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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**  
**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**ARMENIA**

**PRELIMINARY JOINT OPINION**  
**ON THE DRAFT ELECTORAL CODE**

**AS OF 18 APRIL 2016**

**on the basis of comments by**

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**Ms Paloma BIGLINO CAMPOS (Substitute Member, Spain)**  
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## I. Introduction

1. In a letter dated 15 February 2016, the Minister of Justice of the Republic of Armenia, Ms Arpine Hovhannisyan, requested the Council of Europe's European Commission for Democracy through Law (Venice Commission) and the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) to provide an assessment on the draft electoral code of the Republic of Armenia (CDL-REF(2016)018).

2. The Minister of Justice submitted to the Venice Commission a new version of the draft electoral code on 6 April 2016 (CDL-REF(2016)025) and another updated version on 18 April 2016 (CDL-REF(2016)030). The present opinion refers to document CDL-REF(2016)030.

3. This preliminary joint opinion follows the reform of the Constitution, which was subject to two opinions of the Venice Commission in 2015.<sup>1</sup> The new Constitution entered into force after being endorsed by voters in a referendum on 6 December 2015. According to its Article 210, a new Electoral Code has to enter into force by 1 June 2016.

4. On 14-16 March 2016, a delegation of the Venice Commission composed of Mr Richard Barrett, Ms Paloma Biglino Campos and Mr Kåre Vollan, rapporteurs, as well as Ms Amaya Ubeda de Torres, from the Secretariat of the Venice Commission, and Mr Richard Lappin and Mr Vasil Vashchanka from the OSCE/ODIHR, travelled to Yerevan. The delegation held meetings with civil society, independent MPs, representatives of all political factions in Parliament, as well as with the working group tasked with electoral reform, which included the Minister of Justice and representatives of the presidential administration, the government administration and the Central Electoral Commission. The delegation also met with members of the international community in Armenia. The delegation is grateful to all stakeholders for the meetings and the exchanges of views on the draft code during their visit.

5. Prior opinions of the OSCE/ODIHR and the Venice Commission, as well as reports from previous OSCE/ODIHR and Council of Europe's Parliamentary Assembly (PACE) election observation activities,<sup>2</sup> provide background for understanding the historical development of electoral legislation in Armenia. These opinions and reports have underscored that the conduct of genuinely democratic elections depends not only on a detailed and solid Electoral Code, but also on the political commitment to fully implement such legislation in good faith.

6. The present preliminary joint opinion is based on an English translation of the draft electoral code provided by the Armenian authorities on 18 April 2016. It should be noted that any legal review based on translated laws may be affected by issues of interpretation resulting from translation. The analysis of the draft code contained in this preliminary joint opinion is not exhaustive.

7. This preliminary joint opinion should be read in conjunction with the following documents and previous joint opinions provided to the Armenian authorities:

- Previous joint opinions issued by the Venice Commission and OSCE/ODIHR on the Electoral Code of the Republic of Armenia and its amendments.<sup>3</sup>

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<sup>1</sup> First opinion on the draft amendments to Chapters 1 to 7 and 10 of the Constitution of the Republic of Armenia (CDL-AD(2015)037) and second opinion on the draft amendments to Chapters 8,9 and 11 to 15 of the Constitution of the Republic of Armenia (CDL-AD(2015)038).

<sup>2</sup> Previous Joint Opinions and Legal Reviews are available at [www.venice.coe.int](http://www.venice.coe.int) and <http://www.osce.org/odihr/elections/armenia>.

<sup>3</sup> The Venice Commission and OSCE/ODIHR have issued 9 opinions on the electoral legislation of Armenia since 2001: Joint Final Opinion on the Electoral Code of Armenia, CDL-AD(2011)032; Joint Interim Opinion on the new draft electoral code of Armenia, CDL-AD(2011)021; Joint Opinion on the Electoral Code of the Republic of Armenia

- OSCE/ODIHR reports on elections observed in the Republic of Armenia.
- PACE reports on elections observed in the Republic of Armenia.
- The Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), CDL-AD(2002)023rev.
- The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) and other relevant OSCE commitments.
- Other international and regional documents that are relevant to the Republic of Armenia, including Article 3 Protocol 1 to the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR).

8. This preliminary joint opinion is provided with the goal of assisting the Armenian authorities, political parties, and civil society in their efforts to develop a sound legal framework for democratic elections.

9. The present preliminary joint opinion was prepared on the basis of contributions of the rapporteurs and experts; it was sent to the Armenian authorities as a preliminary opinion and made public on 10 May 2016. *It was endorsed by the Council for Democratic Elections at its xxx meeting (Venice, xxx) and by the Venice Commission at its xxx Plenary Session (Venice, xxx).*

## II. Executive summary

10. The Venice Commission and OSCE/ODIHR have closely followed changes to the Electoral Code of Armenia through several opinions. The proposed draft electoral code follows the 2015 adoption of a revised Constitution. In line with previous Venice Commission and OSCE/ODIHR opinions and reports, it is underscored that the key challenge for the conduct of genuinely democratic elections is the exercise of political will by all stakeholders to fully and effectively uphold the letter and the spirit of the law. The timeframe for reform is regrettably very short, as the Constitution provides that the new code has to enter into force by 1 June 2016. While the stability of the electoral system is a key principle, it is equally important to have sufficient time for a thorough, inclusive, and public discussion in order to build consensus and confidence around major changes in electoral legislation

11. The draft electoral code could provide an adequate basis for the conduct of democratic elections, and has addressed some prior Venice Commission and OSCE/ODIHR recommendations. For example, it introduces a system to improve voter identification, enhances the Central Electoral Commission regulatory powers, strengthens the quota for the participation of women as candidates, removes provisions that could lead to the arbitrary withdrawal of observer accreditation, and systematises the rules on campaigning.

