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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE ISSUE OF THE IMMUNITY OF PERSONS INVOLVED IN THE ELECTORAL PROCESS IN ARMENIA

on the basis of comments by

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Introduction

1. By letter of 1 July 2008, the Human Rights Defender of Armenia, Mr Armen Harutyunyan, requested an opinion on draft amendments to the Election Code of Armenia (CDL(2008)083). The Commission invited Messrs Mifsud Bonnici and Tuori to act as rapporteurs in this issue. Their comments figure in documents CDL(2008)111 and 112 respectively.

2. In the same request, the Human Rights Defender of Armenia requested an opinion on the draft amendments to Article 23(5) of the Law on the Human Rights Defender. An Opinion on this issue has therefore been prepared by the Venice Commission (CDL(2008)087).

3. Additionally, the Venice Commission prepared in parallel a larger opinion on the Election Code of Armenia, jointly with the ODIHR of the OSCE (CDL(2008)081) that should be adopted at the 76th Session of the Commission, on 17-18 October 2008.

4. The present opinion was adopted by the Venice Commission at its … Plenary Session on …

The amendments

5. According to the proposed amendments, the following provisions of the Election Code of Armenia would be revised: Article 33(2), Article 78(5), Article 111(6) and Article 127. These provisions establish certain immunity for the members of the Central Electoral Commission, as well as the members of district and precinct electoral commissions (Article 33(2)); Presidential candidates (Article 78(5)); candidates for the National Assembly (Article 111(6)); and candidates to mayor and municipal councils (Article 127).

6. The provisions from the Election Code which could be amended are as follows:

7. Article 33.2: "*Members of the Central Electoral Commission (during the entire period of the Commission's operation) and members of Territorial and Precinct Electoral Commissions (during national elections) may be detained or subjected to administrative or criminal prosecution by courts with the consent of the Central Electoral Commission only.*"

8. Article 78.4: "*Presidential candidates may not be detained or subjected to criminal or judicial prosecution without the Central Electoral Commission's consent. The vote of the two-thirds of the Central Electoral Commission members is required to pass decisions on such matters.*"

9. Article 111.6: "*MP candidates under proportional or majoritarian system may be detained or subjected to court mandated administrative or criminal prosecution only with the Central Electoral Commission's consent. The vote of the two-thirds of the Central Electoral Commission members is required to pass decisions on such matters.*"

10. Article 127: "*Community leader and council member candidates may be detained only with the Territorial Electoral Commission's consent. The vote of the two-thirds of the Territorial Electoral Commission members is required to pass a final decision on such matters.*"

Background: the exceptional character of immunity in civil and criminal actions

11. As a departing point of principle, it should be underlined that all instances of immunity from criminal or civil procedures and actions, as well as from administrative measures, create a form of privilege and should be derogations vis-à-vis the basic principle of equality before the Law. These exceptions should be specifically justified and limited as much as possible. Privileges and immunities have, as a matter of history, given rise to abuse and corruption, in many countries. Their existence and extent can lead to suspicion, and give rise to uncertainty with lack of transparency, and therefore provide a cover for improper behaviour.

12. A distinction should be made between "immunities in the strict sense" shielding officials or parliamentarians from civil action and arrest, detention or prosecution, either absolutely or depending on the consent of the institution or chamber to which they belong, and "non-liability" or "immunity in the wider sense" of officials elected or appointed, or parliamentarians in respect of judicial proceedings for acts performed or not performed, or opinions expressed and votes cast in the discharge of their official or parliamentary duties.

13. The former kind knows its origin to the notion that at Common Law in the United Kingdom, the "King could do no wrong". In other countries, in continental Europe, the Sovereignty of the Monarch was construed to mean that he would not be subject to Court. Impeachment was the extreme remedy when the Executive Head committed treason or otherwise could no longer be trusted with the supreme power. In the cruder examples of State organisation, subjecting the Chief or Head, or indeed a dictator, to the process of law was unthinkable. In the absence of impeachment, the only recourse, if the position was no longer sustainable, was to tyrannicide or rebellion.

