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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**
**(VENICE COMMISSION)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**
**(OSCE/ODIHR)**

# ARMENIA

# URGENT JOINT OPINION

# ON AMENDMENTS TO THE ELECTORAL CODE AND RELATED LEGISLATION

**on the basis of comments by**

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## I. Introduction

1. By letter of 4 March 2021, Mr Ararat Mirzoyan, Speaker of the National Assembly of Armenia, requested an opinion by the European Commission for Democracy through Law of the Council of Europe (hereinafter "Venice Commission") and the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") on draft amendments to the Electoral Code of Armenia as well as laws amending the Code of Administrative Offences, the Criminal Code, the Labour Code and the Law on Public Service (CDL-REF(2021)018, CDL-REF(2021)019).[1] According to the established practice, the opinion has been prepared jointly by the ODIHR and the Venice Commission.

2. Ms Biglino Campos, Messrs Barrett, Holmøyvik and Kask acted as rapporteurs for the Venice Commission. Ms Eirini-Maria Gounari was appointed as legal expert for ODIHR.

3. On 8-9 April 2021, a joint delegation composed of Ms Biglino Campos, Messrs Barrett, Holmøyvik and Kask on behalf of the Venice Commission, and Ms Eirini-Maria Gounari on behalf of the ODIHR, accompanied by Mr Gaël Martin-Micallef from the Secretariat of the Venice Commission and Mr Hamadziripi Munyikwa from the ODIHR, participated in a series of video conference meetings with representatives of parliamentary groups of the National Assembly, extra-parliamentary parties, the Standing Committee on State and Legal Affairs of the National Assembly, the Central Electoral Commission, the Prime Minister's Office, the Deputy Minister of Justice, the Corruption Prevention Commission as well as non-governmental organisations and the international community represented in Yerevan. This Joint Opinion takes into account the information obtained during these meetings. The ODIHR and the Venice Commission are grateful to the National Assembly of Armenia and the Council of Europe Office in Armenia for the excellent organisation of the videoconferences.

4. This Joint Opinion aims at assisting the Armenian authorities, political parties, and civil society in their continued efforts to develop a sound legal framework for democratic elections.

5. The Venice Commission authorised the rapporteurs to prepare this urgent opinion at its online 126th Plenary Session. It was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 21 April 2021.

## II. Scope of the Joint Opinion

6. The scope of this Joint Opinion covers only the amendments to legislation officially submitted for review ("the amendments") including the provisions which were passed by the National Assembly on 1 April 2021. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections in Armenia.

7. The recommendations issued in the Joint Opinion by the Venice Commission and the ODIHR are based on international standards, norms and practices, as for example set out in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and its additional protocols, as well as the relevant OSCE human dimension commitments, and the Venice Commission's Code of good practice in electoral matters.[2] The Joint Opinion also highlights, as appropriate, good practices from other Council of Europe member states and OSCE participating States in this field. When referring to national legislation, the ODIHR and the Venice Commission do not advocate for any specific country

[1] See also CDL-REF(2021)020, CDL-REF(2021)021, CDL-REF(2021)022, CDL-REF(2021)026 and CDL-REF(2021)029.
[2] Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor.

model; they rather focus on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws.

8. This Joint Opinion is based on unofficial English translations. Errors from translation may result.

9. In view of the above, the ODIHR and the Venice Commission would like to make mention that this Joint Opinion does not prevent the ODIHR and the Venice Commission from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating political parties and electoral legislation in Armenia in the future.

## III. Executive summary

10. The Venice Commission and ODIHR note with satisfaction that consultations among the political stakeholders and non-governmental organisations were broad and took place within an adequate timeframe in order to ensure that amendments of such fundamental texts receive the widest possible support amongst different political forces, civil society and expert community. This resulted in the adoption by the Parliament on 1 April 2021 of a first set of amendments to the Electoral Code concerning the abolition of the territorial candidate lists with 82 votes in favour and no abstentions or votes against.[3] The signing of the amendments into law is pending.

11. The Venice Commission and the ODIHR have taken note that these amendments are supposed to be applied to the forthcoming early parliamentary elections, which are tentatively scheduled for 20 June 2021. Any legislative change taking place so close before an election should be in principle avoided as it leads to uncertainty. Additionally, the public and all stakeholders have to adapt to new rules in a tight time frame. The abolishment of the territorial candidates lists does not alter the electoral system proper, but it does appear to formally change the way votes are turned into mandates in terms of geographical representation. However, the simplification of the proportional electoral system appears to enjoy a broad support by most of the political forces and the civil society. The changes have been discussed and prepared for a long time following an inclusive and transparent political process. In addition, although the next parliamentary elections would take place in less than three months, in purely technical terms the new system does not seem to have a major impact either on the capacity of the electoral administration to organise such elections, or on the understanding of the procedures by the voters.

12. The package of amendments is to be broadly welcomed as it addresses the majority of recommendations raised in previous Venice Commission and ODIHR opinions, as well as in ODIHR Election Observation Missions final reports, in particular those related to:

- Enabling the formation of governing coalitions by extending the required time limits and removing the restriction in the number of parties to form a coalition;
- Reducing the electoral deposit for political parties, thus facilitating the right to be elected;
- Increasing the type and amount of information provided to the electorate via the Central Electoral Commission's website;
- Requiring the publication of the list of electors on the Central Electoral Commission's website;
- Providing for wider coverage of the activities that constitute election campaigns and increased transparency of campaigns on the media;
- Offering clarifications on the use of administrative resources;

[3] CDL-REF(2021)032. MPs from the opposition Prosperous Armenia and Bright Armenia parties did not take part in the vote.

- Reinforcing provisions for campaign finance reporting and auditing leading to increased transparency;
- Strengthening the quota mechanism for promoting the participation of women as candidates;
- Including additional provisions to facilitate the participation of people with disabilities as voters.

13. However, the Venice Commission and ODIHR make the following key recommendations aimed at improving these amendments:

A. Reconsidering the provisions relating to electoral thresholds;
B. Clarifying the notion of "false information" so that it does not interfere with legitimate aims, for example investigative media, or stifle political debates;
C. Extending legal standing to allow for voters to submit challenges against election results;
D. Clarifying the meaning of "gross violation" as a ground of early termination of powers of a member of a constituency and precinct electoral commission;
E. Providing for longer time frames to submit an application for recount.

14. In addition for the purpose of the forthcoming early parliamentary elections, the ODIHR and the Venice Commission recommend that specific measures for holding elections during emergency situations including pandemic periods be stipulated in law or in infra-legal texts well in advance.

15. The Venice Commission and ODIHR stand ready to assist the Armenian authorities, in particular to facilitate the implementation of the revised Electoral Code and related legislation.

## IV. Analysis and recommendations regarding the draft amendments to the Electoral Code

16. The Venice Commission and ODIHR will examine the conformity of the procedure as well as of the content of the amendments with international standards. The opinion will not address the constitutionality of the amendments. This should be the task of the Constitutional Court.

### General remarks

### 1. The reform process

17. Any successful changes to electoral and political party legislation should be built on at least the following three elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) the political commitment to fully implement such legislation in good faith. In particular, the ODIHR and the Venice Commission stress that an open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the state institutions in general.

18. It appears that the current proposals follow from a long and inclusive public debate, as indicated in the explanatory note on the amendments, and the regular meetings held *inter alia* by a working group composed of the three factions seating in parliament as well as an advisory group including representatives of ministries, the Central Electoral Commission (hereafter "the CEC"), non-governmental organisations and international experts.

19. The Venice Commission and the ODIHR welcome these broad consultations and public discussions. Such processes, when conducted in a meaningful way, increase all stakeholders'

understanding of the various factors involved and enhance confidence and trust in the adopted legislation. It is to be hoped that this will lead to a period of stability during which future adjustments can be planned based on experience and evidence.