12. However, significant concerns exist in the draft code, including with regard to insufficient measures to enhance confidence in the accuracy of voter lists, a lack of clarity as to how the introduction of new technologies may be implemented, and the restrictions on citizen election observers. The draft code also does not address a number of prior recommendations related to the effectiveness of complaints and appeals procedures, the

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as amended through December 2007, CDL-AD (2008)023; Joint Opinion on the 26 February 2007 Amendments to the Electoral Code of the Republic of Armenia, CDL-AD(2007)023; Final Joint Opinion on Amendments to the Electoral Code of the Republic of Armenia, CDL-AD(2007)013; Joint Opinion on Draft Amendments to the Electoral Code of the Republic of Armenia, CDL-AD(2006)026; Final Opinion on the Amendments to the Electoral Code of the Republic of Armenia (Venice, 21-22 October 2005), CDL-AD(2005)027; Joint Opinion on the Draft Amendments to the Electoral Code of Armenia by the Venice Commission and OSCE/ODIHR, CDL-AD(2004)049; Joint Recommendations on the Electoral Law and the Electoral Administration in Armenia, CDL-AD(2003)021; Joint Assessment of the Amendments to the Electoral Code of the Republic of Armenia, CDL-AD(2002)029.

transparency and accountability of campaign finance, safeguards against potential abuse of state resources, and clarity of the role and oversight of media during elections.

13. Mainly in order to address the constitutional requirement to guarantee a “stable majority”, the new electoral system proposed in the draft code is rather complex. It establishes a number of significant deviations from a purely proportional system, which in combination with the short time allocated to carry out the reform, may affect voters’ trust in the electoral system.

14. It is recommended to address the following key issues:

A. The draft code establishes limitations and deadlines for the formation of coalitions after the first round of elections. These provisions unduly limit the possibility of building a political coalition as a means for ensuring the “stable majority” required by the Constitution. It is recommended to reconsider restrictions on the number of participants in a coalition and extend the time period for formation of coalitions after the first round.

B. Concerns regarding the accuracy of voter lists and potential impersonation of voters *de facto* abroad underlie longstanding opposition and civil society calls to publish signed voter lists after election day. Publication of signed voters’ lists raises a number of concerns regarding privacy of information. The concerns expressed by civil society seem to have been at least partially addressed in the interim version of the draft code, through the possibility of accessing the list of voters who voted. Considering the importance of ensuring a balance between data protection and the secrecy of the vote on the one hand and stakeholders’ interest in consulting the signed voter lists on the other, it is recommended, as a confidence building measure, to allow meaningful consultation of signed voter lists by stakeholders under specific conditions.

C. The draft code envisages the introduction of new technologies in respect of voter registration and identification. It is welcome that voter registration and identification issues are addressed, but the proper implementation of new technologies has to be ensured. Particularly in light of the short time before the next elections and the need to build trust in the electoral process, it is recommended that a number of issues be thoroughly considered, including harmonising new provisions with existing data protection laws and standards, applying proper procedures for procurement, ensuring public testing and certification of the equipment, guaranteeing contingency planning, providing sufficient training for electoral staff, and ensuring effective awareness-raising among voters and political parties. A gradual approach to the introduction of such technologies through a series of pilots would be a measure to enhance confidence in the system and provide opportunities to address technical issues regarding effective implementation. Initial pilots could take place, for example, during the upcoming local elections.

15. Additional recommendations include:

D. The draft code establishes or maintains restrictions on citizen election observers which may impede their activity and undermine transparency of the electoral process. It is recommended to remove the mandatory testing and certification of citizen observers, as well as the requirement that the charters of citizen observer organisations be in force for the three years preceding the elections, as this would deprive new organisations of the possibility to observe elections.

E. The code should further guarantee the independence of the electoral administration, notably, by ensuring that presidential powers to nominate members of the Central Electoral Commission in case of a parliamentary stalemate are exercised in consultation

with all parliamentary parties and by clarifying the procedure for the early termination of mandate.

F. While the draft code improves the previous gender quota for candidate lists, increasing it from 20 to 25 per cent within certain brackets of the list, the impact might be limited. It is recommended that the draft code provide for a still more effective quota for women's representation, for example by placing women among every two or three candidates.

G. Particularly in light of the extensive changes to the electoral system, the draft code would benefit from simplifying and clarifying procedures for voting, counting and tabulation, as well as the determination of election results. This would also require extensive training for electoral staff and comprehensive voter education well in advance of elections to ensure better understanding of the process and enhanced public confidence.

H. Electoral reform requires broad and public discussion in order to encourage participation in the process and acceptance of the outcomes. Final amendments to the code should ensure meaningful engagement with all relevant stakeholders, so as to encourage broad agreement and support for the new code.

16. In this preliminary joint opinion, the Venice Commission and the OSCE/ODIHR have made recommendations to the authorities of the Republic of Armenia in support of their efforts to improve election-related legislation and bring it more closely in line with OSCE commitments and European and international standards. However, it must be emphasised that, in addition to further amendments to the legislative framework, an effective and impartial implementation of the law is necessary to ensure conduct of elections in line with international standards.

### **III. Analysis and recommendations**

#### **A. Background and procedure**

17. The draft electoral code sets a new legal framework for the conduct of elections following the adoption of a revised Constitution in December 2015. As the Constitution requires the new code to enter into force by 1 June 2016, the timeframe for reform is very short.

18. The Code of Good Practice in Electoral Matters stipulates that fundamental elements of the electoral system should not be changed a year before an election so as to guarantee the stability of the law.<sup>4</sup> However, it is equally important to have sufficient time for a thorough, inclusive, and public discussion in order to build consensus around major changes in electoral legislation.<sup>5</sup>

19. Public discussion is important in order to encourage participation in the process of reform and acceptance of the outcomes. Broad consultation enriches comparative perspectives and understanding of the various factors that can result in legislation that best suits the specific context of Armenia. It is an established principle that legislation regulating fundamental rights should be adopted openly, following public debate.<sup>6</sup> The submission of a

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<sup>4</sup> CDL-AD(2002)023rev, para. 64.

<sup>5</sup> Recommendation 7, OSCE/ODIHR Election Observation Mission Final Report (2013); Recommendation 1, OSCE/ODIHR Referendum Expert Team Final Report (2016).

