

## CERTAIN ASPECTS OF THE IMPROVEMENT OF THE ELECTORAL CODE OF THE REPUBLIC OF ARMENIA

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From the first days of the independence of the Republic of Armenia, the legal regulation of social relations was accompanied by reviewing, re-establishing (like in any country being in the phase of transition) the values and priorities in many areas of the country's life (economic, social, political, etc.). A special re-evaluation is implemented in regard to the issues of organization, execution of the state authority, the bearer of the state authority and the mechanisms of the organization and realization of the state authority which belongs thereto.

This process was reinforced in the Declaration about the independence of Armenia, adopted on August 23, 1990, according to which: "The bearer of the Armenian statehood is the people of the Republic of Armenia, which exercises the authority directly and through its representative bodies..." (paragraph 3)<sup>2</sup>. Then this idea was legislatively reinforced in Article 2 of the RA Constitution adopted in 1995: **"The people shall exercise their power through free elections, referenda, as well as through state and local self-government bodies and officials provided for by the Constitution."**

The text of the Article implies that in the discussed question the Constitution gives preference to the forms of immediate democratic governance: free elections, referenda, through which the representative institutions of democratic governance are formed.

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<sup>2</sup> Collection of Legal Acts of Armenia (1990-1995), Yerevan, 1995, pp.9-10 [Հայաստանի գործող օրենքների ժողովածու (1990-1995թթ.), Երևան, 1995թ., էջեր 9-10].

The experience of the organization of elections in different times proves that the important institute of immediate democratic governance in the Republic of Armenia is yet in essence in the stage of formation. “In the Republic of Armenia, there have not yet been formed democratic elections in line with the international standards on the legislative prerequisites, institutional decisions as well as the organization, realization of the process.”<sup>3</sup>

There are plenty of objective and subjective factors which are an obstacle for this institute to be sustained, such as the shortcomings of the electoral legislation, the poor socio-economic condition, the low level of the culture of free and fair elections, and other circumstances which are used by influential individuals of the Republic: during the elections the political parties count the voting results in their favor.

As a result, the public at large raises some complaints, and the confidence toward the formed authorities is undermined, which considerably hinders the progressive development of the country.

In the range of the mentioned factors, the gaps and shortcomings that exist in the electoral legislation are distinguished, which have negative consequences, and the suggestions made as a result of a scientific analysis and their practical application will give the possibility to somewhat mitigate the contradictions existing in public life and concerning the discussed sphere, as well as to contribute to the restoration of confidence among the people towards the authorities.

In the context of expecting such results, Article 11(1) of the RA Electoral Code<sup>4</sup> plays a very important role; according to the article: “The list of electors of the Republic of Armenia, except for the lists drawn up in military units as well as the ones lists signed by electors,

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<sup>3</sup> Harutyunyan G.G. Introductory remarks on the 13<sup>th</sup> Yerevan International Conference : “The role of the Constitutional Courts in safeguarding democratic elections” (5-7 October, 2006), Almanac, Yerevan, 2006, P. 5. [Арутюнян Г.Г. Вступительное слово на XII Ереванской международной конференции: “Роль конституционных судов в обеспечении демократических выборов”, (5-7 октября 2006г.) Альманах, Ереван, 2006, стр. 5].

<sup>4</sup> Adopted on May 26, 2011 (Official Journal of the Republic of Armenia, N36 (839), 16.06.11).

shall be open to the public.

Lists signed by electors shall not be published, and no carbon copy of these lists shall be made, they shall not be photographed and videotaped.”

There are prohibitions of such contents envisaged in Article 31(1)(3) and Article 33(1)(2) of the Code.

Making the list signed by voters confidential and limiting the publication (in any way) of the information contained therein are not perceived by the society, political areas in a definite way.

This approach is not clear to the citizens of the Republic even in the sense that there are many cases when following the summarization of the voting results, names of deceased people have been found there or names of people who have left the Republic, while in front of their names there have been signatures.