## 2. Amendments to the Electoral Code adopted on 1 April 2021 in the light of the principle of stability of the electoral law

20. On 1 April 2021 the National Assembly adopted the amendments to the Electoral Code abolishing the territorial candidate lists. These changes were approved by the National Assembly of the Republic of Armenia by 82 votes in favour with no votes against and no abstentions.[4] On 17 April 2021, the President of the Republic announced that he would not sign the law but would not apply to the Constitutional Court. Thus, the signing of the amendments into law is pending.

21. The Venice Commission's Code of Good Practice in Electoral Matters and its Interpretative declaration on the stability of electoral law[5] underline the importance of the stability of the legal electoral framework as part of the credibility of any electoral process. If any amendments are made to fundamental elements of electoral law (such as the electoral system proper; the rules relating to the membership of electoral commissions or another body which organises the ballot; the drawing of constituency boundaries and rules relating to the distribution of seats between the constituencies), they should take place well in advance of the next elections and at any rate at the latest one year beforehand. Should early elections be called after the introduction of changes to an electoral system, this system should be applied only at least one year after the adoption of the amendments.[6] Repeated changes therefore undermine the credibility of electoral processes.

22. Nevertheless, changes may be acceptable if they are technical rather than substantive and are based on recommendations from grounded expert advice. Additionally, the Venice Commission underlined that the reservations stated in the Code of good practice in electoral matters and the Interpretative declaration on the stability of electoral law regarding substantive changes are less relevant if there is consensus among political forces about the changes.[7] Such late amendments also suppose they leave a reasonable time for the election administration and the political stakeholders to organise properly the elections, and for the citizens to understand the outcomes of such a reform.

23. The amendments to the Electoral Code adopted on 1 April 2021 would simplify the electoral system. Even though the abolishment of the territorial candidates lists does not alter the electoral system proper, it does appear to formally change the way votes are turned into mandates in terms of geographical representation. In this sense, the abolishment of the territorial candidate lists appears to be a change of a fundamental element of the electoral system shortly before the election. However, the simplification of the proportional electoral system appears to enjoy a broad support by most of the political forces and the civil society. It is also significant that the changes had been discussed and prepared for a long time following an inclusive and transparent political process. One of the arguments justifying this change is the need to reduce regional inequalities in the value of the ballot. Although the next parliamentary elections would take place in less than three months, in purely technical terms the new system does not seem to have a major impact either on the capacity of the electoral

[4] MPs from the opposition Prosperous Armenia and Bright Armenia parties did not take part in the vote.
[5] See Code of Good Practice in Electoral Matters, II.2.b, and Interpretative declaration on the stability of electoral law.
[6] See Code of Good Practice in Electoral Matters, and Interpretative declaration on the stability of electoral law. See also Joint opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament) of the Republic of Moldova, para. 12.
[7] Idem.

administration to organise such elections, or on the understanding of the procedures by the voters.

## 3. The structure of the Electoral Code

24. The Electoral Code as proposed to be amended (hereafter "the Code") is very long and detailed, compared to similar laws in other countries. The Code is reasonably well structured but it is nonetheless very hard to navigate. Such an elaborate and detailed piece of legislation can lead to difficulties in the application of its provisions; repetitions as well as possible discrepancies or loopholes in the legislation can also occur. Situations unforeseen by the legislation may nevertheless arise. Solutions to such unforeseen circumstances should be based on general principles of democratic elections such as free, universal, equal and secret vote. An alternative legislative technique would be to reserve the law for the main principles and key rules on the election bodies and the different steps in the election, while giving more detailed rules (such as step-to-step guidelines for election officials and stakeholders) in secondary legal instruments.

25. The proper implementation of the amended Code and the other revised laws, including the training of election commissioners, will be crucial, especially for the Central Electoral Commission and in the context of early parliamentary elections planned for 20 June 2021.

## 4. Transparency of the electoral process

26. Overall, the amendments increase the transparency of electoral processes. The various amendments proposed in Article 8 participate in this increased transparency. The amendments include a more extensive use of video recording in polling stations and during CEC meetings. Further, the amendments give a central role to the use of the CEC website. The amendment in Article 8.10 addresses a previous recommendation of the 2016 Second Preliminary Joint Opinion of the Venice Commission and the ODIHR related to the transparency of the tabulation process[8] by introducing the requirement for the CEC to post the scanned extracts of the records of the voting results of electoral precincts on its website no later than 36 hours after the end of voting, with the possibility to download them. Similarly, Article 8.12 providing for video recording of the voting and counting processes, adds a requirement that the real time and number of the polling station must be visible on the video footage. This will increase voters' confidence in the credibility of the process. Additionally these amendments require that video-recordings remain accessible on the relevant website until the publication of the final results, after which their carbon copies may be provided, upon request, to electoral commissioners, representatives of political parties and of observer organisations. The foregoing not only enhances the transparency of the process but also facilitates the collection of evidence by electoral contestants to support any challenges of the results. However, it is advisable that a paper record of all interactions done via the website be available for future complaints and appeals as well as research. **The Venice Commission and the ODIHR recall the importance of procedures devoid of formalism and easily accessible for every citizen and political party, which may imply the possibility to maintain a paper-access procedure as well. Moreover, consideration should be given to moving some of that detail to secondary legal instruments.**

27. While measures leading to greater transparency of electoral processes are generally to be welcomed, it is necessary that these are applied cautiously with regard to certain documents and information. For instance, publishing the income and property declarations of parties and candidates on the CEC website, which will include private data, may raise privacy

[8] Second Preliminary Joint Opinion on the Electoral Code (as amended on 30 June 2016), CDL-PI(2016)008, page 5, para. 20.

concerns. **These provisions should be reconsidered in the light of international standards and best practices on personal data protection.**

## 5. Holding elections during emergency situations

28. The amendments address the issue of holding elections or referendums during emergency situations, including epidemics. Such amendments are overall in line with international standards.[9]

29. The main amendments include the possibility to hold local elections in parts of the country during an emergency situation, if the emergency affects the country only partially (Article 7 para 3). Such amendments would have an impact on campaigning in national media. If the local elections are not held at the same time, the situation and political discussions in the areas ahead of local elections will be discussed more widely in the media.

30. Proposed Article 55 foresees a wide margin of appreciation for the CEC in regulating the specific issues related to holding elections during the epidemic. Due to the difficulties in foreseeing the needs and possible solutions to be addressed, this approach is welcome. It however remains in the hands of the parliament to define the balance between the necessary restrictions imposed by holding elections during a pandemic and the necessity to ensure to a maximum extent a fair and transparent electoral campaign and the subsequent respect of fundamental freedoms, in particular the freedom of expression. The CEC should therefore not decide on the limitations regarding campaigning without guidance from the lawmakers, especially concerning public gatherings. Emergency periods are also an opportunity for lawmakers to facilitate additional ways of campaigning, for instance by allowing free time slots in the public media or longer campaign periods. It may not be the case in view of the forthcoming early parliamentary elections. Other possibilities may ease the organisation of elections during emergency periods and may be considered for future elections that may occur in such emergency situations, such as extending elections to more than one day or developing a wider use of mobile or drive-through voting with additional integrity measures.

31. Article 69 new para 9 (former Article 65) affords the CEC the responsibility to decide on the number of authorised persons within the voting premises and to restrict access to polling stations during emergency periods as necessary. Such a measure is justified provided that it does not lead to arbitrary choices by the CEC regarding access by election observers. The observation of elections is indeed one of the most important guarantees of legality of the elections and a source of public trust. Alternative solutions may therefore be acceptable if they are widely agreed by the various political forces and non-governmental organisations and if applied as transitory and exceptional measures.

