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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

by
the Venice Commission
and OSCE/ODIHR

on the basis of comments by

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I. Introduction

1. *This opinion focuses on the electoral reform package that was sent for consideration to the Venice Commission and OSCE/ODIHR by the then President of the National Assembly of the Republic of Armenia, Mr Arthur Baghdasaryan, on 28 March 2006. The reform package consists of 100 draft amendments to the Electoral Code, four draft amendments to the Law on Political Parties and 12 draft amendments to the Criminal Code.[1] The views expressed in this opinion are restricted to the text of the amendments (CDL-EL(2006)020), and do not refer to the Electoral Code, the Party Law or the Criminal Code as a whole.*

2. *These proposed draft amendments have been evaluated against the background of the most recent joint opinions by the Venice Commission and OSCE/ODIHR, an unofficial English translation of the current Electoral Code, as well as the Venice Commission Code of Good Practice in Electoral Matters.[2]*

3. *This comment should, for the reasons stated, be read together with the following documents:*

   - *Final Opinion on the Amendments to the Electoral Code of the Republic of Armenia, by the Venice Commission and OSCE/ODIHR. Strasbourg/Warsaw, 25 October 2005 (CDL-AD(2005)027).*
   - *Electoral Code of the Republic of Armenia (including the amendments adopted on 17 May 2005 by the National Assembly of Armenia) (CDL-EL(2006)019).*
   - *Draft Law on Changes and Amendments to the Electoral Code of the Republic of Armenia (CDL-EL(2006)020).*
   - *The Code of Good Practice in Electoral Matters of the Venice Commission (CDL-AD(2002)023rev).*

4. *Previous joint (interim) opinions and recommendations by the Venice Commission and OSCE/ODIHR are also applicable as they address the Electoral Code as a whole and previous electoral amendments, see e.g. CDL-AD (2005)019, CDL-AD(2005)008; CDL-AD(2004)049, CDL-AD(2003)021.*

5. *Evaluating the proposed electoral reform package, one can distinguish between:*

   - *draft amendments which improve the legal framework for elections (Part II);*
   - *draft amendments which might have positive effects, but need further clarification or have to be proved in practice (Part III);*
   - *draft amendments which might have ambivalent or negative effects and should be re-considered (Part IV);*
   - *recommendations of previous joint opinions by the Venice Commission and OSCE/ODIHR which have not been addressed (Part V).*

6. *The Electoral Code of the Republic of Armenia is a very long document (141 articles) with very detailed provisions. This may not hide the fact that, as the former opinion signalled, the biggest shortcoming in the conduct of elections lies in the implementation of the Code rather*

[1] The election-related amendments to the Law on Political Parties and the Criminal Code have only been considered marginally since the reviewers have the English translation of the amendments, but not of the respective laws.

[2] CDL-AD(2002)023rev.

than in the Code itself. Electoral laws alone cannot guarantee democratic elections. The democratic character of elections depends first and foremost on the responsibility of the authorities to properly implement the electoral law and the commitment of all other election stakeholders (voters, candidates, parties, media etc.) to conduct democratic elections. As previous opinions have stated, a major shortcoming in the conduct of the elections in Armenia has been in the implementation of the Electoral Code. The good faith implementation of the Code remains crucial for the conduct of genuinely democratic elections.

7. *Technical note: The numbering of articles of the draft amendments is not identical with the articles in the respective documents (Electoral Code, Law on Political Parties, Criminal Code). In this comment, first the numbering of articles of the existing laws will be mentioned, followed by the number of the articles of the draft amendments.*

II. Amendments which improve the legal framework for elections

8. The proposed amendments to the electoral legislation contain a number of provisions that can be regarded as positive (or at least unproblematic) steps. Besides minor clarifying provisions, the following articles should be pointed out here:

9. Right to vote in local elections for non citizens (Article 2, Paragraph 1 of the Electoral Code): According to Article 2 of the draft amendments, the right to vote in local elections seems to be granted generally to all non-citizens who reside in the specific community (and not only to non-citizens with refugee status). In accordance with the Council of Europe Framework Convention on the Participation of Foreigners in Public Life at Local Level[3], the introduction of general voting rights for foreign residents in local elections is greatly welcomed. However, "citizen" is used as a conditioning term in several places in the articles regulating compilation of the voter list. Although Paragraph 1 of Article 10 also references "persons who have the right to vote in accordance with Article 2", the concern remains that the articles (*e.g.*, Article 11) regulating the voter list could be applied to limit the rights of non-citizens in local elections. The articles regulating the voter list should be amended to prevent the limitation of voting rights of non-citizens due to the manner in which the voter list is compiled.

