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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

**by
the Venice Commission
and
the OSCE Office for Democratic Institutions and Human Rights
(OSCE/ODIHR)**

**on the basis of comments by
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**This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. The Venice Commission was requested on 28 March 2006 by the President of the National Assembly of the Republic of Armenia to provide an Opinion on the draft amendments to the Electoral Code. The most recent joint opinion of the Venice Commission and the Organisation for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the Election Code (CDL-AD(2006)026) is dated 15 June 2006 and addresses the Draft Law on Changes and Amendments to the Electoral Code of the Republic of Armenia (CDL-EL(2006)020). Following adoption of latest amendments on 22 December 2006, the OSCE/ODIHR and the Venice Commission agreed on providing a final joint opinion. The present opinion represents therefore an update to the June 2006 Opinion and covers the latest amendments of 22 December 2006 (CDL-EL(2007)002).
2. The present opinion focuses on the electoral reform package that was adopted by the National Assembly of the Republic of Armenia on 22 December 2006 and concludes a continuous process of co-operation between the National Assembly of Armenia, the Venice Commission and the OSCE/ODIHR.
3. The former Joint Opinion on the Electoral Code of the Republic of Armenia from ODIHR and the Venice Commission (Joint Opinion on Draft Amendments to the Electoral Code of the Republic of Armenia, no. 378/2006, Doc. CDL-AD(2006)026), 15 June 2006) classified the changes required to the legislation in four categories: Amendments which improve the legal framework for elections, draft amendments which need to be clarified or proved in practice, draft amendments that should be reconsidered and non addressed recommendations. Both this Joint Opinion and a former Final Opinion on the Amendments to the Electoral Code of the Republic of Armenia, by the Venice Commission and OSCE/ODIHR, 25 October 2005 (CDL-AD(2005)027) focus on three main points: electoral administration, electoral complaints, and mechanisms for ensuring the integrity of the voting. Nevertheless, both stress that having genuinely democratic elections is not exclusively a matter of having a very detailed legal document, but of a good implementation of the electoral legislation.
4. This opinion should be read together with the following documents:
 - 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).
 - Law amending the Electoral Code of the Republic of Armenia (CDL-EL(2007)002).
 - Final Opinion on the Amendments to the Electoral Code of the Republic of Armenia, by the Venice Commission and OSCE/ODIHR (CDL-AD(2005)027; "the Final Opinion").
 - Joint Opinion on Draft Amendments to the Electoral Code of the Republic of Armenia (CDL-AD(2006)026; "the Joint Opinion").
 - Congress of Local and Regional Authorities of the Council of Europe, Report on the constitutional referendum in Armenia observed on 27 November 2005 (CG/BUR (12) 97, Rapporteur: Sean O'Brien (Ireland, L, SOC) Document adopted by the Bureau of the Congress on 10 February 2006).
 - Committee of Ministers of the Council of Europe, Recommendation no. R (99) 15, of the Committee of Ministers to Member States on Measures concerning Media coverage of Election Campaigns (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies).
 - The Code of Good Practice in Electoral Matters of the Venice Commission (CDL-AD(2002)023rev).
5. The present document has been adopted by the Council for Democratic Elections at its ... meeting (Venice, ...) and the Venice Commission at its ... plenary session (Venice, ...).

II. Amendments which improve the legal framework for elections and partially addressed recommendations

6. The current draft contains a number of improvements, on issues such as distribution of tasks within electoral commissions, electoral deposit, voting procedure, recall.

Functioning of the electoral administration

7. According to Article 46 of the draft amendments, amending 53 Part 1 of the Code, the precinct electoral commission (PEC) shall hold a draw to distribute the following tasks within the commission members: a) on the day before the voting day, three commission members signing ballots, which shall be obliged to sign all ballots and all pages of the voter lists prior to 24:00; b) commission members registering voters, provided that there is at least one commission member per 1,000 voters; c) commission members allocating ballots and voting envelopes, provided that there is at least one commission member per 1,000 voters; d) commission member responsible for sealing the voting envelopes and for the ballot box; e) commission member holding the voting by means of a travelling ballot box; f) the shift of functions to rotate between precinct electoral commission members at 2 hour intervals. The commission chairman and the secretary shall not participate in the draw, but they have to replace other commission members in case of absence.

Election deposit

8. The former Draft Amendment removed the following text of Article 128 Paragraph 1: "The community leader or council member candidates may use the resources in the pre-election fund to pay their electoral deposits". The amendments under comment maintain this sentence (even if they do make other changes to this paragraph), facilitating citizens to seek candidacy and to pay the election deposit. Nevertheless, the level of candidate deposits should be reduced to encourage more candidates in rural communities.

