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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AND

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

JOINT INTERIM OPINION ON THE NEW DRAFT ELECTORAL CODE OF ARMENIA

Endorsed by the Council for Democratic Elections at its 37th meeting (Venice, 16 June 2011) and by the Venice Commission at its 87th plenary session (Venice, 17-18 June 2011)

on the basis of comments by
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I. Introduction

1. In a letter dated 10 February 2011, the President of the National Assembly of Armenia requested that the Council of Europe's Commission for Democracy through Law (Venice Commission) and the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) provide an assessment of the draft amendments and addenda to the Election Code of the Republic of Armenia.[1]

2. The joint opinion comments on the January 2011 version of the draft Electoral Code (CDL-REF(2011)009). Earlier opinions of OSCE/ODIHR and the Venice Commission, as well as numerous election reports from previous election observation missions in Armenia, provide excellent background for understanding the historical development of election legislation in Armenia.

3. Previous joint opinions of the Venice Commission and OSCE/ODIHR have underscored that the conduct of genuinely democratic elections depends not only on a comprehensive election code but on political will and good faith implementation of the election legislation. Although the draft Electoral Code addresses a number of the previous recommendations made by the Venice Commission and OSCE/ODIHR, there are areas where the Code would benefit from further improvement. These areas include: formation of election commissions, including the selection of leadership positions, candidacy rights, campaign regulations, including as relates to the separation of state and party structures, rights of observers, electronic voting, the determination of election results, recounts and the invalidation of voting, and complaint and appeal procedures.

4. This joint opinion should be read in conjunction with the following documents and prior joint opinions provided to the authorities of the Republic of Armenia:

- 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;
- Council of Europe's Parliamentary Assembly reports on elections observed in the Republic of Armenia;
- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990);
- 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.

5. This joint opinion does not take into consideration other laws which have provisions that may relate to elections. Notably, it does not include a review of the Administrative Procedure Code, provisions of which are incorporated by reference in several articles of the draft Electoral Code. Nor does this joint opinion include a review of the Law on Political Parties, the Broadcasting Law, the Criminal Code, or the Law on Data Protection.

[1] This draft opinion is based upon an English translation of the draft Electoral Code without further clarifications with the Armenian text. It is possible that some issues have been misinterpreted due to incorrect translation.

6. Since 2001, the Electoral Code of the Republic of Armenia has been the subject of extensive scrutiny by the Venice Commission and OSCE/ODIHR.[2] The following joint opinions have been issued previously by the Venice Commission and OSCE/ODIHR:

- Joint Opinion on the Electoral Code of the Republic of Armenia as amended through December 2007 by the Venice Commission and OSCE/ODIHR, CDL-AD(2008)023;

- Joint Opinion on the 26 February 2007 Amendments to the Electoral Code of the Republic of Armenia by the Venice Commission and 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 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 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 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 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 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 OSCE/ODIHR and the Venice Commission, adopted by the Venice Commission at its 52nd plenary session (Venice, 18-19 October 2002), CDL-AD(2002)029.

7. OSCE/ODIHR has also commented on the legal framework as a part of its election observation mission election reports on numerous occasions since 1996.[3]

8. The present opinion was endorsed by the Council for Democratic Elections at its 37th meeting (Venice, 16 June 2011) and by the Venice Commission at its 87th plenary session (Venice, 17-18 June).

[2] The opinions of the Venice Commission may be found on the Venice commission website, www.venice.coe.int. Previous Joint Opinions and Legal Reviews are also available on the OSCE/ODIHR website: http://www.osce.org/odihr/elections/armenia.

[3] All reports on elections in the Republic of Armenia are also available on the OSCE/ODIHR website: www.osce.org/odihr/elections/armenia.

II. General principles

9. In conformity with the Constitution, Article 1.1 of the draft Code provides for the election of the President (Article 50 of the Constitution), of the National Assembly (Article 63 of the Constitution) as well as of local self-government bodies (Council of Elders and Heads of Communities, Article 107 of the Constitution) by universal, equal and direct suffrage.

10. An exception is provided for elections of the mayor of Yerevan, who is indirectly elected by the municipal council. The Constitution allows for indirect as well as direct election (Article 108). No international standard imposes the direct or indirect election of the mayor. According to the European Charter of Local Self-Government, the local executive organs have to be responsible to the local council.[4]

III. The election administration

Formation of Election Commissions

11. The draft Electoral Code tasks electoral commissions to ensure the exercise and protection of electors' right of suffrage. The Central Electoral Commission (CEC) has the overall responsibility for organizing elections and the responsibility of supervising the legality of elections. The subordinate election commissions are the Constituency Electoral Commissions (CSECs) and Precinct Electoral Commissions (PECs). CSECs replace the Territorial Election Commissions in previous versions of the Code.

12. Article 40 of the draft Electoral Code establishes a new procedure for the appointment of the seven members of the CEC. The CEC members are appointed by the President of the Republic for a term of five years. The President selects the seven members among candidates proposed by the Human Rights Defender, the Chairperson of the Chamber of Advocates, and the Chairperson of the Court of Cassation.[5] Article 40(3) requires that at least two of the CEC members must be women, which is a positive development, and that at least one-third of the seven CEC members have a legal education.

13. The independence and impartiality of the CEC in implementing its mandate are key elements in ensuring that elections are held in conformity with international standards. General Comment 25 of the United Nations Human Rights Committee calls for "an independent electoral authority… to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws".[6]

14. The draft Electoral Code shifts the procedure of appointment to an independent, professional model (which is an appointment model only and should not be mistaken for having an independent commission as called for by General Comment 25). This model is defined as a system where parties are not involved in the appointment of CEC members, but instead appointment is made through an application procedure that should be free of political influence.

15. The fundamental basis for this approach is a trust in the neutrality of the state institutions. If such a model does not ensure that electoral stakeholders in Armenia trust the neutrality of

[4] ETS No. 122, Article 3.2.

[5] Any potential CEC member should be a professional with high integrity. This could include possessing a professional background in law, political science or other related field, as well as experience in and understanding of electoral issues and public administration.

[6] *See* General Comment 25, Paragraph 20 of the United Nations Human Rights Committee. General Comments of the United Nations Human Rights Committee are interpretative statements of the provisions of the International Covenant on Civil and Political Rights (ICCPR). General Comment No. 25 (adopted 12 July 1996), interprets the principles for democratic elections and public service set forth in Article 25 of the ICCPR.

professionals appointed by the state structure, consideration should be given to implementing a partisan model that finds an agreeable balance between government and opposition groups. The goal of any method of appointment, politically based, independent or mixed, is to create a body that is deemed by all election stakeholders as able to function in a manner which ensures that one side does not wield undue influence over the process.

