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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE DRAFT AMENDMENTS TO THE ELECTION CODE OF ARMENIA REGARDING THE IMMUNITY OF CANDIDATES IN ELECTIONS

by

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1. As a departing point of principle, one can affirm that all instances of immunity from criminal or civil procedures and actions, as well as from administrative measures, create a form of privilege and are derogations from the basic principle of equality before the laws. Every instance has to be especially and specifically justified and limited as much as possible. Privileges and immunities have in actual fact, as a matter of history, given rise to abuse and corruption, in many countries. Even today their existence and extent can arouse suspicion, and give rise to uncertainty with lack of transparency, and therefore provide a cover for improper behaviour.

2. A distinction is to be made between “immunities in the strict sense" shielding officials or parliamentarians from civil action and arrest, detention or prosecution, either absolutely or depending on the consent of the institution or chamber to which they belong, and "non-liability" or “immunity in the wider sense” of officials elected or appointed or parliamentarians in respect of judicial proceedings for acts performed or not performed, or opinions expressed and votes cast in the discharge of their official or parliamentary duties.

3. The former kind knows its origin to the notion that at Common Law in Great Britain the “King could do no wrong”. In other countries in continental Europe, the Sovereignty of the Monarch was construed to mean that he would not be subject to Court. Impeachment was the extreme remedy when the Executive Head committed treason or otherwise could no longer be trusted with the supreme power. In the cruder examples of State organisation, subjecting the Chief or Head, or indeed a dictator, to the process of law was unthinkable. In the absence of impeachment the only recourse, if the position was no longer sustainable, was to ‘tyrannicide’ or rebellion.

4. Parliamentary immunity was limited to what was uttered in Parliament, and it evolved so as to render members of parliament free to express themselves, and their freedom from arrest when proceeding to the House was meant to defend them against undue interference, which would impede them from being present in Parliament to perform their people-delegated task. This interference could involve outside bodies: either from the executive branch of Government, or even from a non-independent Judiciary.

5. The non-liability of elected or appointed officials for acts performed in the discharge of their legal duties is a constitutional shield for the use of “legally authorised” discretion and is rendered necessary by the theory of the separation of powers, in the sense that certain acts of executive discretion, parliamentary deliberation or even judicial determination, should not be subjected to judicial sanction.

6. The position in the United States is illustrative of the theoretical and practical democratic evolution, in this field. Thus in the well-known case *Nixon v. Fitgerald* (1982), the Supreme Court held the President immune from civil suit, as the President *"is entitled to absolute immunity from damages liability predicated on his official acts*." This sweeping immunity, argued Justice Powell, who wrote the judgement, was a function of the "*President's unique office, rooted in the constitutional tradition of separation of powers and supported by our history”*. In a later case however, *Clinton v. Jones* (1997), this generality was circumscribed. It was held that: “*The separation of powers doctrine does not require federal courts to stay all private actions against the President until he leaves office. Even accepting the unique importance of the Presidency in the constitutional scheme, it does not follow that that doctrine would be violated by allowing this action to proceed. The doctrine provides a self executing safeguard against the encroachment or aggrandizement of one of the three co equal branches of Government at the expense of another. Petitioner's principal submission --that in all but the most exceptional cases, the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office-- cannot be sustained on the basis of*

precedent. The principal rationale for affording Presidents immunity from damages actions based on their official acts --i.e., to enable them to perform their designated functions effectively without fear that a particular decision may give rise to personal liability, see, e.g., Nixon v. Fitzgerald, provides no support for an immunity for unofficial conduct. Moreover, immunities for acts clearly within official capacity are grounded in the nature of the function performed, not the identity of the actor who performed it."

7. Later Constitutions made it more formal. As an example in the German Federal Republic while in office, the President enjoys immunity from prosecution and cannot be voted out of office or recalled. The only mechanism for removing the President is impeachment by the Bundestag or Bundesrat for wilfully violating German law Article 61 of. Once the Bundestag impeaches the President, the Federal Constitutional Court is charged with determining if he or she is guilty of the offence. If the charge is sustained, the court has authority to remove the President from office. Impeachment would be of course a very grave *vulnus* to the normal functioning of the machinery of the Republic and to date has never been resorted to.

8. In the United States, the Supreme Court also decided on the immunities of other, lower Executive Officials. Thus in *Butz v. Economou* (1978), the Court in a 4-to-5 opinion, noted that, "*absent exceptional circumstances, federal executive officials are only entitled to qualified immunity, since such officials must abide by constitutional and statutory scope-of-power limitations.*" But his was qualified as "*Federal officials who perform adjudicatory, or other similar prosecutorial functions* [could not]*, however, be held liable for mere "good faith" judgment errors.*" The Court reasoned that the risk of making unconstitutional determinations is outweighed by the need to preserve independent judgement, through grants of absolute immunity to judges and other similarly situated decision makers*.* The Court concluded that the similarity between the type of decision-making required of federal prosecutors and other administrative agents is sufficiently strong to warrant an extension of absolute immunity to the latter for decisions made in the course of their official duties. Judges and Magistrates have traditionally been held immune from any civil action in respect of their acts within the judicial function performed in good faith. Their criminal and civil liability for corruption or gross negligence is not in doubt.