Naturally, even if these cases are just exceptions, anyhow, there is some distrust in the society regarding the fairness of the electors' processes.

The parliamentary and extra-parliamentary discussions organized upon the suggestion of some political powers of the Republic engaged with this issue also finished without success. The question was presented to the Constitutional Court of the Republic of Armenia. On May 5, 2012 the Constitutional Court of Republic of Armenia started the examination of the application presented by 29 members of the National Assembly of the Republic on April 28, 2012 concerning the compliance of certain norms (Article 11(1), Article 31(1)(3), Article 33(1)(2)) of the RA Electoral Code, reinforcing the confidentiality of signed electoral lists, with the RA Constitution.

Discussing the application presented by the Members of the National Assembly, while formulating his legal position, he followed the requirement reinforced in the sub-point 3 of the point 4 (Secret suffrage) of the document of the Venice Commission of the Council of Europe, titled “Code of good practice in electoral matters:

guidelines and explanatory report”<sup>5</sup>, according to which “lists of persons actually voting should not be published”, the meaning of which is explained in point 54 of the mentioned document, according to which: “...since abstention may indicate a political choice, lists of persons voting should not be published.”<sup>6</sup> With this and other justifications, as a result, the Constitutional Court rejected the proposal presented in the application of the members of the National Assembly and recognized that the mentioned norms of the Electoral Code are not in violation of the Constitution<sup>7</sup>.

Here the problem is not at all whether the legal position of the Constitutional Court regarding discussed issue is justified or not, but the problem is to what extent it contributes to the mitigation of the tense socio-economic, legal and political situation that exists in the country.

As it has already been mentioned, the migration in the Republic continues and the society finds that the reason behind this migration are the activities (not contributing to the nation) implemented by the authorities which are not formed as a result of free and fair elections.

Consequently a provision of primary importance for the President and the Government of Republic of Armenia was announced, according to which it is planned not only to completely prevent the migration, but also take efficient measures towards repatriation.

In our opinion, in this case it would be appropriate if besides invoking the relevant norms of the documents adopted by European bodies regarding the justified nature of not publishing the lists signed by the voters, the Constitutional court took into account also the following circumstances:

First, the document titled “Code of good practice in electoral matters: guidelines and explanatory report” of the Venice

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<sup>5</sup> Adopted by the Venice Commission during the plenary session 52 (Venice, October 18-19, 2002) CDL-AD (2002) 023 rev.

<sup>6</sup> See *ibid*, page 28.

<sup>7</sup> See Decision of the Constitutional Court of the Republic of Armenia #1027 adopted on May 5, 2012.

Commission of the Council of Europe stipulates as follows: “The list of persons actually voting should not be published (sub-point (c) of point 4), ... since abstention may indicate a political choice...” (point 54).

It turns out that, according to the document “the confidentiality of the list of persons who actually voted is meant to ensure “the confidentiality of persons who did not vote””, which may have a political dimension. In our opinion, such a setting of this issue is justified for the voters of European countries, where exists a proper political culture, the political parties and citizens have a clear political orientation; however, the same cannot be said about the reality of the Republic of Armenia.

First of all, it is known that the vast majority of more than 70 political parties registered in the Republic do not have an orientation, a clear activity program. It is also a general phenomenon that the citizens included in them often change their party affiliation exceptionally due to their personal motives. In such conditions, making the lists of persons who signed them confidential according to the procedure defined by legislation and considering the fact that the citizens of the Republic of Armenia do not participate as a “testimony of political choice” is at least a fallacy.

Then, the RA Constitution reinforces the principle of election’s confidentiality (Article 4) as an important principle of the suffrage of citizens. What concerns the confidentiality of “not electing” or “not participating in the elections”, then let us say that there is no such principle envisaged by the Constitution. Since it is known that the Constitution has supremacy over international legal acts, we, therefore, can rely on the Constitution regarding the discussed issue.