<sup>6</sup> Paragraph 5.8 of the 1990 OSCE Copenhagen Document provides that "legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone." See also, paragraph 18.1 of the 1991 OSCE Moscow Document, as well as, among many others, Joint Opinions of the Venice Commission and OSCE/ODIHR on the draft electoral law of the Kyrgyz

request for an international opinion on proposed changes is to be welcomed. However, any electoral reform process should also be subject to open debate at the national level. The preliminary version was sent to the Venice Commission and OSCE/ODIHR for assessment in February 2016 before the draft was discussed and shared with opposition political parties or civil society. A process of open discussions has since been initiated concerning electoral reform in March and April 2016. Inclusiveness and transparency are key aspects related to electoral reform and should be specifically ensured when modifying electoral legislation. *It is strongly recommended to pursue public consultations and discussions with a view to obtaining political agreement on and support for the new code. These consultations could also find ways to take forward OSCE/ODIHR and Venice Commission recommendations contained in this and previous opinions and reports.*

20. The draft code envisages special measures for the promotion of women in electoral processes. It is important that any such measures be developed and implemented in consultation with organisations representing the interests of these groups.<sup>7</sup> *Consultations on the drafting of the new electoral code should include meaningful engagement with groups that represent women, so as to ensure that special measures reflect their needs and wishes.*

## **B. Electoral system**

### **Outline of the proposed system**

21. The draft code details the electoral system provided for in Article 89 of the new Constitution for electing National Assembly members. This Article states:

- “1. The National Assembly shall consist of at least 101 parliamentarians.
2. In accordance with the procedure prescribed by the Electoral Code, places shall be assigned in the National Assembly for representatives of national minorities.
3. The National Assembly shall be elected by a proportional electoral contest. The Electoral Code shall guarantee the formation of a stable parliamentary majority. If no stable parliamentary majority is formed as a result of the election or by building a political coalition, then a second round of the election may be held. In case a second round is held, it shall be allowed to form new alliances. The restrictions, conditions, and procedure of forming a political coalition shall be prescribed by the Electoral Code.”

22. In line with a Venice Commission recommendation,<sup>8</sup> a paragraph 4 detailing the features of the second round of elections was removed from the draft Constitution, with such regulations to be outlined in the new Electoral Code.

23. The National Assembly is elected by a complex system. In line with the Constitution, the electoral system in Armenia has changed from a mixed one to a mainly proportional one. There is a variable number of parliamentarians, which cannot be less than 101 (not including the minority representatives). The ballot paper includes one page with the national list and one page with the district candidates. The district candidates have to appear on the national list. The voter can, in addition to choosing a ballot with the list of the party, also give a preference vote to

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Republic, CDL-AD(2014)019; on the draft law amending the electoral legislation of Moldova, CDL-AD(2014)003; on the draft amendments to the laws on election of people's deputies and on the Central Election Commission and on the draft law on repeat elections of Ukraine, CDL-AD(2013)016.

<sup>7</sup> In accordance with Paragraph 25 of the 1997 Committee Convention on the Elimination of Discrimination Against Women General Recommendation 23 “Article 7 (b) [of CEDAW] requires States parties to ensure that women have the right to participate fully in and be represented in public policy formulation in all sectors and at all levels.” In accordance with Paragraph 18 of the 2009 Committee Convention on the Elimination of Racial Discrimination General Recommendation 32 “States parties [to the ICERD] should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.”

<sup>8</sup> CDL-AD(2015)037, para. 80.

a district candidate. The seats are distributed between the parties nationally; then, half of the seats allocated to each party are distributed proportionally to the 13 district lists. The district seats are then allocated to candidates according to the number of preferences expressed by voters. The other half of the seats is allocated to candidates from the national list, in the order of the list. Moreover, the draft code introduces many deviations from a purely proportional system, including the following:

- Political parties have to overcome a threshold of 5 per cent and alliances a threshold of 7 per cent;
- There is a second round between the two most voted political parties or alliances if no party or alliance obtained a majority of the seats, unless a coalition with a majority of the mandates is formed;
- In line with the Constitution, the elections have to produce a “stable parliamentary majority”. The Constitution does not define a “stable parliamentary majority.” The draft electoral code provides for giving extra seats to the winning party (or alliance or coalition) in order to provide a majority with a margin of at least 54 per cent of the mandates;
- The smaller parties will be given extra seats, if the winning party or alliance gets more than 2/3 of the total number of mandates;
- The system awards a total of four extra seats to certain national minorities.

24. A detailed analysis of these features is made in the following paragraphs.

25. The 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 needs. The combined deviations listed above create an unusual system, whose effects represent a significant modification of the proportional system. A proportional system assuring a majority bonus has recently been adopted in Italy.<sup>9</sup> However, as stated in the first opinion on the Constitution of Armenia, “[T]his system has been adopted after a rather long period of instability and with the aim of finding a better balance between governability and representation. This system is the fruit of a long experience. It is not necessarily transferrable to a country which is making the choice of a parliamentary system and will experiment it for the first time.”<sup>10</sup>

26. While any electoral system may be chosen as long as it is in conformity with the standards of the European electoral heritage and it guarantees and gives effect to the free expression of the will of the voters,<sup>11</sup> it should be reminded that “[t]he choice of an electoral system as well as a method of seat allocation remain both a sensitive constitutional issue and have to be carefully considered, including their adoption by a large consensus among political parties. While it is a sovereign choice of any democracy to determine its appropriate electoral system, there is the assumption that the electoral system has to reflect the will of the people. In other words, people have to trust the chosen system and its implementation”.<sup>12</sup>

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<sup>9</sup> Italian Electoral Law of 6 May 2015.

<sup>10</sup> CDL-AD(2015)037, para. 79.

<sup>11</sup> Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II.4.

<sup>12</sup> CDL-AD(2015)001, para. 9. See also, para. 21 of the 1996 UN Human Rights Committee (UNHRC) General Comment No. 25 “Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors”.



## **The two-round system and the formation of coalitions**

27. Articles 95, 97, 98, and 99 describe the distribution of seats to parties and alliances and the two-round system. The calculation is done in a preliminary and, if necessary, a final round, and it is the preliminary round which decides whether a second round is necessary. 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 95.3.1, if a party or alliance wins at least 53 seats out of the 105 seats (101 seats plus four minority seats), the first round is final.

