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Some of the Major Challenges of the Electoral System in the Republic of Armenia

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Abstract

This article presents some of the major problems of the electoral legislation and the electoral system of the Republic of Armenia. First, it analyses the electoral system and the activities of the electoral administration bodies. It then discusses the interdependence between the law enforcement practice and changes in the electoral law. Furthermore, the article also discusses the problems and risks observed in electoral processes. As part of these problems, the article scrutinizes the efficiency of the existing legislative solutions in terms of preventing and revealing electoral violations, conducting effective examination, and effectively defending subjective and objective electoral rights.

Electoral Administration Bodies as the Institutes Defending Subjective and Objective Electoral Rights and Their Effectiveness

Drawing on the advice provided by the Venice Commission of the Council of Europe, the Republic of Armenia (RA) created a three-tier structure for electoral commissions, consisting of a permanently operating Central Electoral Commission (hereinafter: the CEC), permanently operating territorial electoral commissions (hereinafter: TEC) and precinct electoral commissions (PEC) formed at the time of the elections. When exercising their powers, the electoral commissions must be independent and autonomous and abide by the principles of legality, collegiality and transparency. Any interference with their actions is prohibited (RA Electoral Code, Article 36). The Electoral Code foresees appeals against the actions and/or inaction of lower-level electoral commissions at upper-level commissions or the Administrative court (RA Electoral Code, Article 48).

The aim of the aforesaid legal regulations is the introduction of checks and balances within the system of electoral commissions, which must ensure effective electoral administration, effective examination of electoral disputes and the right to appeal, which are among the essential components of electoral law. Without these components, if there are no effective remedies, electoral law becomes declarative in nature.

There are innumerable facts demonstrating the lack of independence and autonomy of TECs, as well as their incompetence. In most cases, TEC members cannot differentiate between administrative proceedings and a session convened with the aim of refusing the initiation of such proceedings, which speaks of their lack of competence. For example, TEC members notify the complainants about administrative proceedings instituted on the basis of their complaints; however, when complainants attend the hearings, they often find that the TECs are

pronouncing draft decisions refusing to institute such proceedings. The majority of TEC members are also incapable of answering questions regarding the draft or final decisions, these drafts (with very few exceptions) are never changed following submissions during these hearings, decisions are taken by a unanimous vote, and there are no special opinions or disagreements in the TECs.

There are also many examples demonstrating the lack of TECs' independence. When cases are instituted in the RA Administrative Court following TEC decisions, it is always the CEC—a member or the head of the legal department thereof—that represents the TECs in the court hearings. Another sign of a lack of independence and autonomy in the TECs is the identical style of their decisions, including repetition of mistakes and identical sentences or even paragraphs, which proves that these decisions are all written by one and the same author. Moreover, in the period following the National Assembly (i.e. parliamentary) elections on 2 April 2017, other facts of interference by the CEC in the actions of the TECs were recorded. A number of observers reported that instead of examining the complaints independently and in a timely manner, many TECs would send them to the CEC. Moreover, the CEC distributed templates for decisions to the TECs (the latter fact was also confirmed by Tigran Moukouchyan, President of the CEC at the time of the Q&A in the Constitutional Court) (Citizen Observer Initiative Report, forthcoming). Independent election observers detected templates for decisions to refuse the initiation of administrative proceedings (two decisions adopted by TEC no. 30). This was most likely instituted for all the TECs given that in the decisions of numerous TECs, there was an ellipsis instead of the number of the TEC and the name of the applicant. Apart from this, some of the justifications included the following wording: "In the event the applicant is an NGO …", which was left in the final text of the adopted decisions. Another sign of the lack of independence and autonomy of the TECs was the synchronization of the dates and hours of hearings selected for the submitted complaints. The presidents of TECs no. 2 and 29 admitted that the dates and hours of hearings had been determined by the CEC and that they could do nothing to change them (Citizen Observer Initiative Report, forthcoming).

In addition to this, for years now, the overwhelming majority of TEC members have been regularly reappointed. The same applies to PEC members. For many years, the ruling Republican Party has been predominantly appointing public servants to electoral commissions, which is a sign of abuse of administrative resources, considering the fact that school principals (with very few exceptions) are members of the Republican Party (Citizen Observer Initiative Report, forthcoming). The local NGO Union of Informed Citizens detected a practice whereby principals of schools and kindergartens maintained lists of children and their parents and tried to coax the latter into voting for the Republican Party (Independent Observer, 2017). The CEC conducts training for the members of these electoral commissions by its members or experts chosen by them, and the law does not encourage alternative trainings or the involvement of broader expert circles in trainings on electoral matters (RA Electoral Code, Article 41). In addition to this, there are no trainings familiarizing voters with the remedies available to defend their electoral rights (objective or subjective) or helping them to understand the procedures and develop skills for resorting to these remedies.