32. Proposed Article 40.22 of the Code on Administrative Offences provides for fines in case of failure to use individual protective measures when conducting election campaigning. As the violation itself does not differ in case of campaigning or other action in public sphere, it has to be guaranteed that the punishment is not more severe than the violation of the requirement to use protective measures in other activities. Thus, **the restrictions applied during campaign periods should not be more severe than those outside campaigning periods.**

[9] In accordance with the derogation clause of Article 4 of the ICCPR, which provides that Member States may take measures restricting rights "to the extent strictly required by the exigencies of the situation' and with General Comment 29, according to which the emergency measures must be limited in geographic and material scope and targeted to the problem. See Report on the "Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections", in particular Section II. K. See also Interim Report on the measures taken in the EU member State as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights, in particular Chapter VI.

33. **The Venice Commission and the ODIHR recommend that specific measures for holding elections during emergency situations including pandemic periods be stipulated in law or in infra-legal texts well in advance to the forthcoming early parliamentary elections, including at the initiative of the Central Electoral Commission in its regulatory limits.**

## 6. The election of local self-government bodies (Councils of Elders)

34. The current Electoral Code applies a majority electoral system for local elections whereas a proportional electoral system applies for the three main cities of the country, i.e. Yerevan, Gyumri, and Vanadzor. According to the explanatory note, the electoral legal framework was amended in 2020 to introduce a proportional system in all municipalities of more than 4000 inhabitants. Moreover, following recommendations of the 2016 Joint Opinion, the bonus that a party would receive if it won at least 40% of the votes was abolished, and the threshold was lowered to 4% for parties and 6% for coalitions.[10] While not commenting on the choice of the electoral system overall, these amendments should be considered as a positive step. However, the necessity of a threshold for local elections could be questioned.

### A. Amendments relating to the issue of stability of parliament

35. A difficulty with the electoral arrangements since the adoption of the 2015 Constitution has been the requirement in Article 89.3 for a 'stable majority in Parliament'. In order to be consistent with this constitutional provision, revised Article 96 of the Code (numbered Article 100 in the draft Code) slightly departs from the strict proportionality by stipulating that a party or coalition which wins 50% of mandates is given 52% of the mandates, instead of the previous 54%. This revised premium makes it easier to establish a majority government and makes the overall system slightly less rigid while still in conformity with the Constitution.

36. Article 108.2 of the amendments proposes to align the timetable for early elections with normal terms in so far as this is possible to comply with the Constitution. Currently after dissolution 'by virtue of law' (which includes snap elections) the President calls the early elections within a short timeframe. It may be that time scales for elections in the Code are understandably influenced by the expectation that an election will lead to stable government.

### B. Amendments relating to the electoral system

37. The present section assesses the draft amendments relating to the electoral system as submitted on 4 March 2021 including the amendments on the abolition of territorial candidate lists of 1 April 2021.

*The choice of the electoral system*

38. The Venice Commission and the ODIHR have consistently expressed the view that the choice of an electoral system is a sovereign decision of a state through its political system,[11] being a matter of national choice influenced by the political tradition. The Commission and the ODIHR also underlined that "any electoral system is in principle acceptable as long as it

[10] See Article 146 Part 3. See Joint Opinion on the draft electoral code as of 18 April 2016, para 100 *et seq*.
[11] Report on proportional electoral systems: the allocation of seats inside the lists (open/closed lists), CDL-AD(2015)001, para. 9. See i.e. Republic of Moldova – Joint Opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament), CDL-AD(2017)012, para. 25 to 28; Armenia – Joint Opinion on the draft electoral code as of 18 April 2016, CDL-AD(2016)019, para. 27; Joint Opinion on the draft Law amending the electoral legislation of Moldova, CDL-AD(2014)003, para. 21 and 25.

respects the international standards in the field of elections"[12] and that "people have to trust the chosen system and its implementation".[13]

39. The amendments adopted on 1 April 2021 by the National Assembly would involve a change of the electoral system, which according to Article 89.3 of the Constitution has to be "a proportional electoral contest". Article 81 of the Code now establishes a simple proportional electoral system for elections to the National Assembly by abolishing the territorial candidate lists and is therefore only based on a nationwide constituency.

40. The system outlined in Articles 99 *et seq*. provide for one closed national list for each party and alliance. This proportional system includes some departures from strict proportionality and equality of the ballot. Moreover, the proposal to abolish the territorial candidate lists and concentrate on one national list reduces regional inequalities in the value of the ballot.

41. The newly proposed system keeps the requirement that parties have a minimum of 80 candidates in their lists. This measure was justified by some interlocutors during the online meetings held on 8-9 April 2021 as a way to deter frivolous parties from contesting the elections. However, this figure should be reconsidered as it appears to make it more difficult for small parties to participate in the contest. Such a restriction might be thus disproportionate and difficult to be justified.

*A two-round system*

42. A second round of elections is foreseen in Article 89 of the Constitution if "a stable parliamentary majority is not formed as a result of elections or through formation of a political coalition". Articles 99, 101, 102, and 103 thus maintain the two-round system from the current law. The distribution formula is the method of the "largest remainder", applied to the results of the parties and alliances passing the threshold. According to Article 99.3.1, if a party or alliance wins at least 50% of the total number of mandates (53 seats out of the 105 seats (101 seats plus four minority seats)), the first round is final. If no party or alliance holds 50% of the mandates at the election or in the post-election attempts to form new alliances, Article 102 of the draft law provides for a second round to be held between the two political parties or alliances having received the highest number of valid votes in the first round.

43. Concerning the potential effects of a second round on the results of the first round and overall on the proportionality of the system**,** the second round appears not to have an impact on the result of the first round. According to Article 102 Part 4 read in conjunction with Article 100, the winner of the second round will receive additional mandates until the legal requirement of 52% is reached. This is achieved by increasing the overall number of mandates (the Constitution only provides for a minimum number of seats). **The draft law may benefit from clarifying the status of the election results of the first round in relation to the second round and the consequences for the parties not taking part in the second round.**

*Coalitions*

44. Compared to the current law, Article 101 stipulates that there are no longer any limitations to the number of political parties that can form a political coalition, facilitating the formation of alternative coalitions in case the major political parties fail to form one. Additionally, Part 1 of the draft law extends the deadline for forming a political coalition in order to obtain a majority from 6 to 14 days. Since coalition building is a complicated matter both before and after an

[12] Code of good practice in electoral matters: guidelines and explanatory report, CDL-AD(2002)023rev-cor2, II.4.
[13] Report on proportional electoral systems: the allocation of seats inside the lists (open/closed lists), CDL-AD(2015)001, para. 9.

election, the removal of the restriction on the maximum number of parties and the extension of the deadline takes into account previous recommendations from the ODIHR and the Venice Commission and is to be welcomed.[14]

*Thresholds*

45. There is no European standard on electoral thresholds. Electoral thresholds are used as a mechanism to balance fair representation of views in the Parliament with effectiveness in the Parliament and capacity to form stable governments. How this balance is struck and how thresholds are used to this aim differs between countries and electoral systems. The ECtHR has recognised that states have a wide margin of appreciation in this respect.[15]

46. Taken as a whole, the amendments in relation to the mechanisms used for turning votes into seats appear to emphasise plurality in the parliament and seem to slightly weaken the stable majority principle in Article 89.3 of the Constitution compared to the current electoral law.

47. Article 99.4 of the draft law reduces the threshold for political parties for participating in the distribution of mandates from 5% to 4%. This amendment is a step towards a more pluralistic composition of the parliament and is to be welcomed. The second paragraph of Article 99.4 has a very complex and unclear wording. This may be due to the English translation. If not, the text should be clarified.