10. Secrecy of vote (Article 6 of the Electoral Code): Article 3 of the draft amendments clarifies that the secrecy of the vote is not only a right, but also a responsibility (to be understood as an obligation) of the voter. It also stipulates that control over the free expression of the voters' will shall be prohibited and prosecuted by law. Against the background of open voting practices, which have been observed in Armenian elections, this clarification is welcome.

11. Voter identification (Article 11, Paragraph 3, and Article 55, Paragraph 2 of the Electoral Code): According to Articles 7 and 39 of the draft amendments, not only the voter, but also the responsible electoral commission member shall sign the voter list, after proving the voter's identity in the polling station. Such a signature requirement might be a measure to improve the integrity of the voter identification process and the accountability of the election

[3] European Treaty Series (ETS), No 144.

officials. It is also a measure for providing evidence in the case of violations of the electoral law.

12. Voters per electoral precinct (Article 15, Paragraph 6 of the Electoral Code): Article 11 of the draft amendments reduces the number of voters per each electoral precinct from 2,000 to 1,600 voters. This is an improvement as smaller electoral precincts usually facilitate the management of the voting process on the election day.

13. Allocation and scheduling of free broadcasting time in public media (Article 20, Paragraph 2 of the Electoral Code): Article 14 of the draft amendments provides that the procedures for allocating and scheduling free airtime on public radio and television shall be set on the next day (up to now: within three days) after the deadline for the registration of candidates. If this shorter deadline can be realised in practice, this will facilitate earlier planning of spots on radio and television by candidates and parties.

14. Incompatibility between candidature and media coverage (Article 22, Paragraph 1 of the Electoral Code): According to Article 15 of the draft amendments, reporters and editors not only from public, but also from other radio and television companies, who are registered as candidates, shall be prohibited from covering the elections and hosting radio and TV programmes. It is welcomed that this provision has been extended to private media.

15. Deadline for income declaration (Article 25, Paragraph 11 of the Electoral Code): Article 17 of the draft amendments allows candidates and parties running for the National Assembly to submit their income and expenditure declarations of pre-election funds by 15 days (up to now: 6 days) after the end of elections. This is a more realistic deadline.

16. Rights of proxies (Article 27^1 of the Electoral Code): Article 20 of the draft amendments clarifies and strengthens the rights of proxies. For example, it is quite important that they are now explicitly allowed to be physically near commission members during voting day procedures. Furthermore, they are now explicitly allowed to offer observations and recommendations about the work of the electoral commission to the commission's chairman.

17. Remuneration of Electoral Commission Members (Article 33, Paragraph 9 of the Electoral Code): Article 23 of the draft amendments modifies the remuneration conditions of election commission members. Of particular importance is the fact that, during the period of elections, not only chairmen, deputy chairmen and secretaries of the respective Territorial Electoral Commissions and Precinct Electoral Commissions shall be remunerated, but also ordinary members of TECs and PECs (with the only exception of court judges, appointed to TECs, and members of PECs formed in diplomatic or consular missions abroad). The fact that, in principle, all members of the CEC, TECs and PECs shall be remunerated is a positive amendment, which may strengthen their commitment to the commission's duties and reduce the risk of bribes. At the same time, a failure to carry out responsibilities for no compelling reason shall now be punishable by law, according to the amendments.

18. Access to the area of voting booths (Article 48, Paragraph 1 of the Electoral Code): Article 34 of the draft amendments contains provisions for a limited access area around the voting booths. Although such provisions usually are not regulated in the electoral law (but rather in electoral commission instructions) they might be helpful to guarantee the secrecy of the vote and to prevent group voting.

19. Preparation of ballot envelopes (Article 49[1], Paragraph 11 of the Electoral Code): On the basis of Article 35 of the draft amendments, this new article provides that the preparation of ballot envelopes, which will be introduced by the draft amendments, shall be ensured by the Central Election Commission. If several elections are conducted concurrently, differently coloured envelopes shall be prepared for every voting event. The colour of the envelopes shall correspond to the colour of the respective ballots. The introduction of ballot envelopes, the CEC's responsibility over the production of the envelopes and the colour issue can generally be regarded as positive. (However, the way in which both the ballot paper and the ballot envelopes must be stamped raises concerns; see below).