16. The proposed appointment procedure also gives the President of the Republic the authority to appoint all seven members. It should be noted that as there are five candidates proposed from each nominating body, the President can disregard the nominees of one of the nominating institutions.

17. Article 41(1) provides that the CSECs are appointed by the CEC. Each CSEC has seven members who serve for a term of five years. Article 41(2) requires that at least one member must be a woman and at least one member must have a legal education. It is a positive development that at least one woman must be a member of the CSECs, as this helps facilitating women's representation in the election administration. However, requirements for women's representation could be increased further.

18. Article 42(2) provides that the PECs are appointed through a primarily partisan model, whereby the President of Armenia appoints one member, political parties or an alliance of political parties having a faction in the National Assembly appoint one member each, and the chairperson of the relevant CSEC appoints one member. The total membership of the PEC should be at least seven members. The term of the PEC terminates on the seventh day following election day if the results are not appealed. Article 50(1) requires that all PEC members complete professional training courses.

19. Where the number of political parties or an alliance of political parties having a faction in the National Assembly is less than five, Article 42(3) provides that the chairperson of the relevant CSEC makes the appointment of any vacant position in the PEC.

20. The number of positions to the PEC is therefore still dependent on the number of parties in the National Assembly belonging to the majority or opposition. The more split the groups are the more nominees they are allowed to propose. When the President's nominations to the PECs are included with the nominations from the President's political party in the National Assembly it gives an advantage to the party of the President. If the chairperson of the CSEC represents a political party, this party could also be given an unfair advantage.

21. The draft Code employs a different appointment mechanism for the PECs (partisan model of appointment) rather than that used for the CEC and CSECs (professional model of appointment). Even the partisan model of appointment should, however, ensure that there exists confidence of all stakeholders that no one party or group wields undue influence over the process.

Selection of Leadership Positions to Election Commissions

22. The draft provides that only civil servants may be members of the central and constituency election commissions (Articles 40(5), 41(5)). As with the professional method of appointment, hiring only from among civil servants requires as a basis a trust in the neutrality of the state institutions. If such a model does not ensure public confidence that those selected are free from political influence, this requirement should then be reconsidered. Such a concern is highlighted in the Code of Good Practice in Electoral Matters: "However, in states with little experience of organising pluralist elections, there is too great a risk of government's pushing the administrative authorities to do what it wants…".[7]

[7] Paragraph 70 of the Council of Europe's Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev.

23. Under Article 40(7), the CEC elects its chairperson, deputy chairperson and the secretary from among its members at its first meeting. Article 41(11) provides that this same election procedure applies to the selection of these election management positions in the CSECs. While Article 41(5) provides that those applying for CSEC positions should "not carry out public social and political activities" it does not mean that the individuals selected cannot be a supporter of one or another party. As elections are made by majority vote or plurality vote where there is more than one candidate (Article 40(12)), it is possible for all leadership positions on the CEC and CSECs to be filled by supporters of the majority group of parties. Therefore, a fair and balanced representation in the management positions of the election administration is not ensured. This is problematic, and the draft Electoral Code should be revised to provide for balance among political forces also in these election management leadership positions.[8]

24. The selection process for leadership positions on the PECs is more complicated. The positions of chairperson, deputy chairperson and secretary in PECs are distributed among: (1) members appointed by the President of Armenia and (2) members appointed by political parties who are part of a faction in the National Assembly. The attempt to ensure politically balanced PECs and to use the voting strength rather than the number of factions as basis for distribution is a positive step. However, Article 42(5) states that the number of these positions for each qualifying political party is partly based on the percentage expression of the number of the "affirmative" votes cast in favor of each political party in the number of valid ballot papers rounded down, with the President given the share belonging to parties not represented in the National Assembly. This will give the President's party an unnecessary and unjustified advantage. Further, how the remainders are to be worked out is not specified in an accurate language. The last paragraph of Article 42(5) is not clear.

25. Article 43 allows the election commissions to dismiss their chairperson, deputy chairperson and secretary without any motivation. Impeachment should be limited to very serious grounds and the decision should be reasoned. Dismissal of other members (Article 43(3)) should be limited to the same grounds and not take the form of a recall by the appointing body.

26. Finally, as underlined in previous Joint Opinions, the Venice Commission and OSCE/ODIHR emphasize again that legislation alone cannot guarantee that members of election 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.[9]

IV. Voter registration

27. Article 2(1) of the draft Electoral Code provides that a foreign national may vote in local self-government elections if he or she has been registered for at least one year in the population register of the community where the elections are held. This is in accordance with international practices and recommendations.[10] However, Article 7(3) states that "only nationals of the Republic of Armenia having the right of suffrage and included in the Population Register of the Republic of Armenia as well as registered in a community of the Republic of Armenia shall be included in the Register of Electors of the Republic of Armenia." Thus, there is a contradiction regarding the eligibility of foreign nationals who are properly registered as residents to vote in local self-government elections. The Venice Commission and OSCE/ODIHR recommend that Article 7(3) of the draft Electoral Code be revised to include the

[8] This recommendation has also been made in previous Venice Commission and OSCE/ODIHR Joint Opinions. See CDL-AD(2008)023, paragraph 19.
[9] CDL-AD(2008)023, paragraph 19 and CDL-AD(2007)013, paragraph 24.
[10] See in particular the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144)

registration of foreign nationals for local self-government elections as contemplated by Article 2(1).

28. Accurate and regularly updated voter lists are of crucial importance for democratic elections. Missing or incorrect entries of some voters, as well as possible multiple registrations of others, can violate the principles of universal and equal suffrage where such entries allow for multiple voting or denial of voting rights. Article 7(1) of the draft Electoral Code states that the voter lists "shall be drawn up and maintained on the basis of the Register of Electors by the public administration body — authorized by the Government of the Republic of Armenia, — maintaining the State Population Register (hereinafter referred to as 'the authorized body')." Article 8 requires other authorities in Armenia to provide information to "the authorized body" and to co-operate in the revision of lists and preparation of "supplementary lists". Article 10 requires that lists be provided to the person responsible for polling stations and Article 12 establishes procedures for correcting inaccuracies in the lists. Article 13 requires the preparation of supplementary lists to correct omissions and add voters submitting court judgments on their voter eligibility.[11]

29. More clarity in the compilation of the voter lists could be added if Article 2 on the "Right to vote" would specify that citizens eligible to vote must have attained the age of 18 "by election day", which is usual practice.