48. However, contrary to the recommendations made by the Venice Commission and the ODIHR in the 2016 Joint Opinion, the draft law maintains a higher threshold for electoral alliances.[16] Moreover, the threshold for electoral alliances has been increased to 8% in case of an alliance with two political parties, 9% for three parties, and 10% for four political parties. Graduated thresholds are not contrary to European standards, though they are rare,[17] but they complicate the system for distribution of mandates.[18] Given the great emphasis on stable majorities in the current Electoral Code and its codification in the Constitution, one may assume that this is also the aim for the graduated thresholds. However, no justification is given for the amendment, and the necessity of the increased threshold for coalitions is not clear given that the general threshold is lowered. While the state has a wide margin of appreciation in balancing fair representation with government stability, thresholds should nonetheless be justified in the specific political and institutional context.[19] In the 2016 Joint Opinion, "[t]he Venice Commission and OSCE/ODIHR recall that proportional systems are intended to create a representative parliament and any modifications to this goal should be implemented with care and out of clear need."[20]

49. Compared to the current electoral law, Article 32 of the law of 1 April 2021 (referring to Article 100 of the Code) would reduce the prime of additional mandates awarded to a party or a coalition that receives 50% of the mandates from 54% to 52% of the total number of mandates. This amendment taken together with the reduction in the general threshold would likely make the composition of the parliament more proportional compared to the system foreseen in the current law. Due to historical reasons, the Armenian constitutional principle of

[14] See Preliminary Joint Opinion on the draft electoral code as of 18 April 2016, para. 14 "A". See also Joint Opinion on the draft electoral code as of 18 April 2016, CDL-AD(2016)019, para. 29 and 30; and Second Preliminary Joint Opinion on the Electoral Code (as amended on 30 June 2016), CDL-PI(2016)008, para.17 and para.19.
[15] Yumak and Sadak v. Turkey [GC], 8 July 2008, No. 10226/03.
[16] CDL-AD(2016)019 Armenia – Joint Opinion on the draft electoral code as of 18 April 2016, para. 39.
[17] One example is Albania, with a 3% threshold for parties, and 5% for coalitions.
[18] See CDL-AD(2008)037, Comparative Report on Thresholds and Other Features of Electoral Systems Which Bar Parties from Access to Parliament, p. 6.
[19] See CDL-AD(2018)031, Turkey, Joint opinion on amendments to the electoral legislation and related "harmonisation laws"2 adopted in March and April 2018, para. 30-36.
[20] CDL-AD(2016)019 Armenia – Joint Opinion on the draft electoral code as of 18 April 2016, para. 25.

stable majority places a rather strong emphasis on government stability over proportionality. In this respect, the Venice Commission and the ODIHR notes that many states award a certain advantage to the largest parties or coalitions to promote government stability, but typically through less rigid measures, such as by the method of turning votes into mandates, i.e. by opting for the d'Hondt method or by modifying the Sainte-Laguë method by increasing the first divisor.[21]

50. Article 99.4 provides a formula for giving opposition parties additional mandates if one party or alliance gets a large majority. This formula is proposed to be amended by reducing the threshold for small parties from 4% to 2% in those circumstances. This is a welcome change as it allows for more diversity of parties rather than simply giving extra seats to those parties which exceeded 4%.

51. **The amendments pertaining to thresholds are not coherent as some are lowered while others are raised without a clear justification. The ODIHR and the Venice Commission recommend reconsidering accordingly the provisions relating to thresholds with the aim of keeping the right balance between the necessary stability of the parliament majority and the plurality proper to proportional systems.**

*National minorities*

52. There has been no substantial amendment to the distribution of the four mandates allocated to national minorities. The assessment of the 2016 Joint Opinion thus stands, including the concern for the allocation of minorities mandates arbitrarily shifting the balance between the political parties.[22]

### C. Amendments relating to the election administration

53. The amendments related to the election administration follow the previous recommendations by the Venice Commission and the ODIHR. A duty to follow training activities has been foreseen (Article 44.8; see also Article 44.5), as recommended by the last election observations missions. The rule for the composition of lower level election commissions (equal representation of political parties as well as additional members nominated by the higher level election commission) has not led to politicisation of the election administration, as the CEC is elected after a broad consultation and through a qualified majority (3/5 of the votes) in the parliament (proposed Article 45.2). The recruitment process is renewed, as the information of the selection of constituency election commission members has to be published on the website of the CEC (Article 46.4). The two-term limit for CEC members is not against international standards, although in order to better enhance the professionalism and competence of the election administration, such a rule might constitute an obstacle.

54. Among the criteria for the membership in election administration bodies, the draft law foresees a requirement that the person should never have been convicted for an intentional crime (proposed Article 44.2). Such restrictions may – at least for the positions in lower level election commissions – be disproportionate, especially if the sentence has been served years ago.

55. The grounds for dismissal of the members of election commissions have been clarified, in accordance with previous recommendations by the Venice Commission and the ODIHR.

[21] See Report on Electoral Systems – Overview of available solutions and selection criteria.
[22] See Preliminary Joint Opinion on the draft electoral code as of 18 April 2016, para 42. See also Electoral rules and affirmative action for national minorities' participation in decision-making process in European countries, para 65-70.

However, the previous recommendation to clarify the meaning of "gross violation" of provisions of the Electoral Code as a ground for early termination of powers of a member of a constituency or precinct electoral commission (proposed Article 48.7 and 48.8) has not been addressed.[23]

56. Article 56 para. 4 foresees a task of the constituency election commissions to provide information to the CEC on violations detected and the undertaking of measures prescribed by the legislation for the elimination thereof. This amendment is welcome.

### D. Amendments relating to the electoral campaigns

57. Article 20 sets out the main principles regulating election campaigning, including legal definitions of key concepts. Such legal definitions provide clarity and precision for the interpretation of the draft law. In line with the recommendations in the 2020 Joint Opinion, Article 26 now defines third-party involvement in the election campaign.

58. Article 20 delimits the duration of the electoral campaign, i.e. the day following the time limit for candidate registration, instead of the 7th day as previously stipulated, the type of activities that compose the campaign and the means by which the campaign can be conducted. The lists of activities and means enumerated in the provision are only examples of the ways in which the campaign may be conducted, since the said provision allows any other forms and means that do not contradict the Constitution, the Code or other laws. Importantly, this definition includes measures taken by third parties in favour of one party or coalition as long as the beneficiary is aware ("upon their knowledge") of the measure.[24] These new provisions must be welcomed as they clarify the extension and the nature of the electoral campaign.

59. However, combined with the broad concept of campaigning in Article 20.4 and 5, i.e. "description of possible consequences (positive or negative) in case of election of candidates, political parties (alliances of political parties)", even journalism and academic commentaries could be considered election campaigning according to the amendments. These are legitimate pursuits that are and should be outside candidates' control and thus the remit of the election campaign regulation. Considering that Article 20.16 and 17 makes the candidates accountable for violations of campaigning rules, it is important that the drafters narrow the definitions of campaigning to measures within candidates' or political parties' control. In this respect, Article 20.17 follows the recommendation in the 2016 Joint Opinion to provide for a range of clear and proportionate sanctions.

60. However, Article 20.16 and 17 does not change the previous regulation on the control of the procedure for election campaigning, which is exercised by election commissions. The ODIHR and the Venice Commission addressed this issue in their first 2016 Joint Opinion. Paragraph 73 of the opinion noted that there were only two possible options in case of violation of the rules on campaign. The first one was an injunction by the relevant election commission to stop the activity, or a three-day warning, which was considered too rigid by the opinion. In the case this approach did not work, the next step was an application to the courts to revoke the registration of the candidate or political parties. **The Venice Commission and the ODIHR reiterate their recommendations to clarify which authority is in charge of enforcing this provision and to specify by law a range of clear and proportionate sanctions for campaign-related offences.**

[23] Second Preliminary Joint Opinion on the Electoral Code (as amended on 30 June 2016), CDL-PI(2016)008, para. 36.
[24] See also the broad definition of third-party involvement in Article 26.

