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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**JOINT OPINION
ON THE ELECTION CODE OF
THE REPUBLIC OF ARMENIA
as amended up to December 2007**

**Adopted by the Venice Commission
at its 76th Plenary Session
(Venice, 17-18 October 2008)**

**on the basis of comments by
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1. Introduction

1. *The Venice Commission and the OSCE/ODIHR provide an opinion on the consolidated Election Law of the Republic of Armenia, 1999 as amended to December 2007. This draft opinion is based upon an English translation of the law without further clarifications with the Armenian text. It is possible that some issues have been misinterpreted due to incorrect translation.*

2. *Previous Joint Opinions by the Venice Commission and the OSCE/ODIHR focused on three main issues: election administration, complaints and appeals, and mechanism for ensuring the integrity of the vote. Previous opinions always underscored that the conduct of genuinely democratic elections depends not only on a detailed and solid election code but on good faith implementation of the election legislation.*

3. *Amendments passed in December 2007 were not covered by the previous joint opinions (CDL-AD(2006)026 ; CDL-AD(2007)023; CDL-AD(2007)013). The present recommendations were consequently elaborated following Resolution 1320 (2003) of the Parliamentary Assembly of the Council of Europe, which invites the Venice Commission to formulate opinions concerning possible improvements to legislation and practices in particular member states or applicant countries and take account of the implementation of the Election Code during the 2007 and 2008 elections.*

4. *The election law was passed by the National Assembly of the Republic of Armenia on 5 February 1999 and signed by the President on 17 February 1999 (Gazetted 23 March 1999). Amendments were passed by the National Assembly on 19 May 2005, 22 December 2006, 26 February 2007, 16 November 2007 and 18 December 2007. With the exception of the last two amendments, they have been subject to reviews by the Venice Commission and the OSCE/ODIHR.*

5. *This Draft Joint Opinion should be read in conjunction with the following documents and prior joint opinions provided to the authorities of the Republic of Armenia:*

- *The Electoral Code of the Republic of Armenia as amended up to December 2007, CDL(2008)083.*
- *Joint Opinions issued by the Venice Commission and OSCE/ODIHR on the Election Code of the Republic of Armenia and amendments as listed below.*
- *OSCE/ODIHR reports on elections observed in the Republic of Armenia.*
- *Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report. Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), CDL-AD(2002)023rev.*
- *Parliamentary Assembly of the Council of Europe, Resolution no. 1320 (Assembly debate and adopted by the Assembly on 30 January 2003, 7th Sitting).*
- *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990).*

6. *The present document does not take into consideration other laws which have provisions that relate to elections, including the Constitution, the Law on Political Parties, the Broadcasting Law, the Criminal Code, and the Administrative Procedures Act.*

7. *The Election Code of Armenia (hereinafter referred to as the Code) has been the subject of extensive scrutiny by the Venice Commission and OSCE/ODIHR.¹ The OSCE/ODIHR has also commented on the legal framework as a part of its election observation mission election*

¹ Venice commission website, www.venice.coe.int. Previous Joint Opinions and Legal Reviews are also available on the website of the OSCE/ODIHR: <http://www.osce.org/odihr-elections/13444.html>.

reports.² The following joint opinions have been issued previously by the Venice Commission and OSCE/ODIHR:

- *Joint Opinion on the 26 February 2007 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), CDL-AD (2007)023.*
- *Final Joint 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) adopted by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007), CDL-AD(2007)013.*
- *Joint Opinion on Draft Amendments to the Electoral Code of the Republic of Armenia by the Venice Commission and OSCE/ODIHR adopted by the Council for Democratic Elections at its 17th meeting (Venice, 8-9 June 2006) and the Venice Commission at its 67th plenary session (Venice, 9-10 June 2006), CDL-AD(2006)026.*
- *Final Opinion on the Amendments to the Electoral Code of the Republic of Armenia by the Venice Commission and OSCE/ODIHR adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005), CDL-AD(2005)027.*
- *Joint Opinion on the Draft Amendments to the Electoral Code of Armenia by the Venice Commission and OSCE/ODIHR adopted by the Council for Democratic Elections at its 10th meeting (Venice, 9 October 2004) and the Venice Commission at its 61st plenary session (Venice, 3-4 December 2004), CDL-AD(2004)049.*
- *Joint Recommendations on the Electoral Law and the Electoral Administration in Armenia by the Venice Commission and the OSCE/ODIHR, CDL-AD(2003)021.*
- *Joint Assessment of the Amendments to the Electoral Code of the Republic of Armenia adopted in July 2002 by the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE and European Commission for Democracy through Law (Venice Commission, Council of Europe) adopted by the Venice Commission at its 52nd plenary session (Venice, 18-19 October 2002), CDL-AD(2002)029.*
- *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.*