These problems inevitably lead to a situation in which the system of electoral commissions rather than consisting of three-tier, autonomous and independent commissions is fully merged with one centre of governance—the CEC—while the lower-level commissions—the TECs and PECs—act as subordinates and do not adopt independent and autonomous decisions. This situation inevitably leads to the absence of effective legal remedies for electoral violations since appeals to higher commissions cannot be considered an effective remedy.

In this regard, the election of the acting CEC staff by the National Assembly on 06.10.2016 (which had formerly been appointed by the President) was indeed worrying, with NGOs expressing serious concerns over this fact in light of the reform of the electoral system and the need to ensure the legality of elections and increase public trust. The NGOs stress the need for a new staff for the CEC, which will be independent and able to administer exemplary and trustworthy elections to ensure adequate protection of electoral rights and will not be tarnished by reasonable doubts of being part of electoral fraud (Citizen Observer, n.d.). This concern was also reiterated by Ambassador Piotr Anthoni Switalski, Head of the EU Delegation in Armenia (Azatutyun, 2017). The low public trust in elections is also conditioned by a lack of trust in electoral commissions, their independence and impartiality.

It should also be noted that the ineffectiveness of electoral commissions in the prevention, detection and effective examination of electoral violations has also been referred to in a number of decisions of the RA Constitutional Court (See decision 1034, 22.06.2012).

The Interdependence Between Law Enforcement Practice and Changes in Electoral Law

With regard to the changes in the electoral legislation, the following regularities have been detected: in the majority of cases the authorities make certain amendments which at first sight seem positive. However, their

positive impact on electoral processes is eliminated by amendments which are latent and in most cases unseen by the public. Some amendments are obviously directed at the concealment of the shortcomings of the commissions' works, legalization of the existing negative law enforcement practices and complication of the process of complaints on electoral matters with a view to preventing the submission of these complaints or limiting the numbers thereof. This is confirmed by the following examples.

In the period following the 2015 constitutional referendum, it was impossible to submit complaints on non-working days, the staff of the CEC simply refused to accept appeals from a number of appellants on the pretext that Sunday was a non-working day. In the meantime, the CEC sat in session. On 25 May 2016, it was determined by the RA Electoral Code that complaints for which the deadline is a non-working day must be submitted to the CEC on the following working day (RA Electoral Code, Article 48 part 5). The CEC revoked the above regulation in order not to accept the complaints submitted following the elections to the National Assembly on 2 April 2017. Revoking this regulation, the CEC did not accept complaints on a non-working day. However, the next working day was the day after the election results were summarized, and the CEC accepted complaints when the results of the election had already been summarized.

In the past, problems arose in connection with the manner of the submission of complaints and whether they had to be considered to be duly submitted to the relevant commission (hand delivered or submitted by post), as well as the determination of the moment of submission (whether this was the moment of its handing over to the postal service or reception by the commission). When examining various election-related disputes, the President of the CEC expressed the position that complaints handed over to the postal service by the set deadline would be considered duly submitted. However, the Electoral Code adopted in 2016 prescribed that complaints must be hand-delivered to electoral commissions, which considerably limits the chances of submitting complaints to all electoral commissions across the country, as a result of which many complaints remain unexamined (Citizen Observer Initiative Report, forthcoming).

Another example is the limitation (essentially the elimination) of the institution of referral. In the past, in conformity with the Electoral Code of 2011, complaints addressed to territorial electoral commissions but submitted to the CEC had to be referred to the relevant electoral commission. This regulation created a possibility to overcome the above mentioned technical obstacles and errors related to submissions to commissions throughout the country. However, this inspired discontent among some members of the CEC, who accused the complainants of abuse of this institute. Communication among various electoral commissions is maintained through a special means that makes the exchange of documents among commissions quite efficient. However, this avenue is not available to others. Despite the fact that the institute of referral is enshrined in the law, there were incidents at the time of the elections in 2015 and 2016 when, through its arbitrary decisions, the CEC refused to refer the complaints to the relevant commissions (CEC decision N 59-A, 16.09.2015). The aim of the above mentioned change in the Electoral Code was to reduce the number of admissible complaints.

