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AMENDMENTS TO THE ELECTORAL CODE OF THE REPUBLIC OF ARMENIA ADOPTED IN THE FIRST READING ON 7 MAY 2002

JOINT ASSESSMENT BY EXPERTS OF

THE ORGANIZATION FOR SECURITY
AND CO-OPERATION IN EUROPE,
OFFICE FOR DEMOCRATIC INSTITUTIONS
AND HUMAN RIGHTS (OSCE/ODIHR)

AND

THE EUROPEAN COMMISSION
FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION, COUNCIL OF EUROPE)

ON THE BASIS OF COMMENTS BY
Mr Joseph MIDDLETON (EXPERT, ODIHR)
Mr Bernard OWEN (EXPERT, VENICE COMMISSION)

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I. EXECUTIVE SUMMARY

On 7 May 2002, the National Assembly of the Republic of Armenia adopted a draft law in the first reading which introduces numerous amendments to the Electoral Code ("the Code"). For the most part, the draft amendments make relatively minor and technical changes to the existing Code. They include a small number of positive and welcome reforms, some of which reflect recommendations previously made by experts on behalf of the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Venice Commission of the Council of Europe. Otherwise, however, previously identified concerns have not been addressed adequately or, in most cases, at all.

The key issue of the formation of the Central Electoral Commission (CEC) has still not been resolved. Given the clear importance of this issue, it is essential that it is addressed at the earliest opportunity. Any amendments should ensure that there is effective plurality in the membership of the CEC and that no political interest, whether a political party, the executive branch or anyone else, has control or unchecked influence over the conduct of elections.

Examples of the positive amendments to the Code include the replacement of regional electoral commissions with a larger number of territorial electoral commissions, an end to the rule allowing political parties to withdraw their nominees to electoral commissions, which should enhance the independence of electoral administration, and greater protection of electoral commission members during their terms of office.

A number of the amendments may give rise to difficulties in practice:

- Parties and candidates only have 15 days after the election (as opposed to 30 in the current Code) in which to submit their campaign accounts. The provision must be carefully monitored to ensure that greater haste does not impinge on the accuracy of the accounts;
- The procedure for verifying voters' credentials at the polling station has been revised, but remains excessively cumbersome; and
- The amendments envisage that precinct commissions would no longer be required to reconcile the number of ballot papers received with the number accounted for at the end of the count. This creates a clear potential for manipulation.

A number of previously suggested amendments, which would have enhanced election transparency, promoted equality among candidates and helped to ensure the security of the ballot, have not been adopted. These include:

- safeguards to ensure that the registration of a candidate or party list cannot be revoked except for serious breaches of the Code according to well-defined criteria;
- mechanisms to reduce the number of voters unable to vote for purely practical reasons, given the absence of early, proxy, mobile and other forms of special voting;

- a requirement that superior election commissions prepare and issue copies of a summary table, showing a full breakdown of results from the next inferior level of electoral commission; and
- clear procedures and criteria for verifying signatures in support of candidates.

This assessment is offered to further improve and strengthen the legislative base for elections in the Republic of Armenia. However, the key to improving the quality of elections remains the fair implementation of the Code. Without such a political commitment, even the best Code can be subverted. In this respect, it is equally clear that improvements to the Code must be accompanied by substantial efforts to enhance the independence and authority of the judiciary.

II. BACKGROUND

The Code governs all elections to State and local government bodies. In general terms it is a comprehensive, largely cohesive body of regulations which provide a sound foundation for the conduct of elections. However there are numerous areas where it could be improved. Since the last national elections in 1999, there has been an on-going process of debate and discussion on improving the Code, both in its general provisions and in relation to particular types of elections.

In February 2001 the Parliamentary Commission for State and Legal Affairs, the CEC, OSCE (Office in Yerevan and ODIHR) convened a round table to discuss these and other proposals on amending the Code. Since then, the process of drafting concrete amendments to the Code has moved rather slowly.

This document addresses amendments which were set out in a draft law proposed as an initiative of 16 members of the National Assembly. It is understood that all of the proposed amendments, save Article 23 dealing with the creation of the CEC, were adopted in a first reading on 7 May 2002.

Most of the comments contained in this report were discussed at a round table held in Yerevan on 16-17 May 2002, prior to a second reading of the Law amending the Code. The round table was organised by the OSCE Office in Yerevan, the Council of Europe representation in Yerevan and the National Democratic Institute for International Affairs, in co-operation with the OSCE/ODIHR and the Venice Commission of the Council of Europe. Experts from OSCE/ODIHR and the Venice Commission who attended both round tables have drafted this assessment jointly.