30. In theory, the above provisions would appear sufficient to establish a basic framework for creating and maintaining accurate voter lists. However, past election observation reports have raised serious questions about the accuracy of the voter lists. Thus, the implementation of these newly proposed legal provisions may be a source of concern with regard to accuracy. Past practice shows that legal provisions have not been implemented in such a manner as to improve accuracy of the lists. In particular, the absence of publicity of military lists (Article 11) and the limited timing required by the competent commissions to finalize the voter lists (Article 12) have had the potential to impact on the accuracy of voter lists. Whether these problems are due to the lack of full commitment, capacity and co-ordination by the institutions involved in the compilation of the voter lists, insufficient legal procedures or neglect, these issues undermine the basic principles of universal and equal suffrage. It is recommended by the Venice Commission and OSCE/ODIHR that further efforts be undertaken to compile and maintain an accurate voter list.

V. Candidate nomination procedures

31. The draft Electoral Code does not provide for the candidacy of independent candidates. The right to nominate candidates is granted only to political parties for presidential elections and to political parties and alliances for other types of elections.[12] Paragraph 7.5 of the OSCE Copenhagen Document recognizes the right of citizens to seek political office, individually or as representatives of political parties or organizations, without discrimination. Further, as noted by the United Nations Human Rights Committee:

> Persons who are otherwise eligible to stand for election should not be excluded … by reason of political affiliation.[13]

32. The Venice Commission and OSCE/ODIHR recommend that the draft Electoral Code be revised to allow independent candidates to stand for elections in Armenia.

[11] Article 12(3) provides that "Disputes concerning inaccuracies in the lists of electors may be appealed against in the manner and within the time limits prescribed by the Administrative Procedure Code." The Administrative Procedure Code has not been reviewed and no opinion is expressed as to the adequacy of the referenced provisions.
[12] See Articles 78, 106(1), 106(7), 134(1), and 155(1) of the draft Electoral Code.
[13] See General Comment 25, Paragraph 15 of the United Nations Human Rights Committee.

33. The draft Electoral Code requires all candidates to pay an electoral deposit that is a number multiplied by the "minimum salary as defined by the legislation of Armenia." (Articles 80, 108(3)(5), 116(2)(2), 134(1)). The draft Code does not provide for signature support as an alternative mechanism for registration. For this reason, the amounts of the electoral deposits are important as deposits should not be arbitrary obstacles to candidacy. OSCE/ODIHR and the Venice Commission reiterate that the amount of an electoral deposit must be considered carefully since every citizen should be provided a meaningful opportunity to be a candidate. The Venice Commission and OSCE/ODIHR recommend, as was recommended in the 2007 joint opinion,[14] that careful consideration be given to whether there should be a reduction in the amounts of candidate electoral deposits or to consider signature requirements for parties and candidates in lieu of a deposit. Allowing for either signatures or a deposit would avoid making the possibility to stand for election dependent on the candidates' financial situation.

VI. Restrictions on candidacies

34. Other restrictions on the rights to stand as a 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 77(1) of the draft Electoral Code, "Anyone having attained the age of thirty-five, having been a national of only the Republic of Armenia for the last ten years, permanently residing in the Republic of Armenia for the last ten years and having the right of suffrage, may be elected as the President of the Republic". The age requirement of 35 years to stand for the presidency, although not without precedent in other countries, could be considered high. Moreover, the requirement of 10 years residence and 10 years citizenship is disproportionate.[15] The Code of Good Practice in Electoral Matters states that "a length of residence requirement may be imposed on nationals solely for local or regional elections".[16] The blunt exclusion of double nationals – and even people having been double nationals in the last ten years – also appears disproportionate.

35. Article 105 of the draft Electoral Code establishes a five-year residency requirement for candidates for the National Assembly. This is contrary to international standards.[17] The same is true for local elections where a two-year residency (three years in Yerevan) in the community is required (Articles 133.2, 152). The exclusion of double nationals from eligibility to be elected (Article 107.1) is contrary to Article 3 of the First Protocol to the European Convention on Human Rights (ECHR).[18]

36. The Venice Commission and OSCE/ODIHR recommend that all residency requirements for candidacy in national elections be reviewed in the draft Electoral Code.

VII. Representation of women on candidate lists

37. Article 108(2) of the draft Electoral Code requires the representation of women in candidates lists for the National Assembly. This article states:

> One woman shall be included among the first ten candidates of the electoral list of a political party for the elections to the National Assembly under the proportional electoral system, whereas starting from the eleventh number of the list, women shall make up at least 20% of each integer group of five candidates (11-15, 11-20, 21-25 and subsequently till the end of the list).

[14] CDL-AD(2007)013, par. 25.
[15] *See, e.g.*, ECtHR Py v. France, 11 January 2005, Application No. 6289/01.
[16] Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.1.c.
[17] See the previous footnote and UN Human Rights Committee General Comment 25, paragraph 15.
[18] Cf. EctHR Tanase v. Moldova, 27 April 2010, Application No. 7/08.

38. Twelve women were elected to the National Assembly in 2007. The above provision may marginally increase the number of women elected, but such an increase is far from ensured as the 20 per cent requirement does not apply until the 11th candidate on the candidate list and thus would affect only the two or three largest parties. The same remarks are valid for the elections to the Yerevan Council of Elders, where women shall make at least ten per cent of the list (Article 156.2). More could be done to further improve the representation of women on candidate lists. The Venice Commission and OSCE/ODIHR recommend that additional measures be implemented by the authorities in Armenia to facilitate the representation of women in political life.

VIII. Campaign regulations

39. Article 18 of the draft Electoral Code provides for significant regulation of campaign activities. As campaigning is considered by many as a form of speech, the restrictions in Article 18 should not raise a question of incompatibility with human rights instruments such as the ECHR. Generally, any limitations on a fundamental right must be narrowly constructed to meet the specific aim pursued by authorities. Further, this aim must be objective and necessary in a democratic society. The state has the burden of establishing that limitations are justified by a substantial interest that can not be fulfilled otherwise.