Recall

9. The possibility to recall a commission's members by the person or body that has the right to nominate them, abolished in 2002 but re-introduced in the previous draft amendments, was finally not included in Article 38 of the Code. As expressed in Paragraph 45 of the Joint Opinion and Paragraph 77 of the Code of Good Practice in Electoral Matters, discretionary recall casts doubts on the independence and political neutrality of the members of electoral commissions.¹ It is an improvement towards the previous draft that the recall does not appear in the final version of the Code.

Observers

10. The new amendments explicitly identify the authorities entitled to invite observers; these authorities are the National Assembly, the President, the Government, and the Central Electoral Commission of Armenia (Article 28 Part 1¹ of the Code, amended by Article 24 of the Draft Amendments). The role of observation missions has also been reinforced, as recommended by §29 of the Joint Opinion,² extending their authority until the 8th day following the official promulgation of the election results.³ In case the results are challenged, the authority of the observers shall terminate on the day following the day on which the judicial act is published. If

¹ However, during the meeting between the Venice Commission, the OSCE/ODIHR and the National Assembly of Armenia to Yerevan on 27-28 September 2006, it was brought to the attention of the delegation that recall might be an instrument for acting against bribes on commission members.

² Joint Opinion on Draft Amendments to the Electoral Code of the Republic of Armenia (CDL-AD(2006)026). Hereafter "the Joint Opinion".

³ The current provision states: "The authority of persons carrying out observation missions shall be terminated ten days after the end of elections" (Article 29, Part 6).

the court orders a re-voting or a new election, there is no need for the observers' organisations to re-register (Article 29 of the Code; Article 25 Draft Amendments). The priority that Article 29 §4 gives to organisations that cover the entire territory of the Republic of Armenia with their observation mission has been revoked.

Voting procedure

11. There are also improvements in the voting procedure. Voting envelopes for placing the ballots by the voter after the voting are introduced (Article 49 Part 11, added by Article 43 of the amendments), and several provisions make reference to them.

Registration for voters

12. The commission member responsible for checking the registration of the voter shall sign next to the voter's signature in the column designated for such member's signature (Article 47 of the draft amendments, adding a new part to Part 2 of Article 55 of the Code).

Ballot papers – Stamping

13. The signing and stamping of the ballots have been previously analysed in the Joint Opinion. Both procedures could be problematic if it leads to some kind of ex-post voter's identification (§33 and §49 of the Joint Opinion). The Law Amending the RA Electoral Code eliminates the requirement of stamping the ballots, and it remains only the signature by three commission members (Article 53 Part 1). The signing of the ballot takes now place 24 hours before the elections.

Police – Right to vote

14. No later than the third day prior to the voting day, the Republic of Armenia Police shall distribute the police officers that should serve in the precinct electoral centres. They will have the right to vote in their duty station, for which an additional list will be made (Article 10 Part 3, amended by Article 6).

Proxies

15. The proxies can be physically present and observe the activities of the members of the commission, without disrupting their work. In addition, a new paragraph 6¹ of Article 27¹ of the Code gives proxies the possibility to observe the commission work and make comments and suggestions to the commission chairman on the voting day.

Video recording

16. The initial draft amendments contemplated video recording both of the voting and of the summarising of the results. The use of video recording, in the opinion of the Venice Commission and OSCE/ODIHR (§46 of the Joint Opinion), should be carefully considered since it could generate, on the one hand, intimidating effects, and, on the other, it could violate the secrecy of the vote. The draft amendments limit the videotaping to the process of summarising the voting results by proxies, observers, and representatives of the mass media without any hindrance.

Patients in medical institutions – Right to vote

17. A new Paragraph has been added to Article 46. This regulates the voting of citizens undergoing in-patient treatment in medical institutions; carrying out in-patient treatment and who are unable on their own to attend the precinct centre on the voting day. The initial draft amendments had a broader personal scope, as it included persons unable to attend the polling station and disable people. Thus, this new regulation introducing mobile voting addresses only partially the recommendation of the Venice Commission and OSCE/ODIHR (§56 of the Joint Opinion), in order to enable part of the citizens unable to attend the polling station – those subjected to medical treatment in certain institutions – to vote, and, in this way, to uphold this fundamental right.

