement by the appointing body before transferring this appointment power to the President of Armenia.

12. Consideration should also be given to specifying the appointing process that a party alliance in the National Assembly must follow in order to make its appointment. This would include stating the voting requirements for successful appointment and the number of balloting rounds that must be taken. The need for details is particularly important for a body such as a party alliance since such a body may have few, if any, provisions relating to the conduct of its internal business. Problems may also be presented should a party alliance break apart into the constituent parties. The details regulating the appointing process should be stated for party alliances due to these concerns.

13. It should be noted that, although appointment powers for the CEC and TEC are held by various sources under the draft amendments, the process of appointment must be completed by Presidential decree.[5] It is recommended that additional text be included to make it clear that the need for a Presidential decree is merely a formality and that the President has no power to veto, negate, or prevent an appointment by reason of this formality. In fact, it would be preferable to also include text that places an affirmative obligation on the President to expeditiously issue the decree.

B. FORMATION OF PRECINCT ELECTION COMMISSIONS

14. Article 37 provides that Precinct Electoral Commissions (PECs) are "appointed by members of the respective Territorial Electoral Commissions, according to the principle of one member of the Territorial Electoral Commission – one member of the Precinct Electoral Commission". Thus, any concern expressed above about the appointment principles governing appointment of the TEC is also applicable to the appointment of the PEC.

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[5] *The letter from A. Khachatryan to Ambassador V.F. Pryakhin, which is noted in the introduction to these comments, states that Articles 35 and 36 "should be read": 'The composition of the Central Election Commission and constituency election commission is determined by the decree of the President of the Republic of Armenia". The letter further states that "Therefore it is recommended to reserve the competence of the ratification of the composition of the aforementioned commissions appointed by various political parties or the court, to the President of the Republic so that pursuant to the decree signed by him the commissions could be deemed shaped."*

15. The amendment to Paragraph 3 of Article 37 provides that PEC vacancies on election day are filled by conducting a lottery drawing from the pool of individuals who have taken part and been qualified in professional training courses by the CEC. Consideration should be given to making this appointment process applicable to all PEC appointments as this could facilitate professionalism in these commissions. The appointment process for the PECs would be non-partisan since membership is determined by lottery. As PECs constitute a significant segment of election administration, such amendment would increase professionalism and public confidence in election day procedures.

C. ELECTORAL CONSTITUENCIES

16. The draft amendments provide more transparency for the formation of electoral constituencies. The amendment to Article 17^1 sets forth the factors that the CEC must consider when forming electoral constituencies. These factors include geographic, topographic, and physical characteristics of the constituency, as well as the availability of communication means and social and administrative factors. If the percentage of deviation for a constituency exceeds 10% from the ideal constituency voter registration population (total registered voter population in Armenia divided by total number of constituencies), then the CEC must specify in a decision the factors justifying the deviation. Under no circumstances can a constituency deviation exceed 15%.

17. The draft amendments also provide that information on constituencies must be published in the official gazette, on the CEC's website, and in print media with a circulation of at least 3,000 copies. The right to appeal the decision of the CEC on the formation of constituencies is also granted. The deadline for an appeal is seven days of official publication of the CEC decision.

18. The amendments regulating the establishment of electoral constituencies are positive and incorporate some prior recommendations.

D. CANDIDACY

19. The required minimum percentage of women in a candidate list is increased from 5% to 15% (amendment to Article 100(2)). This is a positive amendment. However, a real increase in the political representation of women cannot be achieved only through mechanical electoral rules. Thus, this initiative should be supplemented by additional measures encouraging the increase in women's representation. Some measures have been included in the Council of Europe Parliamentary Assembly recommendation 1676 (2004), adopted on 5 October 2004.

20. The draft amendments eliminate the requirement of collecting signatures supporting a candidate's nomination and raise the amounts of electoral deposits. This is acceptable in principle. However, the draft (amendments to Articles 71(1), 101(1)(1) and 108(2)), would raise the electoral deposits significantly (in case of presidential elections, from 5,000 to 8,000; in case of proportional elections, from 2,500 to 4,000 and in case of

majority elections from 100 to 150 times the minimum salary). It is recommended that these increased deposit amounts be reconsidered, as it is not apparent that the existing deposit amounts are insufficient to deter frivolous candidates. An unreasonably high electoral deposit also presents a problem under international and European standards. It is an established principle that wrongful discrimination includes discrimination against a person on the basis of social or property status.[6] Thus, the amount of an electoral deposit must be considered carefully to ensure that it does not prevent the candidacy of a serious candidate who happens to be economically disadvantaged.

