Strasbourg/Warsaw, 13 October 2004

CDL-EL(2004)016rev
Engl. only

Opinion no. 310 /2004

JOINT OPINION ON THE DRAFT AMENDMENTS TO THE ELECTORAL CODE OF ARMENIA

by
the Venice Commission
and
OSCE/ODIHR

Adopted by the Council for Democratic Elections
at its 10th meeting
(Venice, 9 October 2004)

on the basis of comments by

Mr Taavi ANNUS (Venice Commission, member, Estonia)
Mr Jessie PILGRIM (OSCE/ODIHR, election expert)

I. Introduction

1. These comments follow the previous work by the Venice Commission and the OSCE/ODIHR on the Electoral Code of the Republic of Armenia. This analysis is specifically based on the two most recent recommendations and the draft law amending the Electoral Code, namely:

- Joint Recommendations on the Electoral Law and the Electoral Administration in Armenia by OSCE/ODIHR and the Venice Commission from 17 December 2003, CDL-AD(2003)021 (further referred to as Joint Recommendations);
- Additional Considerations on the Electoral Law and Electoral Administration in Armenia based on the roundtable on electoral reform held in Yerevan between 24/27 February 2004 by Michael Krennerich, Owen Masters and Jessie Pilgrim (Additional Considerations);
- Draft Law on Amending and Supplementing the Electoral Code of the Republic of Armenia, submitted by Mr Torossian, version of 21 July 2004.

2. The comments are based on the version of the Electoral Code as of 3 August 2002, see document CDL(2003)052.

3. The following remarks are structured upon the Joint Recommendations CDL/AD (2003), taking into account the Additional Considerations referred to above. The remarks are focused on the changes to the Electoral Code and do not deal with the suggestions regarding electoral administration.

4. The draft amendments would implement several of the recommendations contained in the previous OSCE/ODIHR and Venice Commission reports. While the Electoral Code would be improved as a result, several areas remain problematic and the Code still should be improved.

II. Draft Amendments to the Electoral Code

5. Composition of Electoral Commissions. An important change is the new requirement that a member of an electoral commission must have passed professional training courses and be certified. The respective procedures for the training and certification are to be established by the CEC. This directly reflects the recommendations in the Additional Considerations. It is recommended that the procedures of the CEC take into consideration the amount of time available, after adoption of the amendment and before the next election, for such training and certification. Obviously, the scope and depth of the training may be limited by the time available before the next election. Further, a transitional provision should be included regarding the current members of the CEC and TECs. This transitional provision should specifically address to what degree, if any, existing commission members are required to undergo training and certification.

6. The draft does not change the appointment method for members of electoral commissions. In particular, there is still no provision enabling a "trusted institution" to appoint members to the CEC. Although the members of the CEC will have

professional training, they may still be under strong influence of one candidate, especially in the presidential elections.

7. Organisation of the activities of an electoral commission. The draft would change the quorum and voting rules within an electoral commission. Due to a question of translation (the amendments do not exactly reflect the text of the law), it is not certain what the exact change is. However, it seems that the new rule requires that more than half of the members must be present, and more than half of the members of the commission have to vote in favour of a decision in order for it to be adopted. Such a rule avoids some of the problems associated with a higher quorum requirement (e.g. 2/3) or supermajority voting rules, where a small minority can block the activities of the commission. On the other hand, it lowers the required level of consensus in the decision making. Thus, in the absence of a "magic" formula for election commission composition and related decision making, one could only reiterate the need for political will to conduct genuine elections.

8. The draft would prohibit a member of an electoral commission from withdrawing from the commission during the last two days before the voting day (new article 38 (2)(7)). This partially addresses the concern expressed in the Joint Recommendations that a member of an electoral commission should not be dismissed shortly before voting. The change is acceptable, assuming that the member of the commission can be released based on his or her application immediately after the most urgent voting procedures have been conducted (e.g., after the declaration of the election results).