14. Parliamentary immunity was limited to what was uttered in Parliament, and it evolved so as to render Members of Parliament free to express themselves, and their freedom from arrest when proceeding to the House was meant to defend them against undue interference, which would impede them from being present in Parliament to perform their people-delegated task. This interference could involve outside bodies: either from the executive branch of Government, or even from a non-independent Judiciary.

15. The non-liability of elected or appointed officials for acts performed in the discharge of their legal duties is a constitutional shield for the use of "legally authorised" discretion and is rendered necessary by the theory of the separation of powers, in the sense that certain acts of executive discretion, parliamentary deliberation or even judicial determination, should not be subjected to judicial sanction.

Immunity of the Head of State, constitutional provisions and case-law

16. **United States of America**. The position in the United States is illustrative of the theoretical and practical democratic evolution in this field. Thus, in the well-known case *Nixon v. Fitzgerald* (1982),[1] the Supreme Court held the President immune from civil suit, as the President "*is entitled to absolute immunity from damages liability predicated on his official acts.*" This sweeping immunity, argued Justice Powell, who wrote the judgement, was a function of the President's "*unique office, rooted in the constitutional tradition of the separation of powers and supported by the Nation's history.*" In a later case however, *Clinton v. Jones* (1997),[2] this generality was circumscribed. It was held that: "*The separation of powers doctrine does not require federal courts to stay all private actions against the President until he leaves office.*

[1] *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), No. 79-1738. Argued November 30, 1981 -- Decided June 24, 1982.

[2] *Clinton v. Jones*, 520 U.S. 681 (1997), No. 95-1853. Argued January 13, 1997 -- Decided May 27, 1997.

Even accepting the unique importance of the Presidency in the constitutional scheme, it does not follow that that doctrine would be violated by allowing this action to proceed. The doctrine provides a self executing safeguard against the encroachment or aggrandizement of one of the three co equal branches of Government at the expense of another."[3] "*Petitioner's principal submission--that in all but the most exceptional cases, the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office--cannot be sustained on the basis of precedent. The principal rationale for affording Presidents immunity from damages actions based on their official acts--i.e., to enable them to perform their designated functions effectively without fear that a particular decision may give rise to personal liability, see, e.g.,* Nixon v. Fitzgerald *[…]--provides no support for an immunity for unofficial conduct. Moreover, immunities for acts clearly within official capacity are grounded in the nature of the function performed, not the identity of the actor who performed it.*"[4]

17. In the United States, the Supreme Court also decided on the immunities of other, lower, Executive Officials. Thus, in the case *Butz v. Economou* (1978),[5] the Court in a 4-to-5 opinion, noted that, "*In a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in* Scheuer v. Rhodes*,*[6] […]*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.*" But he added that "*persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts.*" The Court reasoned that the risk of making unconstitutional determinations is outweighed by the need to preserve independent judgement, through grants of absolute immunity to judges and other similarly situated decision-makers. The Court concluded that the similarity between the type of decision-making required of federal prosecutors and other administrative agents is sufficiently strong to warrant an extension of absolute immunity to the latter for decisions made in the course of their official duties. Judges and Magistrates have traditionally been held immune from any civil action in respect of their acts within the judicial function performed in good faith. Their criminal and civil liability for corruption or gross negligence is not in doubt.

18. **Federal Republic of Germany**. Later Constitutions made it more formal. As an example in the Federal Republic of Germany while in office, the President enjoys immunity from prosecution and cannot be voted out of office or recalled. In Germany, the only mechanism for removing the President is impeachment by the Bundestag or Bundesrat. Both the Parliament and the Constitutional Court are involved in the removal of a President from office. The President may be impeached for wilful violation of the Basic Law or of any other federal law. The motion for impeachment must be brought by at least one-quarter of the members of the Bundestag or the Bundesrat, and must be passed by a majority of two-thirds of the Bundestag or Bundesrat.

