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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

JOINT INFORMAL COMMENTS ON THE RECOMMENDATIONS OF THE NATIONAL ASSEMBLY WORKING GROUP ON REFORMS IN THE ELECTION CODE OF ARMENIA

by

Mr Kåre Vollan (Expert, Venice Commission, Norway)
Mr Jessie Pilgrim (Expert, OSCE/ODIHR)

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1. Introduction

1. A working group on reforms of the election code within the National Assembly of Armenia has developed a set of principles for legislative reform. The impetus for this reform stems from the challenges during the February 2008 elections. The Venice Commission and OSCE/ODIHR have previously issued a number of joint opinions on the election code of Armenia, most recently in October 2008 (CDL-AD(2008)023, hereinafter referred to as the Joint Opinion). This paper comments on the proposals of the working group based on electoral standards and earlier recommendations of the Venice Commission and OSCE/ODIHR. It should be noted that the proposals of the working group are not presented as the actual text of articles of law, but present concepts that would have to be converted to legal text.

2. Many of the recommendations offered in the most recent Joint Opinion, as well as earlier opinions, have not been addressed in the proposals from the working group. This paper comments only on the proposals actually offered by the working group and not on issues which have been raised but remain unaddressed by the working group's proposals.

2. Composition of Election Commissions

3. The Joint Opinion pointed out that with the current law the election commissions would often be politically biased towards the government coalition with less representation of the opposition:

> "18. The Venice Commission and the OSCE/ODIHR have commented on the lack of political balance in the composition of election commissions in prior opinions and election reports. The practical political problem with this nomination and composition formula is that it can produce an unbalanced composition of these bodies, as observed in the 2008 presidential election."

4. Each political faction had a representative in the CEC and therefore the more factions in a block (government or opposition), the more representatives. The working group tries to correct this by giving the same number of members to the governing coalition and the opposition.

5. In Section 1 , the proposal recommends that four members of the CEC be appointed: one each, by four factions, half of which would represent parties in government and the other half parties in opposition, all for a term of five years. With the chairperson, who is appointed by the President of the Republic of Armenia, full membership of the CEC would consist of five members. The proposal then states that those factions which have not participated in previous appointments would appoint one member each two and half years after the initial appointment of the CEC, also for a five year period. However, the recommendation does not state how many such factions are eligible to appoint members at this time, or what criteria should determine appointment eligibility for these factions. Without further clarification regarding the term and process for appointment by each faction, this recommendation could result in a larger number of CEC members which could detract from its effectiveness. The intention of the working group seems to be to establish CEC membership of a fixed number of five members, which has rolling, overlapping terms of service. Such overlapping terms, independent from the electoral calendar, could potentially serve to increase political independence in the CEC.

6. In addition, for the working group's suggestion to be implemented in practice, clarification is necessary in regards to the guidelines governing appointments in case a political group consists of only one faction. The working group proposes that, in such cases, a faction can assign one of the parties participating in the last election, who received more than 3 per cent of the votes, to appoint the other member, the proposal should include additional rules including procedures in case there is no such party. In such a case, the Venice Commission and

OSCE/ODIHR suggest that the one faction group should be able to appoint two members from their faction.

7. The working group also suggests that, since each faction participating in an election will not necessarily have members in the CEC, all parties registering a list in proportional race be allowed to appoint an advisory member, with no voting rights , to the CEC during election times. The Venice Commission and OSCE/ODIHR note that this is an arrangement that has been proven to work well in other countries and may do so in Armenia as well.

8. The working group proposes that TECs are composed similarly to the CEC. However, the working group also suggests an alternative procedure in footnote 1. Perhaps due to translation, the meaning of this footnote, and how it is practically different from the primary proposal, is not clear. This footnote may be read to mean that half of the TEC chairpersons will also be appointed from each group. If this is the meaning of the footnote, this would be another important measure to maintain political balance and the text (for translation) should be made clearer.

9. According to the English text of the document, during elections each candidate and each party appoint a member with advisory voting rights to the PEC. This could lead to duplication. It might be considered to restrict this to one member for each party proposing candidates and one member for each individual candidate.

10. Under existing law, the PECs are appointed as a reflection of the TEC. The working group proposes that this system be replaced by selecting civil servants (and teachers) by drawing lots. With the establishment of more balanced TECs, this principle may work if civil servants will have the necessary independence and professionalism. Other alternatives include a mixed professional/political model, until such time as the independence and professionalism of the civil service can be improved upon.

11. A very serious penalty is proposed for PEC members committing crimes during their work (please see the last bullet point of section 3 of the proposal). While the imposition of criminal liability at times may be necessary, additional guidance should be provided to ensure that the penalty be proportional to the crime. A lifetime loss of rights to public employment may be too harsh. Additionally, punishment should be restricted to crimes for which malfeasance can be proven. The current proposal suggests that PEC members may be held legally responsible for inaccurate results summarisation at the PEC level. While intentional fraud should clearly be punished, criminal punishment is questionable in cases of honest mistakes in calculation or counting.