8. *The Code has been amended several times. Many of these changes were initiated by comments by the Venice Commission and OSCE/ODIHR. The amended Code can be the basis for genuinely democratic elections if implemented in good faith. However, further improvements can be made, and the Code could also be improved by including more explicit obligations within areas where the implementation seems to fall short of international standards.*

9. *The Code regulates elections at all levels of government. Such consolidated legislation is of considerable benefit because differences in the administration of different elections can be avoided, and it is easier to maintain. However, the Code does not take full benefit of these advantages since there is still unnecessary repetition between the sections specific for the various elections. For example, rules applicable to all elections regarding ballots or*

² All reports on elections in the Republic of Armenia are available on the OSCE/ODIHR Website: <http://www.osce.org/odihr-elections/13444.html>.

summarisation of results could be included in a general section.

10. *The present opinion was adopted by the Venice Commission at its 76th plenary session (Venice, 17-18 October 2008).*

2. Functioning of the election administration

11. According to Article 41(1) the Central Election Commission (CEC) has overall responsibility for organising elections within the law. The territorial election commissions (TECs) are responsible for organising elections within districts according to Article 42 of the Code.

12. The independence of the CEC, and the reinforcement of its duty to fully regulate all levels of electoral administration in all phases of the election, is important in order to ensure elections in conformity with international standards. The Code and the CEC regulations could be developed further, in order to ensure a more effective intervention of the CEC in cases when a suspicion may arise about irregularities (like an exceptional turnout or margin of victory of a candidate or a very high proportion of invalid ballots), and not only in the cases of formal complaints. Moreover, any formalistic approach should be avoided in the consideration of complaints and complaints should be examined in substance.

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.

14. In previous elections, the CEC has also hesitated to issue regulations where it is not explicitly stated in the Code that a regulation should be issued. Article 41(1) already includes sub-paragraphs which should enable the CEC to issue any regulations necessary to conduct democratic elections (sub-paragraphs 2, 7 and 10), but it is recommended to include an additional paragraph stating explicitly that the CEC may issue regulations whenever deemed necessary to implement the law.

15. It could be considered that the CEC not only makes a statement in the National Assembly on the organisation and the conduct of the elections but also elaborates on post-election analysis of electoral violations, remedies for them and required improvements to the electoral legislation and administration. This could lead to an amendment of Article 41.3.

3. Composition of election commissions

16. The principles for formation of election commissions are set out in Article 34 of the Code, which provides that election commissions shall be comprised of citizens with professional training. Article 35 sets out the formula for the selection of members of the CEC which shall be made up of one member from each faction in the National Assembly, one member appointed by the President of Armenia and two members appointed by the Council of Chairmen of the Republic of Armenia Courts from among the judicial servants.

17. The Territorial Election Commissions are appointed by the members of the CEC on the basis of one member of the TEC per member of the CEC, and the PEC shall again reflect the

TEC membership.

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.³

19. Moreover, the election of the management positions of election commissions (chairperson, deputy chairperson and secretary) is done by majority vote of commission members, which makes it possible for all leadership positions on an election commission to be taken by representatives of the majority group of parties or of the governing coalition. Therefore, a fair and balanced political representation in the management positions, as well as among the other membership, is crucial and should be better ensured at all levels of the election administration.

20. Finally, as underlined in the previous Joint Opinion,⁴ the Venice Commission and the OSCE/ODIHR emphasise again, that legislation alone cannot guarantee that members of electoral commissions will act professionally, honestly and impartially. Good faith implementation of the existing and possible new provisions on electoral commission formation and administration remains crucial and could increase confidence in the electoral administration.