21. The amount of the electoral deposit has been a previous concern of the OSCE/ODIHR and the Venice Commission. In response to this concern, it has been suggested that the current minimum wage in Armenia has not changed to keep pace with economic reality and that the proposed amounts for the electoral deposits are reasonable in light of current economic conditions. The OSCE/ODIHR and the Venice Commission express no opinion as to current economic conditions, but only restate that the amount of an electoral deposit must be considered carefully since every citizen should be provided a meaningful opportunity to be a candidate.

22. Article 78 still does not provide sufficient regulation for candidate withdrawal. The rules governing the withdrawal of candidates should be clearly stated. This includes the legal ground for withdrawal as well as the *process* for withdrawal. Article 78 should be improved.

23. The higher education requirement for the candidates for community heads that was present in a previous draft, has been removed. Also, the requirement that a party needs to be registered at least one year before the elections has been removed. Those changes correspond to the recommendations in the Preliminary Joint Opinion.

E. VOTING RIGHTS

24. The draft amendments do not include the previous recommendation that provision be made for voters to vote who are unable to attend their polling station (e.g. hospitalised persons). Although there may be a greater opportunity for fraud under those circumstances, the right to vote is a very important human right and all possible measures should be used to uphold this right.

25. The draft amendments do not regulate in detail the voting rights of members of the military, detained persons, and citizens abroad. The new Article 10 regulates the procedures for inclusion of such persons in voter lists. However, the actual voting procedures are left unregulated. Moreover, Article 2(6) is retained, which prohibits members of the military from participating in elections of local self-governing bodies and National Assembly elections under the majoritarian system. This issue should be given

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[6] *Article 2 of the Universal Declaration of Human Rights; Article 26 of the International Covenant on Civil and Political Rights; Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Paragraphs 7.3 and 7.5 of the OSCE 1990 Copenhagen Document.*

further consideration. As noted in Paragraphs 25 and 26 of the Preliminary Joint Opinion, these articles do not ensure voting rights for all citizens of Armenia. Limitations on the voting rights of citizens have been justified by authorities in Armenia with the argument that it is not possible to control the fraud that would result. However, under international standards, a state has the affirmative obligation to "take effective measures to ensure that all persons entitled to vote are able to exercise that right."[7] At some point, the argument of "unpreventable fraud" will no longer be sufficient to justify the denial of the voting rights of these citizens.

F. VOTER LISTS

26. The amendments would create a permanent national register of voters. This is positive, as noted in the previous opinions. The provisions on supplementary voters' lists (article 14^1) have also been improved according to the Preliminary Joint Opinion. However, due to some of the text used to describe the roles of various institutions in the creation of the register, some confusion still remains as to what the institutions are actually responsible for and exactly what authority they have over the content of the register. In most instances, the authority over decisions related to the voters' lists is allocated to the Authorized Agency. However, in some instances the Authorized Agency acts in accordance with procedures defined by the CEC (Article 13 (2), 13 (3) 13 (8)), leaving certain powers to the CEC. Further, Article 9(7) states that the CEC and the TECs "shall oversee the compilation and maintenance of voter lists". However, the law does not specify the powers of the CEC and TECs when exercising this authority. How will the CEC and the TECs ensure that the procedures created by the CEC are followed by the Authorized Agency?

27. It is unclear in Article 12(4) how many copies of the voter list must be prepared by the head of a detention facility. Earlier amendments stated that two copies would be prepared. The latest version of the amendments does not state a number, but uses the plural "lists". The number of copies required should be clearly stated in the article.

G. PUBLIC OPINION POLLING

28. The amendment to Article 22(3) constitutes improvement as it sets forth that published opinion polls "shall specify the name of the organization conducting the poll, the timing of the poll, the number of respondents, the sample type, the collection method and area, the exact formulation of the question, the statistical estimate of the possible error, the client purchasing the product of the poll, and the source that financed publication of the results of the poll." Another amendment to Article 22 clarifies that the seven days prohibition on opinion polls before election day includes election day and until 8:00 p.m. of election day. This is also a positive improvement in the law.