3. Complaints and Appeals

12. The 2008 Joint Opinion stated:

> "72. In substance, there are still shortcomings in the legal framework relating to this issue, as has been consistently highlighted in previous joint opinions and OSCE/ODIHR election reports. Currently complaints about the decisions, actions or inactions of a PEC are heard by the TEC and complaints about the decisions, actions or inactions of the TEC are to be appealed to the Administrative Court. The CEC retains a residual jurisdiction to overturn decisions of the TEC that do not comply with the law. It is not clear how and when the CEC may exercise this oversight jurisdiction. In the 2008 presidential elections, some TECs had refused applications for recounts on the basis that they were groundless. These decisions were appealed to the CEC, but the CEC did not exercise its powers to set aside the TEC decisions. The Code should clarify on what grounds the TEC can refuse to undertake a recount. It should also ensure that the CEC makes a considered decision in the case of an appeal or is requested to forward the case to the Administrative Court."

13. A new appeals process is proposed where PEC decisions can be appealed to the TEC and then to a court. TEC decisions (in first instance) may be appealed to the CEC and then to a court. The working group could consider to allow all cases to exhaust the election commission route (all the way to CEC) before they are transmitted to a court. This will underpin the CEC's full responsibility for correct elections and secure an even-handed process regardless where or at which level a complaint was initiated.

14. It is also proposed (see Section 5 of the proposal) that certain actions should always lead to annulment of election results in a precinct. It appears that the decision for annulment is made independent from whether the violation could change the results of the election. This may be a preventive action to reduce attempts of fraud in the future. However, the working group should consider that the invalidation of election results is normally reserved for such instances where the fraud could have affected the results. As such, this proposal could be clarified, recognising that the invalidation of election results should be carefully weighed and applied only where necessary.

15. The proposals to tighten the procedural measures in Sections 6 and 9 are welcomed. However, the language in Section 6 of the proposal should be carefully considered in light of the discussion above regarding proportional punishment.

16. Demands for recounts and the procedure for recounts of ballots from polling stations at TEC level has been one of the controversial issues in the past. The 2008 Joint Opinion stated:

> "64. Article 40.2 provides the procedure for recounts of voting results by TECs. Recounts should begin at 9:00 hours two days after Election Day and continue for five days with no individual recount of any PEC taking more than five hours. The working hours of TECs are from 9:00 to 18:00 hours. The Code provides the TECs with discretion to extend their working hours; however, the Code should be amended to make such an extension mandatory where the number of recounts warrants it. During the 2008 Presidential elections, there were incidents where TECs did not recount all PECs for which recounts had been requested, yet they did not extend their working hours. All possible efforts should be made to conclude all recounts requested; it should not be acceptable to not finish a recount for lack of time, where a TEC had not extended their working hours to complete it. This possibility should be expressed clearly in the code."

17. In regard to this issue, the working group proposes fixing the number of re-counts to twelve per district and allowing for the extension of working hours as necessary. The particular situation in Armenia is that it is the demands which decide which polling stations should be re-counted rather than a responsible commission's assessment of the validity of the demands. In the proposal it seems that the number of recounts in a district is limited to twelve regardless of evidence of fraud. The twelve are then used as a representative sample to deduct the level of fraud for the whole district. This is a highly problematic methodology of assessing the level of fraud in the whole district.

18. It may be good that twelve polling stations are always re-counted. However, if there is clear evidence of fraud in more than twelve polling stations, then all polling stations with potential inaccuracies should be recounted based on the facts, not on drawing lots. The judgement of the validity of claims requesting recounts should still be part of the decision of re-counts and it should therefore not be limited to twelve polling stations.

19. One possibility is to allow any polling station where the TEC agrees with the claimant (or decides at its own initiative) that there is a need for a re-count to proceed with such re-count. In addition, a number of polling stations can be drawn from the rest (regardless of claims) to also

re-count. This would increase public confidence in the overall process, or, if fraud was identified, provide a basis for further inspection of the results process.

20. In addition, the TECs should at their own initiative make reviews of the PEC protocols and assess whether a recount or other assessments are needed. The TEC (and CEC) should not only passively wait for complaints to be filed. In the 2008 Joint Opinion it was stated:

> "13. The powers vested in the CEC and TECs according to Articles 41 and 42 could imply that they do not need to wait for complaints to be filed in cases of potential irregularities of the election process. They should conduct their own reviews and investigate cases of possible fraud. The Code outlines their general authority and duties and implies the possibility of such actions. The introduction of an explicit article stating that the CEC and the TECs should review all work of the subordinate commissions and should investigate and act on irregularities should be considered. Articles 63.1 and 63.2 (and Articles 41 and 42) should be amended to require the TECs and the CEC to conduct independent reviews of the results from precinct election commission (PEC) level and up in cases of obvious mistakes or justified doubts on turnout or invalid votes."