Training of members of electoral commissions

18. In particular, it is noticed with satisfaction that the new amendments have introduced procedures for training Armenian citizens in courses about how to conduct elections (Article 28 of the Draft Amendments; New Part 1¹ of Article 34 of the Code). This was suggested during the meeting in Yerevan in September 2006. Despite some reserves on the test as the qualifying instrument for membership of electoral commissions, these courses may be an important step for empowering citizens and giving them a sense of ownership of the electoral process.

III. Non-addressed recommendations

19. There are a number of amendments still not clarified and of non-addressed recommendations, previously pointed out by the opinions of the Venice Commission and the OSCE/ODIHR.

Composition of the CEC

20. The presidential role in approving the composition of the CEC is not yet clear. Article 35 Paragraph 3 (as amended by Article 29 of the Draft Amendments) requires a decree of the President of the Republic of Armenia for approving the composition of the CEC, on the basis of nominations made by the entities responsible for forming the CEC. The former opinions expressed concern and asked for a clarification of this article of the Code (§31 of the Joint Opinion; §13 of the Final Opinion⁴). It is not specified whether the Presidential decree is merely a formality, which would imply that he has no power to veto, negate, or prevent an appointment by means of this formality.

Voting procedure

21. Article 57 Part 3 (modified by Article 49 of the Law Amending the RA Electoral Code) specifies the procedure to be followed by the voter and by the commission member responsible for stamping the voting envelopes and for the ballot box after the voter marks the ballot. He shall fold the ballot while in the voting booth, place it inside the voting envelope, and approach the ballot box. The commission member shall seal the voting envelope, open the slot of the ballot box, and enable the voter to drop the voting envelope into the ballot box. The stamping of the envelope produces similar objections as the stamping of the ballot, since the stamp might mark the ballot in such a way that the voter could be identified during the counting (§49 of the Joint Opinion) The fact that the commission member responsible for stamping the voting envelopes seals the envelope conflicts with the rule that states that after the voter has received the ballot, no one else should touch the ballot (Code of Good Practice in Electoral Matters, §34-35).

22. The printing and preparation of the ballots remains unclear and does not address previous recommendations of the Venice Commission and the ODIHR (§47 of the Joint Opinion). While the CEC is in charge of the printing and preparation of envelope (Article 49¹ (11), part added by Article 43 of the amendments), there is a contradiction concerning the ballots. On the one hand, Article 49¹ (6) of the Code says that the CEC shall approve the ballot specimen and ensure the printing and preparation of ballots for presidential and National Assembly elections; on the other hand, according to Article 114 (3) and (5), a distinction is made between elections held under the majoritarian system (in which the Territorial Electoral Commission – TEC – is responsible for printing the ballots), and the ones held under proportional system (in which CEC has to print the ballots).

⁴ 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). Hereafter “the Final Opinion”.

Electoral violations

23. As in former opinions, provisions related to prosecution of electoral violations are of particular concern. The overview of the different institutions that handle the appeals is as follows: 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 (Article 40 of the Code). The later provision that regulates complaints against decisions, actions or inactions of electoral commission, has not changed substantially with the amendments, but certain numbers have been re-written or slightly changed. Article 40¹ introduces some new contents, like the possibility to correct formal mistakes in the applications. However, previous objections remain, such as the lack of clear definition of the powers and responsibilities of both the commissions and the courts as appealing institutions (§55 of the Joint Opinion; §27-35 of the Final Opinion). The creation of a comprehensive and proper system for prosecuting irregularities of the voting process is necessary to ensure the integrity of elections.

Appointment of members to the CEC

24. There are other issues not specified or regulated, such as the authority to appoint members of the CEC should a coalition or party alliance break apart (§58 of the Joint Opinion; §12 of the Final Opinion), or the appointment powers of the President of Armenia over vacancies on the CEC and TEC's emergency situations (§59 of the Joint Opinion; § 13 of the Final Opinion).

Voters' identity

25. The Joint Opinion recommends in Paragraph 48 to check voter's identity only once, and considers unnecessary and cumbersome to check it three times inside the polling station, as results from three articles of the current Code (Article 55 Paragraph 2, Article 56 Paragraph 2, and Article 57 Paragraph 3). This multiple voter identification check is complex and time consuming, and doesn't state clearly on the basis of which documents the identification check must be made. The purpose of assuring the integrity of the voting is pursued by other means, as, for example, an effective management of voter flow, proxies and observers.

Extraordinary presidential elections

26. In case of state of emergency or state of martial law, extraordinary presidential elections are prohibited, and shall take place on the 40th day after the ceasing of the emergency or military situation (Article 91 of the Code, amended by Article 80 of the amendments). The former Joint Opinion, paragraph 51, held that there could be a danger of provoking or abusing of this provision to prevent the realisation of extraordinary elections. The exact time of the end of the emergency or military situation is also unclear, considering that the 40 days deadline is determined on the basis of this time.

