

10 May, 2016

OPINION

On the compliance of the provisions of Draft Electoral Code of the Republic of Armenia with international standards

According to the Amendments to the Constitution of the Republic of Armenia adopted on 6 December 2015, new Electoral Code is planned to be adopted by 1 June 2016.¹ The responsible bodies to participate in the elaboration and submission of the Electoral Code were the Ministry of Justice and the Central Electoral Commission (CEC) of Armenia, and 1 March 2016 was the deadline set up for submission of the Draft to the National Assembly for discussion provided by presidential decree of 10 February 2016.²

The Draft Electoral Code (hereinafter the Draft) failed to be submitted to the National Assembly in due time and was not published, though as was revealed later, the fact of it being ready was kept secret from the public by the responsible state bodies for a certain time. As it was found later, the English version of the document was posted on the official website of the European Commission for Democracy Through Law (Venice Commission) on 22 February 2016. It was only on 2 March 2016 that the public got access to the Draft due to its inclusion on the agenda of the Government session of 3 March 2016.³ Moreover, even as of that time the Draft failed to be posted on the official websites of either the Ministry of Justice, or the CEC.

The Draft was elaborated and was included on the agenda of Government session in gross violation of the procedures stipulated by Armenian legislation on elaboration and circulation of legal acts. In particular, the requirements on regulatory impact assessment of legal acts stipulated by the Law on Legal Acts,⁴ organizing and conducting public discussions provided

¹ Constitution of the Republic of Armenia, Article 201, part 1

² Presidential decree No NH-170-A of 10 February 2016 "On organizing the process of development of a legal framework based on the Constitutional reforms"

³ Government of Armenia session agenda of 3 March 2016 <https://www.e-gov.am/sessions/archive/2016/03/03/>

⁴ RA Law on Legal Acts, Article 27.1, part 2

by Government decision,⁵ and submitting issues to the Government's session prescribed by presidential decree⁶ were violated. Before the Government approval the authors drafting the document refrained from participating in the discussions initiated by NGOs.

Responding to the opposition political forces' proposal of negotiating with the authorities to reach consensus on the main issues of the Draft and delegated by more than 200 civil society organizations, the NGO representatives with an extensive experience in the elections, took part in discussions in 4+4+4 format (government coalition, non-ruling political parties and NGOs). It was expected that as a result of negotiations the Draft Electoral Code would be considerably improved and through stipulation of effective mechanisms there would be prerequisites for reforming the electoral system of Armenia created within the Draft in order to ensure the public trust. Five priority recommendations, agreed by a group of NGOs and non-ruling political parties, were the main issues discussed during the discussions. However, due to unyielding position of the representatives of state bodies the discussions failed to give any essential results. Despite the recommendations put forward in the final report of OSCE/ODIHR referendum expert team and the previous respective recommendations made by OSCE/ODIHR, the amendments to electoral legislation were not carried out inclusively, and the stakeholders were not given an opportunity to make every effort for reaching possible consensus on the reforms. Hence, one may insist that the authorities did not undertake any real step towards reaching a consensus in the process of drafting the electoral code and developing the public trust.

In addition to the above mentioned issues of concern, the Draft failed to make any progress to meet the requirements of the *Code of Good Practice in Electoral Matters* of the Venice Commission.⁷ Below are presented the issues of the Draft worth mentioning.

Issues related to universal suffrage⁸

The Draft fails to ensure the right to universal suffrage, since it enables to exercise the right to vote only to limited number of individuals who are outside the territory of the Republic of

⁵ RA Government decision N 296-N of 25 March 2010 "On approving the order of organizing and conducting public discussions" and N 13 Protocol decision "On repealing RA government decision of 5 April 2012 on approving methodical instructions for elaborating draft legal acts and N 42 protocol decision of RA Government of 28 October 2010"

⁶ RA President decree N NH-174-N of 18 July 2007 on "Procedure of organizing the activities of the Government and other agencies under its jurisdiction"

⁷ Code of good practice in electoral matters (hereinafter Code)