9. Whilst there is a wide variety of statutory formulation in the constitutional conferment of immunity or inviolability,[1] it can be safely said that blanket inviolability and immunity are to be avoided, when conceived as absolute and permanent, in as much as inherently against the Rule of Law.

10. Whilst provision for immunity from prosecution for acts performed in the execution of a constitutional function is not unusual even in the older democracies the whole area is still subject to considerable fluctuations, as recent political developments in Italy, with introduction of the *Legge Alfani,* seem to show.

11. Parliamentary immunity has been extended gradually to other persons such as those participating in "proceedings in Parliament" (for example "clerks at the table", etc.) in the countries with British-style institutions (United Kingdom, Netherlands, Ireland).

12. In certain countries this immunity or non-liability has been extended to the members of Electoral Commissions (*vide* the Kenya[2], Mozambique[3] and Uganda[4] Electoral Laws). This

[1] *Vide* the Venice Commission's *Report on the regime of Parliamentary immunity*, CDL-INF(1996)007.
[2] Section 3A provides for the immunity of the Electoral Commission members and officers from personal liability for actions they may take in the course of their duties.
[3] Article 15 (Legal immunity): "*During their terms of office, the members of National Electoral Commission enjoy legal immunity except in those cases in which their activities might have an improper effect on the final result of elections or referenda*."

protection was introduced with the evident good intention of rendering the Electoral Commissions less subject to pressures and threats, whilst giving the members the "functional" liberty of action within the limits of their mandate.

13. It is to be noted that in the Venice Commission's Code of Good Practice in electoral Matters under subtitle "*3. Procedural guarantees*",[5] one finds notably these further requirements:

3.1. Organisation of elections by an impartial body

a. An impartial body must be in charge of applying electoral law.

b. Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

c. The central electoral commission must be permanent in nature.

14. The electoral commissions must be "impartial bodies", applying electoral law and the Central Electoral Commission must have a permanent nature[6] that is not merely organised for the occasion of a particular election. This part of the Code ostensibly applies to all democracies. The previous quotation from the Code of Good Practice in Electoral Matters[7] however makes a reference to the existence or otherwise of a "*longstanding tradition of administrative authorities' independence from those holding political power*". The truth is that the safeguards needed to assure the Electoral Commissions' impartiality and indeed authority will be contingent on the kind of tradition a particular country might have. The election administration model of the older established democracies, in which elections are administered by government departments staffed by a traditionally independent bureaucracy, over which political parties exercise some surveillance through specially appointed representatives, with electoral disputes being decided upon by the ordinary courts, might not be the most appropriate for many of the new democracies. With the hope that having especially selected and authoritative electoral commissions as independent institutions managing elections might result in free and fair elections, generally accepted as such, many of the newer post-colonial[8] or post-communist[9] democracies charged these commissions with some combination of legislative, administrative, and adjudicative powers which would seem strange in the traditional democratic settings.

15. In many of these new democracies, the bureaucratic apparatus would have been the one left behind by the colonial or communist set up, and could not be trusted to have cultivated the required impartial or independent frame of mind.

16. Against this background, one looks at the Armenian Electoral Code's conferment of the status provided in Article 33, "*Status of Electoral Commission Members*":

1. *Electoral commission members shall be exempt from military musters and training exercises and, in the period of national elections, from military draft.*
2. *Members of the Central Electoral Commission (during the entire period of the Commission's operation) and members of Territorial and Precinct Electoral Commissions (during national elections) may be detained or subjected to administrative or criminal prosecution by courts with the consent of the Central Electoral Commission only.*

17. Exemption from Military musters or training during the election period does not appear

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[4] Article 49 (Exemption from liability): "*A member of the commission or an employee of the commission or any other person performing any function of the commission under the direction of the commission shall not be personally liable to any civil proceedings for any act done in good faith in the performance of those functions.*"

[5] CDL-AD(2002)023rev, II. 3.1.

[6] CDL-AD(2002)023rev, II. 3.1. c.

[7] CDL-AD(2002)023rev, II. 3.1. b.

[8] The examples quoted above as also South Africa.

[9] Hungary, Slovenia, Romania, Poland, Czechoslovakia, Bulgaria, and Russia are examples.

excessive or over protective, indeed it is obvious that preparing for elections would and should be an absorbing job which would not leave time for military exercises. Even the freedom from detention and from administrative or criminal prosecution is defensible, though with some effort: it is limited to the Commission's period of operation, and can be waived by the Central Commission itself.

18. Having stated that privileges and immunities should be limited to what is absolutely necessary (i) for the proper functioning of a Republic; (ii) what is strictly required by the separation of powers; and (iii) the delimitations of areas of discretion; it does not follow that all extant privileges and immunities, which can no longer be justified, should be done away with immediately, and that no consideration be given to the timing and method of such abolition.