4. Quorum and voting requirements in election commissions

21. The December 2006 amendments changed quorum and voting requirements for election commissions during times of a national election. They also changed the requirement for qualified majorities for a valid decision. Decisions could be made based on minimum support when deciding for example on election results.⁵

22. In the amended Code, previous quorum and voting rules have been reintroduced for the election of the chairperson, the deputy chairperson and the secretary of the commission (Article 39.7). This still leaves the possibility to adopt important decisions with minimal support of commission members but removes part of the concerns previously expressed. As recommended in the previous Joint Opinion 2007, mechanisms to ensure participation of commission members should be defined in the text.

23. To ensure the functioning of election commissions and avoid deadlock, further steps could be taken to improve the balance between efficiency and secure decision-making by considering one or both of the following changes:

1. Lowering the overall majority requirements (for example by keeping the quorum, but only requiring a simple majority of those present and voting) and make this the rule valid even during election time;

³ Comments hereafter issued from the 2007 Joint Opinion on Amendments to the Electoral Code of the Republic of Armenia (Venice, 16-17 March 2007, CDL-AD(2007)013) still remain accurate:

Composition of election commissions

24. Paragraph 10 of the Final Opinion underlined that it is not possible to predict whether the provisions on the composition of election commissions will be applied in good faith. <http://www.venice.coe.int/docs/2007/CDL-AD%282007%29013-E.asp?MenuL=E> - ftn6
The extent to which these provisions will result in a balanced composition of election commissions and an impartial and professional electoral administration remains to be seen during future elections. Good faith implementation of these provisions could increase confidence in the electoral administration. However, legislation alone cannot guarantee that members of electoral commissions will act professionally, honestly and impartially. The Venice Commission and the OSCE/ODIHR again stress that good faith implementation of the provisions on electoral commission formation and administration remains crucial.

⁴ CDL-AD(2007)013, par. 24.

⁵ The Joint Opinion of 2007 (CDL-AD(2007)013) criticised this change as well, par. 36.

2. Making a distinction between important issues which need a quorum and decisions necessary for day-to-day business where a simple majority suffices.

5. Voter registration

24. The changes to Article 10 allow voters to change their inclusion in the voter list from their place of registered residence to their place of actual residence. Article 10 includes procedures aimed at ensuring that the person is temporarily removed from the voter list of his or her community of registered residence before being added to the additional voter list in their place of actual residence. This procedure ensures that some voters who are not in their place of registered residence are not denied the right to vote. It is however challenging for the authorities in charge of the voter register since they have to make sure that this procedure does not result in duplicates in the register. With more flexibility for voters in requesting inclusion in the voter list or changes to their inclusion, it is increasingly important to have a solid system for review of the central database to detect duplicates.

25. To ensure transparency with respect to how many people had requested inclusion in the additional voter list at their place of actual residence, the Code should be amended to provide that the police, as the authorized agency in charge of compilation and maintenance of the voter register, announce on a regular basis the number of voters who have availed themselves of these provisions and changed where they intend to vote.

6. Nomination procedures

26. The nomination procedures for candidates for presidential election (Articles 66, 67, 68) and for the first past the post constituency races in parliamentary elections (Articles 104 and 105) have recently been changed in two ways: party alliances have been removed from the presidential nomination process, and citizen's initiatives are replaced by self nomination procedures at all levels. Neither of these changes should restrict the possibilities for persons to stand for elections.

27. Requirements for candidates for presidential as well as for first past the post parliamentary constituency candidates to collect signatures of support have been removed. On the other hand, the electoral deposit has been increased significantly, in case of constituency candidates ten-fold. This increase may lead to an unjustified barrier *inter alia* vis-à-vis candidates who could have strong support by citizens in the context of the previous provisions i.e. those able to collect enough signatures but unable to pay a high deposit. While erroneous candidacies should be prevented, consideration could be given, as recommended in the 2007 Joint Opinion, to reducing the financial amounts for candidate electoral deposits.⁶

28. In the February 2008 presidential elections, four out of nine candidates received less than 10,000 votes or less than 1 per cent of the total number of votes. If a number of candidates with little support are running in future elections, reintroducing a signature requirement may be considered. Likewise, the rules for parties to nominate candidates could also be revised, for example by requiring parties which have not won seats in the parliament during the last two elections to collect signatures in order to run in national elections.