40. Article 18(5)(3) of the draft Electoral Code prohibits campaigning by charitable and religious organizations. While it would appear that this is intended to prevent undue influence by specific groups, every person should have the right to the exercise of free speech through campaigning. Further, Articles 15 and 23 of the Constitution of Armenia prohibit discrimination on the basis of religion. OSCE/ODIHR and the Venice Commission recommend that Article 18(5)(3) be amended to conform to international standards and domestic law protecting freedom of religion and the right to non-discrimination in the exercise of free speech through campaigning.

41. Article 18(5)(4) prohibits campaigning by foreign nationals "except for electors having the right to participate in local self-government elections." Foreign citizens and stateless persons residing in Armenia have the right to freely express their opinion and to associate during election campaigns, although they are non-citizens. The rights to freedom of expression and association, under Articles 10 and 11 of the ECHR, belong not only to citizens but to all persons within the jurisdiction of a Member State. OSCE/ODIHR and the Venice Commission recommend that Article 18(5)(4) be amended to conform to international standards protecting freedom of expression and speech.

42. Article 18(6) provides for an "official" campaign period which does not commence until "the seventh day following the last day provided for by this Code for registration of candidates and electoral lists". This creates a potential gap between the period when candidate registration ends and when the campaign begins. OSCE/ODIHR and the Venice Commission recommend that Article 18(6) be revised to remove this gap and mitigate the potential imposition of sanctions for expressing campaign choices and political opinions that occur outside of the "official" campaign period.

43. Article 18(8) allows for a candidate's registration to be revoked after a warning and a court decision, for any violation of Article 18. Punishment for minor violations of the law should not entail the cancellation of the candidacy. OSCE/ODIHR and the Venice Commission recommend that the provisions on cancellation of candidate registration in Article 18(8) be revised and narrowly tailored to satisfy the principle of proportionality.[19]

[19] As stated in paragraph 24 of the 1990 OSCE Copenhagen Document and paragraph 1.1 (d) of the Code of Good Practice in Electoral Matters, any limitation imposed on an individual's rights must be proportionate in nature and effective at achieving the specified purpose. Particularly in the case of suffrage rights, given their

44. Article 20(5) requires that a campaign poster be "submitted to the electoral commission" before it is posted and the campaign poster can be posted only "in case no decision on prohibiting the posting of a poster is taken by the electoral commission within a three-day period." This partially hampers freedom of expression through a significant form of campaigning for a three-day period automatically pending the non-exercise of veto power held by the election commission. This control over campaigning is excessive and disproportionate. OSCE/ODIHR and the Venice Commission recommend that Article 20(5) be revised to respect the right to freedom of expression through campaigning by not submitting the content of posters to a preliminary approval.

45. Article 19 of the draft Electoral Code requires equal conditions in the treatment of candidates and political parties by the media. Article 19(3) specifies that such equal conditions must adhere "to the proportional equality principle". The proportional equality principle is not defined in Article 19. However, Article 42(5), which regulates the procedure for the formation of PECs, uses the phrase "the principle of proportional equality based on the results of elections to the National Assembly through proportional electoral system." Thus, it is not clear in Article 19 whether non-parliamentary political parties will be able to avail themselves of the free airtime and other benefits granted in Article 19. It is also not clear whether the "proportional equality principle" is intended to apply to all provisions in Article 19 or just to subparagraphs (3), (5) and (11) of Article 19.

46. As with previous recommendations, the Venice Commission and OSCE/ODIHR recommend that Article 19 be clarified so that there is no question as to what conditions and treatment each candidate and political party (alliance) is entitled. "Proportional equality" is too important an area to leave room for discretion in implementation and should be expressly defined.

47. Article 21(3) prohibits the publication of opinion polls during the seven days prior to the voting as well as on voting day. With the development of the Internet, such a restriction could be difficult to implement. Consideration may be given to clarifying where opinion polls cannot be published (i.e. – broadcast media, print media) to ensure the restriction can be effectively applied.

48. The separation of State resources from party and candidate resources has been a chronic problem in Armenia, cited in every OSCE/ODIHR election report since 1996.[20] During a national election, the resources that are under the control of some government offices are called upon to campaign on behalf of the government candidates. This creates a disparity in resources available between government and non-government candidates. This practice is not in conformity with OSCE commitments which call for a separation of party and State and for campaigning on the basis of equal treatment.[21] They are also not in line with the Code of Good Practice in Electoral Matters, where the principle of equality of opportunity entails a neutral attitude by state authorities.[22] Article 22 of the draft Electoral Code is intended to address these issues.

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fundamental role in the democratic process, proportionality should be carefully weighed and prohibitive measures narrowly applied. The only restrictions imposed should be those that are necessary in a democratic society and prescribed by law. If restrictions do not meet such criteria, they cannot rightly be deemed as proportionate to the offence. The cancellation of candidacy is the most extreme sanction available and should never be imposed unless such measure is proportionate and necessary in a democratic society.

[20] 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.

[21] 1990 OSCE Copenhagen Document, paragraphs 5.4 and 7.7.

[22] Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I. 2.3.

49. Article 22 states that candidates occupying political and discretionary positions, as well as candidates occupying a position of state or community servant shall conduct election campaigns taking into account the following prohibitions: conducting an election campaign while performing official duties, any abuse of official position to gain advantage at elections, as well as the use for election campaign purposes of premises, means of transport and communication, material and human resources provided for performing official duties. However, such restrictions are not applied to high-ranking officials "subject to state protection under the Law of the Republic of Armenia". While some use of state resources for high ranking officials is impossible to avoid, the Code should be amended, in order not to provide a blanket exemption from use of State resources. In addition, no privileged treatment should be given by broadcasters to public authorities during news and current affairs programs.[23] Good faith implementation of such provisions, including Article 22 (1)(3) on the coverage of activities of such candidates by the media, is critical to the future conduct of genuinely democratic elections.

IX. Campaign finance

50. Articles 25 through 28 of the draft Electoral Code govern the establishment of campaign accounts, use of campaign funds, reporting requirements, and the Oversight and Audit Service of the CEC. These articles do include previous recommendations of the Venice Commission and OSCE/ODIHR to provide greater details as to what are acceptable expenditures for the campaign and more information on services or goods that are donated. Consideration should be given to also implementing recommendations of the Council of Europe's Group of States Against Corruption (GRECO) from its most recent report, dated 3 December 2010.[24]

51. However, the list of acceptable expenditures in Article 26(12) is still somewhat limited. Article 26(12) identifies the following as acceptable campaign expenditures: "mass media, funding for renting halls, premises, preparing (posting) campaign posters, acquiring print campaign and other materials, funding for all types of campaign materials, including print materials, to be provided to electors". The Venice Commission and OSCE/ODIHR recommend that Article 26 be expanded to provide for 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.