61. The draft laws on making amendments and supplements to the Code on administrative offences and to the Criminal Code follow this recommendation since both define conducts that are prohibited and establish sanctions for these actions. However, there is an important point that should be reconsidered.

62. Article 20.17 establishes that courts may revoke the registration of the candidate or the electoral lists of the political party running in elections in two circumstances: firstly, when the violation of the procedure for the electoral campaign is of continuous nature; secondly, when it is impossible to eliminate the consequences of the violation. In both cases, it is necessary that the committed violation be serious in that it "may essentially affect the election results".

63. The cancellation of the registration severely limits the fundamental right to be elected and it may be questioned whether this provision is consistent with international standards. The definition of the violation in Article 20.17 is too vague. In fact, it is very difficult to decide whether or not a violation of the law affects the results, especially if elections are still running.

64. Article 26 regulates the participation of third persons in the campaign, establishing limits to their expenditures and an obligation to declare such funds. The new regulation is welcome since it follows previous recommendations of the Venice Commission and the ODIHR.[25]

65. Article 23 appears to follow the recommendation of the 2016 Joint Opinion concerning "[a] specific rule on the use of posters or distribution of election material at some public buildings such as administrative buildings and schools should be considered due to allegations of misuse in the past."

66. Article 22 regulates election campaigning on the internet. Importantly, the provision requires all election campaign materials to be captioned, which should also apply to videos, pictures, and messages conveyed via social media through microtargeting techniques that may easily be concealed. Given the broad definition of "election campaigning" and "political advertising" in Article 20.4 and 7 respectively, enforcement by the authorities is vital for the effectiveness of the provisions of the draft law on election campaigning in order to guarantee equality of opportunity in the election. However, Article 22.6 and 7 only requires "Internet televisions" to provide airtime and report on political advertising, while no such reporting obligation is put on social media platforms or internet intermediaries. Effectively regulating the election campaign in the face of new and increased possibilities to influence voters through social media and microtargeting, while respecting the strong protection of political speech set by the ECHR, is a challenge for all Council of Europe member states.[26] The Venice Commission and the ODIHR recall the Council of Europe's Committee of Ministers declaration on the manipulative capabilities of algorithmic processes, which "emphasises in particular the need to assess the regulatory frameworks related to political communication and electoral processes to safeguard the fairness and integrity of elections offline as well as online in line with established principles. In particular it should be ensured that voters have access to comparable levels of information across the political spectrum, that voters are aware of the dangers of political redlining, which occurs when political campaigning is limited to those most likely to be influenced, and that voters are protected effectively against unfair practices and manipulation".[27]

[25] See paragraph 35 of the 2020 Joint Opinion on the draft amendments to the legislation concerning political parties.
[26] See CDL-AD(2019)016, Joint Report of the Venice Commission and the Directorate of Information Society and Action Against Crime of the Directorate General of Human Rights and Rule of Law (DGI) on Digital Technologies and Elections.
[27] Declaration Dec (13/02/2019)1 on the manipulative capabilities of algorithmic processes, https://search.coe.int/cm/pages/result_details.aspx?ObjectId=090000168092dd4b.

67. Given past experiences in Armenia,[28] a ban on "Cluster of vehicles and continuous presence of a person (persons) on the area adjacent to the polling station", provided by Article 24.3, and corresponding sanctions in the draft law on making amendments and supplements to the Criminal Code, appears justified and proportionate as it aims at preventing voter intimidation. A similar provision is repeated in Article 59.3 on the tasks of the police within the premises of polling stations. The provision empowers police officers carrying out service in the polling station to enforce the ban, which shall be carried out "irrespective of the request of the electoral commission". While the Code of good practice in electoral matters acknowledges that some member States have a tradition of police presence at the polling stations, these police powers "to enforce the ban of presence of persons adjacent to the polling station" should be clearly defined in order not to infringe on the head of the polling station's authority to maintain order within the polling station itself.[29]

68. Article 21 of the draft Code regulates the mission of public and private radio and television companies to ensure non-discriminatory conditions for candidates, political parties and coalitions. The provision guarantees free airtime in public media (para 1 and 2), equal access to paid airtime in public and private media (para 2 and 6) and impartial and unbiased information on election campaigns (para 3 and 6). The main innovation of this provision is the obligation imposed on the Public Television Company to organise debates. While the right to express opinions and ideas also encompasses the right not to express them, this provision does not seem to infringe the freedom of expression, as the duty to participate in the debates is aimed to guarantee the right of voters to receive information and to foster political participation.

69. Article 21.4 imposes an obligation to translate into Armenian sign language, and to subtitle video records of programmes. These provisions are welcomed because they improve citizens' equality to access to political messages during the election campaign, in line with the UN Convention on the Rights of Persons with Disabilities.[30]

70. Article 22 incorporates a new regulation on the electoral campaign on the Internet. The new rules apply similar limits and obligations to those established by Article 21 on radio and television. These constraints are not applicable to all websites, as they only affect mass media that have a news website, persons who are legal owners of an Internet website (para 1) and Internet televisions (para. 7). In general, the goal of these limits is to guarantee non-discriminatory and impartial conditions for candidates, political parties and coalitions running in the elections.

71. The limits established in Articles 21 and 22 are in line with the principles stated in the Code of good practice in electoral matters. Paragraph 1.2.3 of the Code states that "equality of opportunities must be guaranteed for parties and candidates alike". Paragraph 18 of the explanatory report of the Code of good practice in electoral matters also states that "the neutrality requirement applies to the electoral campaign and coverage by the media, especially the publicly owned media."

72. The Code of good practice in electoral matters recognises[31] that "media failure to provide impartial information about the election campaign and candidates is one of the most frequent shortcomings arising during elections."[32] For this reason, their recommendation is "to draw up

[28] See for instance PACE Observation report following the observation of the parliamentary elections in Armenia of 2 April 2017, notably para. 63: "[…] large groups of people were present in the immediate vicinity of polling stations in 30% of cases, with tensions and direct intimidation of voters seen in a number of cases."
[29] See Code of Good Practice in Electoral Matters, Explanatory Report, CDL-AD(2002)23rev2-cor, para. 112.
[30] The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 at the United Nations Headquarters in New York. The text is available at this link.
[31] Para. 18 of the explanatory report of the Code of Good Practice in Electoral Matters.
[32] Ibid., para. 19.

a list of the media organisations in each country and to make sure that the candidates or parties have a balanced amounts of airtime or advertising space, including on state radio and television".