<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282002%29023rev-e>

⁸ Code, Section 1, part 1, point 1, 1.1. Rule and exceptions

Armenia. They are the voters who are on diplomatic service in diplomatic or consular representations of the Republic of Armenia, as well as members of their families residing abroad with them, military servants seconded for a long period of time to or those studying in foreign states, as well as persons employed at representations of legal persons registered in the Republic of Armenia, which are located abroad, and their family members residing with them.⁹ Whereas the hundred thousands of the Armenian citizens living abroad for education, temporary work or other purposes are deprived of participation in voting. Thus, the state displays discriminatory attitude toward them and violates the principle of equal suffrage. What is more, for account of such discriminative approach the Government secures the basis for election fraud, since the names of registered voters could be used for impersonation of voters residing abroad and results of elections falsified.

Issues related to credibility of electoral registers¹⁰

Regulations addressing updates of electoral registers are of concern not only within the Electoral Code in force but also in the Draft of the new code. The proper maintenance of electoral registers, their regular and constant updates and publication are not fully ensured. According to the Draft the authorized body shall twice a year submit the electoral register to the Central Electoral Commission in an electronic format for posting it on the website of the CEC with a search option.¹¹ However, this is not sufficient as long as there is no parallel legal requirement to post the register updated by the police on its own website once in six months. To be precise, the updated full register with download functionality is posted on the website of the police only before the national elections, while, as a matter of fact, there are numerous mistakes and inaccuracies in it. For instance, more than 49,000 people did not have records on their year of birth during 2015 constitutional referendum, more than 6,000 people did not have addresses of registration, more than 10,700 addresses hosted more than 10 residents.¹² Inaccuracies in voter registers that reach up to several thousands, repeat from election to election, and the responsible bodies do not take proper measures to ensure

⁹Draft, Article 62

¹⁰ Code, Section 1, part 1, point 1.2. Electoral registers

¹¹ Draft, Article 9, part 4

¹² Transparency International Anticorruption Center, *Voting Numbers Electronic Monitoring of 2015 Constitutional Referendum*, Yerevan 2016 <http://transparency.am/files/publications/1455616168-0-812260.pdf> and interactive data base <http://elections.transparency.am/2015/>

accuracy and credibility of the voterlists. Whereas regular publication of the register could have contributed to reveal and correct inaccuracies in reasonable time.

The key problem of the electoral register remains to be the inclusion of data of several hundred thousands citizens residing abroad and the potential use of their names in the elections to achieve a desirable outcome, a problem that was proved by the considerable volume of facts collected by the efforts of observer non-governmental organizations (NGOs).¹³

Issues related to equal voting rights¹⁴

Mechanism of multiple voting through “mobile” voters has been formed and sophisticated in Armenia for years and it is being used within the same precinct as well as moving from a precinct to another and from a community to another. Given that at present the citizens of Armenia can vote by several identification documents (passport, biometric passport, ID card)¹⁵ there are increased doubts on the opportunities for organization of multiple voting.

Though the Draft proposes to introduce electronic registration system in order to prevent multiple voting, given an atmosphere of overall mistrust and chronic and unpunished election fraud, use of the system cannot be credible. Electronic registration system implies more limited public oversight and less visibility of certain components of the voting process, meanwhile, in view of holding various identification documents instances of multiple voting in the same or different precincts, using different fingers and abuse of the possibility that the fingerprints will be unreadable are likely to occur. Moreover, even if the cross checking of all fingerprints of precinct results reveals multiple voting, as suggested by the Draft, still there are doubts, since, on the one hand, the Draft fails to provide proper oversight over the respective software and the cross checking process, on the other hand, the tradition of the impunity of fraudsters in Armenia dispels doubts that the exposed illegalities may be concealed, as the electoral fraud was covered for years.