28. According to Article 97.1, coalitions may be formed after the first round, and if they obtain the majority of the seats preliminarily distributed after the first round, a second round is not needed (such a coalition is also entitled to receive extra seats to reach a majority with at least 54 per cent of the mandates). However, such coalitions can only be formed with a maximum of two other political parties or alliances. The Venice Commission and OSCE/ODIHR delegation was informed by the authorities that this limitation was introduced to ensure the constitutional requirement on “stable majorities”. However, a pre-election alliance by itself consists of a number of parties, and the fact that it is formed before the elections does not guarantee its stability. It is very difficult to regulate the political platforms of coalitions and to assess whether they will be stable or not. The limitation of the number of partners in a coalition does not offer *per se* such a guarantee and any such quantitative restrictions on coalition-building require a clear justification. *It is recommended to reconsider restrictions on the number of participants in a coalition.*

29. Article 97.1 provides that the deadline for forming a coalition in order to avoid a second round is three days from the announcement of the official results, which should usually amount to ten days after election day and nine from the announcement of the preliminary results (Article 75.1 and 3). Coalition building implies complicated negotiations and the deadline seems short, even if the preliminary results have been known some days earlier. As the Constitution (Article 89.3) provides two equal possibilities for the formation of a “stable parliamentary majority” – as a result of election or by building a political coalition – this second possibility must be given a reasonable chance. *It is recommended that the time period for formation of political coalitions after the first round of voting be extended – before a decision on a second round of voting is taken.*

30. If no party or alliance wins 53 seats (out of 101 regular seats plus 4 seats for minorities) or more in the preliminary distribution after the first round, and no new coalition is formed that makes up a majority of the seats, a second round is organised (Articles 97.4 and 98). In that round, the two contestants (parties or alliances) that won the highest number of votes in the first round compete. They are, however, allowed to form new alliances, which could, for example, include parties that ran individually in the first round, without being among the top two.

31. Article 98.2 provides that by 18:00 on the second day following the adoption of the corresponding Central Electoral Commission decision on holding a second round of elections, any political party (alliance) which has passed the electoral threshold may form a new alliance with other political parties (alliances) having passed the threshold and come to an agreement on the candidate for the Prime Minister (in view of the second round). *This deadline is short and could be extended.*

32. Article 95.3(2) states that parties not awarded additional seats will preserve their seats from the preliminary distribution. This provision is understood as meaning that all seats obtained in the first round are kept, including by the parties or alliances that participated in the second round, whatever the results of a possible second round or the minority bonus(es). However, unless it is an issue of translation, the formulation should be made clearer.

### **National and district lists**

33. The proportional system chosen is a two-tier system with candidate lists at national level and at district level. There are 13 electoral districts, which correspond to eight *marzes* (or provinces) each with their own district, two *marzes* combined into one district, and four electoral districts in Yerevan (Article 78).

34. The 101 seats are distributed to those parties and alliances passing the threshold by the method of the largest remainders (Article 95.4-6). For each party, the seats won are divided in two equal parts (rounded down for national lists and up for district lists). The total number of district seats would therefore not be fixed before the elections. The seats won from national lists are filled from the top of the list (Article 100.2); the remaining seats are distributed to district lists in proportion to the votes cast for each party (Article 95.7 and 95.8) by the D'Hondt method. Higher turnout will give more seats, which would give an incentive for participating in elections. However, in theory at least, the smallest districts might not be awarded district seats. District seats are filled in the sequence of preference votes allocated to candidates.

35. According to Article 83.3, the candidates of the district lists have to be on the first part of the national lists as well. If a candidate wins a district seat, that candidate is struck off the national list, according to Article 100.1.

36. On the district ballots, the voters vote for individual candidates within the list and the seats are filled in the sequence of such preference votes (open lists). The choice of open lists in a proportional system is a legitimate one. However, some of the political parties, NGOs, and experts consulted during the delegation's working visit feared possible negative consequences of the open list system. They were concerned about a possible influence of local businesspeople or other candidates, and that this could potentially exacerbate the misuse of administrative resources. Cases of misuse of administrative resources in elections have been observed in former elections in Armenia,<sup>13</sup> but they may be fought by a range of means other than changing the electoral system.

37. Vacancies that may occur during the term in office are filled: (1) by the candidate with the next highest number of preference votes not having been elected from the district lists; (2) by the next candidate on the national lists, unless the number of representatives of any gender in the given faction falls below 20 per cent; in that case, the seat shall be given to the next candidate of the less represented gender in the first part of the national list (Article 103.3) Article 100.2 states that if the district list is exhausted, the mandate is given to the next in line on the national list. It would be suitable to make it explicit that this applies both when the initial distribution is done and when filling vacancies at a later stage.

### **Threshold**

38. A party needs to have at least five per cent of the national vote, and an alliance needs at least seven per cent, like in the present version of the code. It is not obvious that there should be a higher threshold for pre-election alliances, as alliances might provide more cooperation and stable government. *Therefore, the threshold for alliances could be the same as for political parties.*

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<sup>13</sup> See for example the *Final Report on the 2012 Parliamentary Elections in Armenia*, OSCE/ODIHR.

## Provisions on national minorities

39. The draft introduces, for the first time in Armenia, the possibility for political parties to compete for minority seats. According to the latest census, in 2011, the four largest minority groups constituted between 0.1 per cent and 1.2 per cent of the population, or between 2,000 and 35,000 people. Each of the four groups is allocated one extra seat in the National Assembly. Including measures to promote representation of national minorities is in line with the *Guidelines on Political Party Regulation*,<sup>14</sup> which encourage the introduction of special measures to ensure that national minorities have an equal opportunity to be elected and represented in parliament. The measures proposed are extensive considering the size of the groups affected by this provision. While the Venice Commission and the OSCE/ODIHR were informed by the authorities that there are historical reasons for such measures, it should be noted that such measures have not been reflected in prior electoral legislation in Armenia.

40. Articles 83.5 and 95.9 enable the national lists of each party or alliance to include a second part, with candidates of the four largest national minorities. This second part of the list has four sections, one for each group, and for each section the list shall include up to four candidates. With the smallest minority groups, it may be difficult for some parties to find qualified candidates. It is not mandatory for lists to have candidates for the minority groups, but if they have, they may have up to four for each group. Therefore, if there are no candidates of a certain group, it cannot be represented.

41. The candidates representing national minorities may be listed in part two of the national list, where their ethnicity is indicated. Article 95.9 states that the d'Hondt method will be used for the distribution of the four additional seats. According to Article 95.9 the mandate is passed on to the next party if the party does not have a minority candidate; according to Article 100.2, if a party has been awarded a minority seat and the party does not have a candidate from a minority which has not been filled yet, the seat remains vacant. This apparent contradiction seems to be a translation issue.