20. Authentification of ballots (Article 58, Paragraph 1 of the Electoral Code): According to Article 42 of the draft amendments, to be valid, ballots must not only be correctly marked and stamped; they must also be signed by authorised election officials (three members of the PEC). This is a positive amendment in order to safeguard the ballot, which reflects the practice that in many countries ballots bear both an official stamp specific to the polling station and the signature of authorised election officials.

21. Tabulation and transmission of results (Article 63 of the Electoral Code): Article 49 of the draft amendments provides additional safeguards for correction of the PEC protocol by the TEC and the tabulation and transmission of the TEC results. The amendments also provide for immediate public posting of the election results at the TEC. However, the amendments do not provide that published results are broken down to polling station level which has previously been recommended by the OSCE/ODIHR.

22. Share of votes required to regain electoral deposits (Articles 71, 79 and 123 of the Electoral Code): Articles 54, 63 and 89 of the draft amendments stipulate that the required vote share of the candidates in order to retain electoral deposits are calculated on the basis of the *valid* ballots cast. This is a welcome clarification.

23. The option to vote "against all" partially remains in the Electoral Code, as this is a voting option where there is only one candidate on the ballot. Although this is some improvement, the Electoral Code still fails to reflect previous recommendations (*see* CDL-AD(2005)027, Paragraph 23) that the option to vote "against all" be completely removed from the law. Additionally, one-candidate elections should be discouraged and re-registration considered in an event when there is only one candidate.

III. Draft amendments which need to be clarified or proved in practice

24. Deadline for publishing information on voter turnout (Article 7, Paragraph 6, of the Electoral Code): Article 4 of the draft amendments, besides minor clarifications and modifications, shortens the CEC's deadline for publishing the final information about voter turnout in national elections from 12:00 to 1:00 on the following day (it is assumed that this is 1:00 a.m.). While quick turnout information is helpful, it remains to be seen whether the deadline is realistic in practice.

25. Conditions for voter registration (Article 10 of the Electoral Code): Article 6 of the draft amendments introduces more rigid conditions for voter registration. It establishes the registered address as the only basis for voter lists. Furthermore, citizens who reside or travel

outside the country have to submit an application for out-of-country registration and voting. Finally, the amendments also specify the conditions for the registration of military servicemen and their family members. In order to improve voter registration, in principle the amendments are useful. However, due to the lack of absentee voting procedures inside the country (see below), voters who reside temporarily or permanently in a community without being registered, have to vote in the place of their last registration. It remains to be seen how the system will work in practice.

26. Proper furnishing of electoral precincts (Article 16, Paragraph 2 of the Electoral Code): Article 12 of the draft amendments provides that community leaders shall be responsible for "proper furnishing of the precinct centers located in their particular communities". It should be clarified in the article what materials, fixtures, and services constitute "proper furnishing".

27. Observation missions (Article 29, Paragraph 4 of the Electoral Code): Article 21 of the draft amendments revokes Paragraph 4. This paragraph provides that, if the number of organisations that have applied to carrying out an observation mission is so large that it may cause technical difficulties for voting and vote counting, then priority shall be given to organisations which guarantee that their observation mission will cover the entire territory of the Republic of Armenia. Revocation of this provision is welcomed. It should be ensured that no bureaucratic barriers and restrictions are created for electoral observation missions.

28. Authority of persons carrying through observation missions (Article 29, Paragraph 6 of the Electoral Code): According to Article 21 of the draft amendments, the authority of persons carrying out observation missions shall be terminated 20 days after the end of elections (up to now: 10 days). Although the extension of the observers' accreditation period is welcomed, it would be preferable to extend the possibility for observation until the announcement of the final results and adjudication of all election complaints and appeals. The electoral law should specify that observers have a role and a right to observe the post-election period and have a right of access to electoral commissions and documents until all the electoral tasks are completed.

29. Precinct electoral commissions in diplomatic delegations (Article 34, Paragraph 1 of the Code): Adding the words of Article 24 of the draft amendments to Article 34, Paragraph 1 of the Code, the wording of the English translation of the Article is grammatically not entirely clear. It is assumed that judges and members of Precinct Electoral Commissions formed in diplomatic or consular missions abroad are not required to undertake electoral training. If this is not an issue of translation, then the wording of the article might be clarified as the article could be interpreted to apply only to Precinct Electoral Commissions formed abroad.

