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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**COMMENTS
ON THE CONFORMITY OF THE PRESENCE OF JUDGES
IN THE ELECTORAL COMMISSIONS
WITH EUROPE'S ELECTORAL HERITAGE**

**(AMICUS CURIAE OPINION AT THE REQUEST OF
THE CONSTITUTIONAL COURT OF ARMENIA)**

**by
Mr Jean-Claude COLLIARD (member, France)**

Introduction

1. On 19 September 2006 the President of the Constitutional Court of Armenia referred to the Venice Commission a request from 27 members of the National Assembly contesting the fact that the judges could be members of the electoral commissions.

2. They were contesting this state of affairs:

- on the grounds that membership of a commission was incompatible with the duties of a judge;

- more specifically, on the basis of Article 98 of the Armenian Constitution, under which judges may not:

- hold public office not connected with their duties;
- engage in any political activity.

3. In a request for an *amicus curiae* opinion, the Constitutional Court seeks to know the position on these points of the Venice Commission, which raised the matter at its 68th session (13 and 14 October 2006) and instructed Mr Jean-Claude Colliard (member, France) to prepare a final report on the basis of the guidelines set out on that occasion.

4. The Venice Commission will deal here with the conformity of the presence of judges in electoral commissions with international standards. It will not express an opinion on the interpretation of the Constitution, which is the responsibility of the Constitutional Court.

5. These comments were ratified by the Venice Commission at its ... plenary session.

Legal analysis

6. It should first be pointed out that the Electoral Code of the Republic of Armenia - in its version of 12 October 2005 - provides for electoral commissions responsible for organising and conducting elections, at three levels:

- A central electoral commission;
- Territorial commissions;
- A precinct electoral commission for each polling station.

7. The provisions relevant to the presence of judges in the commissions are as follows:

- Article 33.3 of the Electoral Code expressly provides for the presence of judges from the Court of Cassation in the central electoral commission; they must be relieved of their duties for the duration of their activities as commission members.

- Article 33.4, which provides for a series of activities in which the members of the commissions may not engage, does not do so in the case of judges, with the exception of members of the Constitutional Court.

- Article 35, paragraphs 3 and 4, expressly provides for the presence of judges in the central electoral commission.

- Article 36.1 provides for the presence of judges in the territorial commissions.

- Article 37, which concerns the precinct electoral commissions, on the other hand, neither provides for nor prohibits the presence of judges.

8. The question is whether the presence of judges is contrary to the principles that the Council of Europe and the Venice Commission seek to uphold.

9. Judges are present in such commissions in several member states of the Council of Europe, in particular Luxembourg, Poland and Portugal. In many others, although their presence is not expressly provided for, it is not prohibited either.

10. In France, while there are no electoral commissions within the meaning of the present law, it is not unusual for judges to be involved in the electoral process. For instance, in the case of the presidential election or a referendum, the Constitutional Council usually delegates judges to oversee voting and, in the case of the presidential election, there is a national monitoring commission comprising the heads of the three highest courts [the *Conseil d'Etat* (the supreme administrative court), the Court of Cassation and the *Cour des comptes* (Auditor General's Department)].

11. Furthermore, and more important, paragraph II.3.1 of the "Code of Good Practice in Electoral Matters" adopted by the Venice Commission on 18 and 19 October 2002 stipulates:

- "b. Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level."

- "d. [The central electoral commission] should include ... at least one member of the judiciary."

12. Moreover, paragraph 82 of the explanatory report to the Code provides that "other electoral commissions operating at regional or constituency level should have a similar composition to that of the central electoral commission."

13. The Electoral Code of Armenia therefore seems to be fully in keeping with the Commission's recommendations, particularly as regards the presence of judges.

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14. It is understandable that there should be doubts about the matter, given the key principle of the separation of powers, which is fully respected by the Armenian Constitution. When, however, there is no recognised "electoral power," such as exists in several Latin American countries, the organisation of elections necessarily depends on one of the three existing powers. The judiciary is indisputably the one with the least interest in the elections, since the others depend for their existence on the election results, directly in the case of the legislature and directly or indirectly, depending on the circumstances, in the case of the executive. Involving the judiciary in the conduct of elections is not therefore in itself open to criticism.

15. The only delicate point is that judges responsible for organising the elections could find themselves involved in disputes arising in connection with the conduct of the elections, which would pose a problem, in that they would be both party and judge.

16. In Armenia electoral disputes are basically organised as follows:

- Complaints against action (or failure to act) on the part of a precinct electoral commission are examined by the corresponding territorial commission;

- Complaints against a territorial commission are examined by a court of first instance, except in certain circumstances, including elections to the National Assembly;

- Complaints against the central commission are examined by a court of appeal.

17. Under Articles 100.3 and 101.3 of the Constitution, the Constitutional Court is responsible for settling disputes concerning elections to the National Assembly. This rule is embodied in Article 40.9 of the Electoral Code.

18. Lastly, the Electoral Code of Armenia pre-empts the objection we are considering here, since Article 40.14 expressly provides that judges appointed to the electoral commissions may not hear appeals against action or failure to act on the part of the commissions.

19. This judicious precaution would seem to dispel any remaining doubts.

20. While it is indeed essential that it should not be the same judge (in other words, the same physical individual) who first conducts the elections and then settles disputes, it might well be desirable that the judge responsible for settling disputes should come from a higher-ranking court than the court from which the judge conducting the elections comes. On the one hand, however, the organisation of the judiciary in Armenia would not seem to make this possible in all cases and, on the other, there could be cases in which a judge from a court at one level was disavowed by another judge from the same level (referral after cassation for instance). While this approach can therefore be recommended, it cannot be considered compulsory.

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21. To conclude, although the issue was discussed by the Venice Commission at its meeting on 13 and 14 October 2006, the only arguments that could be put forward against the Armenian Electoral Code - subject to domestic constitutional provisions - are clear recommendations from the Code of Good Practice in Electoral Matters or other international instruments. As has already been said, however, not only does the Code of Good Practice not object to the presence of judges in electoral commissions: it actually advocates it.

22. The President of the Constitutional Court of Armenia should therefore be informed that the issue he referred to the Venice Commission does not raise any problem with regard to the standards upheld by the Commission.