7. Restrictions for candidacies

29. The Code stipulates that dual citizens are ineligible to stand as candidates.⁷ The comment by the previous Joint opinion is therefore still valid:

"The Armenian National Assembly has chosen to give full active voting rights (depending on the

⁶ CDL-AD(2007)013, par. 25.

⁷ Article 2.7 of the Election Code.

ability to obtain residency in the Republic of Armenia) to those with an additional citizenship, but not the right to be elected (the passive voting right) for national positions. This is against the Code of Good Practice. The Venice Commission has stated previously that restrictions on the right to vote, both active and passive, should be abolished.⁸ Once the right to dual citizenship has been accepted, citizens with dual citizenship should not have fewer rights than other citizens; such limitations are not common.⁹”

30. An exception could be envisaged only for exceptional cases, for example for the head of state. Such exceptions should be foreseen by the Constitution.

31. Other restrictions on the rights to stand as a presidential candidate should be carefully addressed, keeping in mind international standards justifying such additional restrictions only on objective grounds and reasonable criteria. According to Article 50 of the Constitution and Article 65.1 of the Election Code, “Every person having attained the age of thirty-five, having been a citizen of the Republic of Armenia for the preceding ten years, having permanently resided in the Republic for the preceding ten years, and having the right to vote is eligible to be elected as President of the Republic”. The age limit of 35 years to stand for the presidency is quite high. Moreover, the requirement of 10 years residence and 10 years citizenship appears excessive. Except in very specific situations, it can hardly be justified by the protection of any national or democratic interests.¹⁰

8. Monitoring the campaign

32. Article 18(8) places an onus on the election commissions to monitor the campaign for violations. The Constitutional Court in its ruling on the validity of the 2008 presidential election, criticised the CEC for failing to discharge its duty under this article of the Code. This section should be expanded to provide a framework as to the role of the CEC in monitoring the campaign and provide detailed guidelines on the monitoring process.

33. Rigorous and good faith implementation of the law is crucial in future elections to maintain fair conditions in the media during the whole electoral period. Article 20 of the Code requires fair and equal conditions in the treatment of candidates by the media. Previous opinions of the Venice Commission and the OSCE/ODIHR have recommended that Article 20 should be amended to provide clear guidelines for ensuring the implementation of this principle.¹¹

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.

9. Campaign finance

35. Earlier Article 81(7) allowed presidential candidates, and through application of Article 113 also parties and party alliances running in National Assembly elections, winning more than 25

⁸ See CDL-AD(2005)011 and 012 Report on the abolition of restrictions on the right to vote in general elections endorsed by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004).

⁹ CDL-AD(2007)023, par. 19. There are examples in some democracies of limitations beyond the four listed in the Code, but they are not generally recommended.

¹⁰ ECHR *Py v. France*, 11 January 2005, Application no. 66289/01.

¹¹ See also 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).

per cent of the votes to be reimbursed 50 per cent of their campaign costs. Currently no provisions exist to reimburse costs incurred in a campaign for presidential candidates or parties and party alliances running in National Assembly elections. If measures to reimburse campaign expenditures are reintroduced, they should be implemented in a balanced way. Such measures could give candidates and parties with some minimum support (possibly less than the previous 25 per cent) access to state funds, for example in accordance with the election result.

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.

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.

10. Other campaign issues

38. The separation of state resources from party and/ or candidate resources has been a chronic problem cited in every OSCE/ ODIHR election report since 1996.¹² The governing party network controls not only national government but also the governors' offices and local self government in most regions. During a national election, the resources that are under the control of these offices are called into play to campaign on behalf of the government candidates. This creates a disparity in resources available with the added problem of creating the perception that employees are obligated to work for, attend rallies on behalf of and vote for the government candidates for fear of their employment. This practice is neither in conformity with the Code of Good Practice in Electoral Matters, where the principle of equality of opportunity entails a neutral attitude by state authorities¹³ nor with OSCE commitments which call for a separation of party and State and campaigning on the basis of equal treatment.¹⁴ Some changes to the current code could serve to clearly delineate the line between state and party resources.