Especially, the basic law of the Republic (Article 2) says that in Armenia the only source of power is the people and the power belongs to the people who exercise their power directly, as well as through state and local self-government bodies and officials over which the people have the right to direct supervision. It means that the ones who realize the power which belongs to the people cannot keep secrets from the people and the subjects who present the

interests of their representatives, including the limitation of the right to have a free access to the list signed by the voters.

Besides, in favor of disclosure of the electoral lists we can invoke another important basis which is Article 63(1) of the Law “On the Constitutional Court of the Republic of Armenia” adopted on June 1, 2006, which gives the Constitutional Court the possibility to evaluate “... both the act and the law enforcement practice” while determining the constitutionality of a legal act.

In this sense the practice of applying Article 11 of the RA Electoral Code, which makes the signed electoral lists confidential, is more than rich with undesirable consequences for the social and political life of the Republic about which we talked above.

There is another suggestion which can contribute to the review of the RA Electoral Code’s norm (Article 11(1)) about making the signed electoral lists confidential. As it is mentioned in the legal position of the Constitutional Court expressed regarding its decision adopted on May 5, 2012 (Decision of the Constitutional Court SDVo-1027) despite the fact that the restriction of publishing the signed lists by voters has been a subject of discussion in the international practice for various times, “the choice of the frames of the possible options and limitations of legal regulation is considered to be an issue under the jurisdiction of the legislator of the given country” (paragraph 5).

Another important circumstance is tightly related to the issue under discussion. The point is that the issue of citizenship of the Republic of Armenia is led by the “blood” principle which means that wherever, in which country is or lives the citizen of the Republic of Armenia, he does not lose the citizenship and is not withdrawn from the registration; therefore, he or she does not lose the right to participate in the relevant elections. As a result, while making the electoral lists of the participants of national elections, the names of persons who have the right to vote are included in the voters' register of the Republic of Armenia.

However, nearly no condition is envisaged in the current RA Electoral Code for exercising the right of voting by the mentioned persons. Thus, in Article 2(2) of the RA Electoral Code adopted in 1999 it was prescribed that “During the preparation and conduct of the elections, the citizens of the Republic of Armenia who reside or are outside of Armenia, have the right to vote. Diplomatic and Consular Representations of the Republic of Armenia, in accordance with the procedures set by this Code and by the Central Electoral Commission, guarantee the exercise of the electoral right of Armenian citizens.”

With the purpose of solving this problem, the old 1999 Electoral Code entitled the heads of diplomatic or consular representations working abroad, in accordance with the procedures set forth by the Central Electoral Commission, to compile the electoral lists of RA citizens who have the right to vote and who live or are in the relevant countries (Article 9(5)).

The citizens who were included in those lists were exercising their electoral right in the polling stations formed at the Diplomatic and Consular Representations of the Republic of Armenia for national elections (Article 15(4)).

The precinct commissions were summarizing the poll results in accordance with the procedure set forth by the Electoral Code and sending to the Central Electoral Commission of the Republic of Armenia.

This procedure continued to exist until 2007 when as a result of an amendment to the Electoral Code adopted on March 6, citizens who were abroad or were residing abroad were prohibited to exercise their electoral right in the polling stations formed at the diplomatic and consular representations.<sup>8</sup>

The RA Electoral Code published in 2008 (with amendments and supplements made on December 18, 2007) was prescribing that “in the Republic of Armenia the elections are held in the territory of the Republic of Armenia” (Article 1(5)).

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<sup>8</sup> See Law of the Republic of Armenia “On making amendments and supplements to the Electoral Code of the Republic of Armenia”, HO-79-N, 06.03.07.

The same procedure is prescribed also by the current RA Electoral Code: “Voting shall take place in the polling stations established on the territory of the Republic of Armenia...” (Article 54(1)).

The evaluation of such approach of the RA Electoral Code in the discussed issue is not our task. We can just suppose that the citizens who left the Republic are, first of all, the persons who had a misunderstanding with the current authorities regarding this or that issue; therefore, they cannot have an objective conduct concerning their political orientation.