42. The arrangement of extra seats for national minorities may change the political balance among the parties. *Having minority representatives taken within the seats won by the parties and filled from the ordinary candidate lists could be considered.*

### C. Suffrage rights

#### Active voting rights

43. With respect to the right to vote, the new Constitution enfranchises prisoners convicted for lesser offences. According to Article 48.4 of the Constitution, persons serving a criminal sentence for intentionally committing grave and particularly grave offences do not have the right to vote. This provision is implemented in the draft code and addresses earlier recommendations made by the OSCE/ODIHR and the Venice Commission.<sup>15</sup>

44. Article 2.4 provides that persons deprived of active legal capacity by a court judgment do not have the right to vote. This limitation is in line with the new Constitution (Article 48.4) but it seems not to be in full conformity with international standards since it applies to all persons declared legally incapable.<sup>16</sup>

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<sup>14</sup> See the Venice Commission and OSCE/ODIHR Guidelines on Political Parties Regulation (CDL-AD(2010)024), para. 137-138.

<sup>15</sup> CDL-AD(2011)032, paragraph 11; Recommendation 8, OSCE/ODIHR Election Observation Mission Final Report (2012); Recommendation 7, OSCE/ODIHR Election Observation Mission Final Report (2013).

<sup>16</sup> CDL-AD(2015)038, Second Opinion on the Draft Amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16) of the Republic of Armenia para. 25, and references; paragraph 9.4 of the 2013 CRPD Committee's Communication No. 4/2011 (*Zsolt Bujdosó and others v. Hungary*).

## Passive voting rights

45. The Constitution (Article 48.2) provides that eligible voters who have attained the age of 25, have been a citizen of (only) Armenia for the preceding four years, have permanently resided in Armenia for the preceding four years, and have a command of the Armenian language may be elected to the National Assembly. This provision is reproduced in Article 80.1 of the draft code.

46. The Venice Commission and the OSCE/ODIHR have previously recommended eliminating the prior five-year citizenship and residency requirement for parliamentary candidates from the Constitution.<sup>17</sup> The revised Constitution has reduced the requirements of nationality and residency from five to four years, but the restrictions remain not fully in line with the international and European standards.<sup>18</sup> In addition, the prohibition on dual citizens to stand for election can be seen as an unreasonable restriction that is contrary to international standards.<sup>19</sup>

47. The draft code also details how the residency requirement should be calculated (Article 80.2) and provides exceptions for public servants who either studied abroad in higher education institutions or were seconded abroad for service purposes.

48. The requirement that candidates have command of the Armenian language is a new constitutional provision and is regulated in Article 80.3 of the draft code. According to the Article, this may be demonstrated either by having secondary or higher education in the Armenian language, or if not, by passing a test. *The code should provide that the testing of language should be reasonable, objective, verifiable, and subject to effective review.*

49. Contrary to OSCE commitments,<sup>20</sup> the draft code does not provide a possibility for candidates to stand individually in the parliamentary elections and in elections for the councils of elders of Yerevan, Gyumri and Vanadzor. This limitation is not remedied by allowing non-party members to be included on political party lists (Article 83.4), as that decision is ultimately in the hands of the political party. *Consideration should be given to allowing nomination of candidate lists not only by political parties but also by groups of citizens.*

## D. Election administration

50. The structure of the election administration remains unchanged, with Article 36.1 establishing a three-level system of election commissions, consisting of the Central Electoral Commission (CEC), District Election Commissions (DECs) and Precinct Election Commissions (PECs). Paragraph 4 of the same Article declares that election commissions shall be independent from the state and local self-government bodies.

51. In line with Article 195.2 of the Constitution, Article 42 of the draft code provides that the CEC is composed of seven members elected by the National Assembly with at least three fifths of votes of the total number of deputies, for a term of six years. This election procedure differs from the current code, by which CEC members were appointed by the President upon recommendation of specified bodies. This qualified majority does not of itself ensure representation of the opposition. *It is recommended that the process to appoint members of the*

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<sup>17</sup> Venice Commission, CDL-AD(2015)037, para 54; Recommendation 8, OSCE/ODIHR Election Observation Mission Final Report (2012).

<sup>18</sup> CDL-AD(2015)038, para. 23.

<sup>19</sup> Paragraph 15 of the 1996 UN Human Rights Committee General Comment 25 states that “any restrictions on the right to stand for election [...] must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation”. See also, section I.1.1(c) of the 2002 Venice Commission Code of Good Practice in Electoral Matters. In *Tănase v. Moldova* (2010), the ECtHR states that “where multiple nationalities are permitted, the holding of more than one nationality should not be a ground for ineligibility to sit as an MP”, para. 172.

<sup>20</sup> See Paragraph 7.5 of the 1990 OSCE Copenhagen Document.

*CEC in the parliament be inclusive, so all parties may have trust in the CEC.* Article 42.6 states that, if the chairperson or a member of the CEC is not elected by the National Assembly within the prescribed time limit, the President shall appoint the acting chairperson or a member of the CEC, which shall hold the office until the proper election by the National Assembly. The President's power should be properly weighted. Indeed, if the President has the political support of the National Assembly, a simple majority may block the selection of candidates and entrust the appointment of the CEC members to the President. *It is recommended that the code provide that the President should hold consultations with all parliamentary parties before appointing the CEC members.*

52. Article 43 deals with the procedure for the nomination of DEC. As in the past, they are composed of seven members for a period of six years and are elected by the CEC from candidates who do not carry out political activities but meet the requirements of studies and professional experience stated in paragraph 3 of the Article. The appointment must follow the method of preferential voting unless the CEC makes a unanimous decision on the members of DEC. The Venice Commission and OSCE/ODIHR previously stated that the use of the preferential vote ensures that the whole composition of DEC is not decided by a narrow majority in the CEC.<sup>21</sup>

53. Article 44.2 deals with the composition of the PEC. The method of appointment is primarily partisan. Political parties and alliances of political parties represented in the National Assembly can appoint one member each where the number of the parliamentary factions is more than four, and two members if the number of the factions is less than five. An additional two members are elected by the DEC. Where the number of nominated candidates is more than two, the DEC shall select these two members by drawing lots. The chairs and secretaries of PEC are distributed in accordance to the strength of political parties in parliament. If no member of the PEC is appointed by any political party or alliance of political parties in the manner and within the time limits prescribed by the code, or the number of candidates nominated by the DEC is less than two, the vacant positions of the PEC shall be appointed by the chairperson of the DEC. This provision does not change the rules of the code in force.

