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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

FINAL OPINION ON THE AMENDMENTS TO THE ELECTORAL CODE OF THE REPUBLIC OF ARMENIA*

by the Venice Commission
and
OSCE/ODIHR

Adopted by the Council for Democratic Elections
At its 14th meeting
(Venice, 20 October 2005)
and the Venice Commission
at its 64th plenary session
(Venice, 21-22 October 2005)

on the basis of comments by

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Mr Jessie PILGRIM (OSCE/ODIHR, election expert)

***Adopted on 17 May 2005 by the National Assembly of Armenia**

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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 (CDL-AD(2005)019). This opinion is specifically based on the most recent previous opinion and on the law amending the Electoral Code, namely:

- *Interim Joint Opinion on the Draft Amendments to the Electoral Code of Armenia, version of 19 April 2005, from 14 June 2005 (CDL-AD(2005)019);*
- *Law on the Amendments and Additions to the Electoral Code of the Republic of Armenia, adopted on 17 May 2005 by the National Assembly of Armenia (CDL-EL(2005)024);*
- *The version of the Electoral Code of 3 August 2002 (CDL(2003)052).*

2. The present opinion by Messrs Taavis Annus (Venise Commission, Member, Estonia) and Jessie Pilgrim (OSCE/ODIHR, election expert) was adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and by the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005)

3. The amendments implement several of the recommendations contained in the previous joint OSCE/ODIHR and the Venice Commission opinions and constitute positive improvement in the legal framework for elections. For example, improvements are made regarding the training and certification of electoral commission members, introduction of the national voters' register, the rights and safeguards of proxies, voting procedures and summarization and publication of voting results. Authorities in Armenia are to be commended for making these improvements.

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

5. Additionally, although the amendments to the Electoral Code constitute overall improvement, good faith implementation of the Code remains crucial for the conduct of genuinely democratic elections. Electoral rules facilitate fair elections and democratic results only if they are not neglected nor abused by the authorities responsible for their implementation. Most international observers have pointed out that the biggest shortcoming in the conduct of elections in Armenia lies in the implementation of the Electoral Code, not in the Electoral Code itself. Among the most important concerns has been the failure by authorities to take measures against those violating the election law. Therefore, the success of the amendments depends on the implementation of them in practice.

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. AMENDMENTS TO THE ELECTORAL CODE

A. FORMATION OF CENTRAL AND TERRITORIAL ELECTORAL COMMISSIONS

7. The lack of confidence in the objectivity, impartiality and transparency of electoral administration has been noted in most election observation reports in Armenia. A major reason for this has been the imbalanced representation of different political forces on the Central Electoral Commission (CEC) and the Territorial Electoral Commissions (TECs). The amendments change the provisions on the formation of the CEC and the TECs. According to Article 35 of the Code, the members of the CEC are appointed as following:

- one member by the permanent body of each party having a faction in the National Assembly; in case of party alliances – by the majority vote of permanent bodies of the parties in the alliance;
- one member by the President of the Republic;
- one member by the Board of Chairmen of the Republic of Armenia Courts from the judges of the Republic of Armenia Universal Jurisdiction Court;[1]
- one member by the Cassation Court from the Cassation Court judges.

8. The members of the TEC are appointed by the CEC members, on the principle "one member of TEC per one member of the CEC" (Article 36). Previously, members of the TECs were appointed by the permanent bodies of parties and party alliances having a faction in the current or dissolved National Assembly (one member each) and the President of Republic (three members). The amendments would thus replace the appointment of two members previously appointed by the President of Republic with the appointment of two judges by judicial bodies. As such, these amendments constitute improvement as the involvement of judiciary should reduce undue influence of the executive branch government or a single political force over these commissions. These amendments should increase political pluralism in the appointment of the CEC and TECs.[2]

9. The amendments foresee 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 electoral commissions, as this can enhance impartiality of the commissions. The amendments take into account the fact that provisions on complaints and appeals permit judicial review of electoral commission decisions, actions, and inaction, and accordingly forbid a member of an electoral commission to review an appeal of the same commission in the member's judicial capacity (Article 40 (14)). This meets the recommendation in the Interim Joint Opinion.

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[1] *Until the next National Assembly elections, this member of the CEC is appointed by the group of parliamentarians endorsed during the first sitting of incumbent National Assembly.*

[2] *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. See as well the Venice Commission Code of Good Practice in Electoral Matters, Chapter I. 2.3.*

10. The Venice Commission and the OSCE/ODIHR cannot predict whether the practical implementation of the adopted amendments will be made in good faith. Thus, the extent to which the amendments will result in impartial and professional electoral administration remains to be seen during future elections. Hopefully, the amendments will be implemented in good faith and with serious efforts to increase confidence in the electoral administration. However, no law can guarantee that the members of electoral commissions will act honestly and impartially. The OSCE/ODIHR and Venice Commission again stress that the good faith implementation of the provisions on electoral commission formation and administration remains crucial.

