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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPORT

2nd Meeting of the Working Group on the revision of the Constitution of Armenia Yerevan, Armenia - 16-17 November 2000,

The Venice Commission Working Group on the Revision of the Constitution held a second meeting on 16- 17 November 2000 in Yerevan, Armenia, with the Armenian authorities (see list of participants, Appendix 1) in order to discuss "Basic provisions for the concept of reforming the Constitution of Armenia"(Document CDL (2000) 88).

The discussions between all participants were rich, fruitful, and highly constructive and led to deep analysis of the proposed draft constitution. The first day was mainly devoted to General remarks and to the Chapter of Human Rights. On the second day, the issues concerning the political regime and the checks and balances between powers were analysed with a view to assuring the highest level of rule of law without interfering in political issues. Such topics included for instance the choice of the most convenient political regime for Armenia.

Unfortunately the Working Group did not have sufficient time to delve deeper into the study of the Chapter of Judiciary and the Chapter of Local Self-Government.

The present report will give an outline of the discussions and written comments of the Working Group as follows: firstly "General Remarks" are made, which include the main issues and points raised by the Working Group, secondly the study is devoted to detailed proposals made by the Working Group concerning specific articles of the draft under consideration.

As to future work, it was agreed that the Armenian authorities will present a new draft to the Working Group, with an explanatory report by the end of December; a meeting will then be organized between the Working Group and the Armenian authorities in January or February; later the final version of the Draft Constitution will be presented at the Plenary Meeting of the Venice Commission in March 2001.

I. General remarks:

A The Foundation of Constitutional Order and the Fundamental Civil and Human Rights and Freedoms

1. The draft constitution contains a **natural law terminology**, which may rise to confusion in implying the existence of supra constitutional principles. This can, for example, create legal insecurity in the control of constitutionality. Natural law terminology can be deleted at least in Article 4, 6 (the distinction between right and law), 15 and 43.

2. For the same reasons relating to legal security, the Working Group suggested avoiding as many redundancies as possible in the text of the Constitution. The supremacy of the rule of law is for example provided for in article 1 and 6.

3. The Working Group also insisted upon the necessity to enshrine **clearly all fundamental values** and more specifically **all fundamental human rights** in the Constitution. The Constitution should also define and list as much as far as possible a catalogue of all constitutional fundamental rights and social and cultural rights. The right to petition is implied in Article 38.2, but could be enshrined more explicitly.

4. Moreover, it should be more explicitly specified that international treaties concerning fundamental rights and freedoms should be regarded as automatically incorporated into

national law by virtue of the constitution (cf. harmonisation of Articles 4 and 6); in particular, the position of the ECHR in the domestic legal order should be made clear, possibly through an explicit provision.

5. Concerning restrictions to fundamental rights, a harmonisation with the requirements of the international treaties such as the ECHR, International Covenant on Civil and Political Rights is also required (cf. Articles 44-45).

6. The procedure of declaring martial law should be explicitly regulated, and the role of the Constitutional Court and the Parliament as such should be clearly defined. The declaration of martial law should indicate the provisions of the Constitution from which derogations can be made.

7. The **Human Rights Chapter** should be restructured to make a clear distinction between classical human rights and other rights. In particular, the drafters should pay attention not to mix in the same chapter individual and enforceable rights with state obligations or non enforceable rights (for example Article 31). The specific legal effects of the provisions should be as clear as possible.

8. As regards social, economic and cultural rights, three basic alternatives can be indicated: a) the constitutional provision directly establishes an enforceable subjective right; b) the constitutional provision requires that the right is secured as an enforceable subjective right through ordinary legislation; c) the constitutional provision establishes a general responsibility for the state to provide for the realisation of the right in question but does not specify the means used.

9. The Working Group stressed the necessity to check again, taking into account the requirements of the European Convention on Human Rights (EHCR) and of other international conventions on human rights, the distinction made in the draft between the rights belonging only to citizens and those granted to all.

B Separation of power and efficiency of the legislator:

10. As it was stated at the first meeting in April 2000, the Working Group underlined the necessity to clearly define and set up **a hierarchy of norms** and the field of regulation at each norm level.