19. To succeed, it must then be prosecuted before the Federal Constitutional Court. If the Court finds the President guilty, it may declare him or her to have forfeited the office.[7] Impeachment would be of course a very grave *vulnus* to the normal functioning of the machinery of the Republic and to date has never been resorted to.

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[3] On this purpose, see as well the case *Buckley v. Valeo*, 424 U.S. 1 (1976), No. 75-436. Argued November 10, 1975, Decided January 30, 1976.

[4] On this purpose, see as well the case *Forrester* v. *White,* 484 U.S. 219 (1988), No. 86-761. Argued November 2, 1987, Decided January 12, 1988.

[5] *Butz v. Economou*, 438 U.S. 478 (1978), No. 76-709. Argued November 7, 1977, Decided June 29, 1978.

[6] *Scheuer v. Rhodes*, 416 U.S. 232 (1974), No. 72-914. Argued December 4, 1973, Decided April 17, 1974.

[7] Basic Law of Germany (*Grundgesetz*), Article 61.

20. Whilst there is a wide variety of statutory formulation in the constitutional conferment of immunity or inviolability,[8] it can be safely said that blanket inviolability and immunity are to be avoided, when conceived as absolute and permanent, in as much as inherently against the Rule of Law.

21. Whilst provision for immunity from prosecution for acts performed in the execution of a constitutional function is not unusual, even in the older democracies, the whole area is still subject to considerable fluctuations, as recent political developments in **Italy**, with introduction of the *Legge Alfani,* seem to show.

Immunity of persons involved in the electoral process

22. Parliamentary immunity has been extended gradually to other persons such as those participating in "proceedings in Parliament" (for example “clerks at the table”, etc.) in the countries with British-style institutions (United Kingdom, Netherlands, Ireland).

23. In certain countries, this immunity or non-liability has been extended to the members of electoral administrations (*vide* the Kenya[9], Mozambique[10] and Uganda[11] Electoral Laws). This protection was introduced with the evident good intention of rendering the electoral commissions less subject to pressures and threats, whilst giving the members the “functional” liberty of action within the limits of their mandate.

24. It is to be noted that in the Venice Commission’s Code of Good Practice in electoral Matters under subtitle “*3. Procedural guarantees*”,[12] one finds notably these further requirements:

3.1. Organisation of elections by an impartial body

a. An impartial body must be in charge of applying electoral law.

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.

c. The central electoral commission must be permanent in nature.

25. The electoral commissions must be “*impartial bodies*”, applying electoral law and the Central Electoral Commission must have “*a permanent nature*”[13] that is not merely organised for the occasion of a particular election. This part of the Code of Good Practice in Electoral Matters ostensibly applies to all democracies. The previous quotation from the Code of Good Practice in Electoral Matters[14] however makes a reference to the existence or otherwise of a

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[8] *Vide* the Venice Commission’s *Report on the regime of Parliamentary immunity*, CDL-INF(1996)007.

[9] The National Assembly and Presidential Elections – This Act defines an elector for the first time – as a person whose name is included in the register of electors. Hence the electors in a presidential election must be registered as voters.
“*The Electoral Commission (EC) […] – Section 3A [p]rovides for the immunity of the Electoral Commission members and officers from personal liability for actions they may take in the course of their duties.*”

[10] Mozambique Electoral Law – Law no. 20/2002 of the 10th October 2002, published in the Official Bulletin of the Republic (Thursday October 10, 2002, Edition 1, no 41):
“*Article 15 (Legal immunity): During their terms of office the members of National Electoral Commission enjoy legal immunity except in those cases in which their activities might have an improper effect on the final result of elections or referenda.*”

[11] Uganda, Electoral Commission Act 1997 (Ch 140). “*Article 49. Exemption from liability. A member of the commission or an employee of the commission or any other person performing any function of the commission under the direction of the commission shall not be personally liable to any civil proceedings for any act done in good faith in the performance of those functions.*”

[12] CDL-AD(2002)023rev, II. 3.1.