21. In the end, discrepancies are used to assess the amount of inaccuracies, which in turn are used to determine whether the vote should be annulled. This should be approached the same way for both single member constituencies and proportional districts. It should also be clearly stated what happens with the specific votes from the PECs where discrepancies are identified, even if the entire election is not annulled. Such an assessment of inaccuracies can be utilised to ensure validity within the proportional representation system as well (for example, see discussion in paragraph 68 of the Joint Opinion).

4. Voting Results

22. The 2008 Joint Opinion stated:

> "53. Article 63.2 provides that for presidential elections and for the proportional part of National Assembly elections the CEC announces preliminary results at regular intervals and posts them on the CEC website. Consideration should be given to amend the Code to ensure that all results broken down to PEC level and all tabulated protocols are also made available at central level."

23. Section 19 suggests that a chairperson of a commission forwards the result to the CEC and it is posted on the web. In regard to transparency, it should be assured that the results include the disaggregated PEC results, not only district level results.

24. As stated above, TECs and the CEC should be obliged to actively scrutinise election results at lower levels. These bodies should not only respond to claims (see Section 7 of the working group's proposal), but make checks themselves.

5. Media and Campaign Issues

25. The 2008 Joint Opinion stated:

> "34. Article 20(9) mandates the National Commission on Television and Radio (NCTR) to monitor the campaign for compliance with media pre-election requirements. The Constitutional Court found that the NCTR failed to discharge its duty under this section. The Code should be amended to provide specific guidelines that would ensure that the NCTR does fulfil its mandate, and that candidates and political parties have their rights to equal access to the media realised during a campaign, and have a clear remedy available in the event that their rights are infringed."

26. Section 11 of the working group's proposal suggests that a methodology for evaluating the equality between parties is developed by NCTR and published at least five days prior to the start of the campaign. While the requirement that such a methodology be published five days prior to the beginning of the campaign is significant, an earlier deadline may better allow parties to ensure compliance with these rules and should be considered. In addition, while the NCTR's role in managing the media environment is critical, the working group should consider formalising the relationship between the CEC (as the body with overall responsibility for the electoral process) and the NCTR to ensure free flowing communication and to avoid duplication of efforts.

27. In Section 11 it is also said that the NTRC is to publish monitoring every seven years. Unless this is a misprint, it is hard to see why it should not be done more often.

28. The Joint Opinion further stated:

> "36. Article 25 outlines regulation of pre-election funds of candidates, parties and party alliances. Details should be included which items should be reported in the declarations of candidates, parties and party alliances, including costs associated with running a campaign and holding campaign events such as rental of premises, administrative costs, personnel, communication, transportation, etc.
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> 37. The Code should also include a definition on what constitutes "other financial means" and a provision that candidates, parties and party alliances must account for the fair market value of all goods and services received and used during a campaign, whether they are paid or donated."

29. Section 12 of the working group's proposal offers a list of expenditures that can only be covered by the controlled pre-election campaign fund (which has a ceiling). This list appears somewhat limited. In the fifth bullet point of Section 12, the following are listed:

> "-TV and radio advertisement;
> -purchase of all material values that are distributed to voters;
> -printed and other materials for external advertisement, expenditures for placement of advertisement;
> -printed materials distributed to voters."

30. Section 12 could be expanded to include *all* costs related to the campaign, including: use of services for marketing, campaign offices, external campaign strategy support, travel costs, and any cost incurred in an effort to be elected.

31. Section 12 notes disagreement within the working group as to whether the CEC, tax authorities, or an independent agency should be responsible for oversight of campaign finance and reporting requirements. The Venice Commission and OSCE/ODIHR recognise the CEC's

competence, but reiterate that state practice has shown that the development of an independent commission focusing solely on campaign finance can be an important means of both increasing public trust in and ensuring the proper functioning of such a system.

32. In Section 13, one bullet point states that "It is prohibited to stake on voting results or election results." The intended meaning of this sentence is unclear. However, it may mean that it is prohibited to place bets on the election results. This might be clarified in the text.