39. For example, Article 18(4) restricts campaigning by various individuals or bodies, including national and local self government bodies and their employees as well as foreign citizens' organizations. This clause should be clarified to include that those in the enumerated list are prohibited from being the recipient of campaigning and cannot be campaigners in their official capacity. National and local self government bodies and their employees should not campaign on behalf of a candidate or party in their official capacity. This would be consistent with the provisions of Article 22.1 which prohibit candidates who are in political or discretionary positions from using their office or other administrative resources for campaign purposes. Consideration should be given to include a more explicit prohibition of the use of administrative resources in general and by candidates and others involved in campaigning.

40. Article 78(1) provides that presidential candidates “who are in state service or work in local self-government bodies shall be relieved of their duties at work and shall have no right to make use of the advantages of their position”. This article raised significant controversy during the 2008 presidential election campaign as to whether the Prime Minister, who was standing as a presidential candidate, was required to resign or take a leave of absence. When the Code was drafted in 1999, this article was designed to create an exception in the case when the sitting

¹² All OSCE/ODIHR reports on elections in the Republic of Armenia are available on the OSCE/ODIHR website: <http://www.osce.org/odihr-elections/14350.html>.

¹³ CDL-AD(2002)023rev, I. 2.3.

¹⁴ 1990 OSCE Copenhagen Document, paragraphs 5.4 and 7.7.

president stood for re-election or the acting president (defined under the constitution as either the Prime Minister or the Speaker of the National Assembly) could continue in the office of president while campaigning. In 2002, the Law on Civil Service introduced the concept of professional civil service, as opposed to state service. This new definition of civil service referred only to professional civil servants and does not include those in political offices. Article 78 was not amended to reflect the new definition of civil service. In the 2008 presidential election, the prime minister did not take a leave of absence while campaigning for presidential office relying on a clarification made by the CEC interpreting the article to permit the prime minister to continue in his official function. It is recommended that Article 78 should be amended for greater clarity.

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.

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.

11. Aid to persons during the vote

43. Article 56(4) states clearly that one person can only assist one voter who needs such assistance in filling out the ballot. This is in accordance with previous recommendations. A further improvement would be to require that the name of the person assisting would have to be recorded in the voter list or in the PEC journal.

12. Stamping voters' identification documents

44. According to Article 57(3), the last page of the voter's identification document is to be stamped to make sure that the voter only votes once. That means that anyone who handles the identification document later may see if the person has voted or not.

45. Secrecy of the vote is not the same as secrecy of who has voted. People present in the polling station will know who has voted and who has not, even if they do not know who the person has voted for. Information on who has voted should not be broadly shared or published in any systematic manner. The Code of Good Practice in Electoral Matters states that the list of persons actually voting should not be published.¹⁵ In the context of Armenian elections, stamping the identification documents could be seen as intimidating in the sense that public benefits could be affected by a stamp or a missing stamp. While this requirement is an improvement in the efforts to prevent multiple voting, some voters may be concerned that it leaves a permanent record of whether someone has voted or not in that person's identification document. The introduction of indelible inking a voter's finger, as previously recommended by the Venice Commission and OSCE/ODIHR, would not identify as to whether or not a voter has voted, as the ink would disappear after few days.

¹⁵ CDL-AD(2002)023rev, I.4. c.

13. Reconciliation of the count

46. The last amendments simplified the counting protocols and changed slightly the reconciliation at all levels by amendments to Articles 60, 61 and 62 for the PECs and Articles 63.1 and 63.2 for TECs and the CEC.

47. One change is that the total number of envelopes is not being reported and reconciled. The amended Code requests a total reconciliation of ballots only, whereas the envelopes are being packed for possible investigation later, without recording their numbers. This provides for a slightly simpler procedure during the count. The number of envelopes “of established specimen”, i.e. valid, found in the box is, however, still recorded and reconciled with the number of ballots in the box.