The feasibility of adopting the institution **of organic laws** should be considered. Such laws could regulate issues, which require relatively detailed provisions but which are simultaneously too significant to be left to the discretion of a simple parliamentary majority. If such a normative level is not in use and if the procedure for amending the constitution is complicated and time-consuming, the Constitution may become “over-loaded”. Nevertheless, it has been also recalled that in countries where there are no organic laws, the necessary constitutional flexibility can be assured by a strong Constitutional Court.

The Working Group underlined the necessity to clearly identify in the Constitution the lawmakers, the extent of parliamentary delegation, and the exclusive legislative powers of the Parliament.

11. Chapter 4 on the National Assembly should therefore include a provision defining the exclusive **competence of parliamentary legislation**. As regards the right of executive organs to issue by-laws, the basic decision to be made is whether such a right stems directly

from the Constitution or is in each case dependent upon an explicit delegation of law. In both cases, a provision on delegated legislation should be included in Chapter 4. Article 100(1) presupposes, for instance, the right of the Government to issue by-laws ("resolutions") but Chapter 5 on the Government lacks provision on such a right. In addition to this right, the President has, according to Article 56, the power to issue orders and decrees; the Prime Minister, according to Article 87 (1), the power to issue resolutions. The reciprocal hierarchical status and respective field of regulation of these by-laws should be specified.

12. The Chapter 3 on The President of the Republic contains no provision on the **decision-making power and procedure** of the President. In the view of the rule of law and political issues it is necessary to regulate and provide for a legal and a political control of the exercise of the Presidential powers. If the aim of the new Constitution is to increase parliamentary control over the activities of the President, this could be achieved by tying the President's decision-making to the presence of ministers and by requiring that the respective minister counter signs the President's decisions: a mandatory consultation of a state body such as a national Security Council could also be provided.

13. As regard the **status of the President** in the political system, there are two principal alternatives: either the President has the role of a *pouvoir neutre* or she/he is an active political agent. If the former alternative is chosen, the National Assembly should play a major role in the formation of the Government. The President's right to dissolve Parliament should be limited to situations of deadlock in the functioning of the constitutional organs, primarily to the failure of forming a Government.

In no case should the Parliament be given the power to dismiss on political grounds directly elected President.

14. The **powers of the Government** should be clearly enshrined. In addition to the remarks above concerning the norm-making competencies of the government, the relations between the President, the Government and the Prime Minister should be clearly set out, as regarding in particular the decision making process.

15. Concerning the executive decisions, the Constitution should clearly state that all executive decision must be taken in accordance with a previous law.

16. Moreover, some crucial issues are dealt with in several provisions, which diminish the clarity of the Constitution. This holds especially for provisions concerning the relations between the President, the National Assembly and the Government (see below specific remarks).

17. The substantive provisions on the formation of the Government should be in Chapter 5 and those on the dissolution of the National Assembly in Chapter 4 on the Draft Constitution.

18. Concerning the **judicial system**, the Working Group recalled the issue of establishing **administrative tribunals**. If such courts are established, their competence should also include appeals against individual administrative decisions. In any case, the Constitution should clearly provide for the right to make such appeals, whether to administrative courts or to ordinary tribunals. This right is to certain extent already presupposed by Article 6.1 of the ECHR.

19. The Constitution should clearly provide for the institution of the Ombudsman. A specific law would determine the functions and the competencies of the Ombudsman, but the institution itself should be expressly introduced in the Constitution.
20. In order the ensure freedom of the press and the mass media, the right to information and the independence of the media, the Constitution should provide for a High Authority for Mass media.

II Specific remarks:

In addition to the above general remarks, the Working Group made specific proposals on the following articles:

Article 1:
This article should be redrafted as following:

The Republic of Armenia is a sovereign, democratic state, based on **human rights and freedoms**, on social justice and the rule of law.

Article 4:
Delete the first phrase. The state guarantees the protection of human rights and freedoms **enshrined in the constitution**, in accordance with the principles and norms of international law.

Article 5:
The Working Group considered the need of the words “and balancing” and suggested deletion since such power is balanced by the regulation provided in other chapters of the Constitution.

Article 6:
The rule of law has already been mentioned in Article 1; there is therefore a overlapping with Article 1, which may lead to confusion. Secondly, as already mentioned in Chapter concerning General remarks, the Constitution shall establish and define a clear hierarchy of norms.