As it was noted above, provision of equal voting rights is failed because of the multiple voting carried out by certain voters and/or their groups, as a result of using the names of hundred

¹³ Citizen Observer Initiative, Final Report of Observation Mission for the Constitutional Amendments Referendum of the Republic of Armenia on December 6, 2015, <http://transparency.am/files/publications/1454523289-0-754489.pdf>

¹⁴ Code, Section 1, part 2, Equal suffrage, 2.1 Equal voting rights

¹⁵ Draft, Article 66, part 1

thousands of people who are absent from Armenia. In response to the demand of the non-ruling parties and CSOs' to publish the signed voter lists after the voting, the Draft intends to completely eliminate the provision for signing of the lists by voters. In parallel, the Draft perpetuates consistent and tenacious "protection" of the voters' signed lists from the public oversight by not publishing them as well as putting a ban on making extracts and taking photos. Thus, the practice of election fraud at the expense of those who are absent from Armenia is to be continued.

Issues related to equality of opportunity¹⁶

The Draft fails to fully exclude the opportunity of misuse of administrative resources. In particular, it does not ban location of election campaign offices in the premises that though do not belong to but are occupied by state and local self-government bodies or belong to the organizations where the state or the community has considerable share.¹⁷ Besides, the Draft does not ban the political party or the candidate to use the public asset for campaigning which is not directly under their possession to carry out official duties.¹⁸ Pursuant to the Draft, indirect expenses such as transportation fees, election campaign office employee compensation and cultural event costs are left out of the campaign funds. It should be mentioned that according to the legislative package enclosed to the Draft no liability is intended for campaigns held in violation of election campaign rules and abuse of the administrative resource.

There are serious concerns with the introduction of regional proportional district lists in the Draft, which despite being officially justified by the need to ensure decentralization and political party members' geographic representativeness, strengthens the legal guarantees for the local criminal authorities to impact the electoral processes and to win seats in representative bodies, which already is a formed practice in Armenia. In spite of the requirement of all non-ruling political parties to apply 100% proportional electoral system or at least to postpone the application of district lists up to the following 2022 national elections, it was categorically rejected by the government. Territorial authorities' role and impact on the results of electoral processes have become obvious in the recent years. Due to district lists,

¹⁶ Code, Section 1, part 2, Equal suffrage, 2.3 Equality of opportunity

¹⁷ Draft, Article 19, part 4

¹⁸ Draft, Article 23, part 1, point 2

in fact, they get additional and rather concrete incentive for investing their financial and administrative resources in order to personally appear on the representative bodies' lists and, in parallel, ensure desirable results for the ruling political party in the elections.

In addition to the above stated, it should be emphasized that the thresholds of electoral deposits are not comparable with the financial resources of the political parties in Armenia, conditioned by the minimal wages, social-economic situation and the level of unequal development of Marzes and communities. Moreover, by no means it is justifiable the intended increase of the threshold of deposits.

Issues related to freedom of voters to form an opinion¹⁹

The Draft also fails to ensure freedom to form an opinion for certain categories of voters, such as the military servicemen and detainees of penitentiary institutions and detention facilities. Though formally they are given the electoral rights, in fact they are deprived of the opportunity to form independent opinion as they do not have adequate access to the political parties' electoral campaign information. Similar to the existing code, the Draft does not regulate campaigns for the military servicemen and detainees, hence there is no relevant enforcement practice formed. Meanwhile, as the practice of NGOs during the constitutional referendum shows, this legal gap is being abused simply by making impossible the awareness raising for these groups of voters. This obstacle further complicates the situation by the risk of limitation of the expression of the opinion, conditioned by not only objectively explained more dependent relationships within the mentioned groups, but also largely by the circumstances, in which these groups actually take their vote.

Thus, the military servicemen mainly have to vote in precincts nearby their service locations and not in the places of their permanent residence.²⁰ The number and names of the servicemen are kept secret²¹, which expands the opportunity for falsifying the election results on their names or at least creates such doubts. A new restriction introduced by the Draft is the confidentiality of the numbers of precincts and their locations,²² which will essentially reduce the chances for public oversight.

¹⁹ Code, Section 1, part 3, Free suffrage, 3.1 Freedom of voters to form an opinion

²⁰ Draft, Article 10, part 8, part 9

²¹ Draft, Article 8, part 12

²² Ibid.

The numbers and names of people kept in the penitentiary institutions and detention facilities are also not published.²³ Moreover, they vote in precincts formed within their respective institutions,²⁴ being completely inaccessible for observation.