III. FORMATION AND POWERS OF THE CEC

Article 23 of the draft amendments proposed a new version of Article 35 of the Code. Although this article was not in fact approved in the first reading, it deals with a fundamentally important and sensitive issue and deserves further consideration.

The draft amendment deals first with *how* the CEC should be constituted. Before considering the proposals, it is worth bearing in mind that the formation of electoral commissions generally, and a CEC in particular, should be governed by the following principles:

- No interested party in the election process – president, government, parliamentary factions, or others – should have control or unchecked influence over the CEC;
- The CEC and other electoral commissions should act impartially and independently from the executive branch of government;
- Political parties fielding candidates in an election, but not represented on the CEC, should have a consultative voice;
- The system of formation of the CEC should be transparent;
- Members of the CEC should possess adequate knowledge and experience; and
- Stability in the composition and continuity of the work of the CEC should be ensured.

At present, Article 35 of the Code establishes a somewhat complex formula for the appointment of the CEC. Three members are nominated by the Government. Each party that presented at least 30,000 signatures in support of their participation in the proportional vote and that had a grouping in the existing or dissolved parliament was entitled to nominate one member. And each of the first five parties that presented at least 30,000 signatures in support of their participation in the proportional vote but had no grouping in parliament is entitled to nominate a member. Thus whilst the existing system for the formation of the CEC is cumbersome, it provides for extensive plurality, incorporating the government, parliamentary parties and parties not represented in the National Assembly.

In comparison, the proposed formula in Article 23 of the draft amendments, which for the time being remains merely a draft proposal, is a step back. The draft envisages that each faction within parliament would appoint one member and the President (in an earlier version, "the government") would appoint the same number minus one. This would give the executive branch of government much more influence over the CEC as compared with the existing rules. This creates a real risk that the elections may be conducted, or may be perceived to have been conducted, in a partisan manner so as to favour the government of the day. In either case, the perceived legitimacy of the election results as well as public trust in the election process in general, may well be undermined. It is therefore strongly recommended that a pluralistic approach is adopted which does not, in effect, give the executive branch a dominant influence over the organisation of elections.

If the formula in Article 23 of the amendments is to be adopted, then the influence of the executive branch could be balanced by limiting the number of representatives appointed by the executive branch, and/or modifying their method of nomination. One way to accomplish this could be for an independent review body to propose a number of candidates (drawn from the judiciary, administrative bodies or civil society etc.) to the executive branch from which the latter could choose a set number.

Alternatively the executive branch could nominate candidates for the independent review body to choose from. This could also serve to add a further professional dimension to membership of the CEC.

Article 23 of the draft amendments also deals with *when* the CEC should be constituted. It envisages that the CEC will be formed forty days *after*, rather than before, the elections. (Given the key role played by the National Assembly in the nomination of CEC members, it is clearly sensible for the CEC to be formed after *parliamentary* elections.) This proposal in the draft amendments is to be welcomed; it reflects the undesirability of forming new electoral commissions shortly before an election takes place. Such an approach undermines continuity in the work of the electoral commissions and impairs their effectiveness.

However, forming the CEC as soon as 40 days after the elections might give rise to two practical problems. First, given that the right to nominate members is reserved to groupings within the newly elected National Assembly, it is not clear that 40 days would be sufficient time for these groupings to take shape and select their nominees. Secondly, Article 41(3) of the Code (which is unaffected by the recent amendments) requires the chairman of the CEC to report on the election 90 days after it takes place. It is highly desirable that this report is delivered by the chairman of the CEC which conducted the election, rather than the new CEC. Accordingly, it would seem sensible to form the new CEC only once the out-going Commission has finished its work.

In previous elections there have been serious concerns about the lack of implementation and non-observance of the existing electoral legislation. It is strongly recommended that the CEC's obligations should include a duty to provide an analysis of violations of the Code following each national election, an indication of measures taken against violators, remedies provided to those aggrieved and any legislative improvements that may be required.

The Code should also set out clear deadlines by which the CEC must adopt the various regulations envisaged in the election process.

IV. IMPROVEMENTS TO THE CODE

Many of the amendments to the Code represent technical refinements rather than substantial changes to the existing rules. Those improvements which are of more substance include the following.

- An amendment to Article 33 enhances the protection of CEC members from prosecution during the period of the CEC's activities.[1] This change reflects a CEC recommendation and was endorsed in previous expert assessments.

[1] Article 22 of the draft amendments.