Thirdly, in order to facilitate the reading, it is suggested that paragraph 3 be redrafted in a positive manner, for example as follows: “ All laws and other norms have to be based upon and be in accordance with the constitution”

The last sentence relating to the non-legal force of unpublished acts should be deleted and drafted in a positive manner, for instance:

“Laws and any other norms shall take effect after official publication”.

Article 7:
It might be better to replace “openness” with “transparency”: So that :

“Parties shall ensure the **transparency** of their financial activities.”

Article 7.1:
It is felt that “accepts” is too weak, and that it should be replaced with “recognises”, “guarantees”, so that:

“The Church in the Republic of Armenia is separate from the state. The Republic of Armenia recognizes the traditional and exceptional role of the national Armenian Apostolic Church in the spiritual life of the Armenian people, in developing national culture and preserving

the nation, as well as, in a procedure defined by law, **recognises/guarantees** the freedom of other religious organisations to operate in the Republic of Armenia."

Article 8:
Article 8 should be harmonised with Article 28, so that all provisions pertaining to the individual right to property are included in the latter.

The first and second paragraph of Article 8 should be integrated into Article 28; since these paragraphs deal with individual rights.

Article 11:
Another wording of Article 11 would clarify the meaning of this article. For instance, in the same context, Article 6.1 of the Constitution of Poland provides:

"The Republic of Poland shall provide conditions for the people's equal access to cultural goods, which are the source of the Nation's identity, continuity and development."

The following is suggested for addition to the Armenian draft:

"The state shall establish the necessary conditions for free access to national **and universal** values."

Article 11.1:
This article might be more appropriate in the Chapter concerning Territorial Administration and Local Self Government.

Article 15:
This article should be the first Article of Chapter 2.

The first sentence could also be reworded in order to make it more clear, for instance similar to that of Article 1 of the Draft Charter of Fundamental Rights of the European Union which stipulates:

"Human dignity is inviolable. It must be respected and protected."

Furthermore, as it is mentioned in the general remarks above, "Citizens" should be replaced by "**Every person**".

The second sentence would be more appropriate under Article 16, which could be consequently devoted to the topic "equality before the law"; this would also avoid any redundancies.

Article 16:
The mention of "and the courts" may be irrelevant. Firstly it is redundant, and secondly everybody shall be equal before any state body or institution and not only before the courts. It is recommended that it be deleted.

Article 17:
The last sentence prohibiting the death penalty with the exception within a period of martial law, is beyond the requirements enshrined by the ECHR which that derogations are possible in time of war stipulates((Article 15 ECHR and Article 2 of Protocol N°6) . The scope of martial law appears wider than that of war.

Furthermore, the Working Group recalled the position of the Council of Europe concerning the abolition of death penalty, and particularly that of the Venice Commission, which has constantly advocated the abolition of this penalty and the adoption in the Constitution of a

provision explicitly abolishing death penalty. (See document **CDL-INF(1999)004** Opinion on the compatibility of the death penalty with the Constitution of Albania, and **CDL-INF(1998)001rev** Opinion of the Venice Commission on the constitutional aspects of the death penalty in Ukraine)

In order to redraft this article, the Working Group also quoted the Constitution and the recent experience of two European countries, Albania and Ukraine, the Constitutions of which contain no express mention of the abolition of death penalty, but where the death penalty has been considered as unconstitutional by the Constitutional court (For Albania, Decision of 10/12/1999, n°65, available in CODICES under ALB-1999-3-008; for the Ukraine, Decision of 29/12/1999, n° 11 rp/99, summary available in CODICES under UKR-200-1-003).

Article 27.1 and 27.2 of the Constitution of Ukraine provides that:

- *"Every person has the inalienable right to life.*
- *No one shall be arbitrarily deprived of life. The duty of the State is to protect human life. "*

Article 21 of the Albanian constitution provides that:

"The life of the person is protected by law".

Article 18:
As the right to liberty is extremely important for the protection of human rights, this Article should be much more detailed.

Pursuant to Article 5 of the ECHR, the reasons for deprivation of liberty should be listed, and a clause providing a time limit of a detention prior to a court order should be specified.