48. Amendments to Article 62 have clarified the language, but the procedures remain in effect the same. Article 62 establishes the procedures for calculating the following inaccuracies. These are recorded during the reconciliation at all levels:

1. The difference (in absolute value) between the total number of ballots received by the PEC and the ballots found in the box, the spoiled and the unused ballots;
2. The difference between the ballots cast according to the signatures on the voter lists and the number of ballots in the box;
3. The difference between the number of used ballot stubs and the number of ballots in the box;
4. The difference between the number of ballots and ballot envelopes of the established specimen in the box.

49. Each difference calculated above may indicate fraud, but the total inaccuracy that has to be calculated may not necessarily indicate the amount of irregularities affecting the outcome of the election. It is important that any inaccuracy, regardless of the numbers, is comprehensively investigated by the appropriate bodies. As the number of inaccuracies is one of the criteria to assess the validity of an election, the Code should provide clear procedures for the recording of inaccuracies and their investigation.

50. The previous Article 60.1.3 which required the PEC to count the total number of voters on the voter list, including the supplementary voter list, has been revoked. The number of voters on the main voter list is only available from data at the TEC level. Article 14.1.4 requires the PEC to note the total number of voters included in the supplementary voter list only on the list itself. It is therefore not possible to get an immediate view on the turnout in a particular polling station from the PEC protocol which is the only document made public. The number on the supplementary voter list is also a measure on the quality of the main voter list. It would be an important transparency measure to make both figures public. It is recommended to reintroduce the number of voters on the main voter lists and on the supplementary voter lists into the protocols.

14. Tabulation and publication of results

51. A key element of transparency in an electoral process is the easy access for the public to the tabulation of results from polling station level up to constituency and national level. Such access should be given at national level, even for constituency based elections. The purpose is that parties, media, observers and others can easily check the total results and how each polling station has contributed to the totals. In particular observers and party representatives need to check that the polling station they witnessed has been correctly entered.

52. Article 61 provides for such transparency at precinct level and Article 63 at TEC level, requiring the respective election commissions to post precinct protocols and protocols of the

tabulated results immediately in a visible place at the commissions. Articles 63(3) and 63.1(9) require that the protocols of tabulated PEC results are posted at the TECs for all elections.

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.

15. Exhausted lists in the proportional race

54. For proportional list elections, it is common to regulate the number of candidate names which a party or alliance list should contain. With 90 contested seats, such regulation could for example stipulate that each list should have a minimum of 25 candidates, and a maximum of 110. The purpose of instituting a minimum is to reduce the risk for a list to win more seats than they have candidates, or for not being able to fill in vacancies during the term of the National Assembly. An upper limit would be kept only for practical reasons.

55. Article 114.2 prescribes that the first three names of a list should appear on the ballot. One may therefore possibly deduct that indirectly there is a requirement for at least three candidates on a list. Other lower limits to the number of candidates are not defined and there is no upper limit.

56. In the 2007 election one party had only six candidates. However, every party which passes the threshold will win at least five seats, and the minimum should therefore be well above that number. The introduction of a reasonable minimum number should not create a problem for any serious party participating in the nationwide contest for the proportional seats.

57. Even with such a minimum number of candidates, it is still theoretically possible for a party to win more seats than they have candidates (unless the minimum is set to 90).

58. Article 115 of the law describes the distribution of seats among lists in the proportional part of the election. According to paragraphs 3 and 4, the method used is the so-called largest remainder method using Hare's quota. The article does not, however, mention what should be done if a party wins more seats than they have candidates.

59. Article 118(4) deals with vacancies which occur during the term in office of the National Assembly and states:

"If the mandate of a deputy elected to the National Assembly under proportional system is terminated early, the Central Electoral Commission shall give his or her mandate to the next person in that party's electoral list, within one week. If there are no other candidates in the party's electoral list, the mandate shall remain vacant."

60. The article is about filling the vacancy of an already elected member, not about distribution of seats after the election. However, one may claim that it should be used even in that situation and leave the seats vacant if the list does not contain enough candidates even during the initial distribution of seats.