- The existing 11 regional electoral commissions will be replaced by 37 territorial electoral commissions, one for each single-mandate constituency. This reform addresses previous concerns that the regional commissions were substantially overburdened, particularly in Yerevan, and that they were subject to interference by regional (*Marz*) governors.
- Article 38 of the Code will be amended to prevent political parties from recalling their members from electoral commissions. This should help to depoliticise the work of the CEC and encourage party nominees to work in a relatively non-partisan fashion.
- An amendment to Article 24 clarifies, in accordance with a recommendation by the CEC, the procedure by which state funding for the administration of elections is distributed.[2]
- An amendment to Article 26 requires the CEC to refer any violations discovered by the oversight-audit service to the court of first instance, presumably with a view to proceedings being taken against those responsible.[3] The Code should make clear whether the CEC has discretion on whether to take this step and, if so, on what basis the discretion is to be exercised.

V. VOTER LISTS AND VOTER RIGHTS

Maintaining accurate voter lists continues to be a very serious problem, not least given the high rate of migration within and out of Armenia. To remedy this, consistent procedures are needed for registering voters and these provisions must be properly implemented. If conducted effectively, one review of the voter lists per year, rather than two as currently prescribed in the Code, would be sufficient.

There appears to be some doubt as to whether conscripts will now be permitted to vote in the proportional vote in both the constituency where they are serving their military service and in their home constituency. If this were to be the case, such double voting rights could not be justified. The issue would benefit from clarification.[4] In the absence of special voting procedures (postal voting, proxy voting etc.), it is not clear how conscripts will be able to participate in any vote in their home constituency if, as is usually the case, they are performing their military service far from home.

Article 14 has been amended so that voters must apply no later than seven days before the election, rather than five days, to correct an inaccuracy in the voter list.[5] This would appear to require a corresponding amendment in Article 10(1). The deletion from article 14(1) of the words "for the inclusion or withdrawal from voter lists of himself/herself or other citizens" is surprising. Does this suggest that the word "inaccuracies" should not be taken to include names which have been incorrectly included on the list?

2 Article 15 of the draft amendments.
3 Article 17 of the draft amendments.
4 Article 5(b) of the draft amendments.
5 Article 9 of the draft amendments.

VI. VOTING AND COUNTING PROCEDURES

The Code makes no provision whatsoever for special voting procedures, i.e. the use of early, proxy, mobile, postal or other extraordinary procedures. Such procedures were omitted from electoral legislation when the Code was adopted in 1999 in an attempt to reduce the incidence of fraud. However, the inevitable result is that large numbers of voters are now completely excluded from exercising one of their most fundamental political rights. It is highly desirable that mechanisms are found to reduce the number of voters excluded in this way. It must be remembered that there are various methods of safeguarding against fraud where any particular special voting procedure is engaged. For instance, where mobile voting is used, there should be strict controls over the number of ballot papers issued, guarantees for observers and representatives to monitor the voting process and other measures to reduce the risk of malpractice.

Article 49(4) of the Code provided that candidate names were to be set out in alphabetical order on the ballot paper, although it made no reference to the ordering of parties for the proportional vote. Article 49(4) has now been deleted.[6] This seems to leave open the question of how the candidates (and parties) will now be ordered on the ballot paper.

Article 56 sets out the procedure by which the ballot paper is issued. The first step is for the voter to present his/her identification. Their details are then checked on the voter list. The voter signs the list (and is thereby "registered") and is issued with the ballot paper. The ballot paper is then sealed by a different member of the electoral commission. Article 56(2) has been amended so that this other member of the commission must also verify that the voter is registered in that precinct.[7] This appears to be an unnecessary duplication of effort which will considerably slow down the voting process. There is, however, a welcome amendment to Article 57(4): it is no longer necessary for a commission member to recheck the voter's ID and verify his/her entitlement to vote immediately before the ballot paper is deposited in the ballot box.[8]

Article 57 governs the procedure by which ballot papers are filled in. The amendments envisage that voters will be obliged to use a specific mark as determined by the CEC. This reform has been prompted by a particular form of fraud, by which voters agree to use a particular mark when voting for a candidate in return for payment. The candidate and his representatives can then tell from examining the ballot papers whether the voter's side of the bargain has been kept. The rationale for this amendment is that requiring all voters to use the same mark will end such malpractice. Whilst this is an understandable response, it should be approached with great caution. There is a real risk that processing the ballot papers will become a much slower and more contentious process as the counters, proxies and candidate representatives argue over whether a mark on the ballot paper is valid or not. If a standard mark is to be used, the mark must be very simple (for instance, an "x"): the

6 Article 32(a) of the draft amendments.
7 Article 34(a) of the draft amendments.
8 Article 35(b) of the draft amendments.

general rule should continue to apply that a ballot paper is valid provided that the voter's intention is clear and unambiguous. In addition, consideration should be given to equipping each voting booth with an inkpad and rubber stamp bearing the standard voting mark.