30. President powers for approving the composition of the Central Electoral Commission (Article 35, Paragraph 3 of the Electoral Code): Article 25 of the draft amendments sets the President of the Republic a 10-day deadline for approving the composition of the Central Electoral Commission on the basis of nominations made by the entities responsible for forming the Central Electoral Commissions. However, it has still not been specified whether the 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 (see also CDL-AD(2005)027, Paragraph 13). This concern also applies to Article 38, sub-Paragraph 4 of Paragraph 3^1 added by Article 28 of the draft amendments, which requires a Presidential decree for filling a vacancy.

31. Staff of the Central Electoral Commission (Article 39, Paragraph 3 of the Electoral Code): Article 29 of the draft amendments revokes Paragraph 3, which stipulates that the chairman of the Central Electoral Commission shall form a staff working on a permanent basis. By revoking such a provision it is not quite clear how permanent staff activities are organised.

32. Signature of ballots (Article 49[1], Paragraph 4, and Article 56, Paragraph 2 of the Electoral Code): According to Articles 35 and 40 of the draft amendments, both the voter and the responsible electoral commission member have to sign the stub of the ballot before the bottom part of the ballot is given to the voter. Such a signature requirement might be an adequate measure to improve the integrity of the process (and to provide evidence in the case of violations of the electoral law). However, it must be assured that this procedure does not permit any attribution of ballots to voters and that the bottom part of the ballot, which is given to the voter, does not permit any *ex-post* voter identification.

33. Electoral documents to be signed (Article 53, Paragraph 1 of the Electoral Code): the new wording of this Paragraph modified by Article 38 of the draft amendments is not consistent with regard to the electoral documents which have to be signed by the members of the Precinct Electoral Commission. Sometimes only ballots and voter lists are mentioned.[4] At other times envelopes are also listed. This article should be reviewed carefully in order to ensure that it describes precisely the intent of the legislator for regulating this aspect of the voting process.

34. Replacement of precinct electoral commissions' members (Article 53, Paragraph 2 of the Electoral Code): According to Article 38 of the draft amendments, the Precinct Electoral Commissions shall decide on the procedures for replacing the commission members in their aforementioned functions with other commission members. It remains to be seen how this rotation system works in practice, and if it creates additional problems.

35. Request to change the colour of the ink for signing ballots (Article 53, Paragraph 3 of the Electoral Code): Article 38 of the draft amendments adds a new sentence in Paragraph 3, which permits a member of the Precinct Electoral Commission or a proxy to request a change in the colour of ink used for stamping the ballots and envelopes. However, the article requires a decision on a request only "if there are different suggestions" on the colour of the ink. This suggests that a single request must be granted by the Precinct Electoral Commission. If this is the intent, then it should be clearly stated in the article. It should also be clearly stated whether there is any limit on the number of requests that can be made by a single member of the Precinct Electoral Commission or a proxy.

36. Procedures for counting and summarising votes and preparing protocols (Articles 60, 60[1], 61 and 62 of the Electoral Code): Articles 45, 46, 47 and 48 of the draft amendments provide for a complex procedure of vote counting, summarising of voting results and preparing election protocols, which may not be easy to implement by Precinct Electoral Commissions. This is partly due to the fact that both the ballot envelopes and the ballot papers have to be checked separately whether they are established specimen. Furthermore, intermediate

[4] This concern also applies to Article 82, Paragraph 1 of the Electoral Code (Article 65 of the draft amendments), which regulates the percentage of extra ballots to be delivered to the polling station. The amendment fails to include ballot envelopes. This concern is also applicable to Article 130, Paragraph 4 of the Electoral Code (Article 94 of the draft amendments).

protocols on voting results in intermediate batches are provided for.[5] Even if the amendments aim at improving the integrity of the procedure, it remains to be seen whether the procedure works without difficulties and time delays in practice. Complex procedures as the one introduced by the draft amendments increase the possibility for errors and require additional training efforts for members of PECs. More troublesome, however, is that this undue complexity could create disruptions in the election processes so serious that some voters may not have their votes accurately counted and the legitimacy of an election is placed at risk.