61. On the other hand, one may argue that the utmost should be done to meet the constitutional provision on the total number of seats in the National Assembly at least immediately after the elections. In most countries where this can occur there are provisions for redistribution of the seats so that all the seats in parliament are filled. The Code should therefore cover the situation when a party wins more seats than it has candidates. If the distribution method (largest remainder) is retained, it may be done by awarding the seats to the party in question and then to distribute the rest of the seats among the remaining parties having

reached the threshold. By the other main set of distribution methods based on divisions (such as Sainte-Laguë and d'Hondt) it is simply done by not calculating more quotients than there are candidates on a list.

16. The criterion for being elected in the case of one candidate only

62. Article 57 provides the possibility of voting against a candidate in cases where only one candidate is standing for election. The Venice Commission and the OSCE/ODIHR have previously recommended that the option of voting against a candidate is removed from the Code. The Republic of Armenia has chosen to require candidates to stand for election even in cases where there is only one candidate. This arrangement may encourage more candidates and give voters the possibility to reject such a single candidate.

63. Article 84(2) regulates the requirement for being elected in the case of one presidential candidate only, stating that: *“he or she shall be considered elected if more than half of the people who participated in the voting have voted for him or her”*. In the case of more candidates running, the requirement to be elected according to Article 84(1) is to have won more than half of the *valid votes*. It seems illogical that the requirement should be different in the two cases. It is therefore suggested that Article 84(2) be changed to: *“he or she shall be considered elected if more than half of the valid votes (i.e. cast for or against him or her) are cast for him or her”*. Articles 116(3), and 133(2) should be changed in the same manner.

17. Recounts

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.

18. Invalidation and repeat elections

65. According to the Code, the inaccuracies are being used as one, but not the only criterion, to assess whether the election is valid or not. Article 116(5) on the constituency part of the National Assembly elections (Article 86 provides a similar rule for presidential elections) states: *“A member of parliament’s election shall be declared void, if:*

- 1) *The magnitude of inaccuracies is greater than or equal to the difference between the numbers of ballots voted for the two candidates for whom the largest number of “for” ballots was cast, or, in case one candidate ran, the magnitude of inaccuracies is greater than or equal to the difference between the number of votes cast for and the number of votes cast against that candidate, which significantly affects the outcome of elections, i.e. it is impossible to establish the real results of the election and to determine the elected candidate; or*
- 2) *During the preparation and conduct of elections, such violations of this Code have taken place, which could have influenced the outcome of elections.”*

66. If this means that the total inaccuracy shall be used to determine if the election should be declared invalid, the provision could be too strictly interpreted. However, the last part of paragraph 1 possibly qualifies the statement in such a way that the election is invalid only if it is

impossible to establish the result. Therefore, the Code should be clarified that only discrepancies which may affect the election outcome should be taken into account, without putting an explicit weight on the sum of inaccuracies.

67. For the proportional part of the parliamentary elections, Article 115(7) states:
“National Assembly elections under proportional system shall be considered invalid, if violations of this Code have occurred during the preparation and conduct of elections, which may have influenced the outcome of the election.”

68. Here, there is no reference to the inaccuracies, which is not logical. It is possible to establish the margin between lists in these elections, even though it is not as simple as for the single member constituencies. However, it is better to have a formulation in both cases which states that when the inaccuracies and other violations are of a magnitude which can affect the election outcome, then the elections are declared invalid.¹⁶ The principle to invalidate parliamentary elections should therefore be the same for first-past-the-post and proportional races.

69. In the Armenian law, repeat elections have to be performed in a whole constituency for the first-past-the-post elections and in the whole country for the proportional National Assembly election or the presidential election. The organisation of elections in the whole country is a big effort and may represent a barrier against invalidating an election, even when it should happen. It should be considered to introduce provisions for limiting a repeat election to the polling stations or the constituencies where irregularities have occurred.¹⁷ This would limit the side effects of repeat elections, and still make repeat elections a realistic and affordable measure in cases where they are the only remaining remedy. It should therefore be clearly stipulated in the Code that repeat elections should only be decided if irregularities may have affected the outcome and that they should be held in part of the concerned territory when possible.