Regardless of all the circumstances, assumptions, in our opinion holding the poll only in the territory of Armenia deprives the citizens of the Republic of Armenia who are or live abroad from their electoral right as hardly ever will the citizen of the Republic of Armenia living abroad visit Armenia, participate in in the poll and then return to the country where he lives.

The Electoral Code envisages an exception from the general rule (exercising the right of voting in the territory of the Republic of Armenia) for electors who are on diplomatic service in diplomatic and consular representations of the Republic of Armenia, as well as the members of their families residing abroad with them and having the right to vote, who may, in case of being outside the territory of the Republic of Armenia on the voting day, participate in national elections by voting electronically within the time limits and as prescribed by the Central Electoral Commission (Article 60(1)).

This procedure is applied also to the voting staff of overseas representations of legal entities registered in the Republic of Armenia (irrespective of the form of ownership), as well as the voting members of their families residing abroad with them (Article 60(3)).

In such situation when there is a single list of voters for holding elections in the Republic, which includes also the citizens of the Republic of Armenia who reside abroad and have the right to vote, if the free access to the electoral lists is prohibited among the participants of the electoral process, the public will naturally have



reasonable doubts that the votes of the citizens residing abroad are used by the political powers participating in the elections in favor their interests. Hence, there arises a doubt about the legitimacy of the elections and distrust towards the winning political powers.

In this regard, we think the following offer may become an option for solving this issue. As it has already been said, until 2007 the citizens of the Republic of Armenia being or residing abroad exercised their electoral right in the polling stations formed in the Diplomatic and Consular Representations of the Republic in the procedure prescribed by the Central Electoral Commission. For these very aims, the latter was drawing up the electoral lists and electoral precinct centers where the citizens were exercising their electoral right.

According to the current Electoral Code, nowadays the citizens who live abroad can exercise their electoral right only in polling stations established on the territory of the Republic of Armenia (Article 54(1)). In this regard, it will be appropriate if the Diplomatic and Consular Representations in foreign countries, according to the procedure prescribed by the Central Electoral Commission, draw up the lists of the RA citizens who are or reside in the given country and present to the state government body authorized by the Government which runs the state register of the population, which can give them to the precinct electoral centers in the prescribed period (heads of penitentiary institutions and of facilities for holding arrestees, and the commanders of military units draw up the lists of eligible electors).

These lists can be posted in the relevant electoral precinct in a visible place both before and after the poll, noting that in that way the “confidentiality of voting” of the Armenian citizens living abroad will not be violated as their number will not be that high, we guess.

As a result of the justifications and conclusions made regarding the discussed issue, we can offer the following amendments and supplements to some of the articles of the RA Electoral Code.

**First**, in Article 7 of the RA Electoral Code (“Maintaining the register of electors; drawing up lists of electors”) besides the heads of penitentiary institutions and facilities for holding arrestees, as well

as the commanders of military units, entitle also the heads of diplomatic missions and consular representations in foreign countries to draw up lists of voters. In this regard, Article 7(3) of the RA Electoral Code shall read as follows: “3. Heads of diplomatic missions and consular representations in foreign countries, penitentiary institutions and facilities for holding arrestees, as well as commanders of military units shall also draw up lists of electors in cases and in the manner prescribed by this Code”.

**Second**, Article 8 of the RA Electoral Code (Including electors in the list) prescribes the procedure for including in the list the citizens of the Republic both in national elections and in the elections of local self-government bodies. As the citizens of the Republic of Armenia who reside or are abroad can participate only in national elections, in Article 8 of the Code a paragraph can be added with the following contents (it is appropriate to add it after paragraph 8): “In national elections, citizens of the Republic of Armenia having the right to vote, who submitted an application and who reside or are out of the territory of the Republic of Armenia, are included in the lists of electors according to the procedure prescribed by the Central Electoral Commission.

In case of absence of diplomatic and consular representations of the Republic of Armenia in foreign countries, the citizen of the Republic of Armenia may apply for being registered at the diplomatic or consular representation of the Republic of Armenia which operates in the state near the place of his or her residence”.