For a new draft, the Working Group quoted Articles 27 and 28 of the Albanian Constitution:

"Article 27

1. *No one's liberty may be taken away except in the cases and according to the procedures provided by law.*
2. *The liberty of a person may not be limited, except in the following cases:*
   a. *when he is punished with imprisonment by a competent court;*
   b. *for failure to comply with the lawful orders of the court or with an obligation set by law;*
   c. *when there is a reasonable suspicion that he has committed a criminal offence or to prevent the commission by him of a criminal offence or his escape after its commission;*
   ç. *for the supervision of a minor for purposes of education or for escorting him to a competent organ;*
   d. *when a person is the carrier of a contagious disease, mentally incompetent and dangerous to society;*
   dh. *for illegal entry at state borders or in cases of deportation or extradition.*
3. *No one may be deprived of liberty just because he is not in a state to fulfil a contractual obligation.*

Article 28

1. *Everyone whose liberty has been taken away has the right to be notified immediately, in a language that he understands, of the reasons for this measure, as well as the accusation made against him. The person whose liberty has been taken away shall be informed that*

he has no obligation to make a declaration and has the right to communicate immediately with his lawyer, and he shall also be given the possibility to exercise his rights.

2. *The person whose liberty has been taken away, according to Article 27, paragraph 2, subparagraph c, must be brought within 48 hours before a judge, who shall decide upon his pre-sentence detention or release not later than 48 hours from the moment he receives the documents for review."*
3. *A person in pre-sentence detention has the right to appeal the judge's decision. He has the right to be tried within a reasonable period of time or to be released on bail pursuant to law.*
4. *In all other cases, the person whose liberty is taken away extra judicially may address a judge at any time, who shall decide within 48 hours regarding the legality of this action.*

Every person whose liberty was taken away pursuant to article 27 has the right to humane treatment and respect for his dignity. »

Article 20:
This current wording of Article 20 is confusing; it might be interpreted as a right to self-defence. The first sentence should be drafted in a positive rather than negative manner, for instance saying "**Everyone has a right to private life**" or "Everyone is entitled **for respect for** his or her private and family life"

The third paragraph should be included in the limitations foreseen in Articles 44 and 45, the wording of the restrictions should be also redrafted accordingly and in compliance with ECHR requirements.

Article 22:
This article should be redrafted in order to comply with Article 3 of Protocol 4 to the ECHR. For instance:

"Every citizen and everyone permanently or legally residing in the territory of the Republic of Armenia is entitled to return to the Republic"

Article 24:
A new wording of this article could more explicitly encompass the right to petition.

Article 25:
The restrictions to the right of forming associations or political parties as laid down in the second sentence might be considered as going too far.

Article 26:
This Article guaranteeing the right to assembly requires redrafting.

The restriction of this right to citizens might be considered as contrary to Article 11 of the ECHR.

It is suggested to guarantee this right to everyone, and consequently in a further paragraph restrict the exercise of this right by foreigners.

Article 28:
Please refer to remarks made relating to Article 8.

The Working Group underlined the necessity to define clearly in a civil code the right to property and in particular the right of foreigners to become a property owner.

The Working Group considered the meaning of the second phrase, and would suggest deleting such.

The third sentence could be redrafted in a positive manner so as to reflect the ECHR (Article 1, Protocol N°1). For instance: " No one shall be deprived of his possession…" Furthermore it shall be specified that ownership can only be restricted in specific conditions in conformity with a law which will lay down terms of compensation.

Article 30.1
Please refer to the General comments on the relevancy in distinguishing in a separate Chapter social and cultural from classical fundamental rights, and also enforceable rights from others, and state obligations from individual's rights.

The Swiss Constitution for example states in Article 2:

"Article 2

Purpose
(1) The Swiss Confederation protects the liberty and rights of the people and safeguards the independence and security of the country.
(2) It promotes common welfare, sustainable development, inner cohesion, and cultural diversity of the country.
(3) It ensures equal opportunities for all citizens to the extent possible.
(4) It strives to safeguard the long-term preservation of natural resources and to promote a just and peaceful international order."

The second and third paragraphs should be moved to Article 10 and harmonised with the latter.

The issue of responsibility of public officials should be carefully considered.

Article 31:
A new wording is required; the term "adequate standard" is confusing.