54. Article 45 provides for the procedure for removal of the deputy chairperson and secretary of the CEC and chairperson, deputy chairperson and secretary of the DEC. In both cases, the decision must be adopted by at least two thirds of the total number of votes of the members of the Commission. Nevertheless, there are no provisions that outline the grounds that could justify such a decision. *Dismissal should be based only on a reasoned decision, and be limited to very serious grounds.*<sup>22</sup>

55. Article 45 also establishes the procedure for early termination of powers of members of DEC. Paragraph 6 lists some grounds, and the possibility to terminate the powers of a member of the DEC upon a decision adopted by two thirds of the votes of the members of the CEC. In addition, the DEC may terminate earlier the power of a member of the PEC upon a decision adopted by at least two thirds of the total number of votes of the members of the Commission if the latter has violated a provision of the code. The Article also establishes that "the procedure prescribed by this part may be enforced for unreasonable absence from regular sittings" of the members of DEC and CEC. However, it is not clear if absence is the only possible cause for removal. *The ambiguity and lack of clarity of the Article should be revised, since it could endanger the security of tenure and independence of commission members.*

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<sup>21</sup> CDL-AD(2011)032, para. 24.

<sup>22</sup> *Ibidem*, para. 28.

56. In a positive step and in line with previous recommendations, the draft code now authorises the CEC to regulate all issues related to the electoral process, unless they are regulated by another competent state body. This should contribute to the uniform implementation of election-related legislation.

57. Additional training on election procedures for election commission members, with a particular focus on counting and tabulation procedures, as well as voter education, has been a long standing recommendation of the OSCE/ODIHR.<sup>23</sup> This is particularly relevant in light of the changes in the organisation of voting and counting procedures envisioned by the draft code. While Article 51.2(14) lists obligations of the CEC to publish training materials for proxies, observers, and PEC members, the law does not refer to publication of training materials for DEC members, as well as any voter education materials. *It is recommended that the law specifies that the CEC elaborate and publish training materials for all categories of electoral stakeholders, in particular for DEC members and for voters.*

### **E. Voter lists**

58. The draft code does not introduce significant changes to the system of voter registration. The Venice Commission and OSCE/ODIHR have consistently recommended building consensus on effective solutions to address persistent concerns related to the accuracy of voter registration.<sup>24</sup> One such concern is the presence on the voter lists of people who are temporarily absent or *de facto* reside abroad, potentially enabling someone to vote illegally on their behalf.<sup>25</sup>

59. The concerns regarding the accuracy of voter lists, potential impersonation and multiple voting underlie the long-standing calls of many opposition parties and civil society organisations to publish signed voter lists after election day. The Explanatory Report of the *Code of Good Practice in Electoral Matters* states that “since abstention may indicate a political choice, lists of persons voting should not be published”.<sup>26</sup> More generally, making personal data as contained in signed voters’ lists broadly available could raise problems of data protection.<sup>27</sup>

60. The translation of Article 68.2(4) is not very clear but, according to the authorities, this provision allows, in practice, candidate proxies and observers to check which voters have actually voted. If this is explicitly stated in the original version, it is a welcome development and a confidence building measure. This measure would however remain incomplete without providing access to signed voter lists in a way that ensures a balance between data protection and secrecy of the vote on the one hand and stakeholders’ interest in consulting the signed voter lists on the other. *It is recommended that this provision be carefully reviewed to ensure that it provides for meaningful consultation of signed voter lists by candidate proxies and*

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<sup>23</sup> Recommendation 9, OSCE/ODIHR Election Observation Mission Final Report (2012); Recommendation 9, OSCE/ODIHR Election Observation Mission Final Report (2013).

<sup>24</sup> See CDL-AD(2011)032, para. 34, OSCE/ODIHR recommendations 4, 10 and 11, OSCE/ODIHR Election Observation Mission Final Report (2012); recommendations 5 and 10, OSCE/ODIHR Election Observation Mission Final Report (2013), recommendation 4, OSCE/ODIHR Referendum Expert Team Final Report (2016).

<sup>25</sup> See all documents of the Venice Commission on voters residing *de facto* abroad, mainly CDL-PI(2015)003 and CDL-AD(2015)040.

<sup>26</sup> Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), para. 54.

<sup>27</sup> See for instance the Joint Opinion on the revised Electoral Code of “the former Yugoslav Republic of Macedonia” (CDL-AD(2011)027), para. 19: “The issue of use or abuse of information from the voter lists is not sufficiently addressed by the amendments. Article 55(1) stipulates that the personal data contained in the voter lists must be protected in line with the law and cannot be used except for the purpose of “*exercising the citizens’ right to vote.*” However, Article 55(2) requires the State Election Commission (“the SEC”) to supply all of the data from the voter lists to any registered political party or independent candidate, upon request. The legal framework should clearly state the permitted usage of information obtained from the voter lists and whether the information can be used for the campaign activities of political parties and candidates. At a minimum, more guidance should be provided to political parties and candidates by providing a concrete definition for the term “*exercising the citizen’s right to vote.*”

observers under controlled conditions and with a reasonable timeframe. It is also recommended that other measures be adopted, such as initiating independent reviews of the signed lists under confidentiality obligation.

61. The code should also clearly spell out the right to make complaints about any irregularities discovered during review of signed voter lists and ensure their timely consideration. A new provision could be included, stating that in judicial proceedings a party could present grounds for access to the signed voter lists for a specific litigation purpose and that the court could grant such access.

62. Other measures to proactively improve the accuracy of the voter register are considered in the draft code, such as audits of voter lists in advance of the election twice a year, as stated in Article 9.4. Inviting political parties and interested NGOs to participate in this exercise could improve public trust in the process.