[13] CDL-AD(2002)023rev, II. 3.1. c.

[14] CDL-AD(2002)023rev, II. 3.1. b.

"*longstanding tradition of administrative authorities' independence from those holding political power*." The truth is that the safeguards needed to assure the electoral commissions' impartiality, and indeed authority, will be contingent on the kind of tradition a particular country might have. The electoral administration model of the older established democracies, in which elections are administered by government's departments or Ministries of Interior's offices composed of a traditionally independent bureaucracy, over which political parties exercise some surveillance through specially appointed representatives, proxies observing the whole electoral process, with electoral disputes being decided upon by the ordinary courts, might not be the most appropriate for many of the new democracies. With the hope that having especially selected and authoritative electoral commissions as independent institutions managing elections might result in free and fair elections, generally accepted as such, many of the newer post-colonial[15] or post-communist[16] democracies charged these commissions with some combination of legislative, administrative, and adjudicative powers which would seem strange in the traditional democratic settings.

26. In many of these new democracies, the bureaucratic apparatus would have been the one left behind by the colonial or communist set up, or another authoritarian regime, and could not be trusted to have cultivated the required impartial or independent frame of mind.

27. Against this background, it can be referred to the Election Code of Armenia conferment of the status provided in Article 33 on the "*Status of Electoral Commission Members*:

> *1. Electoral commission members shall be exempt from military musters and training exercises and, in the period of national elections, from military draft.*
> *2. Members of the Central Electoral Commission (during the entire period of the Commission's operation) and members of Territorial and Precinct Electoral Commissions (during national elections) may be detained or subjected to administrative or criminal prosecution by courts with the consent of the Central Electoral Commission only.*"

Immunity vis-à-vis military personnel

28. Exemption from military musters or training during the election period does not appear excessive or overbearing, indeed it is obvious that preparing for elections would and should be an absorbing duty which would not leave time for military exercises. Even the freedom from detention and from administrative or criminal prosecution is defensible, though with some effort, if it is limited to the Central Election Commission's period of operation, and can be waived by the Commission itself.

The fight against corruption as a justification for the amendments and the position of the Group of States against Corruption (GRECO)[17]

29. In its Guiding Principles for the Fight against Corruption, the Council of Europe Committee of Ministers has emphasised that immunity from investigation, prosecution or adjudication of corruption offences should be limited to the degree necessary in a democratic society.[18]

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[15] The examples quoted above as well as South Africa.

[16] *Inter alia*, Hungary, Slovenia, Romania, Poland, Bulgaria and Russia are examples.

[17] Regarding the GRECO's recommendations notably, it is recommended to refer to the Venice Commission's Opinion *on the draft amendments to Article 23(5) of the Law on the Human Rights Defender* for more details (CDL(2008)087).

[18] Council of Europe Resolution (97)24 on the Twenty Guiding Principles for the Fight Against Corruption, Committee of Ministers (adopted by the Committee of Ministers on 6 November 1997 at the 101st session of the Committee of Ministers), Guiding Principle no. 6.

30. In its Fifth General Activity Report,[19] the GRECO (Group of States against Corruption) stated that "*compliance with Guiding Principle 6 requires that the categories of professionals benefiting from immunity be limited to a minimum.*" However, it also added that "*according to GRECO's standing practice each Member has been assessed on its own merits and, as a consequence, a few exceptions to the aforementioned rather strict interpretation of General Principle 6 have been accepted*".

31. In its Evaluation Report on Armenia adopted in March 2006,[20] the GRECO was concerned about the rather wide scope of immunities and recommended "*to consider reducing the categories of persons enjoying immunity from prosecution and to abolish, in particular, the immunity provided for parliamentary candidates, members of the central electoral commission, members of regional and local electoral commissions, candidate mayors and local council candidates.*" The recommendation was repeated in the compliance report on Armenia, adopted in June 2008.