The Electoral Code of 2016 (Article 49 part 3) eliminated the obligation to refer the complaints to other commissions. In a situation where there is no possibility of submitting complaints electronically, it is obvious that the new regulation aims at further reducing the number of complaints by means of maximally limiting the possibility of making them available to the relevant electoral commissions. Nevertheless, during the 2017 election to the National Assembly the CEC again applied double standards. For example, a complaint concerning voting in place of another person was submitted to the CEC later than the set deadline. However, the CEC referred the complaint to TEC no. 33 (Citizen Observer Initiative Report, forthcoming, CEC decision N 162-A, 09.04.2017). Another complaint was submitted to the CEC by the Armenian Revolutionary Federation, which was referred to TEC no. 17 (Citizen Observer Initiative Report, forthcoming, CEC decision N 162-A, 09.04.2017).

Another example of the "fight" by the authorities against complaints is the new requirement of the 2016 Electoral Code (Article 48) to attach original POAs (Powers of Attorney) from observers and copies of observer badges to complaints, while a failure to meet this requirement resulted in non-examination of the complaint (Article 48). The 2011 Electoral Code did not have such a requirement, and submission of a complaint without a POA or its copy was viewed as a formal error, in which case the complainant was given an opportunity to correct it.

The enumerated restrictions in the law enforcement practice considerably limit the possibility to submit complaints, which results in ineffective protection of electoral law and non-examination of detected prima facie violations.

The assumption is that the amendments related to the entry into force of the decisions of the electoral commissions and the obligation to notify the parties

about their adoption were also made with a view to neutralizing the positive amendments by means of procedural obstacles and the reduction and/or exclusion of the number of complaints. The 2011 Electoral Code foresaw that an administrative act adopted by the Central Electoral Commission entered into force following its posting on the CEC website after its pronouncement in the CEC session, while the act of a TEC entered into force following its posting on a site visible to all following its pronouncement in the TEC session. There was an obligation for TECs to notify the participants of proceedings about the adopted decisions (RA Electoral Code, 2011, Article 45). In both cases, the law foresaw an obligation on the part of the commissions to send a message to the complainant by means of electronic communication as indicated in the complaint (RA Electoral Code, 2011, Article 45, parts 5 and 6). As a result, the three-day period for appealing the act adopted by the commission started at the moment the complainant gained access to the decision, and if s/he was notified thereof under more definite circumstances. However, the 2016 Electoral Code prescribed that the acts adopted by the commissions enter into force once they are pronounced in the commission hearing. In the case of the CEC they are posted on the website by the end of the following day (RA Electoral Code 2016, Article 8 part 2), while in case of the TECs they are posted on a site visible to all within 24 hours after the adoption of the act (RA Electoral Code 2016, Article 47 part 6). The new Code removed the obligation to notify the complainant, which results in an artificial reduction of the three-day period of appeal by at least one day. In addition to this, there is uncertainty stemming from the fact that complainants are not notified about the adoption of the act given that holding a session per se does not necessarily result in the adoption of an act because a session may be postponed (Citizen Observer Report, forthcoming). The complicated nature of the complaints procedure and problems related to the issue of legal certainty make it impossible for non-specialists to submit an election-related complaint.

Some Problems and Risks Observed/ Registered in Electoral Processes

The observation missions and observers registered numerous violations and situations comprising such risks during the 2017 elections to the National Assembly (Independent Observer Report, Citizen Observer Report, forthcoming), including abuse of administrative resources (TIAC, 2017), vote buying, making lists of potential voters, transfer of voters to polling stations on the day of voting, directed voting, violation of the procedure of assisted voting, violation of the secrecy of the vote, signing a voter list in place of others, violation of the principles of impartiality and neutrality/independence by observers representing various organizations (which are not known to the public for any meaningful activity), violation of observer rights (including cases of not registering their observations in the register), violations of procedures during the summary of the votes, electronic equipment failures, inconsistencies between electoral lists and paper-based voter lists, nearly 100% voting of military personnel, voting in penitentiary and psychiatric institutions, as well as inaction by electoral commissions and the law enforcement bodies in the period preceding elections, the pre-election campaign and the voting day. The abovementioned violations and problems remained without a proper response and effective examination by electoral commissions and law enforcement bodies.