### **Voter identification**

63. Concerns about illegal proxy voting on behalf of absent voters could be addressed through improved voter identification. The Venice Commission and OSCE/ODIHR have recommended introducing effective and consistent safeguards against multiple voting and impersonation on election day, which should be applied to all voters independently of the document used for voter identification purposes.<sup>28</sup>

64. The draft code proposes a system of voter identification in Article 66 that serves to improve transparency of voter identification, but it is not sufficient of itself to eliminate the possibility of fraudulent voting on someone's behalf or other forms of multiple voting. The draft code eliminates the stamping of the identification documents of voters. Some interlocutors suggested the inking of voters fingers to prevent multiple voting, at least as a short-term measure. Such a mechanism can be regarded as one of the effective and reasonable safeguards against multiple voting and is used in a number of countries in the European space and OSCE region, including Albania, Georgia, Serbia, and the "former Yugoslav Republic of Macedonia". *It is recommended to introduce additional safeguards against potential multiple voting. In the short term, this could include the inking of voters' fingers.*

65. In the draft code, as submitted by the authorities on 18 April, a mechanism for electronically collecting the fingerprints of voters at polling stations is provided. The data collected will be checked for cases of potential multiple voting (Article 75.2). This could help to limit potential voter impersonation and multiple voting, if the system functions properly. The draft code does not clearly define the competences of the various state bodies involved in the collection, storage, and use of this personal biometric data, or the consequences of discovering cases of matching fingerprints. In any case, should any new technologies be introduced in the electoral process, a number of issues should be thoroughly considered, including a risk assessment of the costs, benefits and challenges of introducing such technologies, harmonisation of new provisions with existing data protection laws and standards,<sup>29</sup> but also ensuring trust in the process, necessary check-ups and pilot procedures, proper procedures for procurement, public testing and certification of the

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<sup>28</sup> According to the Venice Commission Summary Report on voters residing *de facto* abroad, the following measures help avoiding fraud: "identity controls at the polling station, which should not undermine the secrecy of the vote, are made more efficient through the issuance of specific voters' ID documents; the use of biometric measures to identify duplication in records; the adoption of anti-counterfeiting measures for identity documents; the on-line verification of the identity of voters; controlled destruction of identification documents which remain unclaimed by citizens. The use of indelible ink is a good complement to such controls", CDL-AD(2015)040, para. 39; Recommendation 5, OSCE/ODIHR Referendum Expert Team Final Report (2016).

<sup>29</sup> See *inter alia* Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, ratified by Armenia on 9 May 2012.

equipment, contingency planning if the technology fails, sufficient efforts for training electoral staff, and effective awareness-raising among voters and political parties. *If new technologies are to be introduced, it is recommended that a gradual approach to the introduction of such technologies be adopted through pilots over the course of several elections, starting from the upcoming local elections. This would serve as an important measure to enhance confidence in the system and provide opportunities to address technical issues and ensure effective implementation.*

## **F. Registration of candidates and parties**

66. The amounts of electoral deposits provided in Article 84.2(6) for parliamentary elections (10,000 minimum salaries,<sup>30</sup> an increase from the previous 8,000 minimum salaries), as well as electoral deposits for local elections appear to be relatively high. It should be borne in mind that the amount of the electoral deposit should not create an unreasonable barrier to candidacy. The draft code provides that a contestant that receives at least four per cent of the votes qualifies for reimbursement of the deposit. *It is recommended that the sum of the deposit and the result valid for refund be not excessive, and in any case, significantly less than the threshold to enter parliament.*<sup>31</sup>

67. The Venice Commission and OSCE/ODIHR have previously recommended that the Electoral Code should not allow de-registration of candidates for minor violations and that candidate de-registration should be allowed only in extraordinary circumstances, which should be clearly and exhaustively defined in the Electoral Code.<sup>32</sup> These recommendations are partially addressed in the draft code. Article 19.8 of the draft code provides that the election commission which registered the candidate or list of candidates may apply to court to revoke registration in case of continuous violations that may impact the results of elections, or when the consequences of an action are impossible to eliminate and the violation impacts the outcome of elections. However, Article 88.2 provides that registration of a political party (alliance) shall be revoked upon the judgment of the court where the provisions of Article 19.8, 26.1, or 27 have been violated. Since Article 27 regulates the use of the means of campaign funds, Article 88.2 may allow de-registration for minor campaign finance violations. Article 88.1(5) provides that the CEC may revoke the full candidate list if the number of candidates of even one district electoral list falls below three. This provision may be regarded as a disproportionate sanction. *It is recommended that the draft code allow de-registration of candidates and party lists only as an exceptional measure for the most serious violations of law.*

68. Article 104 makes it possible for the time between registration of political parties running in early elections and the election day to be reduced to five days. This deadline is excessively short. *It is recommended that all candidate registration deadlines be reasonable and facilitate credible and inclusive electoral processes.*

## **G. Election campaign, campaign finance, and media**

### **Election campaign**

69. The general obligation on the State in Article 19.2 to ensure the free conduct of an election campaign is to be welcomed. Allowed forms of campaigning and canvassing may be described by the concept of 'established procedure' in Article 19.7 but it is unclear what is captured by this. *There should be criteria for what the electoral commissions can set out as established procedure.*

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<sup>30</sup> Deposit equals AMD 10 million (or some EUR 18,430 as of writing the Opinion).

<sup>31</sup> Code of Good Practice in Electoral Matters, CDL-AD (2002)023rev, at I.1.3.iv.

<sup>32</sup> CDL-AD(2011)032, para. 45; Recommendation 12, OSCE/ODIHR Election Observation Mission Final Report (2012); Recommendation 11, OSCE/ODIHR Election Observation Mission Final Report (2013).



70. The draft code addresses some previous Venice Commission and OSCE/ODIHR recommendations. In particular, Article 21 of the draft code addresses a prior recommendation to adopt a more consistent approach to the placement of campaign material and extending regulations to all types of printed material.<sup>33</sup> At the same time, a prior recommendation to narrow the scope of restrictions on the placement of campaign material on privately owned facilities has not been fully addressed and Article 21.2 of the draft code continues to restrict placement of campaign materials on privately owned catering or trading facilities, with no clear rationale behind such a restriction. *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.*

71. The draft code does not establish clear rules on whether the rights and facilities given to political parties during the campaign are also available to candidates. The draft code is not fully consistent in that regard. Some provisions cover both parties and candidates, while others do not. While this distinction is less significant when the code only allows for party lists, it appears that the same campaign rules apply for local elections when non-party (self-nominated) candidates are possible.