Issues related to freedom of voters to express their wishes and combating election fraud²⁵

Election fraud in Armenia is manifested via an arsenal of extensive and numerous electoral violations, including misuse of administrative resources, vote buying, overcrowdings and guidance inside precincts, ruling of the voting process by unauthorized people or proxies for the ruling political parties, open or collective voting, impersonation, carousel voting, ballot box stuffing, “helping” the people needing assistance, etc.²⁶ The mentioned violations were exposed as a result of election observations carried out by both local and international observation missions, while others were revealed by comparing electoral documents subject to registration (ballot papers, stubs, envelopes, signatures) and baseline and process data.²⁷ No effective mechanisms to prevent the above mentioned violations are stipulated either by the Draft or the enclosed legislative package. The number of documents/data subject to registration will be limited only to the report on the number of voters generated by the electronic device and self-adhesive stamps, while electronic registration mechanism implied for excluding multiple voting will simply make invisible some processes of the election fraud.

Consistent with observations, proper administrative proceedings and criminal prosecution on cases of widespread electoral violations were failed to be carried out during 2012 and 2013 national elections, 2013-2015 elections of local government bodies and 6 December 2015 referendum of constitutional amendments. Therefore, one may conclude that the fight against electoral fraud is nothing but imitation.

Civil society reiterates its longstanding claim that in present situation the best and only means as a safeguard against electoral fraud and for building the citizens' trust in the electoral process is making the signed voter lists available so that every person is able to verify whether or not votes were cast on behalf of their acquaintances and relatives who are

²³ Draft, Article 12, parts 5 and 6

²⁴ Draft, Article 63

²⁵ Code, Section 1, part 3, Free suffrage, 3.2 Freedom of voters to express their wishes and combating electoral fraud

²⁶ Violations committed in 2012 parliamentary elections and 2013 presidential election on <http://www.iditord.org> and Yerevan council and local government elections on <http://armdex.com/elections2013/map>, violations in constitutional amendments on <http://transparency.am/elections/2015-12-06/map> websites

²⁷ http://electionscount.info/2012/index.php?en_vote-result.21, http://elections.transparency.am/2013/index.php?en_vote-error.34 http://elections.transparency.am/yerevan/index.php?en_vote-error.34

absent from the country or simply whodid not participate in the voting. It should be mentioned that this claim is based not only on the vicious practice persistent in Armenia and the widespread public mistrust, but also the provisions of OSCE/ODIHR report published after 2015 constitutional referendum, which reads: *“While the Venice Commission does not regard this measure as a good practice because abstention from voting may indicate a political choice, it should be noted that making marked voter lists available for public verification is not prohibited by international law.”*²⁸

Issues related to secret suffrage²⁹

By introduction of electronic registration mechanism the Draft proposed such a complicated mechanism of voter’ registration and voting,which is not obviously based on the principle prescribed by the Code on the simplicity of the voting procedure. It is likely to create a situation where on the one hand the commission members will have difficulty in carrying out their functions properly and, on the other hand, more voters will be in need of help. As Armenia’s electoral practice shows, the institute of “helpers” is largely abused and, as a matter of fact, violates the secrecy of ballot.

Considering the fact that individual ballot papers shall be printed for each political party running in the elections³⁰and counting is not envisioned for the unused ballots there are risks that the bundles of unregistered ballots can serve for “carousel voting” or be taken out of the precincts intended to ensure control over the voting procedure.

Special attention should be paid on provision of the right to vote by electronic voting by the people who are on diplomatic service or members of their families residing abroad with them, military servants seconded for a long period of time to or those studying in foreign states, people employed at representations of legal persons registered in Armenia, which are located abroad, and their family members residing with them. The procedure set up by CEC on electronic voting bears certain risks. The heads of legal persons employed at representations having registered in the Republic of Armenia may submit the list of their employees who are abroad,without their awareness receive the passwords for electronic

²⁸ OSCE/ODIHR, “Final report of referendum expert team on constitutional referendum in the Republic of Armenia of 6 December 2015,” Warsaw, 2016, <http://www.osce.org/odihr/elections/220656?download=true>

²⁹ Code, Section1, part 4, Secret suffrage

³⁰ Draft, Article 59, part1

voting and vote on their behalf.³¹A survey on electronic voting has revealed that only a quarter of the people who voted using electronic means considered internet and the secrecy of the data transmitted by it “mainly secure.”³²Since it is impossible to ensure secret ballot in an uncontrolled environment, as well as be assured if voting takes place in someone's presence or direct guidance, it was recommended in Joint Final Opinion of Venice Commission and OSCE/ODIHR on Electoral Code published still in October 2011 that the Armenian authorities review that provision.³³This recommendation, however, was failed to be carried out.