Despite the fact that the authorities were broadly advertising the new Electoral Code, and especially given that certain amendments were effected following the expression of concerns by various representatives of the opposition parties and civil society, the new Code nevertheless contained a number of serious problems that remained neglected despite concerns on the part of non-governmental organizations, the professional community and the opposition parties. In particular:

- Nothing was done to adopt effective mechanisms against manifestations of abuse of administrative resources;
- The publication of non-searchable signed voter lists is ineffective for any profound analysis and detection of possible violations given that the absence of a search engine renders their timely and effective use impossible;
- There is no mechanism for comparing the voter register with the population register and no possibility of mutual checks;
- There is no possibility of checking the electronic lists and the data entered during voting produced by the electronic registration equipment;
- The introduction of the legislative requirement whereby, in cases where there is already a (false) signature in front of the name of a voter in the list of voters, the voter signs in the column for "other notes," which is neither registered in the log nor otherwise examined;
- There is no footage available from the cameras installed in polling stations (it is very expensive and time consuming to obtain all the footage from the relevant company);
- The newly introduced system of a "stable parliamentary majority," according to which the party or party alliance that has collected the maximum number of votes acquires 54% of the seats in the parliament,

if necessary by provision of bonus seats, which is a serious problem in terms of political competition;
- The mechanism of nomination of candidates from national minorities and distribution of the mandates, which enables acquisition of additional mandates;
- Restrictions on political forces forming coalitions (not more than 3 parties);
- Foreseeing the second round of voting with a view to forming a political majority;
- Introduction of territorial candidate lists (rating lists), which stimulated the vicious practice of abusing administrative and financial resources and essentially excluded political competition and, as a consequence, undermined the political goal of the proportional voting system;
- Restriction of the right to carry out a "public watchdog" function by newly created non-governmental organizations and mass media outlets, as well as limiting the rights to media to only 50 representatives per organisation;
- Restriction of the number of observers and media representatives in the voting room, which does not apply to visitors, international observers and television and radio companies engaged in over-ground broadcasting, which is discriminatory;
- Introducing the power to expel an observer, proxy or media representative from the session of the commission or the voting room;
- Limited scope of subjects having the standing to bring a complaint with a view to protecting objective electoral rights which is contrary to the OSCE/ODIHR recommendations (OSCE ODIHR, 2016);
- The complicated nature of the complaints procedure and problems related to the issue of legal certainty;
- Lack of uniformity in electoral administration (with a view to excluding double standards);
- Lack of real and effective public oversight over electoral commissions at all levels;
- No audit of electoral voter lists and electronic equipment was conducted contrary to what had been envisioned by the agreement concluded between the ruling and the opposition parties;
- The recommendation to check fingerprints of voters registered with electronic equipment, put forward by the ORO Alliance, was not granted. (CEC decision N 157-A, 08.04.2017, Decision of the RA Administrative Court on 14.04.2017, Case N VD/3175/05/17).

In addition to the aforementioned problems related to the RA Electoral Code, liability was envisioned by the RA Criminal Code for making a false report about voting in place of another person or for submitting such a report with a false signature both intentionally and negligently. This obviously limits the possibility of receiving such reports with the aim of detecting this type of electoral fraud and essentially neutralizes the positive impact of the publication of signed voter lists in terms of public oversight.

Conclusion

More in-depth analysis, which this article draws on, demonstrates that there is a need to further amend the electoral legislation with a view to ensuring political competition and equal conditions for such competition (by way of excluding the abuse of administrative resources); ensuring the realization of the free will of the people; increasing the effectiveness of public oversight; and the prevention, detection and effective examination of electoral violations. However, legislative amendments per se cannot ensure the desired results given the fact that in order to ensure adequate application of the law in the law enforcement practice it is of utmost importance to ensure the independence and impartiality of electoral commissions and other responsible state institutions, as well as the transparency of their proceedings. Regulations governing the formation of these commissions, as well as public oversight mechanisms, should be reviewed. To achieve the aforesaid, it is important that all the relevant interested parties demonstrate a consistent and indefatigable policy to ensure real and effective involvement of all the interested parties.

About the Author

Tigran Yegoryan is a practicing lawyer in the area of the right to free and fair elections. Starting from 2011, he has been conducting research in the sphere of electoral law. Since 2012, he has been engaged in electoral processes by working on the improvement of electoral legislation, acting as a human rights defender, and through private professional activity in the sphere of the practical protection of electoral rights (provision of legal services to public and political organizations). He is also a member and a senior legal advisor of the human rights NGO "Europe in Law Association".

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