Inking of voters' fingers

27. The inking of a voters' finger to indicate that he or she has already voted is a recommendation that this new draft amendments still do not address (§57 of the Joint Opinion; §25 of the Final Opinion). The use of indelible ink (visible or invisible) is an effective method for preventing or diminishing the risk of 'multiple voting'.

Selection of the candidates

28. The selection of the candidates in single seat elections contains an asymmetrical system depending on whether there are one or more candidates. Article 116 of the RA Electoral Code (as amended by Article 94 of the RA Law Amending the RA Electoral Code amending Article 116 of the RA Electoral Code) states that "*candidates that receive the most of the "for" votes shall be considered elected* (Article 116.2) whilst *if only one candidate is running, she or he shall be considered elected if she/he receives more than half of the votes cast* (Article 11.3). The system (that the RA Electoral Code names generally majoritarian) contains in reality two

systems; a purely plurality system akin to the British one (for instance) and a system of absolute majority (50% + 1 votes). The rationale for this differentiated approach is questionable.

Quorum

29. The latest amendments contain a new provision (Article 33 that modifies Article 39 of the RA Electoral Code) which introduces a quorum both for the activity of the electoral commissions and the adoption of decisions.

30. The previous provision on quorum for activities of the Commissions (Article 39.6 RA Electoral Code) required half of the members to be present. The new one (Article 33 of the amendments) makes provision for commissions to act regardless the number of members *if all the possibilities of ensuring the participation of the number of Commission members necessary to convene a session have been exhausted*. Whilst this provision may be considered a mechanism for avoiding deadlock, and thus, it may be accepted, it is not clear why the former provision has not been partially retained. Thus, the provision could have stated: *the quorum required is half of the members; nevertheless, the Commission could act if all the possible mechanism for ensuring the participation of members (...) have been exhausted*. Furthermore, the expression *all the possibilities of ensuring the participation* is fairly vague on what exact duties correspond to public authorities to mobilise members.

31. Likewise, the new amendments (Article 33) introduce a provision by which *a decision shall be considered taken, if the number of commission members that voted for such decision is greater than the number of commission members that voted against it*. This substitutes the former provision (Article 39.7 RA Electoral Code): *A vote shall be considered valid if more than half the commission members have taken part in the vote. A decision shall be considered adopted if more than half of the total number of commission's members has voted for it*. Notice that the main change is that the quorum requirement is eliminated and, furthermore, a plurality (single majority) of votes is required.

32. Apart from the suggested wording for article 39.6, both provisions are not, in themselves, questionable. In an electoral system in which the formation and effective working of electoral commissions may not be secured by the political culture of the citizens involved, it may be understandable that some legal redressing mechanism may be designed. However, this cannot be understood as a full and uncommitted endorsement of the use that Armenian authorities can make of these provisions. Rather, international observers and international organisms are called upon to monitor whether these pragmatic measures become a political instrument in the hands of the authorities to alter the normal proceedings in democratic elections. Should this happen the Venice Commission should duly revise its conditional endorsement of the quorum and vote requirements within electoral commissions.

Media

33. Article 20 of the Code on *Pre-Election Campaign Through Mass Media* should more clearly define regarding references on *impartial* treatment and on *fair and equal conditions*. Current provisions should therefore be clarified in order to raise the necessity of fairness, balance and impartiality in Mass Media.⁵

⁵ See Committee of Ministers of the Council of Europe, Recommendation no. R(99)15 to Member States on Measures concerning Media coverage of Election Campaigns (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies).

III. Concluding remarks

34. After an extensive process of reform of the Armenian Electoral Code, the amendments were passed in Parliament on 22 December 2006 in their second reading. It is unfortunate that they were not approved earlier as there is no much time from the next parliamentary elections, foreseen on 12 May 2007.

35. The RA Electoral Code is a fairly long and detailed instrument that regulates many of the aspects involved in the electoral process. Nevertheless, legal detail is not an alternative for good political practices and a political culture committed with democratic values and the rule of law. Less so, a detailed legal code should not be taken as an alibi for breaching the substance of the respect for the democratic procedures and processes for free elections.

36. The Electoral code is therefore from now on a good basis for the organisation of genuine elections, in spite of the fact that some Venice Commission and OSCE-ODIHR recommendations were not addressed in the revised text, and does not prejudge elections since political will remain the biggest challenge of all political actors.