Issues related to effective observation of elections³⁴

The voters' rights are significantly restricted by the Draft. In particular, threshold is set up for experience in observing elections. Thus, those NGOs of Armenia whose charter objectives include issues related to democracy and protection of human rights (for minimum 3 years preceding the day of calling elections) shall have the right to act as observation mission during elections.³⁵Neglecting OSCE/ODIHR recommendation that the CEC testing of observers should not be mandatory or prerequisite for accreditation of citizen observers, the Draft again stipulates requirement for local observers' accreditation, which causes serious obstacles for the local NGOs who act as observation mission during elections, by increasing their administrative, organizational and financial burden and violating the balance between voters' rights and obligations.³⁶

The observer will have very limited rights according to the Draft. When exercising their rights, observers may only ask questions to officers responsible for the elections and draw their attention to violations but have no right to make claims or suggestions on elimination of the violation.³⁷This is a significant setback compared with the legislation in force, according

³¹Decision of RA CEC No 48-N of 20 July 2015 “Procedure on electronic voting in national elections for the voters who are on diplomatic service in diplomatic or consular representations and members of their families having right to vote residing abroad with them, ” point 5

³²Hamazasp Danielyan, “Internet voting in Armenia: analysis of unnoticeable innovation in Armenia,” Yerevan, 2015, , http://www.osf.am/wp-content/uploads/2015/10/Hamazasp_Danielyan_PP.pdf

³³Venice Commission and OSCE/ODIHR, “Joint Final Opinion on the Electoral Code of Armenia adopted on 26 May 2011”<http://www.osce.org/odihr/elections/84269>

³⁴ Code, Section 2, Conditions for implementing the principles, 3.2 Observation of elections

³⁵ Code, Article 30, part 1

³⁶ During Constitutional referendum of 6 December 2015 Citizen Observer Initiative had to rent halls in different Marzes to move the people who were supposed to pass tests from one Marz to another.

³⁷ Draft, Article 32, part 2

to which observers could at least present their observations and suggestions to the chairman of the commission.

Besides the observers, the Draft considerably restricts also the freedom of mass media, creates obstacles for the coverage of the electoral process as well as includes unjustified mechanisms for the oversight of broadcast media. The Draft prescribes that only those mass media representatives may get accreditation, who have been disseminating information on behalf of the given media for at least one year before the elections. Above and beyond, each entity carrying out media activities may accredit no more than 50 representatives.³⁸

The Draft limits the number of observers and mass media representatives having the right to be in the voting room at the same time to 15.³⁹ This limitation, is likely to be applied for keeping principled and unbiased observer organizations and representatives of mass media “lined up” near the precinct and depriving them from an opportunity to enter the precinct. On the other hand, such regulation is also illogical, since the organizations undergo certain processes to be able to exercise their rights as observers and are accredited by CEC, meanwhile, it turns out that the certificate of accreditation granted by CEC is not a guarantee for NGOs or mass media representatives to enter precincts and carry out their mission.

Legal protection of the observers has been considerably weakened by the Draft. If pursuant to the legal regulation in force the observer may be removed from the precinct only in case of arrest or detention, according to the Draft the chairperson of the electoral commission may remove the observer from the sitting of the commission, and from the precinct on the voting day, upon a decision adopted by 2/3 of the votes of attending members of the electoral commission in case an observer supports a candidate, political party running in elections or violates the requirements of this Code.⁴⁰ Thus, the electoral commissions are entitled with uncontrollable extensive authority that might be abused and by arbitrary decisions the commissions may remove the undesirable observers to ban them from public oversight of the voting procedure.