37. Deadline for announcing preliminary results (Article 63^2, Paragraph 1 of the Electoral Code): Article 51 of the draft amendments shortens the CEC's deadline for announcing the preliminary results of national elections from 28 hours to 24 hours after the end of the voting. While an early announcement of provisional results is desirable, it remains to be seen if the deadline is realistic in practice. It should be clear that there is not only a need for an early announcement but also for a reliable consolidation of provisional results.

38. Election of single candidates standing for a seat (Article 84, Paragraph 2 of the Electoral Code): Article 67 of the draft amendments states that "if only one candidate was running, then he/she shall be considered elected if more than half of the people who participated in the election voted for him/her." This article does not state how the number of voters "who participated in the election" is determined. This could be based on the number of persons who have signed the voters' lists in the polling stations or it could be based on the number of ballots found in ballot boxes. It is not uncommon for these numbers to be different in an election should voters fail to sign the voters lists or to place a ballot in the ballot box. This article should provide additional text stating how this number is determined. This concern also applies to Article 133, Paragraph 2 of the Electoral Code (Article 96 of the draft amendments). However, to provide voters with a genuine choice between different candidates, it would be desirable to have more than one candidate standing in any particular election.

39. Time limits for announcing presidential elections (Article 90, Paragraph 1 of the Electoral Code): Article 71 of the draft amendments stipulates that the voting in new presidential elections according to Article 90 of the Electoral Code shall take place on the 40^{th} day after the new election is announced (instead of "the 40^{th} day after the voting day", as it is stipulated in the existing Code). However, the time limit for the announcement is not specified there.

40. Electoral formula (Article 115, Paragraphs 2, 3, 4, 5, and 9 of the Electoral Code): Article 84 of the draft amendments establishes proportional representation and legal thresholds for 90 of the mandates in the National Assembly. However, the English text does not precisely describe the mathematical formula for allocating mandates to and within candidate lists. The mathematical formula for allocating mandates should be clearly stated so that there is no question as to what constitutes the proper method of allocating mandates.

41. Conditions for invalidating elections (Article 134, Paragraph 5 of the Electoral Code): Article 97 of the draft amendments provides that community council member elections are invalid if "the amount of inaccuracies makes it impossible to determine the winners, whose

[5] However, the articles do not describe how intermediate batches are to be bundled or maintained or whether they are to have "batch numbers".

number is at least half the number of community council members, as specified in Article 120, Paragraph 2, i.e. the difference between the number of ballots cast for the elected candidate and non-elected candidate is smaller than or equal to the difference between the amount of inaccuracies and the ratio of the number of community council member candidates." This text is vague and arbitrarily applies an "irregularity ratio" to all candidates based on the total number of irregularities in the election. Further, the invalidation principle in this text appears to conflict with the invalidation principle provided in the next sentence in Article 134, Paragraph 5, which requires invalidation if "such violations of this Code have occurred during the preparation and conduct of elections, which may have influenced the outcome of the election." This invalidation principle is based on potential "influence" regardless of whether the "influence" could have affected the determination of a winning candidate(s). Article 134, Paragraph 5 should be stated in more precise language and the principles of invalidation, for both inaccuracies and violations of the Electoral Code, should be based on whether a determination of winning candidates may have been affected.

42. Prosecution of electoral violations. Several articles of the Electoral Code (*e.g.* Article 6, Article 9, Paragraph 2; Article 12, Paragraph 2; Article 33, Paragraph 9; Article 63, Paragraph 2; Article 63^1, Paragraph 10); several articles of the Criminal Code (Articles 149 to 154) and a number of draft amendments to the Electoral Code (e.g. Articles 3, 5, 8, 23, 49) and to the Criminal Code (Articles 1 to 12) provide for legal punishment, opening criminal cases or tougher penalties for electoral violations. Given the "culture of impunity" for election-related offences that has been observed in past elections in Armenia, in principle it is most welcome that electoral violators will be held accountable by law. However, it must be assured that unintended "genuine" errors, which are committed by relatively inexperienced election stake-holders, will not be inappropriately criminalised. Furthermore, it should be borne in mind that it is of little value to include severe penalties in the law unless illegal practices will in fact be investigated, prosecuted and punished. Thus, it remains to be seen how the new amendments will be enforced.