9. Electoral constituencies. The amendments to article 17^1 address the problems noted in the Joint Recommendations regarding the permissible variation in constituency size (the discrepancy of up to 10% is now allowed, down from the previous 15%). It is also welcome that the constituencies must be drawn and corresponding information published at least 180 days prior to the voting day, as opposed to the previous 90 days. However, the law still does not regulate more precisely the procedure for drawing and re-drawing constituencies. Although the requirement of territorial integrity of the constituency provides some guidance for the CEC, a provision also prescribing constituencies based on closely neighbouring administrative units, in order to avoid gerrymandering, could be considered.

10. Requirements for candidates: "permanent residency". The draft makes no changes in the Electoral Code regarding the definition of permanent residency. These comments cannot take into account possible changes in the Civil Code where the issue may be regulated.

11. Ineligibility to be elected. The draft does not take into account the concern that the restrictions on some public officials to stand for election inappropriately differentiate between the majority and the proportional part of the parliamentary elections.

12. Nomination of candidates. As recommended, the draft law would allow party alliances to nominate candidates for deputies of the National Assembly by majority system. The regulations on financing National Assembly elections should also be reconsidered, especially article 112 (2) providing that party alliances may not

contribute to the candidates' pre-election funds. It seems logical that party alliances could financially support the candidates they nominate.

13. The amendments to articles 100 and 101 could be stated in a more logical manner. It is recommended that article 100 state all requirements of a party list, including documents to be provided, and article 101 grant the right of registration if the requirements have been met. Alternatively, these two articles could be combined.

14. It is positive that the draft would foresee a 48-hour period during which candidates or parties may supplement documents and correct errors before their registration can be denied. This adequately responds to the recommendation in the Additional Considerations.

15. Signatures required for registration. The draft eliminates the requirement of collecting signatures supporting a candidate's nomination. Instead, the electoral deposits are raised (in case of presidential elections, from 5,000 to 10,000; in case of proportional elections, from 2,500 to 5,000; and in case of majority elections from 100 to 200 times the minimum salary). The elimination of voter signatures and the use of only deposits are clearly acceptable. This would also eliminate many of the difficulties regarding the verification of voter signatures. However, it should be considered whether the new amounts of deposits are not excessive and whether lesser amounts would not be sufficient to deter frivolous candidates. It should be noted that the amounts presidential candidates may contribute to their pre-election funds equals the electoral deposit. It is not appropriate that a major cost of the campaign is the electoral deposit.

16. Property declaration. The draft would considerably change the rules regarding property declarations. The draft refers to the Law on the Disclosure of Assets and Income of Senior Officials of Authorities in the Republic of Armenia for the procedure regulating the declaration of assets and income. This opinion does not consider the Law on Disclosure and consequently does not assess either its appropriateness or sufficiency for the electoral administration.

17. The amendments would eliminate the duty to declare assets of the candidate's family members and replace it with the duty to declare the assets of the candidate's proxies (new articles 72 (2)(6), 101 (1^1), and 108 (2)(5)). It seems to be an excessive burden on the proxies to declare their assets, and it is not justified by any weighty public interest. It is the financial position of the candidate (and even more of the future office-holder) that is of interest to the public, not of her or his proxies. It is also somewhat unclear which authority is the "authorised public agency" having to verify the declarations.

18. Withdrawal of candidates. The withdrawal of candidates has not been regulated in more detail. It is recommended that the criteria for withdrawal be stated in the Electoral Code.

19. Pre-election campaign. It was recommended that the rules on creation of even conditions between candidates be broadened to encompass news coverage of public media institutions. This recommendation has not been included in the draft.

20. Media. The draft would amend Article 20 of the Electoral Code, responding to some of the issues raised in the Joint Recommendations and Additional Considerations. The exact changes are not clear, due to the fact that the translation of the amendments to paragraphs 3 and 4 of Article 20 and paragraph 2 of Article 22 did not exactly reflect the text of the law. It seems that the changes would require privately owned TV and radio stations, as well as newspapers, and not only public media, to ensure equal access to the candidates. Although efforts to regulate private media are welcome, this approach causes some concerns. Surely it cannot be the aim of these amendments to regulate the behaviour of even small partisan newspapers (even official party publications)? More detailed regulation, with specific definitions of all forms of media and specific requirements for each defined form of media, is necessary.