11. Amended Article 38 grants the President of Armenia appointment powers over vacancies on the CEC and TECs during the 20 days before an election, if 2/3 of the commission members would not be otherwise in office. The presidential emergency appointee must be a member of the judiciary and his or her powers terminate 10 days after the election, when the original appointment body makes the new appointment (Article 38 (3^1) 1) last sentence). Thus, the original appointing body does not have the power to appoint a new member after the President of the Republic has made the choice until after the elections. There also seems to be no time period for the original appointment body to find a commission member for the vacant position before the President of the Republic makes the appointment. Nor is the President of the Republic bound to fill the earliest seat left vacant. This might create opportunities for the President to fill seats with members that should be appointed by parties or alliances in the opposition to the President of the Republic, while leaving other seats open. Such uncertainty should be avoided.

12. The amendments specify that the party alliances appoint members to the CEC by the majority vote of the permanent bodies of the parties that are a part of a party alliance (Article 35 (1) 1)). If such decision is not taken within the prescribed time period, the appointment power is transferred to the "respective faction." No specific provision is included for the case when party alliance breaks apart. Based on the Electoral Code, it is not clear whether a "respective faction" can always be easily determined for a party alliance (especially after a break-up of the alliance).

13. Although appointment powers for the CEC and TEC are held by various sources under the amendments, the process of appointment must be completed by Presidential decree (Article 35 (3): "Structure of Central Electoral Commission is approved by the Decree of the President of Republic of Armenia on the basis on recommendations made by the entities forming Central Electoral Commission").[3] It is not specified 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. According to the adopted text, the appointing institutions make a recommendation to the president, not a binding nomination. It would be preferable to also include text that places an affirmative obligation on the President to expeditiously issue the decree after nominations have been made.

B. FORMATION OF PRECINCT ELECTORAL 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".

[3] *There is a confusion in the translated text, as the amended Article 36 (1), last sentence, restates the same provision; although the Article should regulate the formation of the TECs, not the CEC. It is assumed that the President of the Republic also issues decrees appointing the members of the TECs.*

Thus, concerns expressed above about the appointment principles governing appointment of the TEC are also applicable to the appointment of the PEC. Further, it is assumed that the judges on the TECs do not have to appoint a judge on the PEC, but may appoint any trained and certified person eligible to become a member of the PEC.

15. The amendment to Paragraph 3.1 of Article 38 provides that in the period of 15 to one day before elections, PEC vacancies 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. The procedure for conducting the lottery should be defined in more detail, specifying its exact mechanism and, in particular, stipulating the right for proxies, international and domestic observers to observe it. As PECs constitute a significant segment of electoral administration, it is crucial to ensure a transparent process of nomination of all PEC members, thus contributing to public confidence in election procedures.

C. CANDIDACY

16. The required minimum percentage of names of women on a candidate list is increased from 5% to 15% (amendment to Article 100(2)). This is a positive amendment. The amendments also foresee that "at least each 10^{th} part of the candidate list shall be comprised of women." It should be once more noted that 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, both legislative as well as non-legislative measures encouraging the increase in women's representation. Examples of such measures have been included in the Council of Europe Parliamentary Assembly Recommendation 1676 (2004), adopted on 5 October 2004.

17. The amendments eliminate the requirement of collecting signatures supporting a candidate's nomination. This is acceptable in principle. Contrary to the various previous drafts, the deposits are not raised in the amended code (Articles 71(1), 101(1)(1) and 108(2)), and remain the same as in previous elections, e.g. in case of presidential elections, at 5,000; in case of proportional elections, at 2,500; and in case of majority elections at 100 times the minimum salary. This corresponds to the previous Venice Commission and OSCE/ODIHR recommendations. Absent evidence of high numbers of potential frivolous candidates, such deposits seem reasonable.

18. Articles 78 and 111 are amended so that the candidate can withdraw after submitting a written application. Previously, no provisions regarding the process of withdrawal were included. The requirement of a written application partially meets the previous recommendations by the Venice Commission and the OSCE/ODIHR. However, the articles could still be improved by stating the grounds, if any, that are necessary to justify withdrawal.

D. VOTING RIGHTS

19. The 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. 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 further consideration. 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."[4] At some point, the argument of "unpreventable fraud" is not sufficient to justify the denial of the voting rights of these citizens.

20. The amended Electoral Code does not regulate separately 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 voters' lists. The new Article 56 (5) refers to the general provisions regulating the voting procedures that are to be applied also to military servicemen, the persons registered in Diplomatic and Consular Representations, as well as persons being in detention or under arrest. Even though normal voting procedures can be used in those instances, it should be stressed that under those circumstances supervision over the enforcement of the Electoral Code should be exercised with special care. Persons under detention or military servicemen are especially prone to being manipulated to vote in a certain way.