19. The complaints and appeals procedure

70. There has been a steady chorus of concern about the complaints and appeals process by the OSCE/ODIHR election reports and Venice Commission over the years. It has been identified as one of the key points that undermine citizens' confidence in the system. In the 2008 presidential elections, the constitutional court¹⁸ noted the CEC's failure to discharge its duty in respect of its mandate to monitor and adjudicate on complaints and appeals and called for a new legal framework to adjudicate complaints and appeals.

71. In the Election Code, the provisions on complaints and appeals are dispersed and thus not very easy to find. Consideration should be then given to drafting a specific chapter on complaint and appeals incorporating all provisions on this matter.

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.¹⁹ 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

¹⁶ See the Code of Good practice in electoral matters, CDL-AD(2002)023rev, II.3.3.e and par. 101.

¹⁷ See the previous footnote.

¹⁸ Constitutional Court decision of 8 March 2008 in respect of appeals filed by candidates Levon Ter-Petrosian and Tigran Karapetyan challenging the decision of the CEC on the election of the president, 24 February 2008.

¹⁹ See the OSCE/ODIHR reports on elections in the Republic of Armenia (<http://www.osce.org/odihr-elections/14350.html>) as well as the previous joint opinions such as CDL-AD(2007)013, par. 31 ff; CDL-AD(2006)026, par. 55; CDL-AD(2005)027, par. 4 and 27-30; and CDL-AD(2003)021, par. 39 ff.

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.

73. Under Article 40.1 of the Code, election commissions, including the CEC do not make decisions on complaints and appeals, they simply issue responses. There are no requirements to hold a public hearing, rather a member of the commission considers a complaint and makes suggestions to the commission. While the complainant may be present when the election commission considers its complaint, the discussions are not in public.

74. In addition, Article 139 should specify which offences fall under the Criminal Code and which under the Administrative Procedures Act. Consistency should be ensured between the Election Code, the Criminal Code and the Administrative Procedures Act.

75. In a seminar for judges held in Yerevan on 26 January 2008, the judges of the Administrative Courts showed both interest and concern about their strengthened role in electoral matters. Their strongest concern was about how they could secure due process within the timeframe given in the law. It is in the nature of the elections that in many disputes a decision simply has to be taken, even though there is a possibility for higher courts later to overturn it. The provisions on how administrative courts have to address electoral disputes should be detailed in the law, be it the Code or another piece of legislation. Emphasis should be put on the rapidity, simplicity and without an overly formalistic approach of such procedures.

76. One of the major issues still seems to be the lack of clarity of competencies and what role the election commissions can play in the complaints process by, for example, forwarding complaints to the court.

77. Article 63.2(3) of the Code provides that the CEC must release final election results no later than seven days after voting. The appeal deadlines, including those in other laws, should be adjusted to ensure that all appeals are heard within this time limit. Complaints against TEC decisions should also be adjudicated before the CEC announces final election results.

78. In the event of an appeal on the final results made to the Constitutional Court, an appellant has seven days to file an appeal once the CEC has issued its final results. Even in the event of an appeal between the first and possible second round of a presidential election, the Constitution requires the second round to be held within 14 days of the first round (Article 51.3), also provided for by Article 85.1 of the Code. Appeal deadlines need to be harmonised to ensure that an appeal after the first round can be decided by the Constitutional Court before a second round has been held.

20. Concluding remarks

79. Even if practice needs more improvement than legislation, a number of amendments to the Code should be considered in order to ensure compliance with the international standards, the OSCE commitments and the Council of Europe standards. The most important points to be considered are:

- the complaints and appeals procedures: the provisions on this issue should be made more systematic, and the procedure more efficient; in particular, overly formalistic approaches should be avoided, so that alleged irregularities are systematically addressed in their substance;
- the balance in the election commissions, in particular in their management positions (chairperson, deputy chairperson and secretary);

- the issue of the electoral deposit, which was increased in a way that could transform it into an excessive hurdle;
- the stamping of voters' identification documents is a positive step as a safeguard against double voting; nevertheless, inking of fingers still remains an appropriate alternative safeguard against fraud.

80. If implemented in good faith, the Election Code of the Republic of Armenia could provide a good basis for democratic elections. Good faith implementation, as well as the exercise of political will by all stakeholders, remain the key challenges for the conduct of genuinely democratic elections in the Republic of Armenia.