52. The sanctions in case of incorrect reports on expenditure or similar violations of the law should be formulated in conformity with the principle of proportionality. A fine of five-fold the amount in question (Article 26(2)(4)) may be disproportionate. The sanction of repealing the registration of a candidate should be used only in extreme cases, whereas Article 26(5)-(6) is rather broad in this respect.

53. The distinction between "funds provided by the political party that has nominated the candidate" and "funds of the political party" in Article 25(2)(2) is unclear. This may be a problem of translation.

54. Article 28 provides for the supervision of the use of campaign funds, as well as "over financial activities of political parties", to be the responsibility of the CEC's Oversight and Audit Service. Previous opinions of the Venice Commission and OSCE/ODIHR have discussed the negative aspect of depositing these responsibilities with the CEC as opposed to an independent agency without general election administration responsibilities. The Venice Commission and OSCE/ODIHR recommend that there be a review as to whether the CEC or a

[23] Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, II.2.
[24] The report can be found at:
http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2010)4_Armenia_Two_EN.pdf

separate agency responsible solely for campaign finance is the best means to increase public trust in this important aspect of the electoral process.

X. Observers

55. Articles 29 through 33 of the draft Electoral Code establish the rights of observers and candidate representatives and the procedures for their accreditation. Although these articles provide broad rights for observation, they could be improved.

56. Article 29(2) prohibits the inclusion of Armenian citizens in the election observation missions of international organizations. This provision is likely to be meant to apply to those members of the observation mission who are making substantive observations and forming opinions based on those observations. However, as translated in the English version of the reviewed draft Code, this provision would also apply to drivers, interpreters, and necessary support staff that are usually relied on by international election observation missions. The Venice Commission and OSCE/ODIHR recommend that Article 29(2) be clarified so that it applies only to observers.

57. Article 31(1)(1) introduces a requirement that an observer has completed a professional course on holding elections and been provided a certificate of such training prior to receiving accreditation. The article further states that "these courses shall be held together with the courses established by this Code for the electoral commission membership candidates." These provisions could be interpreted to mean that observer status cannot be obtained without undergoing the same training as required of electoral commission members. The Venice Commission and OSCE/ODIHR are concerned about any legal provision that can be applied to limit transparency by limiting the pool of potential observers. The Venice Commission and OSCE/ODIHR recommend that this provision be revised so that any training be placed as the responsibility of the observer organization but without unduly limiting the number of potential observers.

XI. Voting

58. According to Article 17.3 of the draft Electoral Code the ratio of voters per constituency should not deviate more than 10 per cent from the average in a single Marz (administrative district). This would ensure that the weight of the vote within the Marz remains within the standards as set out in the Code of Good Practice in Electoral Matters.[25] However, it is possible that a constituency in one Marz may deviate more than 10 per cent when compared to a constituency in another Marz. Thus, nationally this article of the Code does not ensure equal voting power. While Article 3.1 states that electors shall participate on equal grounds, Article 17.3 could be elaborated to ensure equality of the vote between all constituencies.

59. Article 60 of the draft Electoral Code provides for electronic voting over the Internet by voters in the diplomatic and consular service of Armenia abroad. This provision also applies to the family members of such voters. The CEC is responsible for establishing the procedures for electronic voting in a manner that guarantees the free expression of the wishes of voters as well as the confidentiality (secrecy) of the voting. Electronic voting is to occur no later than "up to five days prior to the voting day."

60. The introduction of electronic voting – especially when conducted in an uncontrolled environment, as indicated by the CEC – should only be an alternative means to paper voting.[26]

[25] Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I.2.2.

[26] See standard 4 of the Recommendation Rec(2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting (Adopted by the Committee of Ministers on 30 September 2004

Remote electronic voting is particularly controversial because it cannot guarantee secrecy and it cannot be "observed" through the methods commonly applied to observation of voting in the controlled environment of a polling station. The adequacy of electronic voting in situations where confidence in the impartiality of the election administration is limited should be carefully evaluated. Should there be a decision to implement electronic voting, its legal basis should be drafted in an equally detailed and accountable manner as for traditional paper-based voting.[27] It should also be in line with the Armenian Law on Personal Data. The Venice Commission and OSCE/ODIHR recommend reviewing whether electronic voting is necessary for voters in the diplomatic and consular service of Armenia abroad and their family members.

61. Article 62(1)(4) of the draft Electoral Code states that there shall be "at least one (PEC) member holding the voting through a mobile ballot box". It should be required to have at least two members of the PEC to conduct voting with the mobile ballot box. Further, these two members should not be members appointed by the same nominating person or institution. Mobile voting, since it is not administered in a controlled environment, is vulnerable to misuse. The Venice Commission and OSCE/ODIHR recommend that the necessary safeguards be adopted to reduce the opportunities for fraudulent voting through the mobile ballot box.

62. Article 65(4) of the draft Electoral Code allows for a voter, who is unable to complete the ballot papers, to be assisted by another person, who shall not be a proxy. The person assisting is limited to providing assistance to only one voter who needs such assistance in filling out the ballot paper. This provision adopts previous recommendations of the Venice Commission and OSCE/ODIHR. This article also requires that the name of the person assisting shall be entered in the record book of the PEC. This amendment is another positive inclusion of a previous recommendation of OSCE/ODIHR and the Venice Commission.

63. Article 65(8) provides that proxies, observers, and mass media representatives may photograph and videotape the voting process provided it is done without violating the principle of secrecy of the ballot. Although this Article requires that secrecy of the ballot be respected, photographs and videotape inside the polling station should be used with caution. Some voters may be intimidated by the recording of activities in the polling station even if this provision is not intentionally abused. Such provision needs to be carefully considered. The potential negative consequence of voter intimidation should be weighed carefully against the possible benefits.

64. The use of indelible ink to mark the fingers of voters has proven to be an effective method for preventing multiple voting. The Venice Commission and OSCE/ODIHR have previously recommended the use of indelible ink to mark voters. OSCE/ODIHR and the Venice Commission recommend that if concerns of multiple voting persist, some measure to prevent multiple voting which does not impinge upon the voters' right to secrecy be considered.