E. VOTERS' LISTS

21. 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 previous recommendations of the Venice Commission and the OSCE/ODIHR. The final amendments eliminate the role of the CEC and the TECs over the compilation of the voters' lists almost completely. For example, compared with the previous draft amendments, the obligation of the CEC and the TECs to oversee the compilation and maintenance of voters' lists has been eliminated. Also, according to the adopted amendments, the CEC would not adopt procedures regarding the publication or distribution of copies of the voters' lists. It is assumed that such procedures are adopted by the Authorized Agency. In principle, the clear responsibility over the voters' lists with one institution (i.e. Authorized Agency) is acceptable. In practice, cooperation between the CEC and the Authorized Agency is still necessary, and the provisions eliminated from the Electoral Code should not be an obstacle to such co-operation.

F. BALLOTS, VOTING AND TRANSPARENCY

22. The amended Article 49^1 (7) changes the rules for approving sample ballots. The amended Code 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.

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[4] *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, pending before the Grand Chamber).*

23. The option to vote "against all" remains in the Electoral Code, failing to reflect previous recommendations. As a matter 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.

24. 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. However, an additional sub-paragraph 6 is added into Article 58, specifying that a ballot is invalid if "procedure of marking a mark in a ballot set out by article 57 of this Code was violated." This provision seems too strict, as it allows the invalidation of ballots for minor violations, even when the identity of the voter was not revealed.

25. Although previous drafts included provisions for inking (Article 55 (2)), the adopted amendment has eliminated this procedure. As inking is one of the most common anti-fraud procedures used to prevent multiple voting. The deletion of this provision from the draft is not a positive step. It is to be hoped that the electoral administration is able to prevent fraud by other means, especially by using updated and accurate voters' lists and carefully checking the voter identity.

26. The amendment to Article 27[1] (1) (7) now grants to a proxy the right to be present when votes are being counted and summarized. This corresponds to the previous opinion. It may be advisable to remind some fundamental principles regarding the observations of elections and the subsequent rights and duties for observers; among them, "observation must not be confined to the election day itself, but must include the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting."[5]

G. COMPLAINTS AND APPEALS

27. The amendments regulating the filing of complaints and appeals concerning the action, inaction, or decision of an electoral commission are set forth in 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 provisions contain ambiguities and inconsistencies, and still require improvement.

28. 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.

29. The following exceptions apply:

[5] *See the Venice Commission Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), Part I, 3.2, "Observation of elections".*

- 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).

30. It is not clear from the amendments which institution handles appeals regarding those disputes related to summarizing (tabulating) 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). This is not clear with the current text. It would also provide more clarity for potential appellants if the text was more precise, stating the specific court to which appeals are submitted.

31. 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.

32. The powers of the bodies handling disputes are not specified as clearly as possible. It is not clear which institutions following which procedures may declare elections invalid if there are violations that may have influenced the results of the elections. Amended Article 40 (4) provides that the TEC may declare elections invalid in a precinct; no appeal or complaint is necessary for such action. It is assumed that such a decision may be taken also if a complaint has reached the TEC. Amended Article 40 (12) provides that the court of first instance may declare local elections null and void. According to the amended Code, the court of first instance may thus not declare an election results partially null and void, if it reviews decisions of the TEC, for example. A more comprehensive list of powers of bodies handling election complaints and appeals should be included in the Code.

33. 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 the authority to annul a decision of the TEC. Thus, it would appear that the CEC would have wide discretion to exercise this authority under any circumstance. This should be considered carefully as such power is very broad. Further, the rationale for granting the CEC such broad powers but then creating a specific exception for a decision electing a National Assembly member in a majority constituency is unclear. It is also unclear whether the Territorial Electoral Commission has the right to review the decisions of the Precinct Electoral Commissions.

34. The amendments (Article 40^1 (4)) provide some procedural rights to the applicant. Namely, the applicant "may regularly get information on the progress of discussion of his/her application

and where required provide justification proving the facts stated in the application." Although a step in the right direction, this text still does not guarantee the right to a fair, public, and transparent hearing on the complaint.

35. The amended Article 40^1 (3) establishes the duty of a person submitting an appeal to clearly state the request, justify it, and attach possible evidence to the appeal. This corresponds to the previous recommendations by the Venice Commission and the OSCE/ODIHR. However, the consequence of omitting such information is inappropriate – it "shall be considered anonymous and shall not be reviewed" (Article 40^1 (3)). Such applications are clearly not anonymous.

III. CONCLUSION

36. The amendments to the Electoral Code 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 electoral administration and the election complaints. Of particular concern are the provisions for filing election complaints and appeals, which fail to create a sound and unambiguous legal framework for the adjudication of election disputes and protection of suffrage rights. Moreover, good faith implementation of the Code remains crucial for the conduct of genuinely democratic elections.