³⁸ Draft, Article 31, part 8

³⁹ Draft, Article 65, part 8

⁴⁰ Draft, Article 31, part 5

The bases of legal protection are considerably weakened for mass media representatives and proxies as well.⁴¹

Issues related to an effective system of appeal⁴²

As it was stated in the report⁴³ by OSCE/ODIHR after 2013 Presidential Election, complaints and appeals system regarding election disputes is ineffective in Armenia, and the Draft in no way improves the current situation. The legal standing to bring complaints in the electoral process and timelines for the submission of claims are still constricted and, therefore, it is unrealistic to gather sufficient evidence and file substantiated and well-grounded complaints⁴⁴. Both the Draft and the Electoral Code in force limit the object of the complaints. For instance, the observer cannot appeal the action or inaction of the electoral commission if the violation is not directly related to observer's rights, but rather is a gross procedural infringement. Besides, the observer has no right to dispute actions or inactions of election commissions observed in the electoral precincts and the rigged election results as was recommended by OSCE/ODIHR.⁴⁵

Currently, electoral complaints filed by local NGOs to territorial electoral commissions (TEC) and CEC are not taken into review on the grounds of either formalistic matters or the lack of legal standing. None of the several hundreds of complaints based on the evidence of violation of the observers or others' rights and on violation of the voting procedure filed during national and local government elections since 2013, as well as during 2015 constitution referendum has been duly considered by administrative bodies and judicial instances. As a matter of fact, ensuring access to justice for observers is consistently violated mainly on the grounds that NGOs are not the right plaintiffs and may not raise concerns on behalf of their observers and, accordingly, to protect their rights. The Draft fails to give any solutions to these issues.

General situation

⁴¹ Draft, Article 31, part 8 and , Article 34, part 4

⁴² Code, Section 2, Conditions for implementing the principles, 3.3 an effective system of appeal

⁴³ OSCE/ODIHR, "Election Observation Mission Final Report on Presidential Election in Armenia of 18 February 2013," Warsaw, 2013, <http://www.osce.org/odihr/elections/220656?download=true>

⁴⁴ Draft, Article 48

⁴⁵ OSCE/ODIHR, <http://www.osce.org/odihr/elections/220656?download=true>

Lack of respect for fundamental rights⁴⁶

In Armenia the exercise of political rights becomes more and more problematic day by day. Freedom of assembly is constantly violated when political issues are raised. Active participants in rallies are frequently subject to assault, persecuted by police and arrested, thus, adding the number of political prisoners. Oftentimes the cases against them are investigated in administrative courts and at the end of long-term trials the citizens bear the responsibility by paying fines for “failure to obey lawful requirement” of the police officers.

No progress had been made on the investigation into the killings of 10 citizens who fell victim to violence by illegal use of military force during peaceful demonstration following 2008 February presidential elections in Armenia. Moreover, the use of armed forces in internal political affairs was actually legalized by amendments to the Law on Legal Regime of Emergency Situations, adopted on 21 March 2012, which in fact contradicted the respective norms of the Republic of Armenia Constitution. Widespread impunity in the country creates distrust and doubts that the same scenario might be repeated any time, and especially during elections.

Summing up the above mentioned, we conclude that no measures are undertaken by the Draft proposed by the Armenian government to bring the new Draft Electoral Code of Armenia in compliance with the Code of Good Practice in Electoral Matters of Venice Commission. The Draft fails to dispel the deep rooted public distrust towards the electoral system. As for the electronic technologies proposed in response to the public demand to reduce the risks of electoral violations, those simply aspire to perpetrate the tradition of rigged elections, this time with a new “packaging.”

Transparency International Anticorruption Center NGO

Open Society Foundations – Armenia foundation

Helsinki Citizens Assembly Vanadzor NGO

⁴⁶ Code, Section 2, Conditions for implementing the principles, part 1. Respect for fundamental right

Journalists Club "Asparez" NGO

Yerevan Press Club NGO

Europe in Law Association NGO

Foundation against Violations of Law NGO

Union of Informed Citizens NGO

"Logos" human rights NGO

"KhoranArd" intellectual NGO