Article 32:
The right to marry should be added (cf. Article 12 EHCR) as well as the right to found a family.

Article 32.1:
The Working Group cannot see the utility of the last paragraph. In any case one should ensure that the last paragraph will not affect the task of the state to ensure social security.

Article 38-39:
Protection afforded by the judiciary is one of the most important issues. These two articles should be reworded by either taking into account or making a clear reference to fair trial requirements of Article 6 and those of Article 13 ECHR.

Article 38.1:
The existence of the Ombudsman institution is only implied. The Draft Constitution however does not include any provision on the institution itself.

Article 41:
Suggested new wording for Article 41 follows:

" A person **charged with a criminal offence** shall be presumed innocent…"

Article 43:
In order to avoid any reference to natural law, the wording could be similar to that of, for instance, Article 16.1 of the Constitution of Portugal which stipulates:

"1. The fundamental rights contained in this Constitution shall not exclude any other fundamental rights provided for in the laws or resulting from applicable rules of international law."

The relevance for Armenia of the issue of retroactivity or not of tax legislation must be taken into consideration.

Article 44:
Please refer to the above section on General remarks as to the restrictions, in particular concerning the compliance of this article with the ECHR. It is not certain whether the provision of Article 44 is intended to be exhaustive or not. Some of the provisions on individual rights refer to the possibility of limiting the right in question through legislation but leave open the grounds for such limitations. From a systematic point of view, restrictions to fundamental rights and freedoms should not only be provided for by law, but should also respect the following conditions :

- the law should be general and abstract
- the restriction should be proportionate
- the restriction should not affect the essence of each right

In this respect, reference was made to Article 18 of the Constitution of Portugal, which stipulates:

"Legal application

1. *The constitutional provisions relating to rights, freedoms and guarantees shall be directly applicable to, and binding upon, both public and private bodies.*
2. *Rights, freedoms and guarantees may be restricted by law in only those cases expressly provided for in this Constitution; restrictions shall be limited to the extent necessary to safeguard other rights or interests protected by this Constitution.*
3. *Laws restricting rights, freedoms and guarantees shall be general and abstract in character, shall not have retroactive effect and shall not limit, in extent or scope, the essential content of the constitutional provisions."*

Furthermore, Article 17 of the Constitution of Albania, stipulates:

"

1. *Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.*
2. *These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights."*

Article 45:
The requirements of compatibility with international treaties should be included. These requirements also extend to procedural issues: both the ECHR (Article 15) and the UN Covenant on Political and Civil Rights (Article 4) presuppose a notification of derogations concerning rights enshrined in them.

The demand for proportionality of any derogation should moreover be explicitly mentioned.

Article 51:

The substitution of the expression "valid votes" for "votes cast for the presidential candidates" may change the meaning of the provision. If returning the ballot without any expression of vote for a candidate is considered as a valid act of exercise of the right to vote,

somebody may draw the conclusion that a candidate shall be elected only if he/she gets more than half of the votes cast for the presidential candidates plus the ballots returned without expression of any vote. This means that a higher threshold is required for the election of the President. The following wording is therefore suggested:

"votes validly cast for one of the presidential candidates".

Article 51§ 6:
This paragraph is amended as follos:

"If the President is not elected, there shall be new elections after 14 days after the first ruling of the Constitutional Court."

Article 52:
No objection for adding the proposal in bold.

Article 54:
Change to ensure by "respect.

Article 55:

The article on the powers of the President should list the President's competencies.

Article 55.2:
The possibility of a Presidential veto is particularly essential and should therefore be envisaged.

Article 55 § 13 and Article 55 § 14:
The use of the power referred to in such provisions should be preceded by a formal declaration (of a state emergency), which should define the scope of derogations. Both Article 15 ECHR and Article 4 of the ICCPR Covenant presuppose such a declaration.

A declaration of martial law, or of state of emergency must exhaustively enumerate the articles relating to fundamental rights which are to be affected. This is not only a formal requirement, but also a necessary condition for the assessment of the proportionality of the derogations concerned.

Article 56:
It would be better to draft the second sentence in a positive manner, as for instance:

"The orders and decrees of the President of the Republic shall be in conformity with the Constitution and the laws."