IV. Draft amendments which should be re-considered

43. Training of election commission members (Article 34, Paragraph 1 of the Electoral Code): Article 24 of the draft amendments places organisation of the professional training of election commission members with the "bodies and officials who have the authority to form a Central Electoral Commission"…"together with the Central Electoral Commission". Further, the right to nominate persons to receive professional training on conducting elections "belongs to bodies and officials who have the authority to form a Central Electoral Commission". Thus, it appears that ordinary citizens who would like to participate in training and be qualified for public service in conducting elections for their country cannot do so without being nominated by an Article 35 benefactor. This is unfortunate as it politicises an educational process that should be open to all citizens. This amendment is a step back and makes election administration less inclusive and pluralistic.

44. Recall of electoral commissions' members (Article 38, sub-paragraph 9 to Paragraph 2 of the Electoral Code): Article 28 of the draft amendments reintroduces the right to control the actions of nominated election commission members by allowing the "person or body that

has the right to nominate" to recall the member.[6] The possibility to recall, which has been previously criticised by the Venice Commission and OSCE/ODIHR, was removed in 2002.[7] It is troublesome that recall is being reintroduced since it implies that the person recalled is politically accountable to the nominating institution. This casts serious doubts on their neutrality and their ability to perform independently. The Code of Good Practice in Electoral Matters establishes that bodies that appoint members to electoral commissions should not be free to recall them, as it casts doubts on their independence.[8] The reintroduction of the possibility to recall is a step back that makes the election administration more political and less independent.

45. Video recording. (Article 47, Paragraph 2 of the Electoral Code): The authors of the draft amendments have suggested introducing video recording of voting and the summarising of voting results if appropriate financial means are available. If such means are not available, the draft's authors have suggested including a provision allowing proxies and observers to photograph and video the voting and summarising of the voting results. Both options are mentioned in Article 33 of the draft amendments. The use of video cameras should be carefully considered. Although they might be used to prevent or document electoral irregularities, they will certainly have an intimidating effect on voters and might violate the secrecy of the vote. In many countries, thus, video cameras are not (or only with special permission) allowed inside the polling station during the voting process. In the absence of evidence that such a measure is necessary to deter fraud and reassure voters of the legitimacy of election processes, the factor of voter intimidation should be considered as controlling on the issue[9].

46. Approval of printing and preparation of ballots (Article 49[1], Paragraph 6 and 7 of the Electoral Code): Article 35 of the draft amendments provides that the Central Electoral Commission shall approve the ballot specimen and ensure the printing and preparation only of ballots for presidential and National Assembly elections under the proportional system. In the case of National Assembly elections under the majoritarian system and local elections, this should be the responsibility of the Territorial Electoral Commissions. However, it would constitute better practice if the CEC continued to approve and ensure the printing and preparation of ballots for all elections, especially for both the proportional and the majoritarian part of the National Assembly elections (see CDL-AD(2005) 027, Paragraph 22). The overall responsibility for the production of ballots should preferably be placed in the hands of the CEC, as will be the case with the production of ballot envelopes (see new Article 49[1], Paragraph 11).

47. Checks on voters' identity. (Article 55, Paragraph 2, Article 56, Paragraph 2, and Article 57, Paragraph 3 of the Electoral Code): Due to Articles 40 and 41 of the draft amendments, the voter's identity is being checked three times inside the polling station: the first time by the commission member who is responsible for voter registration (according to Article 55, Paragraph 2), the second time by the commission member who is responsible for stamping the ballot (according to the revised Article 56, Paragraph 2) and, finally, by the commission member who is responsible for stamping the ballot envelope (according to the revised Article 57, Paragraph 3). Although the proposed multiple voter identification check aims at

[6] The right to recall is currently limited to recall of a proxy in Article 27, Paragraph 3 of the Electoral Code.
[7] *See* CDL (2000) 103 rev., pp. 3-4; CDL-AD (2002) 007, paragraph 7; CDL (2002) 84, p. 5.
[8] CDL-AD-2002)023rev, II.3.1.f, Paragraph 77.
[9] Interestingly, the Handbook for European Union Election Observation Missions recommends not to use or carry photography, video or recording equipment when undertaking observation duties.

ensuring the integrity of the process, it seems to be unnecessary and cumbersome. First, it is not completely clear on which basis and through which documents the voter's identity is checked by the commission members who are responsible for stamping the ballots or the ballot envelopes. Second, checking voter identity three times inside the polling station is a very complex and time-consuming process. With an appropriate layout of polling stations, an effective management of voter flow and a clear overview of all staff and voter activity by commission members, proxies and observers, it should be sufficient to check the voter's identity once.