## E. Criminalising false information and slander

73. Article 8 of the draft law on making amendments and supplements to the Criminal Code introduces a new Article 154.15 sanctioning the "Publishing — during the period of election campaign, on the voting day, before the end of the voting, or on the preceding day — false information or slander via information and communication technologies, anonymous source, about a political party (alliance of political parties) or a candidate running in elections, for the purpose of damaging the reputation thereof". The provision also lists a number of aggravating circumstances leading to a more severe punishment. This provision addresses the very complex issue of regulating false information or news intended to sway voters. So far, very few countries have adopted legislation allowing courts or electoral bodies to stop the spread of false information in the electoral context, Poland[33] and more recently France being notable exceptions.[34]

74. Criminalising the publishing of information in the electoral context raises obvious questions in relation to Article 10 of the ECHR and the Constitution of Armenia. Restrictions must be provided by law, have a legitimate aim and be necessary and proportionate. As underlined in the long-standing case law of the ECtHR, there is little scope under Article 10 of the ECHR for restrictions on political speech.[35] Politicians must accept closer public scrutiny of their statements and actions both in relation to their office and their private life.[36] For this reason, the ECtHR has in several cases found that the application of legislation aimed at preventing the spread of false information in the electoral context amounted to a disproportionate interference with the freedom of expression in the light of Article 10 of the ECHR.[37] While the ECtHR has recognised the importance of combatting the dissemination of false information in the electoral context, it has, at the same time, emphasised the particular importance of the free circulation of information and opinions during the electoral period.[38] The electoral context therefore blurs to a certain extent the well-established distinction[39] between statements of facts, which can be determined by a court, and value-judgements, which are not susceptible to proof though they must be supported by a certain factual basis. As for opinions and information pertinent to elections, which are disseminated during the electoral campaign, the ECtHR has held that such statements should be considered as being part of a debate on questions of public interest, unless proof to the contrary is offered.[40]

75. When it regards election campaigning on the internet and social media, the Venice Commission underlines in its Principles for a Fundamental Rights-compliant Use of Digital Technologies in Electoral processes[41] that "[t]he principles of freedom of expression implying

[33] See article 72 of the law of 16 July 1998 on Elections to Municipal Councils, District Councils and Regional Assemblies.
[34] See Code electoral, article L163-2, as amended by Loi no. 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information.
[35] See i.e. Kość v. Poland, 1 June 2017, application no. 34598/12, par. 35, Bédat v. Switzerland [GC], 29 March 2016, application no. 56925/08, par. 49, Sürek v. Turkey [GC], 8 July 1999, application no. 26682/95, par. 61 and Castells v. Spain, 23 April 1992, application no. 1798/85, para. 42.
[36] See i.e. Couderc and Hachette Filipacchi Associés v. France [GC], no. 40454/07, para. 119-120.
[37] See Kwiecień v. Poland, no. 51744/99; Kita v. Poland, no. 57659/00; Brzeziński v. Poland, no. 47542/07.
[38] Brzeziński v. Poland, no. 47542/07, para. 55.
[39] See i.e. Lingens v. Austria, no. 9815/82, para. 46; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, para. 76; Lindon, Otchakovsky-Laurens and July v. France [GC], no. 21279/02 and 36448/02, para. 55.
[40] See Kwiecień v. Poland, no. 51744/99, para. 51.
[41] CDL-AD(2020)037, Principle 1, para. 47 *et seq*.

a robust public debate must be translated into the digital environment, in particular during electoral periods."

76. **These principles suggest that the lawmakers should make sure that the threshold set in the law for courts to sanction false information should not be set so low that it stifles the political debate.**

77. A minimum requirement is that the interference with the freedom of speech is clearly and precisely circumscribed in the law. While the notion of "false information" may in many cases be determined objectively, the wording "slander" refers to a highly subjective standard. In elections, information of a candidate's morals and suitability for the office is clearly a relevant information for voters.[42] Accordingly, the criminalisation of "slander" in the electoral context should be reconsidered, and at the minimum specified more clearly in a way to prevent arbitrary decisions and a chilling effect on the electoral debate and scrutiny of politicians.[43] As for the notion of "false information", the lawmakers may consider qualifying its application, for example by setting a higher threshold for proof, or by requiring that the false information be meant to serve an illegitimate aim of misleading the voters. The remit of Article 154.15 is limited somewhat as it appears to be aimed only at anonymous expressions such as anonymous accounts on social media. However, the wording "via information and communication technologies, anonymous source" is not very clear and may also refer to information that is retrieved from anonymous sources but published by identifiable individuals and groups. Moreover, there can be legitimate reasons in an electoral context for disclosing information about candidates anonymously or based on anonymous sources. **The Venice Commission and the ODIHR therefore recommend clarifying the provision so that it does not interfere with legitimate aims, for example investigative media.**

78. The remit of the new Article 154.15 should therefore be reconsidered, and the lawmakers must carefully balance the restriction on the freedom of speech and the right to impart information, taking into account the case-law of the ECtHR under Article 10 of the ECHR.[44]

79. The provisions proposed in Article 26 of the Electoral Code on campaigning by third parties are very comprehensive, as is the connected sanction proposed in Article 3 of the Law on Amendments to the Code of Administrative Offences. However, they appear to cover natural persons. This could have the effect of hindering the ability of individuals to express political views during a campaign. **This element of third-party regulation should be reconsidered.**

### F. Amendments relating to the voter lists and voter registration

80. The June 2016 Joint Opinion recommended taking steps to increase the transparency and availability of signed voter lists for the candidates or their proxies to control. According to draft Article 14.2, voter lists will be published by electoral precincts on the internet 40 days before election day or 20 days in case of an early election. According to Article 14.6, signed voters' lists will be available on a designated website until final election result is ready, or in case of complaints, until a final judicial decision is pronounced. However, it is not clear from the amendments and the explanatory note which measures will be implemented in order to guarantee the secrecy of the vote when the signed voter lists are publicly available. The Code of good practice in electoral matters considers abstention as a political choice and recommends that voters lists should not be published if the secrecy of that choice can be breached.[45] Furthermore, the Interpretative Declaration to the Code of good practice in

[42] See i.e. Brzeziński v. Poland, no. 47542/07, para. 52-54.
[43] It should be noted, though, that defamation was decriminalised in 2010 and the Civil Code provides for damages instead.
[44] See CDL-AD(2017)016, Bulgaria, Joint opinion on amendments to the electoral code, para. 49.
[45] Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev-cor2), para. 5.

electoral matters recommends that "[s]uch access to the list of voters having voted should be meaningful, should be granted for a sufficient period of time and should take place under controlled conditions."[46] In their first Joint Opinion on the draft Electoral Code of Armenia, the ODIHR and the Venice Commission recommended reviewing a similar provision in order to ensure data protection and secrecy of the vote.[47] During the meetings with the stakeholders, the delegation learned that there was a broad support of the publication of the signed voter lists. The interlocutors met perceived this measure as an effective way to fight electoral fraud due to inflated voter lists and were of the opinion that they ensure greater transparency in elections. Based on the consensus observed on the matter and the necessity to increase trust in voter registers in Armenia, **the Venice Commission and the ODIHR acknowledge that publishing the signed voter lists can participate in the overall transparency of the electoral process, provided that this measure remains strictly temporary and preferably limited to the next elections. Thereafter, improving the accuracy and integrity of the voter lists should be highly prioritised by the electoral authorities.** Such temporary measures should then be revised in the near future when other guarantees less restrictive of fundamental rights (such as the requirement of identity cards for voters) will be fully implemented.

81. Article 15 establishes an online procedure for everyone to demand corrections of voter lists in case of inaccuracies. The procedure appears simple and non-bureaucratic as well as reasonable speedy. The ODIHR and the Venice Commission were informed during the meeting with the Deputy Minister of Justice that the general regulation applied and that the voters could appeal to courts if their applications for online corrections were denied. According to the clarifications received from the Ministry of Justice, Article 15 (3) of the Electoral Code also applies to the requests for making additions to the voter list filed electronically.

82. Important changes affect the issue of voter identification and its reliability, which was an issue raised in previous opinions.[48] Article 11.1 of the amendments follows previous recommendations as it requires a valid identification document to be included in the voter list. This step will improve the reliability of the elections and can solve long-standing concerns about impersonating voters residing *de facto* abroad. Furthermore, Article 15.3 of the amendments introduces a clause of flexibility to this general rule. It states that "persons registered at the address included in the description of the relevant electoral precinct, but not included in the list of electors of that electoral precinct upon the ground of not having a valid identification as of the voting day" can submit an application to be included in the list. This provision could solve the problem of citizens that have the right to vote but do not have the identification document.