XII. Counting of ballots

65. Article 68(2) of the draft Electoral Code could be clarified to better define the validity of ballot papers. Article 68(2)(5) provides that a ballot is invalid if "it is not signed". This should be clarified to state the ballot is invalid if not signed by the required PEC member. Otherwise, it could be interpreted to require a voter to sign the ballot in order for the ballot to be valid, which is contrary to Article 68(1) and the principle of secrecy of the ballot.

66. Article 68(2)(6) provides a ballot is invalid if "the manner of marking the ballot paper is breached apparently." In the English translation, this is not a firm statement to provide guidance

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at the 898th meeting of the Ministers' Deputies) which reads "[…] remote e-voting […] shall be only an additional and optional means of voting".

[27] For guidance on regulating electronic voting see in addition the recently published CoE guidelines on certification and transparency.

as to ballot validity. The original language text of this provision should be checked to ensure that the provision clearly states that the ballot is invalid if not marked in the manner required by the Code.

67. Article 72 establishes the procedure for "determining inaccuracies". Inaccuracies are recorded in protocols as follows:

> (1) The difference (in absolute value) between the total number of ballots received by the PEC and the number of cancelled ballot papers, valid ballot papers, and invalid ballot papers in the ballot box;
> (2) The difference between the number of 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 ballot box;
> (4) The difference between the number of ballots and ballot envelopes of the established specimen in the box;
> (5) The sum of the second and the fourth inaccuracy amounts shall be added to the largest amount among the first and third inaccuracy amounts, and in case they are equal, to any one of the said amounts. The received sum shall be the amount of inaccuracies in the given precinct.

68. Each difference calculated above may indicate fraud, but the total inaccuracy that is calculated will only be indicative of inaccuracies revealed due to the reconciliation process that is necessary to complete the protocols. It is possible that there may be evidence of other election irregularities – such as ballot stuffing – that are not disclosed through the reconciliation and completion of protocols. It is important that any inaccuracy or irregularity, regardless of the manner in which it is discovered, is comprehensively investigated by the appropriate bodies. The Code could be revised in order to ensure that the election commissions investigate all electoral irregularities submitted to their consideration.

XIII. Tabulation and publication of results

69. A key element of transparency in an electoral process is the ease of access for the public to the tabulation of results from the polling station level up to constituency and national levels. Such access should be given at the national level, even for constituency based elections. Accredited political parties, media, observers and officials should be able to easily check the tabulation process, and how each polling station has contributed to the totals. In particular, accredited observers and political party representatives need to be able to verify that the polling station results have been correctly entered and aggregated in all tabulation stages including that leading to the aggregation of the final election results.

70. Article 71 requires the posting of polling station protocols at the precinct level. Article 74 requires the posting of the CSEC protocol at the CSEC level. Similarly, Article 75 requires the CEC to prepare a protocol on final election results. All these protocols must be published or publicly posted at the respective place at the commissions. However, in the English translation of Articles 74 and 75, it does not appear that the CSEC and CEC protocols must include a breakdown of the results from each polling station. The Venice Commission and OSCE/ODIHR recommend that these articles be amended to clearly state that the CSEC and CEC protocols include the disaggregated totals for each polling station so it can be verified by political parties and observers that the polling station results have been correctly entered and aggregated in all subsequent tabulations at the higher levels of the election administration.

71. There is also a text in the English translation that might appear to be contradictory. Article 73(4) contains the phrase "the constituency electoral commission shall not make a protocol on summarisation of voting results in the constituency" in the case of national elections. This

appears inconsistent with Article 74(1), which requires the CSEC to "endorse" results in the form of a protocol for National Assembly elections. It could be an error in translation. The original language text of Article 73(4) should be checked.

XIV. Exhausted lists in the proportional race

72. For proportional list elections, it is common to regulate the number of candidate names which a political 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.

73. Article 108(2) requires every candidate list to contain at least ten candidates, which is an improvement from earlier. A list which passes the 5 per cent threshold (Article 126(2)) will win at least five seats so there is room for both members and substitutes for the smallest parties. There is no limit in this article on the number of candidates that may be included on a list. Article 126 of the draft Electoral Code describes the distribution of seats among lists in the proportional part of the election. The method used is the largest remainder formula using Hare's quota.

74. Article 126(7) states that a mandate shall remain vacant if the political party has fewer candidates than the mandates it has won for the National Assembly or if it runs out of listed candidates to fill later possible vacancies. If possible, vacancies should be avoided by mechanisms to meet the constitutional provision to fill the total number of seats in the National Assembly. 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 might consider 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 as many seats to the party in question as they have candidates and then distributing the rest of the seats among the remaining parties having reached the threshold. With 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. The Venice Commission and OSCE/ODIHR recommend that the Code be amended to address a vacancy, due to the lack of candidates on a political party list, by distributing the vacant seat to the political party which would be next to win a seat, provided the party has crossed the legal threshold for the distribution of seats.

XV. Recounts, invalidation of results, and repeat elections

75. Article 46(7) of the draft Electoral Code requires that an application for the recount of voting results in a precinct be submitted to the CSEC from 10:00 to 16:00 hours on the day after Election Day. Article 48 of the draft Electoral Code addresses the procedure for recounts of voting results by CSECs. Recounts begin at 09:00 hours two days after Election Day and no individual recount may take more than four hours. The working hours of CSECs are from 09:00 to 18:00 hours. The draft Electoral Code provides that the CSECs shall extend the working time if it is not possible to complete the recount by 18:00 hours.

76. Article 48(6) arbitrarily limits the number of recounts by a CSEC to seven. Where the number of applications exceeds seven and the applicants cannot agree to which seven precinct results should be recounted, then the CSEC draws lots to determine which seven precinct voting results should be recounted. There is no legitimate rationale for limiting the number of recounts in this way.

77. The problem does not seem to be one of translation in the text. It appears there is some confusion as to the purpose of a general statistical audit of a sample of the results as opposed to a specific request to count certain ballots that are believed to have been counted incorrectly in a specific precinct. Mixing the two concepts and limiting the number of recounts to seven is highly problematic.

78. The purpose of a recount is not to have a statistical audit of the election results. The purpose of a recount is to ensure that the ballots have been correctly counted in a specifically identified precinct and accurately reported to the CSEC. The "audit" mechanism for election results is already provided for with the requirement for recording "inaccuracies" in the PEC, CSEC, and CEC protocols.