48. Stamping the ballot (Article 56, Paragraph 2, and Article 57, Paragraph 3 of the Electoral Code): Articles 40 and 41 of the draft amendments also provide for stamping both the ballot and the ballot envelope. Obviously, this double stamping procedure aims at ensuring the integrity of the electoral documents and the voting process. However, the way in which the procedure will be conducted is unusually complex and could be problematic with regard to the secrecy of the vote. According to the amendments, the voter is first given the ballot paper by the commission member responsible; then he or she proceeds to another commission member who stamps the ballot paper and returns it to the voter together with a ballot envelope; the voter proceeds to the voting booth, where he or she marks the ballot and puts it into the ballot envelope; finally, the envelope is stamped by another commission member, before the voter is allowed to drop the ballot envelope into the ballot box. Two objections can be raised against such a procedure: first, according to the Code of Good Practice in Electoral Matters, the stamping of ballot papers should not take place at the point at which the ballot is presented to the voter because, theoretically, the stamp or the signature might mark the ballot in such a way that the voter could be identified during the count. The second objection is even more important: after the voter has received the ballot, as a rule, no one else should touch the ballot from that point on (see also CDL-AD(2002)023rev, Paragraphs 34-35). Both principles, which aim at ensuring the secrecy of the vote, are not fully respected by the draft amendments.

49. Secrecy of vote (Article 56, Paragraph 4 of the Electoral Code): According to Article 40 of the draft amendments, citizens who are unable to mark the ballots on their own, shall have the right to invite two members of the Precinct Electoral Commission or two proxies into the voting booth with them. Up to now such a voter has the right to invite "another person (but never a proxy) into the voting booth". At a first glance, it seems to be an improvement that not only one, but two persons, who may observe each other, will be allowed to accompany the voter. However, on closer inspection, the amendment makes it more difficult for the respective voter to be accompanied by a person of his/her confidence and to ensure the secrecy of his/her vote. It also creates the situation where political pressure may be exerted on the voter in the voting booth. Permitting a proxy (that is party observer) to enter the voting booth is unacceptable. Furthermore, the article should describe the process for voters who are not able to mark the ballots due to blindness or a condition that requires that information on the ballot be communicated to the voter.

50. Extraordinary presidential elections during military and emergency situations. Article 72 of the draft amendments introduces a paragraph to Article 91 of the Code which prohibits extraordinary presidential elections during military and emergency situations. Extraordinary presidential elections shall take place on the 40th day after the end of the military or emergency situation. While it can be regarded as appropriate not to conduct elections in the context of military and emergency situations, there is the danger that such situations might

be provoked or abused in order to prevent the realisation of extraordinary elections by constitutional means.

51. Payment of election deposits (Article 128, Paragraph 1 of the Electoral Code): Article 93 of the draft amendments removes the text "The community leader or council member candidates shall have the right to use the resources in the pre-election fund to pay their electoral deposits". This amendment will only make it more difficult for some citizens to seek candidacy and should be reconsidered.

52. Liquidation of political parties (Article 31, Part 2 of the Law on Political Parties; Article 2 of the draft amendments) increases the percentage of votes a political party must receive in order to avoid liquidation. As recognised by the Constitution and the Law on Political Parties, a political party can have a role in a democratic society even when not participating in elections. Liquidation of a political party should not be based on its performance in the last two national elections. This concern also applies to Article 31, Part 2^1 of the Law on Political Parties (Article 3 of the draft amendments).

V. Non-addressed recommendations

53. Various points and recommendations expressed in the previous Joint Opinion of the Venice Commission and OSCE/ODIHR (CDL-AD(2005)027) remain fully valid in so far as they are not addressed by the amendments.

54. 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 (*see* CDL-AD(2005)027, Paragraphs 4 and 27-35). The respective Articles 40, 40^1 and 40^2 of the Election Code have not been modified by the proposed draft amendments. However, it is of paramount importance that appeal procedures should be clear, transparent, and easily understandable. Especially with dual complaint and appeal procedures, which involve electoral commissions and ordinary courts, the electoral law should clearly regulate the respective powers and responsibilities of commissions and courts. Thus, the provisions regarding election complaints and appeals should be carefully re-considered, taking into account the suggestions of the previous Joint opinion.