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[7] *See Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), Paragraph 11. See also Hirst v. United Kingdom, Application No. 74025/01, European Court of Human Rights (30 March 2004).*

H. BALLOTS AND VOTING

29. The draft Article 49[1](7) changes the rules for approving sample ballots. The draft foresees that some sample ballots are approved by the CEC and some by the TEC. The OSCE/ODIHR and the Venice Commission have previously raised the issue of the TEC preparing the ballot design for the National Assembly single member constituency election. It would be a better practice if the CEC continued to approve sample ballots for all elections, especially for the National Assembly elections, including elections in the single member constituencies.

30. The draft amendments incorporate previous recommendations concerning the form of the ballot. The draft amendments introduce perforated ballots with serial numbers printed on their stubs and also require the publication of the name of the printing house. These are positive amendments.

31. The option to vote "against all" remains in the proposed amendments, failing to reflect previous recommendations. As a mater of principle, voters should be encouraged to vote for their preferred candidate or party and thereby take the responsibility for the body that is being elected. Votes "against all" are usually unequal to votes "for" a party and candidate, and fail to express political choices.

32. The amendment to Article 58 adopts a previous recommendation that a marked ballot paper is valid if the voter's intention is clear and unambiguous. Paragraph two of Article 58 adopts this rule, with the additional requirement that the ballot does not contain any marks that could reveal the voter's identity. The amended Article 58 is an improvement over the existing text.

33. Article 55 (2) now includes the provisions for inking, as well as checking for the ink on the voters' fingers. Only if the ink is missing, can the voting procedures proceed. Also, the possibility of the use of automated ballot boxes has been removed from the draft. These changes address the concerns in the Preliminary Joint Opinion. Additionally, since it is clear that the final regulation of the procedure of inking is left to the CEC decision, it could be then recommended that the first part of Article 55 specifies at least that there is a "certain" finger which is marked by the commission member, "as established by the CEC".

I. PROPERTY DECLARATION

34. The amendments to articles 72 (2), 101 (1), 108 (2) now refer to the Law on Declaration of Property and Incomes of Leading Officials of Government Bodies of the Republic of Armenia as the basis for submitting property declarations by the candidates (it is not clear why no such referral is included in article 123 (5)). The family members of the candidates are not obliged to submit such declarations. Those amendments correspond to the suggestions made in the Preliminary Joint Opinion.

J. MEDIA

35. The provisions on media (article 20) provide much more detail than previously, corresponding to the recommendation made in the Preliminary Joint Opinion. For example, it has been specified that both private and public newspapers and magazines, are required to ensure equal conditions in publishing campaign materials. However, it is specified that this duty does not encompass newspapers and magazines founded by political parties.

K. TRANSPARENCY

36. An amendment to Article 27^1(1)(7) grants to a proxy the right to observe "when votes are being summarized". It is not clear that this would also include the "counting" of marked ballots. This should be clarified so that there is no doubt as to the right of proxies to be present during "counting" as well as "summarizing".

37. The phrase "during the vote" in the amendment to Article 27^1(3) is also unclear. This could reference "during the vote" on a decision taken by the election commission or "during" the polling on election day. It is recommended that this be clarified to make it clear that a proxy has the right to be present on both occasions and for "counting" and "summarization" after polling.

38. The draft amendments would clearly and explicitly require the preliminary results of the polling stations to be displayed in front of the polling stations (new Article 61(7)). Also, the procedures regarding the tabulation, summarisation, and publishing of the results have been refined. These are positive amendments.

39. The new Article 63^2 adds paragraphs 12 and 13, which require announcement of preliminary results and information on electoral violations through various media and the internet. These improvements should increase confidence in the final voting results among the public. The CEC is required to regularly publish information on preliminary results as they become available, broken down by polling stations. These changes adopt previous recommendations.

40. The draft amendments (Article 57) permit a single member of an election commission or a single proxy to record a violation of the voting procedure in the register. This is a positive improvement over the existing Electoral Code and consistent with earlier recommendations.

L. COMPLAINTS AND APPEALS

41. The draft amendments regulating the filing of complaints and appeals concerning the action, inaction, or decision of an election commission set forth greater detail than previously stated in the law. The OSCE/ODIHR and the Venice Commission recommended that the law provide greater detail for the filing of complaints and appeals.