79. It may be of value that seven polling stations results are always re-counted. However, if there is clear evidence of fraud in more than seven polling stations, then all polling stations results with potential inaccuracies should be recounted based on facts, not on compromise or on drawing lots. The judgment of the validity of claims requesting recounts should be part of the decision of recounts and it should not be limited to seven polling stations.

80. The confusion between audits and recounts is apparent in the following provision in Article 48(8):

> In case of national elections and elections to the Yerevan Council of Elders, if in any constituency the number of voting results subject to recount is more than seven, the recount of voting results shall also be carried out by the Central Electoral Commission. For this purpose, the Central Electoral Commission shall, two days after the end of the voting, by 13:00, convene an extraordinary sitting, at which each member of the Commission shall present the numbers of two electoral precincts selected by him or her for recount. In the Central Electoral Commission, the recount for each electoral precinct shall be carried out by at least two members of the Commission; staff members of the Central Electoral Commission may also be involved in this process.

81. The above provision requires each CEC member to conduct, with staff assistance, a recount of two electoral precincts selected by him or her for recount. This suggests that the "recounts" are intended as an audit function. However, Article 48(9) conversely suggests these are true recounts of ballots intended to accurately record the voting results because this provision states that the protocol on the voting results is drawn up based on the results of the recount. Further, it is not clear why the CEC should be involved in such a basic task as recounting ballots.

82. In the end, discrepancies are used to assess the amount of inaccuracies, which in turn are used to determine whether the voting results should be invalidated. This is stated in Articles 72(3), 94(1), 127(5), 144(3), and 145(3) of the draft Electoral Code. Thus, it would again appear that the "recount" procedures add no value as an audit mechanism. This conclusion suggests that the "recount" procedures are true efforts to obtain a correct count of the votes in a specific precinct. As such, recounts should not be arbitrarily limited to *any* set number.

83. It should be noted that the use of "inaccuracies" for invalidation is not the only ground in the draft Electoral Code for invalidation of election results. Articles 94(1), 127(5), 144(3), and 145(3) also permit invalidation where there has occurred any violation of the Code "that might have affected the election results".

84. Article 127(5) on the constituency part of the National Assembly elections (Article 94 provides a similar rule for Presidential elections) states: "The elections of the deputy shall be declared as invalid, if:

> (1) The amount of inaccuracies is more than, or equal to, the difference of the number of affirmative votes given to two candidates having received the greater number of affirmative votes, or, where one candidate was voted on, is more than, or equal to, the difference of affirmative and negative votes given to the candidate; or
> (2) Violations of this Code, that may have affected the results of the elections, have occurred in the course of preparation and holding of elections."

85. The definition of "the amount of inaccuracies" has changed in such a way that it can be applied directly to determine if an election should be invalidated. This is positive. In addition to using the inaccuracies directly, other violations which may affect the result may cause invalidation of the election.

86. The possibility of a negative vote in case there is only one candidate in a constituency (Article 57(4), 66(2)) may be understandable in order to avoid non-competitive elections. When there are several candidates, no negative vote may be envisaged, and the terms of "affirmative vote" should be simply transformed into "vote" in the whole Code (*e.g.* in Articles 21(3), 24(2), 42(5), 127(5).

87. For the proportional part of the parliamentary elections, Article 126 (8) states: "Elections to the National Assembly under the proportional electoral system shall be declared as invalid, if violations of this Code that may have affected the election results have taken place in the course of preparation and holding of elections." Here, there is no reference to inaccuracies. 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.[28] The principle to invalidate parliamentary elections should therefore be the same for first-past-the-post and proportional races.

88. In cases of invalidation of the election results, 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 organization of elections in the whole country is a large effort and may represent a barrier against invalidating elections, even when invalidation should be justified. Consideration could be given to introducing provisions for limiting repeat elections to the polling stations or the constituencies where irregularities have occurred.[29] This would limit the negative effects of repeat elections, and still make repeat elections a realistic and affordable measure in cases where they are the only remaining remedy. It could therefore be stipulated in the Code that repeat elections should only be held if irregularities may have effect on the outcome and that they be organized only in part of the concerned territory when possible.

89. The Venice Commission and OSCE/ODIHR recommend that all provisions in the draft Code for recounts and invalidation be carefully reviewed to ensure that they serve the specific goal and policies intended. It is recommended that the number of recounts not be arbitrarily limited to the number seven but be based upon an assessment of the merit of the complaints. It is further recommended that consideration be given to whether the resources of the CEC should be consumed with CEC members supervising the recount of precinct voting results.

XVI. The complaints and appeals procedure

[28] *See* the Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, II.3.3.e and paragraph 101.
[29] *See* the Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, II.3.3.e.

90. The Venice Commission and OSCE/ODIHR have commented numerous times on the need to improve the complaints and appeals process.[30] Insufficient mechanisms for addressing complaints and appeals have been identified as key issues undermining citizens' confidence in election results. In the 2008 presidential elections, the Constitutional Court[31] 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.

91. Articles 45 through 47 of the draft Electoral Code discuss "applications (complaints)", "appeals", and applications that result in "administrative proceedings" within an election commission. Although the substantive content of these articles, when properly interpreted and applied may result in better processes than before, some voters, candidates, and political party proxies may find the articles difficult to ensure effective remedy.

92. Article 45 of the draft Electoral Code states that administrative proceedings in an electoral commission are conducted according to the Administrative Procedure Code, except as to the specifics and deadlines stated in the Electoral Code. This joint opinion does not include any review of the Administrative Procedure Code.

93. Article 46(2) states that "Decisions and actions (inaction) of the precinct electoral commission may be appealed against before the constituency electoral commission." Similarly, under Article 46(3), decisions and actions (inaction) of the CSEC are appealed to the CEC. There is no remedy to a judicial body. An exception applies for CSEC decisions on most election results, which are appealed to the Constitutional Court.[32] The lack of judicial appeal appears contrary to the Code on Good Practice on Electoral Matters as well as to OSCE commitments.[33]

94. The difference between an appeal and an application to initiate an administrative proceeding is not completely clear. Article 46(1) suggests that a decision allegedly violating subjective rights is open to appeal. However, all election commission decisions relate to implementation of the election legislation, which is based on the rights to elect and be elected (suffrage rights). Further, the second sentence of Article 46(1) states that where the commission finds no violation of rights, it then "rejects the instigation of an administrative proceeding." It might be argued that there is no real distinction between a complaint and an appeal based on the translated text of Article 46.