**Third**, Article 10 of the RA Electoral Code prescribes the procedure for providing the lists of electors to the electoral commissions and to the person possessing the premises of a polling station. According to that article, “the authorized body shall, two days before the voting day, provide to chairpersons of precinct electoral commissions the lists of electors drawn up by the authorized body as per electoral precincts and the addresses of residential buildings (houses) included in the electoral precinct, in two printed carbon copies” (paragraph 3).

In the same procedure, the commander of the military unit,

heads of penitentiary institutions and places for holding arrestees compile the relevant electoral lists and provide them to the chairperson of the precinct electoral commission 2-3 days prior to the voting day.

There is another problem in case of electoral lists which are compiled outside the territory of the Republic of Armenia. Those lists are compiled, paginated, and each page is signed by the heads of diplomatic and consular representations of the Republic of Armenia in foreign states. And as there may be citizens in the list who are registered in different communities of the Republic, the heads of diplomatic or consular representations of the Republic of Armenia who compile the lists send the electoral list to the governing body authorized by the Government of the Republic of Armenia, conducting the State Population Register.

In this regard, it is appropriate to envisage a separate paragraph in Article 10 of the RA Electoral Code (after paragraph 3) with the following contents:

“After having received the electoral lists, the authorized body shall, based thereon, draw up a single list of electors as per electoral precincts and the addresses of residential buildings (houses) included in the electoral precinct, in two printed carbon copies (the first carbon copy of the lists of electors shall be drawn up in the form of a book, and the second carbon copy shall be for posting in the polling station)”.

**Fourth**, the lists drawn up outside the territory of the Republic of Armenia are considered to be the integral part of the register of electors of the Republic of Armenia. Upon receiving the lists of electors drawn up by the heads of diplomatic and consular representations of the Republic of Armenia in foreign states, the state governing body authorized by the Government (the authorized body) which conducts the State Population Register coordinates them as per the place of registration and provides two copies of it to the relevant precinct electoral commission as a single list.

The electoral precinct uses the first copy of the lists drawn up in the form of a book for organizing the poll of the citizens of the

Republic of Armenia, residing abroad, and the second copy posts in the polling station.

After the elections are finished and the results of the voting are summarized, the copy of electors list which was signed by the electors when voting, is posted in the constituency within the period prescribed by the Central Electoral Commission and is freely accessible.

In this regard, the following supplement to Article 11(1) (“Accessibility of the lists of electors”) of the Electoral Code may be made: “The list of electors of the Republic of Armenia and ***the signed list of electors who are or reside abroad*** are freely accessible, except for the lists drawn up in military units as well the lists signed by the electors”.

The signed lists of electors should not be published, photocopied, photographed or videotaped, except for ***the lists signed by electors who are or reside abroad.***”

***Fifth***, Article 31(1) of the RA Electoral Code (“Rights, obligations, and guarantees for activities of observers and mass media representatives”) entitles the observers and mass media representatives to freely familiarize with election documents under the disposal of the electoral commission, to receive copies or excerpts thereof, except for the lists signed by the electors.

In our opinion, this exception should not apply to the lists drawn up outside the territory of the Republic of Armenia, including the electoral lists signed by voters. In this regard it is appropriate to make the following supplement in the text of Article 31(1)(3) of the Electoral Code: after the words “the relevant statement provided to the electors by the authorized body” in the 7<sup>th</sup> line of the mentioned paragraph add “, the lists drawn up outside the territory of the Republic of Armenia which are signed by the electors”, then leave the rest unchanged.

***Sixth***, the RA Electoral Code gives rights with the same contents to the proxies of the candidates as well. According to Article 33(1)(2) the proxies are entitled to freely familiarize with election documents under the disposal of the electoral commission,

receive their copies or excerpts thereof, except for the lists signed by the voters. In our opinion this exception for the observers, mass media representatives as well as the proxies should not be applied to the lists compiled outside the territory of the Republic of Armenia, including the electoral lists signed by voters. Thus, it is appropriate to make the following amendment to the text of Article 33(1)(2) of the Electoral code: after the words “the relevant statement provided to the electors by the authorized body” in the 7<sup>th</sup> line of the mentioned paragraph add “, the lists drawn up outside the territory of the Republic of Armenia which are signed by the electors”, then leave the rest unchanged.