83. On a more specific issue, the use of the term "authorised body" throughout the Code is confusing. In Article 8.7 the State Population Register of the Republic of Armenia is identified as one of such bodies. However, Article 15.3 refers to a "superior authorised body", which is not defined. The "authorised body" is also given powers in relation to electoral precincts and polling stations in Chapter 3 and it is not obvious that these are tasks for the State Population Register, although they appear to be so in the amendments. The Ministry of Justice has clarified in this respect that the Police possesses the functions of the State Population Register and acts as the superior authorised body for such Register, according to the Law on Administrative Proceedings. The Police is also the authorised body referred to in Chapter 3,

[46] Venice Commission's Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Publication of List of Voters Having Participated in Elections, CDL-AD(2016)028, Paragraph IV A. Furthermore, Paragraph 10 of the General Comment 16 to the ICCPR stipulates that "Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive, process and use it, and is never used for purposes incompatible with the Covenant."

[47] CDL-AD(2016)019, para 61.

[48] CDL-AD(2016)019, para 59, CDL-AD(2016)031, para 44.

which helps the CEC as well as updates residence information, including but not limited to door-to-door visits and synchronisation of data from other state institutions.

### G. Amendments relating to the candidate and list registration procedures

84. The proposed amendments foresee an online registration of candidates, which should make electoral processes smoother and more candidate friendly.

85. In addition, the amendments[49] provide for an obligation to include a gender-balance list in a manner that one out of every three candidates in the sequence in the candidates' list has to be represented of the less-represented gender and no gender may be represented in the list by more than 65 per cent (instead of 70 per cent in the current Code). Such rules at both national and local levels are welcome[50] and respond to international standards in the matter.[51]

86. In national elections political parties and their alliances must also present to the CEC their electoral programme (Article 87 para 2.10). This requirement seems to be disproportionate, as it should not be the task of state authorities to decide on the aims and programs of the political parties nor the candidates. **It is recommended to abandon this amendment as well as the requirement to present the charter of the political party** (see also Article 87.6). While the requirement was justified by several stakeholders as a measure to strengthen the ideological cohesion of the political parties, the presentation of these documents to the CEC does not bear any legitimate aim. It is up to the political parties to decide on how to present their programmes to the voters. In case the charter of a political party does not comply with legislation on political parties, the consequence should not be deregistration but a duty to bring the charter in line with the law or a dissolution of the political party. Moreover, the rejection of candidates' or lists' registration (Article 89.2 (6)) should not lead to subjective appreciation of the internal rules/charters of political parties that may lead to rejection of their registration.[52]

87. The electoral deposit is reduced for political parties and increased for alliances. As clarified in the 2016 Joint Opinion, para 67, it should be borne in mind that the amount of the electoral deposit should not create an unreasonable barrier to candidacy. The decrease of such amount to be paid is reduced only to a small extent, still bearing a risk that it hinders some political parties with noticeable support from registering candidates. **Although the amendment goes in the right direction, it is recommended to reduce the deposit even further.** The same comment applies to the local elections (Article 112.3.1 and Article 134. 3.7).

### H. Amendments relating to the funding of political parties and coalitions as well as of electoral campaigns

88. The system for financing political parties and campaigns makes a great emphasis on public funding. There can be no donations by legal persons and no anonymous donations, in line with a previous recommendation.[53] All contributions must be reflected in the official campaign account. The proposed Article 29.4 appears to have the effect that data on all contributions is declared and goes on CEC website including name and ID number. There is a danger that this level of transparency will discourage citizens from any involvement in the political system.

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[49] Articles 86.3, 104.2; 146.7 for community councils of elders
[50] See Joint Opinion on the draft electoral code as of 18 April 2016, para 118-122 and Section L.
[51] See Code of good practice in electoral matters, I.2.5, and Interpretative declaration to the Code on Women's participation in elections.
[52] See Joint guidelines on political party regulation - Second edition, para. 85 *et seq.*, para. 99.
[53] Joint Opinion on the Draft Electoral Code (as of 18 April 2016), CDL-AD(2016)019, para. 75.

89. A long-standing recommendation is for the law to provide a legal definition of campaign expenditures so that all costs related to electoral campaigns would be included. Article 30 appears to follow at least partially this recommendation, by listing a non-exhaustive ("the following expenditures shall also…") number of expenditures to be carried out only at the expense of the campaign fund. Article 20.8 also requires financial support to events to be carried out only by means of the campaign fund, which is repeated in Article 30.1.4.

90. Article 31 has new provisions on volunteers which are consistent with the Venice Commission and ODIHR recommendations. Article 26.6 contains a general ban on foreign funding for electoral campaigns, which seems understandable for a small country with a substantial diaspora. As clarified by interlocutors during the online meetings held on 8-9 April 2021, this ban does not apply to Armenian citizens abroad, who enjoy full rights as all citizens in the country.

91. Donation rules are to be backed up by new administrative infringements. New rules on charity events in Article 24 will close a possible loophole. The rules on the use of the election fund have been tightened up. Left over funds are returned to the party rather than to the state budget. Proposed Article 28.2(2) reduces the threshold for returning electoral deposits to 2%, instead of 4% that the current Electoral Code prescribes, therefore implementing an outstanding recommendation.[54]

92. In line with the recommendation in the 2016 Joint Opinion, Article 32 expressly states that the Oversight and Audit Service is independent from electoral commissions and its head has an independent position. The deadlines for submitting reports to the CEC have been increased from 2 to 7 days, which should allow for a meaningful audit. Following the recommendations from the 2016 Joint Opinion, the amendments allow the Oversight and Audit Service to demand from both public institutions and private entities relevant information for carrying out the audit.[55]

93. If the maximum set for the campaign fund is exceeded by 20% or more, Article 30. 6 of the draft law as well as the current law require a court (upon the application from the CEC) to revoke the registration of a candidate, a party, or an electoral list. While severe sanctions may be necessary to guarantee equality of opportunity, **the ODIHR and the Venice Commission question the proportionality of such a severe and automatic sanction without any assessment of guilt. For example, it is not clear whether actions of third parties outside the candidate or party's control, may be attributed to the candidate or party and lead to their registration being revoked for exceeding the spending limit. The court should be empowered to make a decision based on the assessment of the situation in its entirety.**

### I. Prohibitions on abuse of administrative resources and guarantees of the free expression of the will of electors

94. In accordance with the recommendations from the 2016 Joint Opinion and the Joint Venice Commission and ODIHR Guidelines for preventing and responding to the misuse of administrative resources during electoral processes,[56] the amendments to the Electoral Code and other laws about the misuse of administrative resources during elections are to be welcomed. These include a ban during campaigning on the use of information provided for official purposes but not officially published. Further there is a ban on announcing new social security schemes during the campaign unless they are already in the budget. In addition, there

[54] Second Preliminary Joint Opinion on the Electoral Code (as amended on 30 June 2016), CDL-PI(2016)008, para. 20.
[55] Joint Opinion on the Draft electoral code (as of 18 April 2016), CDL-AD(2016)019, para. 79.
[56] See Armenia – Joint Opinion on the draft electoral code as of 18 April 2016, CDL-AD(2016)019, para. 80. See also the Venice Commission and OSCE/ODIHR 2016 Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, part II.A.1.1.

is a proposal that when a public servant participates, as an official, in discussions of a political nature during an election campaign, the purpose of this involvement shall be limited to providing information on the official position.

95. Article 25 (Article 23 of the current Code) establishes new guarantees of the neutrality of public powers by defining exhaustively what administrative resources are and by prohibiting their use during the organisation and conduct of election campaigns. The same article also increases the categories of persons who hold public positions or public service positions and who are not allowed to participate in the electoral campaign.