95. In Article 45, "administrative proceedings" result in an "administrative act". Article 46 proceedings, though, result in an election commission "decision", which may be appealed to the CEC. However, Article 45 does not define the factual circumstances that require an "applicant" to initiate an Article 45 proceeding as opposed to proceedings under Articles 46 or 47. Thus, it is assumed that all applications (complaints) must be applications to institute Article 45 "administrative proceedings". It appears that any application (complaint) which does not merit the institution of an administrative proceeding is rejected without any consideration as to the underlying facts. However, this cannot be stated with certainty since "administrative proceedings" may be a legal term defined in the Administrative Procedure Code. "Administrative proceeding" is not defined in the draft Electoral Code and the Administrative

[30] 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, paragraph 31 ff; CDL-AD(2006)026, paragraph 55; CDL-AD(2005)027, paragraphs 4 and 27-30; and CDL-AD(2003)021, paragraph 39 ff.

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

[32] Only the results of local self-government elections (Article 46(10)) are not appealed in this manner.

[33] *See* the Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev. II.3.3 (a). "The appeal body in electoral matters should be either an electoral commission or a court. In any case, final appeal to a court must be possible" as well as paragraph 18.4 of the 1991 OSCE Moscow Document.

Procedure Code has not been reviewed. The Venice Commission and OSCE/ODIHR recommend that “administrative proceeding” be expressly defined in the draft Electoral Code.

96. In order to better clarify and define the complaint and appeals process for voters, candidates, and political party proxies, the Venice Commission and OSCE/ODIHR recommend that Articles 45 through 47 of the draft Electoral Code be revised to set out a comprehensive and clear procedure for each type of complaint and appeal. This process should be described chronologically and in a step by step manner that ensures the protection of electoral rights. This may require changing the order of Articles 45 through 47.

97. Article 46(5), which puts the difficult burden of proof on the applicant, may restrict the ability of applicants to seek effective remedy. Further, the right of electoral commissions to seek proof, but without the obligation, could lead to inequalities of treatment between different cases.

98. Exceptional provisions provided for in the draft raise some concern. Article 45(2), according to which information on the date and time of the discussion is posted on the website of the CEC and the applicant is informed by electronic means of communication, makes a difference between applicants having access to computer technologies and those who have not. Another means of informing the latter should be included. The availability of an electronic mail should not be a condition for the validity of an application (cf. Article 47(2)). Article 45(3) excludes any possibility for recusal of member of election commissions to an administrative hearing; the implementation of such a general rule could run counter to the principle of a fair trial.

99. Article 47(6) provides for election commissions to take appropriate measures with regard to issues requiring urgent solution. This should be detailed in the Electoral Code if it is not in the Administrative Procedure Code.

100. Article 75(6) of the draft Electoral Code provides that the CEC must release final election results and adopt a decision on the results no later than seven days after voting. All deadlines, including those in other laws, should be checked to ensure that all appeals can be heard and decided upon within this time limit.

101. An appeal on the final results made to the Constitutional Court must be filed in the five days after the CEC has issued its final results (Article 91(2)). 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). This is also provided for by Article 93 of the draft Electoral Code. Appeal deadlines need to be harmonized to ensure that an appeal after the first round can be decided by the Constitutional Court before a second round has been held.

XVII. Role of the police

102. Article 53 deals with co-operation of electoral commissions and law enforcement authorities. Police should however intervene in polling stations only in case of unrest and not interfere in the electoral process.

XVIII. Specific issues concerning local elections

103. The election system for the Council of Elders is not defined very clearly. Apparently it is a plurality system in a multi-member constituency (Article 145(2)).

104. On this basis, providing for similar election funds for candidates for head of community and for member of the Council of Elders (Article 141) does not appear as justified. This might be reconsidered.

105. For the Yerevan Council of Elders, a proportional system is used, but a party receiving more than 40 per cent of the seats but not the absolute majority shall be granted the absolute majority of the seats (Article 166(4)(2)). As it is feasible for two lists to receive more than 40 per cent of the seats, it should be made clear that this applies only to the party obtaining the largest number of seats, and, in case of a tie, the largest number of votes.

XIX. Concluding remarks

106. It is positive that the process to amend the Electoral Code is being undertaken well before the next election, scheduled for May 2012. This allows sufficient time to ensure that electoral stakeholders can discuss the draft Code before its passage and can familiarize themselves with the contents once it is passed into legislation.

107. Furthermore, there have been a number of positive amendments made to the law, which address previous Venice Commission and OSCE/ODIHR recommendations. Amendments, such as the inclusion of quotas for women in the CEC and CSEC, clarification on providing assistance to voters in the polling station, and broadening the definition for what may be cause for an election to be invalidated, all improve the legal framework for elections.

108. However, it is the exercise of political will by all stakeholders that remains the key challenge for the conduct of genuinely democratic elections in the Republic of Armenia. The Venice Commission and OSCE/ODIHR have long stated that the Electoral Code of the Republic of Armenia could provide a good basis for democratic elections, if implemented in good faith.

109. It is also of particular importance that legislation regulating fundamental rights such as the right to genuinely democratic elections be adopted openly, following debate, and with the broadest support in order to ensure confidence and trust in electoral outcomes. A public process, with the inclusion of all stakeholders, encourages trust and confidence in electoral outcomes. All parties, both in the government and the opposition, have a responsibility in this regard. This has been lacking in previous Electoral Code revisions.

110. While noting that a number of previous recommendations made by the Venice Commission and OSCE/ODIHR have been addressed, the significant changes in the current draft Code would benefit from further revision in order to ensure full compliance with OSCE commitments, Council of Europe and other international standards for the conduct of democratic elections. Areas which could be addressed include:

- Reviewing the formation of election commissions to ensure their independent functioning and public confidence in their work;
- Removing excessive restrictions on candidacy rights;
- Allowing election observers to undertake their duties without any unreasonable restrictions;
- Removing any undue restrictions on campaigning, while ensuring a separation of state and party/candidate structures;
- Reconsidering the use of new voting technologies for out-of-country voters;
- Clarifying the difference between a recount and an audit of results;
- Improving provisions for the count and tabulation process, including the determination of election results; and
- Improving complaint and appeal procedures to ensure effective remedy.

111. The Venice Commission and OSCE/ODIHR stand ready to assist the authorities in Armenia in their efforts to improve the draft Electoral Code.