32. The proposed amendments are in line with the GRECO recommendations. However, presidential candidates are not expressly mentioned in the recommendations.

The extent of immunity in a democratic state

33. Having stated that privileges and immunities should be limited to what is absolutely necessary (i) for the proper functioning of a Republic; (ii) what is strictly required by the separation of powers; and (iii) the delimitations of areas of discretion; it does not follow that all extant privileges and immunities, which can no longer be justified, should be done away with immediately, and that no consideration be given to the timing and method of such abolition.

34. One can concede that the range of privileges and immunities in Armenia is, to outside eyes, extraordinary. Protecting Presidential candidates and people standing for elections, from arrest as well as shielding them from criminal and administrative liability, by granting the Central Election Commission the right to decide thereon by a two-third majority is tantamount to anointing them with a very privileged status even before they have actually been elected to a position of responsibility. Impeachment of a president or a judge is one thing, and a two-third majority requirement would there seem justified, but requiring the same for a mere unelected candidate for office would seem excessive.

35. Some of the privileges and immunities could give rise to a resurrection of the happily buried right of sanctuary, which provided an umbrella of protection, at times, temporary and brief as respite, at other times, for some scandalously long or indefinite period, to people absconding from justice. In the generosity for protection, Armenia might have gone beyond what is absolutely needed for the proper running of a democracy. There are definitely too many exceptions to the general rule.

36. On the other hand, the procedure for pruning and lopping off what is excessive should however be agreed upon by wide consensus. Immediate excision of these rights might be considered by the opposition as a threat. Given that in Armenia some people might still labour under the apprehension that the tool of prosecution during a delicate electoral period could be used to deter opposition candidates from entering into the political arena, one would counsel prudence in the procedures to be adopted. The timing is also vital.

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[19] Fifth General Activity Report (2004), adopted by GRECO at its 22nd Plenary Meeting (Strasbourg, 14-18 March 2005; Greco (2005) 1E Final).

[20] Joint First and Second Evaluation Round – Evaluation Report on Armenia, adopted by GRECO at its 27th Plenary Meeting (Strasbourg, 6-10 March 2006; Greco Eval I-II Rep (2005) 2E), par. 56.

Conclusion

37. It can be considered exceptional that immunity is extended to mere candidates for public offices. The only conceivable justification for such an extension is to prevent undue pressure on the candidates and guarantee that elections are not affected by ungrounded indictments or detentions. This justification must be balanced against the reasons favouring the limitation of immunity and underpinning the GRECO recommendations.

38. Taking into account the importance of the office in the political system, in a young democracy like Armenia, securing fair elections may justify the immunity of presidential candidates. Therefore, immunity for Presidential candidates does not seem disproportionate. On the contrary, immunity vis-à-vis candidates for National Assembly, territorial and local elections does not appear justified, and could even lead to reverse abuse. It could concern candidates, among whom some could take benefits in standing for such elections in order to avoid either pending or potential cases before courts.

39. Regarding the electoral administration and more particularly the central organ of this administration, i.e. the Central Election Commission, it seems recommendable to distinguish the members vis-à-vis the staff members. The members, all appointed by elected stakeholders (political parties sitting at the National Assembly and the President of the Republic), themselves stakeholders highly involved by their decisions – occurring in the Central Election Commission sessions – in the organisation of the elections, should enjoy immunity during their entire mandate, due to the high level of risk of pressure they could undergo from political factions, Government, etc. In spite of the GRECO recommendations[21] regarding the members of the Central Election Commission, the Venice Commission recommends for the time being to maintain immunity to the Central Election Commission's members. On the contrary, it seems excessive to provide the staff of the electoral administration with immunity; such staff should be considered comparable to other civil servants, in spite of the fact that they are agents of a body independent from any Ministry or national Agency.

[21] *See* par. 31 of the present opinion.