However, these new provisions contain many ambiguities and inconsistencies, and still require improvement.

42. There is still some confusion about which institution handles which appeals. Article 40 provides that the “general” flow of cases is the following:

- Decisions of the Precinct Electoral Commission to the Territorial Electoral Commission.
- Decisions of the Territorial Electoral Commission to the courts of first instance.
- Decisions of the Central Electoral Commission to the court of appeals.

43. The following exceptions apply:

- The decisions of the Territorial Electoral Commission about "tabulating the results of National Assembly majority contest elections and local self-government elections" are not submitted to the court of first instance (Article 40 paragraph 2).
- The decisions of the Central Electoral Commission about “the tabulation of election results" are not appealed to the court of appeals (Article 40 paragraph 3).

44. It is not clear from the draft amendments which institution handles appeals regarding those disputes related to summarizing the results of the elections. Article 40 paragraph 9 provides that “Disputes on the results of elections, with the exception of those concerning the results of local self-government elections, shall be resolved by the Republic of Armenia Constitutional Court" Disputes regarding the results of local elections are dealt with court of first instance or court of appeals (Article 40 paragraphs 10 and 11). It should be clarified whether a dispute “on the results of the elections” (used in paragraphs 9, 10 and 11) is equivalent to the decision on “tabulating the results of elections” (used in paragraphs 2 and 3). With the present wording, this is not clear. It would also provide more clarity for the potential appellants if the wording would be more precise, specifying the specific court to which appeals are submitted.

45. Finally, it should be specified what happens if a violation is appealed in the “regular” procedure, for example to the higher electoral commission, and then it becomes clear to this commission that the violations are serious enough to influence the results of the elections. In this case, the appeal has technically been lodged in the wrong institution (it should have been submitted to the court according to paragraphs 9, 10 and 11). However, it would not be appropriate to dismiss the appeal for this technical reason.

46. The powers of the bodies handling disputes should be specified more exactly. For example, it should be made clear that if there are violations that may have influenced the results of the elections, the body handling appeals should have the right to declare elections invalid.

47. The Central Electoral Commission may, on its own initiative, quash the decisions of the Territorial Electoral Commissions (Article 40 paragraph 4). However, the Central Electoral Commission may not review the decisions of Territorial Electoral Commissions

about "electing a member of the parliament in majority system, head of the local self-governing body or member of community council." No criteria are provided to establish when it would be appropriate for the Central Electoral Commission to exercise such authority. Thus, it would appear that the commission would have wide discretion to exercise this review under any circumstance. It is recommended that this be considered carefully as such power is very broad. Also, the logic behind granting the Central Electoral Commission such broad powers but then creating a specific exception for a decision electing a National Assembly member in a majority constituency is unclear. Also, it is unclear whether the Territorial Electoral Commission has the right to review the decisions of the Precinct Electoral Commissions.

48. The amendments (see Article 40^1 paragraphs 4-6) still do not clearly guarantee the following rights for proceedings in electoral commissions:

- The right to present evidence in support of the complaint after it is filed;
- The right to a fair, public, and transparent hearing on the complaint.

49. The only communication between the person submitting the appeal and the electoral commission seems to be a written answer sent to the applicant (paragraph 6). This should be rectified.

50. The Electoral Code should also specify the duty of the person presenting the appeal to identify the complaint in the appeal and provide a justification for the claims, and to present available evidence (or information regarding the possibilities of gathering evidence, including the names of potential witnesses). With the present version of the amendments, it is unclear what material may be the basis of the electoral commission's decision on the appeal. This is especially important as article 40^2 seems to retain the duty to perform an automatic recount if this is requested. This is problematic as a recount should only occur where there is justification for the recount and the justification for a recount should be specified in the law.

III. CONCLUSION

51. The draft amendments implement many recommendations contained in previous joint OSCE/ODIHR and the Venice Commission opinions and constitute positive improvement in the legal framework for elections. However, the Electoral Code could still be improved, particularly in the areas of election administration, voter lists, transparency, and the processes for filing election related complaints and appeals. Of particular concern are the provisions for election complaints and appeals, which fail to create a sound and unambiguous legal framework for the adjudication of disputes and protection of suffrage rights. Moreover, good faith implementation of the Code remains crucial for the conduct of genuinely democratic elections.