96. Moreover, the draft laws on making amendments and supplements to the law on Public Service and to the Code on Administrative Offences reinforce the neutrality of civil servants and persons who hold public offices, establish new duties, new prohibitions and sanctions. Additionally, in accordance with the recommendations of the 2016 Joint Opinion, the proportionality of the fines should be considered in relation to sanctions for violations of a similar nature.[57]

97. Article 3 of the draft law amending the Law on Public Service dealing with the political activities of public servants is a welcome attempt to stop the use in campaigning of the reputation and prestige of the office held by public officials. This does not apply to public officials who are themselves candidates.

### J. Amendments relating to the voting and post-voting operations

98. In general, the regulation of the voting and counting operations in Chapters 11 and 12 details every step of the operations. Article 53.8 requires “sound evidence” for recounting the voting results of electoral precincts or if the examination of the protocols has left the constituency electoral commission “uncertain”. It is unclear what “sound evidence” and “uncertain” refer to. According to the clarifications received from the Ministry of Justice, “sound evidence” in the context of the Armenian legal system implies that a justification is required to ask for a recount. If these terms and their assessment are clear within the context of the Armenian legal system, it is fine, but they should refer to an objective standard that is understood and shared by all election officials and the stakeholders.

99. The amendments to Article 72 aim at increasing the transparency of the counting, which is welcome. Article 73 specifies the conditions for declaring a ballot paper invalid when it contains any writing or when there is an item other than the ballot paper in the envelope. The latter condition is new. These conditions are objective and do not appear to allow for arbitrary invalidations of ballots.

### K. Amendments relating to the complaints and appeals procedures

100. Complaints about voter registration (Article 15) have not been amended in substance except for time-limits. More amendments concern Articles 51 and 52.

101. As a positive development, complaints and appeals may be submitted electronically as well (Article 52 para 1). The standing in complaints and appeals procedures is wide. The amendments add the possibility for non-governmental organisations to submit complaints and appeals if they find a violation of the principles of the suffrage right listed in Article 7 of the Constitution. However, the previous recommendation to grant broader standing to bring challenges has not been met, as draft Article 51.12 does not include voters in the categories of persons with legal standing on challenges against the voting results in electoral precincts;

[57] See also the Joint guidelines for preventing and responding to the misuse of administrative resources during electoral processes, especially II. A. 1.3; II. A. 3; II. A. 4.1-4.2; II. A. 5.2.

therefore not fully providing for an effective remedy, contrary to OSCE Commitments and international standards.[58] Similarly, the time limit to submit an application for recount, "on the day following the voting, from 12:00 to 18:00 or on the second day following the voting, from 9:00 to 11:00", as per Article 53.1 of the draft Electoral Code, remains excessively short, contrary to a previous Venice Commission and ODIHR recommendation.[59]

102. Article 51 para 12.2-12.4 foresee a possibility to apply for the invalidation of election results also to proxies, PEC members and observers. This is not contrary to international standards although rarely observed in other countries, as it may overburden the competent election management bodies or courts with complaints and appeals.[60]

### L. Amendments relating to rights and duties of election observers

103. All past recommendations from previous Joint Opinion have been addressed and the amendments are positive. Organisations carrying out observation missions may do it jointly (Article 34.2). The accreditation process is simplified and done through the Internet without delays (Article 34.3; in the previous law the CEC had 12 days to issue certificates to observers) and it is possible to register as observer later, 10 days before elections instead of 15 days previously), as well as to submit the list of persons observing for an organisation just three days before elections (Article 34.2).

104. The wording of Article 34.5 provides some safeguards against revoking the permits of observers for minor infractions of the Electoral Code. The restrictions to act as observers for certain groups due to their office appears justified and proportional and corresponds partly to the categories listed in Guideline 4.3 in the Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes.

105. Article 34.10 foresees a list of persons who may not act as observers. It should be interpreted in a manner that those persons may not be domestic observers, whereas e. g. foreign judges could observe the elections in Armenia.

### V. Amendments relating to other laws

106. The proposed amendments to the **Law on Public Service** aim to guarantee the neutrality of civil service and avoid a situation where the civil servants show publicly their party affiliation or political preferences. This aim is in line with the principle of the rule of law.[61] The implementation of these requirements proposed in the draft law might be challenging, as the borderline between proposals based on expertise and political proposals is not clear. The civil servants also enjoy the freedom of speech and any restrictions thereof have to be stipulated clearly in the law. It is important to avoid disciplinary measures against civil servants based on pure political will based on vague criteria such as "political restraint" (see proposed Article 27.1.1) or "discussions of political nature" (Article 27.1.6). Instead, it is recommended to provide for norms forbidding to state publicly political party affiliation both by the civil servant and by the political party, and to participate in campaign activities organised by the political party as an official (i. e. while fulfilling official duties).

107. Existing Article 32.1.5[62] prohibits civil servants to use official information for non-official purposes, including for the purpose of electoral campaigning. This has the benefit that official information which is not in the public domain cannot be used to the advantage of parties which

[58] Code of Good Practice in Electoral Matters, para.3.3 (f); ICCPR, art. 3(a); ECHR, art. 13.
[59] Second Preliminary Joint Opinion on the Electoral Code (as amended on 30 June 2016), CDL-PI(2016)008, para. 71.
[60] See CDL-AD(2020)025, para 73-74.
[61] See the Rule of Law Checklist, para 114 on corruption and conflict of interest.
[62] Included from the law of 25 March 2020.

have access to such information by virtue of office. However, the formulation of the restriction should be reconsidered in order to be consistent with greater transparency of the information on the state activities. Thus, the use of public information should not be restricted based on who uses it, but on what is the content of it.

108. The amendments to the **Labour Code** introduce an unpaid "election leave" for the purpose of allowing persons holding public positions and those in public service to participate in an election campaign. The new Article 176.2 appears to cover election candidates and other persons involved in the campaign. These provisions are linked to the provisions on unpaid leave for public servants as allowed in the Electoral Code in Article 25. This provision sets out that any citizen is free to participate in election activities outside of their normal working hours. The Ministry of Justice stated in their comments that this means that employees who wish to participate in election activities during what would otherwise have been their working hours need to take unpaid leave. A general requirement to take unpaid leave for any election campaign activity would entail a significant economic burden for public servants in exercising their civil and political rights in the contest of an election. The proportionality of this restriction on the freedom of speech, freedom of association and the right to stand for election is dependent on its scope. As the provision stands, it appears to apply to a wide range of public officials regardless of rank and position and regardless of the institution, with the exception of the categories mentioned in Article 25.3, sub-paragraphs 3 to 15.[63] **The Venice Commission and the ODIHR therefore recommend clarifying the precise scope of this restriction so that officials can take part in an election campaign outside their official duties.**

109. Criminal sanctions for violating the prohibition of dual citizenship, as per the proposed Article 10 of the Law on making amendments to the Criminal Code, should be considered in the light of Article 3 of the First Protocol of the ECHR. A blanket restriction on the right to stand for election due to dual citizenship would likely be considered a disproportional restriction.[64] As long as Armenia accepts dual citizenship, holding two citizenships should not be ground for ineligibility to be elected to the parliament and thus not criminalised.[65]

110. The sanctions for obstructing assemblies and compelling participation in or refusing such assemblies appears to be in line with the Guidelines on freedom of peaceful assembly. **However, the ODIHR and the Venice Commission recommend that the election-related legislation or the law regulating assemblies clearly specifies the conditions for what constitutes obstructing the holding of assemblies, which would mean to exclude persons from participating in an assembly**.

[63] Compare Norway, where the right to stand for election is restricted for public officials in the Ministries under the Government regardless of rank, but not for other public servants.
[64] See ECtHR, Tănase v. Moldova, 27 April 2010, Application No. 7/08. See also Joint interim opinion on the draft new Electoral Code of Armenia, para. 35. See First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 54. See also Report on electoral law and electoral administration in Europe, in particular para. 86 and 87.
[65] In this context, it should be noted that Armenia has not ratified the European Convention on Nationality.