21. The amendments would give enforcement powers over the regulations regarding media to the National Television and Radio Committee and the CEC. Most notably, the CEC would be responsible for applying to a court requesting the ordering of sanctions on television and radio companies. This would put the CEC in the position of a prosecutor, which should carefully be considered – the current Code does not contain a similar provision. According to article 41 (1) (24), the CEC applies to the relevant competent state bodies in cases of violation of the Code. It should be carefully considered whether the CEC should assume functions directly aimed at punishing.

22. Voting rights. The draft does not include the recommendation that provision be made for voters to vote who are unable to attend their polling station (e.g. hospitalised persons). Although fraud is more probable under those circumstances, the right to vote is a very important human right and all possible measures should be used to uphold this right.

23. It should be borne in mind that the Grand Chamber of the European Court of Human Rights is currently considering whether the blanket ban on voting by detained criminals is justified in light of the European Convention of Human Rights. The Chamber judgment has already found the contrary (Hirst v. the United Kingdom (No. 2) judgment of 30 March 2004, application no. 74025/01). If the Grand Chamber finds a breach of the Convention, the need for mobile ballot boxes at least for detained persons may be required.

24. Voting rights for members of the military and for citizens abroad. The draft would not give the members of the military and the citizens abroad the right to vote in constituency elections. This issue should be given further consideration.

25. Voters lists. The creation of a permanent national voter register would be among the most important developments if the amendments were adopted. A clear division of responsibilities of the relevant central and local government authorities, defined in the law, would enhance the accuracy of the national voter register. It is also positive that the compilation and maintenance of the voter register would be monitored by the CEC. However, as pointed out in the Joint Recommendations, other than the general requirement that the CEC adopt procedures controlling maintenance of voter register, it is unclear what would be the actual process for monitoring voters' lists by electoral commissions.

26. The amendments (article 14 (1)) would enable voters to apply at a precinct electoral commission for a change in the voters list "no later than two days" prior to the voting day. This contradicts the new article 14 (3), allowing for changes in the voters lists during two days prior to the voting day only through a judicial decision (e.g. if the voting day is on Sunday, the voter seems to be able to apply for a change on Friday, but a change can no longer be made). In any case, the time pressure on the various entities is great when a voter asks for a correction on the last possible day. It seems more appropriate to enable voters to submit requests concerning the inaccuracies to the electoral commission up until five days prior to the voting day, as foreseen in the current law.

27. Notification of the voters. It was recommended that voters should receive notification of the precinct where they vote. This recommendation has not been included in the draft. The notification of the voters would be of great use, not only because in such case they would receive information about the appropriate polling station, but also because errors in voters lists can be detected in this way. If a voter does not receive the notification, the voter would immediately be aware of a problem in the register (either a wrong address or no entry in the register). Notification should be sent well ahead of the elections in order to enable voters to correct potential problems. It is obvious that individual notification means mailing costs, but its benefits may well be worth such costs.

28. "Inking". The draft does not include a provision regarding "inking" of the voters' fingers. This should be given further consideration. The reluctance to introduce the inking of voters might be due to a misunderstanding regarding the nature of the procedure and type of ink used. It should be noted that one ink option is invisible ink which is not detectable by the human eye.

29. Ballot security measures. The draft law does not introduce perforated ballots with serial numbers printed on the stubs. The only change regarding ballot security is that the ballots be printed by "one printing house." There is no explicit provision obliging the publication of the name of the printing house, although the decisions of the CEC are generally public.

30. The draft partly incorporates the recommendation in the Additional Considerations that the percentage of extra ballots should be reduced. It is now foreseen that there may be 3% extra ballots. A further step reducing the number of extra ballots until reaching the recommended 1% level should be considered.

31. "Voting against all". The draft would not eliminate the option of voting against all candidates. This option is unusual among established democracies. It may strengthen political apathy in the population. It may also provide voters with an illusion that they have meaningfully voted whereas their vote really does not make a difference. It is recommended that this option be removed from the ballot.