55. The amendments still do not include previous recommendations that provisions be made for those voters to vote who are unable to attend their polling station. The lack of absentee voting procedures may *de facto* disenfranchise a substantial part of the voters who are not able to vote in their respective polling station on the election day. In the case of Armenia, paradoxically, citizens abroad are able to vote for national elections but not citizens within the country who are unable to go to their polling station. Such special voting procedures were omitted from electoral legislation when the original Election Code was adopted in 1999 in an attempt to reduce fraud. However, the argument of "unpreventable" fraud is not sufficient to justify the denial of the voting rights of these citizens. The suffrage is such a fundamental right that all possible measures should be taken to uphold it (*see* CDL-AD(2005)027, Paragraph 19). Of course, it must be clear that with absentee voting strict conditions should be imposed to prevent fraud. Alternatively, additional registration could be introduced on the basis of current or temporary address with voters having the choice to

register this address. However, the voter register should remain based on the permanent registered address.

56. In addition to using accurate voters' lists and carefully checking voters' identities, an effective method to diminish the risk of "multiple voting" is to mark the voter's finger with indelible (visible or invisible) ink to indicate that he or she has voted. The inking of voters' fingers is used in several countries and recommended for emerging and new democracies. Despite the fact that inking was repeatedly recommended by Venice Commission and OSCE/ODIHR experts and was included in previous draft amendments to the Election Code, both the existing Code and the proposed draft amendments do not provide for this procedure in Armenia. It is strongly recommended to introduce such an inking procedure (*see also* CDL-AD(2005)027, Paragraph 25).

57. The proposed amendments do not address the concern voiced in the previous joint opinion (CDL-AD(2005)027, Paragraph 12) on who has the authority to appoint members of the CEC should a coalition or party alliance break apart. Subsequently, factions (i.e. parliamentary groups) may carry through this function however based on the Electoral Code it is not clear whether a "respective faction" can be identified as a party alliance. Good faith implementation of the provisions on formation of electoral commissions remains crucial.

58. The previous Joint Opinion (CDL-AD(2005)027, Paragraph 11) expressed concern relating to the appointment powers of the President of Armenia over vacancies on the CEC and TECs in emergency situations. The proposed amendments do not introduce improvements to these limitations.

59. The election of the Chairperson of the CEC presents some asymmetries: if there are one or more than two candidates, the chairperson is elected by absolute majority (50% of the votes plus one). If there are two candidates, then the one that receives more votes (a plurality) is elected. For the sake of consistency, the same requirement should be introduced in the case of two candidates (this implies a reform of Article 35.9).

VI. Concluding Remarks

60. The proposed amendments to the Electoral Code of Armenia contain a number of improvements in the legal framework for elections. Besides many minor clarifying provisions, positive draft amendments refer, for example, to voting rights for non-citizens in local elections, the characterisation of the secrecy of the vote as both a right and an obligation, stricter signature requirements for electoral documents, smaller sizes of electoral precincts, the improved status of proxies and the remuneration of election commission members.

61. Some, in principle positive draft amendments may need further clarification or must be proved in practice. There are still some unanswered questions with regard to, for example, voter registration, the presidential role in approving the composition of the Central Election Commission, the complexity of vote counting, some modified deadlines, as well as the prosecution of electoral violations.

62. Furthermore there are some draft amendments which might have ambivalent or negative effects and should be re-considered. Further discussion might be necessary with regard to, for example, politicisation of the training process for election commission members, the right to recall election commission members, the issue of video-recording voting day procedures inside the polling stations, the responsibilities for approving the ballot specimen, the multiple voter identity check, the procedure of stamping ballots and ballot envelopes, and the assistance to voters who are unable to mark the ballots on their own.

63. Most important, however, is the fact that some important recommendations in previous opinions have not been addressed by the authorities. Of particular concern are the unsatisfactory provisions for filing election complaints and appeals. Additional recommendations that remain to be addressed include shortcomings related to the lack of absentee voting procedures inside the country, the issue of inking, as well as the ballot option to vote “against all”.

64. However, it must also be noted that a major shortcoming in the conduct of the elections in Armenia has been in the implementation of the electoral legislation. Good faith implementation of the electoral legislation remains crucial for the conduct of genuinely democratic elections.