**Seventh**, the given article (Article 33) of the RA Electoral Code envisages a range of other rights and responsibilities for proxies. The most important ones are: during the summarization of the voting results freely familiarize with the cast ballot papers and indications made therein, be present during the counting of ballot papers and summarization of voting results (paragraph 1, part 7), etc.

But, in our opinion, the controlling function of the proxy over the electoral processes is considered as even more important by the precinct electoral commission while summarizing the results of the voting, as the results of voting (both for objective and subjective reasons) are mostly falsified in this case.

This is proved by the Council of Europe's Observation Mission Final Report regarding the Parliamentary Elections of May 6, 1912, where it is stated that “[o]ne fifth of observed vote counts were assessed negatively, mainly due to procedural problems, such as failure to perform basic reconciliation procedures, cases of non-transparent counts, problems completing the results protocols, and isolated cases of serious violations”<sup>9</sup>.

In this regard, Article 67(4) (“Procedure of summarization of voting results in electoral precincts”) of the RA Electoral Code envisages that the chairperson of the precinct electoral commission shall open the ballot box, take one ballot envelope out of the ballot

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<sup>9</sup> Republic of Armenia Parliamentary Elections, 6 May 2012. OSCE/ODIHR Election Observation Mission, Final Report. Warsaw, 26 June 2012, page 3.

box, and announce out loud whether the envelope is of established sample or not, then demonstrate it in such a way that it is visible to those present. If requested, the ballot envelope shall be passed on to the other commission members.

In this process the proxy who is, in essence, the most interested party of a fair outcome of election actually does not have the possibility of direct supervision and plays just the role of a passive observer. Hence, the Electoral Code should provide a real possibility for the proxies to control the activity of the electoral precinct commission mostly in the stage of calculating the votes and summarizing the results of the elections. In this regards, in our opinion, it is appropriate to stipulate a provision in Article 67(4) of the Electoral Code, whereby if requested the commission chairperson shall pass the ballot paper not only “to the other commission members”, but also to the proxy. Thus, it is necessary to add the words “and to the proxy” after the expression “to the other commission members”, at the end of the first sentence of Article 67(4) of the Code.

Besides, it is appropriate to entitle the proxy with the right to raise an objection if he disagrees with the opinion expressed by the chairperson of the precinct electoral commission during the counting of the votes. This objection is envisaged for the commission members.

In this regard it is necessary to add the words “or the proxy” after the expression “commission member” on lines 6, 7, 8, 16 and 17 of Article 67(4) of the Electoral Code, and after the phrase “to the other commission members” on line 15 add the words “and to the proxy”.

In our opinion, in this way we will solve several key issues closely related to keeping the electoral lists signed by the citizens secret and related to their disclosure.

a) The prohibition of publishing the electoral lists signed by voters of the Republic of Armenia, except for the electoral lists signed by the citizens of the Republic of Armenia who are or reside abroad, will no longer cast doubt that those lists may be falsified.

b) There will be no other opinion that there is a requirement of introducing Article 54 of the international document of Venice Commission of the Council of Europe with the title “Code of good practice in electoral matters: guidelines and explanatory report” into the RA Electoral Code, which reads as follows “...since abstention may indicate a political choice, the lists of persons voting should not be published”.

c) The Republic of Armenia citizens’ faith in free and fair elections, therefore also in the state authorities and local self-government bodies formed as a result of it, will be restored.

d) It will be possible to find out the actual number of citizens who reside in the Republic of Armenia and have electoral rights and the number of citizens who participated in the voting of each national election which will give a possibility to obtain an understanding of the statistics of citizens' participation in the elections.