Article 58:
The proposal of a vote by the National Assembly on resignation of the President could constrain the President to perform her/his duties against their will. The Working Group expressed concern about the relevance of this proposal.

Article 60:
The issue of temporary absence should be foreseen.

Article 65:

The relevance of professional incompatibilities with a Deputy Mandate has been widely discussed among the participants. Though this will give more time for the Deputies to perform their parliamentary tasks, this might lead to an unsuitable distance from concerns of their elctorate. A median solution could be envisaged.

Article 75:
A parallel legislative initiative of the President and the Government can lead to confusions and to a situation where executive organs submit contradictory bills to the National Assembly.
The Working Group did not agree with the proposal of deleting the third paragraph.

Article 78:
The Working Group suggested that this provision be removed.

Article 80:
There should be a clear distinction between the right to obtain information and the right to pose questions implying political responsibility. Questions of the latter type should be addressed exclusively to the Government in accordance with the principles of parliamentary democracy.
The Working Group considered the removal of the second sentence. The issue of parliamentary inquiries is missing, though it is an important notion of democracy. The Committees as foreseen under Article 73.3 cannot be assimilated to parliamentary inquiries, as they do not have the same purposes. The Constitution should not prevent the National Assembly from appointing specialised committees designated for the control of the government.

The possibility for deputies to address questions to local self authorities seems problematic in the context of the autonomy of local administration. This eventuality should furthermore be limited to the field of the government and not extended to other bodies (local self government, administration, central bank).

The rights of Deputies should be moreover exhaustively listed.

Article 80.1:
This article includes regulations that can be regarded as too detailed for the level of the Constitution.

Article 83:
The National Assembly is also to nominate the Ombudsman.

Article 92.3:
This Article provides for the possibility of establishing specialised courts dealing with economic, military and other specific issues. An extensive use of such courts may lead to a too complicated judicial system and actually impair the state of rule of law.

Article 95:
The Constitution should include explicit provisions relating to the composition and nomination and powers of a Judicial Council, bearing in mind the Recommendations laid down by the Council of Europe, in the European Charter on the Statute for Judges.

Article 97:
The guarantees for the exercise of judge's duties and the grounds and procedures of the legal responsibility applicable to judges and members of the Constitutional Court should preferably be prescribed by the Constitution or a Constitutional Act.

This point must be linked to the provisions of Article 55.10 second sentence and 100g).

It is questioned whether the requirement of the agreement of the respective court before a judge can be tried should be extended to all judges. It might be justified at the level of the Constitutional Court and the Supreme Court (the Court of Appeals), but as concerns the lower levels, the proposal should reconsidered.

Article 100. 1):
Is Article 1.1) to be interpreted so that only the Constitutional Court, and not any other Court, can exercise norm control over various kinds of by-laws, even when the issue arises in the context of a concrete case? If so, the feasibility of the proposal can be questioned (cf. Article 101 (5-), where only the issue of the constitutionality of laws is mentioned).

Article 100. 5):
According to the last sentence of Article 57, the decision of the Constitutional Court on this item is not final, as the National Assembly can call up for discussion the issue of removal of the President of the Republic. This solution seems non coherent with the principle of the rule of law. Furthermore, it appears as if the drafters aim to convert a legal issue into one of politics.

Article 101:
The list of State bodies which are permitted to submit cases to the Constitutional Court does not appear to be complete and exhaustive. It does not apparently cover cases under Article 100 2), 3) as far as referenda are concerned, 4), 6), 8), and 9).

Article 101.5):
It is not clear whether the draft prefers a form of *Verfassungsbeschwerde* or the incidental review of legislation which implies that the parties of a case are permitted to ask the judge of the case the submission to the Constitutional Court the question of constitutionality of the law which has to be applied in the case. If there is a preference for the *Verfassungsbeschwerde*, it could be advisable to state that the case can be submitted to the Constitutional Court only after a final decision of the judicial authorities. In default of such a constitutional provision, a similar, possible addition by ordinary law could be judged unconstitutional.

Article 102:
It might be more appropriate to provide for the adoption of a “decision” (and not of a conclusion) on the issues covered by Article 101.5) and 6).

Chapter 7:
The Chapter should include an explicit provision on the elections of the bodies of Local Self-Government (the elders and the head of the community).