32. Procedure for marking the ballot. As in the Joint Recommendation, it is recommended that a general provision be introduced providing that the ballot paper is valid if the voter's intention is clear and unambiguous. This provision would help prevent manipulation by an electoral commission if it detects a minor violation of the

ballot marking rules, and the invalidation of the vote would benefit the candidate whom the commission members support.

33. Electoral observers. The draft still does not treat the rights and responsibilities of proxies, observers, and representatives of the mass media separately but in a single article, and still contains the provision that observers monitor the work of the electoral commission (article 30 (4)). As observed in the Joint Recommendations and the Additional Considerations, those provisions are not satisfactory. However, a positive development is the right explicitly granted to the proxies, observers and the media representatives to "monitor the process of printing, transporting, and storing ballots in accordance with the procedures established by the CEC". They also would have the explicit right to move freely within the polling station, according to the procedures established by the CEC. It is recommended that those procedures should not include unreasonable restrictions on the right to move freely, such as a permission to move only one at a time. The draft takes into account the recommendation to have observer ID cards stamped by the observer organization represented.

34. Violation of voting procedures. Following the Joint Recommendations, article 57 (5) has been amended to allow a single commission member or proxy to record a violation of the voting procedure in a register.

35. Publishing preliminary results. The draft would require the CEC to regularly publish information on voter turnout on election day, and tabulate available polling station results after midnight (amendment to article 7 paragraph 6). This is a welcome development, especially regarding the duty to publish preliminary results broken down by polling station. However, the draft does not incorporate the recommendation that the Electoral Code include a clear and explicit requirement that detailed preliminary results should immediately be published at all levels and displayed in front of the polling stations. This would avoid many of the serious problems with tabulation that occurred during previous elections and noted by international observers. The immediate posting of results in front of polling stations would not only prevent election fraud, but would also provide citizens with vital information thus enhancing confidence regarding the fairness of elections. It is also questionable as to why the CEC should be restricted to publishing results in three-hour intervals starting from midnight. The CEC should start making preliminary results available as soon as possible and as often as practicable. It would be appropriate to include a provision that the three-hour interval and midnight starting points are the minimum requirements. The Electoral Code could also include a provision requiring the CEC to publish the preliminary results, as soon as they become available, on its website in addition to TV and radio. Further recommendations regarding count, summarisation, reporting and publication of results, stated in the Additional Considerations, have not been included in the draft.

35. Complaints and appeals. The draft does not deal with the complaints and appeals procedures. It is recommended that this part of the Code be thoroughly revised according to the Joint Recommendations and the Additional Considerations. It is of utmost importance that the appeals regarding electoral decisions are treated uniformly. Under the current law, it is possible that violations in a single polling station may be treated differently by separate appeals and review bodies deciding at the same time.

36. Electoral violations. The chapter on electoral violations remains unchanged and could be improved as noted in the Joint Recommendations. The draft would place on electoral commissions under the obligation to report violations of electoral law within a five-day period (new second sentence to the article 45). It could be considered whether such a duty should be extended to all members of the electoral commission, especially considering the possibility that an electoral commission itself could commit a violation.

37. Loss of electoral commission membership as a consequence for electoral violations. As recommended, persons who have committed electoral crimes would lose the right to be members of electoral commissions (the change in article 34 (4)).

38. Report on elections. It is strongly recommended that the CEC should be obliged to "provide an analysis of the violations of the Code following each national election, an indication of measures taken against violators, remedies provided to those aggrieved and any legislative improvements that may be required" (Joint Recommendations, paragraph 55). The draft does not address this issue.

39. Time frames. A welcome change, based on the Joint Recommendations, is the extension of the time when the new CEC assumes office from 40 days to 60 days after the last national election. However, several of the recommendations regarding time frames have not been implemented, especially regarding the 30-day deadline to report on the election, the time frame of the Overview and Audit Service, and the deadlines for parties and candidates to submit campaign accounts.

40. Campaign financing. The draft does not improve the regulations on campaign financing. The recommendations in the Additional Considerations should be thoroughly considered.