Article 60(4)(1) and other provisions of the Code have been amended as regards accounting for the ballot papers. Under the previous rules, one of the essential accuracy checks was to compare the number of ballot papers given to the precinct commission with the total number of ballot papers in the ballot box and cancelled ballot papers. This has now been changed so that the comparison is made between the number of ballots signed by the precinct commission before polling begins and the number cancelled and recovered from the ballot boxes.[9] The justification for such an amendment is far from clear, and indeed it gives rise to real concerns about the security of the ballot. The precinct commission must be held accountable for all the ballots that it received, not just those that were signed before polling began. If for some reason the precinct commission receives fewer (or indeed more) ballots than it is supposed to have received, that fact needs to be identified immediately, recorded and reported to the body responsible for issuing the ballot papers. The new procedures create a serious risk that ballot papers may be intercepted between issuance to the precinct commission and signing, without anyone being held accountable.

The protocol arrangements provide little by way of transparency safeguards if superior electoral commissions are not required promptly to publish and publicly display summary tables of all the results from the next inferior level of electoral commission. Such tables should form part of each superior commission's protocol of results. They would allow all parties, candidates and observers to cross-reference results between precinct and territorial protocols and territorial and CEC protocols, thus increasing public confidence in the reliability of published results. In this respect, it is highly desirable that full precinct protocols are published by the territorial commissions or the CEC, or preferably by both.

VII. OTHER ISSUES

Article 25 of the Code has been amended to reduce the deadline for submitting campaign accounts to the oversight-audit service from 30 to 15 days.[10] This change should only proceed if the reduced deadline can be complied with effectively. There is obviously value in achieving these accounting procedures promptly, but this should not be done at the expense of accuracy and completeness.

Article 27 has been modified to indicate that appeals may be lodged by candidate proxies.[11] It may be worth clarifying that such appeals are lodged on behalf of and in the name of the candidate, not the proxy.

9 See Article 36(c) and other articles of the draft amendments.

10 Article 16 of the draft amendments.

11 Article 20(a) of the draft amendments.

The first sentence in Article 56(5) of the existing Code provides that voters are not entitled to announce who they will vote for (or against). The second prohibits people from asking voters who they will vote for. The latter provision may be justifiable in circumstances where voters feel intimidated by being asked such questions. It is more difficult to justify the former provision, which obviously impinges on the voter's right to free expression. It is therefore surprising that, under the amendments, this provision has now been modified and in part extended, rather than removed: within the polling station or its vicinity, voters must not announce who they have or will vote for. Such a rule imposes a disproportionate restriction on a voter's freedom of expression and is unjustifiable. By no means does such a restriction necessarily flow from a prohibition on conducting opinion/exit polls on polling day, which is a common feature in many election laws.

The text in Article 36(a) and 39(d) of the draft amendments appears to be incomplete and/or incorrect. Nor is it clear what Article 53(d) means. It is not known how or whether this text was clarified when the amendments were approved on 7 May.

Many previously identified concerns have not been addressed in these amendments, including the introduction of rules governing the conduct of referenda in the Code. Other recommendations which have not been acted upon include the following:

- The registration of a candidate or list should not be revoked except for serious breaches of the Code according to well-defined criteria;
- The procedures and criteria for verifying signatures in support of candidates should be set out in the Code;
- Chapter 31 of the Code, which deals with liability for violations of the Code, would benefit from further review. A number of the violations identified appear to be far too loosely defined (such as "hindering the free expression of the voter's will" and "hindering the election functions"), and as such can be subject to abuse or arbitrary interpretation; and
- The procedures in the Code on dealing with complaints and appeals are not clearly defined and are very complicated. It is recommended that Article 40.1 of the current Code be rewritten as a general statement dealing with complaints and appeals and that all provisions relating to complaints and appeals be gathered together in one chapter of the Code.

It is strongly recommended that these proposals are reconsidered for inclusion in the Code.

An additional point that the Venice Commission expert would like to raise concerns the ratio of proportional and majority seats in the National Assembly. While this is not a subject of the amendments adopted in the first reading on 7 May 2002 and was not a topic for discussion at the round table held on 16-17 May, the Venice Commission expert considers it to be a matter of importance. In his opinion, the current ratio of 75 majority seats to 56 proportional seats should be retained and the Electoral Code should be amended to reverse the amendment adopted on 4 December 2000 to introduce a ratio of 94 proportional and 37 majority seats to come into effect

after 1 January 2003. From the point of view of stability the Venice Commission expert would also caution against changes being made to the election system too often.

In line with ODIHR policy that the issue of election systems is not subject to international commitments and standards, the ODIHR expert offers no comment on this issue.