19. One can concede that the range of privileges and immunities in Armenia, is to outside eyes, extraordinary. Protecting Presidential Candidates and people standing for elections, from arrest as well as shielding them from criminal and administrative liability, by granting the Central Election Commission the right to decide thereon by a two-third majority is tantamount to anointing them with a very privileged status even before they have actually been elected to a position of responsibility. Impeachment of a president or a judge is one thing, and a two-third majority requirement would there seem justified, but requiring the same for a mere unelected candidate for office would seem excessive.

20. Some of the privileges and immunities could give rise to a resurrection of the happily buried right of sanctuary, which provided an umbrella of protection, at times, temporary and brief as respite, at other times, for some scandalously long or indefinite period, to people absconding from justice. In the generosity for protection, Armenia might have gone beyond what is absolutely needed for the proper running of a democracy. There are definitely too many exceptions to the general rule.

21. On the other hand, the procedure for pruning and lopping off what is excessive should however be agreed upon by wide consensus. Immediate excision of these rights might be considered by the opposition as a threat. Given that in Armenia some people might still labour under the apprehension that the tool of prosecution during a delicate electoral period could be used to deter opposition candidates from entering into the political arena, one would counsel prudence in the procedures to be adopted. The timing is also vital.

22. Some comments can be made on the position of the officials of the Human Rights Defender. These immunities do merit preservation. The defenders of the rights of others will ex hypothesis come into contrast and collision with those who are denying them, and who are in power. It would therefore seem necessary and appropriate to allow these officials the same protection that is given to render prosecutors independent and immune from civil liability when acting within the scope of their mandate.

23. In many of the Laws instituting the Office of Ombudsman, *Médiateur*, *Defensor del Pueblo* or Human Rights Defender, the need was felt for surrounding the officials with special protection Thus, Article 3 of the Law of 1973 instituting the "Médiateur de la République"[10] in France provides: "*The Mediator of the French Republic shall be immune from prosecution, arrest, detention and judgement in respect of any opinions he may voice or any acts he may accomplish in the performance of his duties".* In the Czech Republic, Article 7 of the relative law stipulates: "*Criminal proceedings may not be instigated against the Defender without the approval of the Chamber of Deputies. Should the Chamber of Deputies refuse to give their approval, such action shall be impossible until the expiry of the term of office of the Defender.*" In Iceland, Article 16 entitled "*Action against the Ombudsman*" gives this official the option:

[10] Mediator of the Republic.

"*Where the Ombudsman so demands, the judge shall dismiss a civil case brought against the Ombudsman on the grounds of decisions taken by him pursuant to Article 10.*" In Ireland, "*3) A person appointed to be the Ombudsman […] (b) may be removed from office by the President but shall not be removed from office except for stated misbehaviour, incapacity or bankruptcy and then only upon resolutions passed by Dáil Ęireann and by Seanad Eireann calling for his removal.*" In the Australian State of New South Wales, Section 35A of the 1974 Ombudsman Act provides: "*(1) The Ombudsman shall not, nor shall an officer of the Ombudsman, be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith. (2) Civil or criminal proceedings in respect of any act or omission referred to in subsection (1) shall not be brought against the Ombudsman or an officer of the Ombudsman without the leave of the Supreme Court. (3) The Supreme Court shall not grant leave under subsection (2) unless it is satisfied that there is substantial ground for the contention that the person to be proceeded against has acted, or omitted to act, in bad faith.*

24. Article 19 of the Election Code of Armenia of 2003, which came into force on the 1 April 2004, providing for the Defender's Immunity is couched in these terms: "*No criminal prosecution or bringing to account shall be brought against the Defender over the whole period of execution of his/her powers and after that for the actions following from his/her status including for the opinion expressed at the National Assembly, if it does not contain slander or offence. The Defender shall not be involved as a defendant, be detained or called to the administrative account without the consent of the national Assembly. The Defender shall not be arrested without the consent of National Assembly, except the cases when the Defender is caught in act of crime. In this case the President of the National Assembly shall be informed immediately.*"

25. Article 23 of the same Code deals with the Status of the Defender's Staff:

> *1. The Defender shall form a staff to ensure the fulfilment of his/her activities.*
> *2. The Defender's staff shall provide legal, organizational, analytical, informational and other support to the Defender's activities.*
> *3. The Defender's staff is a state institution with its own seal bearing the Coat of Arms of the Republic of Armenia and the name of the institution. Regional representative offices of the Defender of human rights may be established in marzes.*
> *4. Members of the Defender's staff shall not be considered civil servants and shall work by term employment contracts. (Amendment of article 23 in 01.06.06).*
> *5. Those persons that hold any position in the Defender's staff cannot be convicted, persecuted, detained arrested or brought to court for any action performed, opinion expressed or decision made while performing their responsibilities under the Defender's instructions. In all these circumstances when any person holding a post in the staff is detained, arrested or brought to court, the enforcing agency shall inform the Defender of this occurrence in the defined procedure and due time.*

26. The Venice Commission has had the occasion to report on this Law in its Opinion no. 232/2003, *Opinion on the draft Law on the Human Rights Defender of Armenia* (CDL-AD(2003)006, adopted at its 54th Session). It does not seem that the protection given under articles 19 and 23 is excessive and not justified.