33. The Joint Opinion further stated:

> "41. Article 18(1) provides that state bodies should ensure that candidates have access free of charge to halls and premises. This has been interpreted by the authorities to refer only to national government premises and not to premises of local authorities. The article should be amended to include all levels of government and to ensure that parties and candidates may have access to state premises at all levels on an equal basis and free of charge or at a reasonable price.
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> 42. Article 21(2) provides that community leaders shall provide special places in their community for placement of campaign posters and that candidates and parties shall be provided with an equal amount of space. The provision does not specify whether this space is provided free of charge and was inconsistently applied in the 2008 presidential election. The Article should be amended to ensure that such space is provided under the same and reasonable conditions to all parties and candidates. In addition, it should prohibit posters and political materials from being posted on public government buildings such as local self government offices, hospitals, schools etc."

34. These concerns appear to be addressed by the proposals of Section 13. This is viewed positively by the Venice Commission and OSCE/ODIHR.

35. The tenth bullet point in Section 13 states that "The nominated candidates (including those in public service) do not go on mandatory leave." This statement is clearly a reflection of the contested 2008 elections in which questions arose as to whether the Prime Minister had to resign his position (discussed in the paragraph 40 of the Joint Opinion). While such a general requirement may be reasonable, particularly in light of Armenia's previous electoral processes, it is important to note that the right to run for election can legitimately be restricted on the basis of holding an office which constitutes a conflict of interest (see for example paragraph 16 of General Comment No. 25 of the United Nations Human Rights Committee).

6. The Voting

36. Section 8 of the working group's proposal suggests a new column is added to the voter lists where a V-mark is added for those voting. This comes in addition to the signatures of both the voter and the PEC official. The purpose seems to be that the voter lists which the marks shall be made available to the election contenders afterwards. This may be a way of being more transparent about the elections but it needs to be balanced against the protection of personal data. Section 54 of the Venice Commission Code of Good Practice in Electoral Matters states that "since abstention may indicate a political choice, lists of persons voting should not be published". Voting or not could also in some places be basis for pressure or intimidation. The suggestion of Section 8 is therefore not recommended.

37. In Section 14 of the working group's proposals it is suggested that "Voting should be done with pens of the same colour; ballot paper voted with a pen of another colour is an invalid ballot paper." It is unclear if it means that all marks on the same ballot paper need to be of the same colour or if it means all marks on all ballots in the polling station or even the country. If it is across ballot papers there is high risk that there will be many invalid ballots, without much

benefit regarding security. Such differences in marking can also be difficult to identify. While improving security of the voting process is commended, this provision should be reconsidered.

38. Section 14 also indicates that all PEC members should have the right to videotape the voting procedure in full, excluding the ballot box. Given the partisan role of advisory members, and the importance of the secrecy of the voting process not just the ballot box, such a practice could have unintended negative consequences, for example could intimidate or be used to intimidate some voters.

39. The working group was divided over the use of indelible ink to mark the fingers of voters. The Venice Commission and OSCE/ODIHR supported the use of indelible ink in the Joint Opinion. Under existing law, voters have a stamp placed in their identification documents. The use of ink (which is often invisible and will disappear after a few days) lessens the fear of intimidation in cases where citizens choose to vote or refrain from doing so (which should be protected as a form of political choice).

7. Representation of Women on Candidate Lists

40. It is positive that Section 16 of the working group's proposal suggests strengthening the requirements for gender balance on the candidate lists. It is proposed that parties include at least 20 per cent women on their lists for the proportional race and that women have to appear at least at candidate list position five, ten, et seq. This is a change from the current requirement of 15 per cent and every tenth position on the list. Those parties passing the five percent threshold will normally win more than five seats and therefore return at least one woman. However, with the suggested rule the representation of women will, if the parties adhere to the minimum requirement only, still be far less than 20 per cent. In the 2007 election, the suggested 20 per cent minimum requirement would have resulted in the election of 16 women out of the 90 proportional seats, which is less than 18 per cent (and 12.2 per cent of the full membership of 131 seats). This would have represented an improvement from the 12 women actually elected in 2007. However, if one really wanted to improve the representation of women, one could require the top of the list to have even more women or simply to increase the share to the more common figure of 33 per cent and placing women in every third list position. This would still be far below the 50 per cent share of women in the electorate.

8. The Electoral Calendar

41. Section 18 of the working group's proposal calls for a reduction in the electoral calendar, specifically regarding candidacy and nomination periods. The purpose of such reductions is not clear. Consideration should be given to whether this reduction will have any negative impact on the administration of election processes or the exercise of suffrage rights.

9. Conclusions

42. The general impact of the working group's recommendations appears positive, serving to both increase the political balance in electoral commissions and improve the stability of the electoral process. The recommendations would also serve to ensure that those who violate the law are held responsible for such violations. The reasoning of these reforms, generally in line with the Joint Opinion, is welcomed. However, the Venice Commission and OSCE/ODIHR do note concern with the practical application and utility of some of the working group's recommendations. In addition to legislative amendments, it should be noted that commensurate political will to implement the law is also required to ensure the legislation can be acted upon.