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AMENDMENTS TO THE ELECTORAL CODE OF THE REPUBLIC OF ARMENIA ADOPTED IN JULY 2002

JOINT ASSESSMENT BY

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

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I. EXECUTIVE SUMMARY

1. In May 2002, the National Assembly of the Republic of Armenia adopted a draft law in the first reading which introduced numerous amendments to the Electoral Code ("the Code"). In July 2002, on the second and last reading, the National Assembly adopted the amendments to be incorporated into the law. For the most part, the amendments adopted into law 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 been addressed partially.

2. On 30 May 2002, after the first reading, OSCE/ODIHR and the Venice Commission issued a joint assessment of those amendments and made recommendations for additional amendments. Although some of the joint OSCE/ODIHR and Venice Commission recommendations were adopted in July, some were not and certain concerns expressed in the 30 May joint assessment remain.

3. Changes in the nomination procedure of the members of the Central Election Commission (CEC) is a positive amendment, which includes some of the proposals of the OSCE/ODIHR and the Venice Commission. The amendment provides that appointments by the executive branch are limited to three members and the other members are appointed by parliamentary groups. A joint comment had previously recommended that executive branch appointments be limited to prevent undue executive branch influence on the CEC.

4. 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.

5. 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.

6. 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 election commission;
- Clear procedures and criteria for verifying signatures in support of candidates;
- The appeals system has been only partially improved and is still complex and difficult to understand.

7. 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.

8. The present assessment was endorsed by the Venice Commission at its 52nd meeting on 18-19 October 2002.

II. BACKGROUND

9. 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.

10. 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.

11. This document addresses amendments which were adopted in July 2002. Many of the comments included in this assessment were discussed at a further round table held in Yerevan on 16-17 May 2002, and in the earlier joint assessment dated 30 May 2002. The round table in May 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

12. Article 24 of the July amendments to Article 35 of the Code deals with how the CEC should be constituted. The approach taken by the amendments is similar to that found in the original law. This means that a concern raised in the previous joint assessment that the

executive branch of government could have a dominant influence over the organization of the elections has been addressed.

13. Article 24 of the July 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 amendments is to be welcomed; it reflects the undesirability of forming new electoral commissions shortly before an election takes place. Such an approach would undermine continuity in the work of the electoral commissions and impairs their effectiveness.

14. 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. Second, 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.

15. 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.

16. 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

17. 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.
- The existing 11 regional electoral commissions will be replaced by 56 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.

[1]Article 23 of the Amendments.

- An amendment to Article 38 prevents 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.
- An amendment to Article 30 has accepted advice in the previous joint assessment to limit the right of appeal of decisions taken by the commissions only to proxies and not observers.
- An amendment to Article 37 has set the number of polling station commission members at "not more than" nine, which is still fairly large but an improvement as previously there could be up to 13 members.

V. VOTER LISTS AND VOTER RIGHTS

18. 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.

VI. VOTING AND COUNTING PROCEDURES

19. 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.[4] This seems to leave open the question of how the candidates (and parties) will now be ordered on the ballot paper.

20. 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. His/her 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.[5] 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.[6]

[2]Article 16 of the Amendments.
[3]Article 18 of the Amendments.
[4]Article 33 of the Amendments.
[5]Article 35 of the Amendments.
[6]Article 36 of the Amendments.

21. 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.[7] 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 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.

22. 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.[8] 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.

23. 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.

24. The code makes no provision for special voting procedures, such as 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 excluded from exercising their right to vote. It could be desirable to find mechanisms to reduce the number of voters excluded in this way, but it depends on the actual risk of fraud.

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[7] Articles 36 and 37 of the July amendments appear to expand the May draft amendments to permit the CEC to approve more than one mark as acceptable. Regardless of whether the CEC approves one mark or several, the concern that voter intent may be ignored if the voter's mark is not an "approved" mark remains.

[8] See e.g. Article 38 c) of the Amendments.

25. It is recommended that counting procedures outlined in Articles 60 and 61 be simplified and made more efficient.[9]

VII. OTHER ISSUES

26. 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.

27. Article 120 has been amended to increase the size of a community council in a community with a population of up to 3,000 from five members to seven members. The fourth paragraph of Article 134 should similarly be amended to provide for allocation of mandates to the top seven candidates instead of the top five candidates.

28. 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.

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

30. 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:

- **Registration.** The registration of a candidate or list should not be revoked except for serious breaches of the Code according to well-defined criteria;
- **Signature verification.** The procedures and criteria for verifying signatures in support of candidates should be set out in the Code;
- **Violations.** 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

[9]See the previous assessment of the Venice Commission, which suggests a counting procedure in use in a number of countries (CDL (2001) 103 rev., par. 12).
[10]Article 17 of the Amendments.

"hindering the election functions"), and as such can be subject to abuse or arbitrary interpretation.

- **Complaints and appeals.** 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.[11]

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

32. The transitional provisions found in Article 81 of the July amendments establish some short deadlines for formation of the new CEC and majoritarian constituencies. The new CEC must be formed within five days of the new law coming into effect. The new CEC must, within five days of its formation, create the majoritarian constituencies for the National Assembly. These are short deadlines, which should be considered again to ensure that they are realistic.

33. Non-transitional provisions in the July amendments for establishment of majoritarian constituencies in later elections also provide short deadlines. Article 12 of the July amendments permits communities to wait until 95 days before an election to submit to the CEC information on the number of registered voters. The CEC then has to publish voters lists and maps of the constituencies at least 90 days prior to the day of voting. This means that the CEC could face the dilemma of fulfilling this task within a period of five days. These are short deadlines, which should be considered again to ensure that they are realistic.[12]

34. The Venice Commission expert would like to point out that a compromise has been found for Article 95 regarding the number of deputies elected in one-member constituencies and those elected on a nationwide list proportional system. The Law N 40-115 of December 2000 reduced drastically the number of deputies elected in single member constituencies to 37. The amendments increase the number of deputies elected in single member constituencies to 56, which is less than before but can be considered a step in the right direction. 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.

35. Finally, it should be noted that the law takes effect the first day after official publication.[13]

[11] It is suggested that the tables included in Annex I of the Venice Commission comments [CDL (2000) 103 rev] be reproduced as a regulation of the CEC to help in the application of the appeal system.
[12] The May draft Amendments provided for 180 days and 170 days respectively for these tasks.
[13] Article 82 of the Amendments.