72. There should be an effective method of resolving campaign-related complaints during the campaign itself. Article 19.7 states that election commissions control the observance of the “established procedure” for election campaigns. However the Article only allows for two resolution options, an application to stop the activity, or a three day warning, and this may be too rigid. If those approaches do not work, the next step in the draft code is an application to revoke the registration of the candidate or political party list when the criteria in Article 19.8 apply. *When conduct during the campaign is prohibited (e.g. Article 21.7), it should be clear who the enforcing authority is. Other provisions should be further specified, mainly concerning what activities are forbidden on election day and on the day before (e.g. Article 21.6 second paragraph). It is recommended that a range of clear and proportionate sanctions for campaign-related offences be provided in the law.*

### **Campaign finance**

73. Campaign finance regulations in the draft code are substantially similar to those of the current code. The OSCE/ODIHR and the Venice Commission have previously recommended that consideration be given to expanding the legal definition of campaign expenditures so that all costs related to a contestant’s campaign would be included.<sup>34</sup> This recommendation remains unaddressed. Articles 27.1 and 27.12 make it clear that the draft code’s regulations on campaign funds relate only to specific campaign expenses: campaign through mass media, rent of premises, and printed campaign materials. *It is recommended that campaign finance regulations cover all campaign-related activities, including organisational expenditures, such as services of marketing agencies, campaign offices, transportation and communication expenses.*

74. As in the current code, parties and candidates running in large communities are required by Article 26 to set up a specific bank account for campaign finance purposes. Article 26 provides for use of own funds of candidates and parties as well as donations from individuals eligible to vote; however it does not explicitly address important campaign finance issues, such as the treatment of anonymous donations and the possibility of making in-kind donations. According to the authorities, these issues are addressed by Articles 26.2(3) and 27.2. *It would be advisable for the code to regulate them explicitly.*

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<sup>33</sup> Recommendation 12, OSCE/ODIHR Election Observation Mission Final Report (2012).

<sup>34</sup> CDL-AD(2011)032, paragraph 53; Recommendation 13, OSCE/ODIHR Election Observation Mission Final Report (2012).

75. Article 27.5 envisages the possibility of revoking candidate or candidate list registration for excessive campaign spending. The formula contained in this Article seems unduly complex and it does not appear that revocation of registration would be a proportionate sanction in this instance. *It is recommended that this provision be reconsidered and deregistration be applied only as an exceptional sanction, after other sanctions have been found to be ineffective.*

76. Article 29 does not clearly define the status of the Oversight and Audit Service (OAS). The Venice Commission and OSCE/ODIHR have previously emphasised the advantage of independent institutional oversight over campaign financing.<sup>35</sup> *It is recommended to clarify whether it is an independent institution or subordinate to the CEC.*

77. Article 29.5 provides that the OAS shall carry out an audit of campaign finance reports, draw up a statement of information on audit results and submit it to the CEC for consideration within two days after receiving declarations on the use of campaign funds. This deadline is unreasonably short to carry out a meaningful audit. *It is recommended that the timeframe for campaign finance audits be extended.*

78. Article 29.6 does not empower the OAS to receive information from commercial entities, contractors, the police and other institutions that may have information relevant to the OAS audits. It is not clear what “receipts and expenditures not prohibited by the legislation” the OAS is not authorised to receive according to Article 29.6(2). *It is recommended that the OAS be empowered to obtain all information relevant to its audits.*

79. Article 8.5 obliges all parties and candidates to submit declarations of their property and income to the relevant election commission and that these declarations be published automatically in the case of parties. The code is ambiguous since it does not establish whether these rules are applicable to all elections or only to national elections. Part 3 of the same Article 8.5 gives the Central Electoral Commission discretion to decide the period for which the declaration of income is to be submitted. In the interests of legal certainty, this period could be established by the law. The declarations about candidates are made available to the media under Article 8.6. It is unclear which “other candidates” are covered by this provision.

### **Misuse of administrative resources**

80. The Constitution of Armenia provides for free and equal elections, and this requires provisions to counter the abuse of state resources during electoral processes. Therefore, new provisions in relation to the separation of the state from political parties and the restriction on the use of state resources are to be welcome. Notwithstanding, the legal framework would benefit from a general prohibition of the misuse of administrative resources during electoral processes, as well as effective, proportionate and dissuasive sanctions in cases when violations are identified.<sup>36</sup>

81. Article 22.2 is a further prohibition on state officials using their power to establish unequal conditions among those standing for election by showing partiality. However, *the extension of this prohibition to the mass media may go too far in restricting free expression by the media and should be reconsidered.*

82. Article 23 is a welcome restriction on how candidates who are incumbents or state officials must conduct their campaigns. Essentially, it is a prohibition on campaigning while performing official powers and campaigning using the resources provided for official purposes. See also

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<sup>35</sup> CDL-AD(2011)032, paragraph 54.

<sup>36</sup> See the Venice Commission and OSCE/ODIHR 2016 Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, part II.C.

Article 91.2. It would be suitable to make it clearer what sanctions will apply in case these provisions are violated.

83. The OSCE/ODIHR has previously recommended the introduction of a specific prohibition to locate party and campaign offices in buildings occupied or owned by state or local government offices.<sup>37</sup> This recommendation has been addressed in Article 19.4 of the draft code.

## Media

84. The rules on election campaign through the mass media remain essentially the same in the draft code. The OSCE/ODIHR and the Venice Commission have been informed that such rules are contained in the Law on Radio and Television. This preliminary joint opinion only assesses the draft code and it is recommended to ensure that legislation addresses prior OSCE/ODIHR and Venice Commission recommendations.<sup>38</sup>

85. Article 20.13 contains a new provision, which prohibits the abuse of freedom of mass media during the conduct of the election campaign. This prohibition is too general and may lead to undue limitations on the freedom of mass media. *It is recommended that this provision be deleted.*

## H. Observers

86. Chapter 6 of the draft code contains rules on observers, proxies, mass media representatives, and authorised representatives.

87. Article 32.1 retains mandatory testing and certification of citizen observers. The Venice Commission and the OSCE/ODIHR have previously recommended that these requirements be reconsidered.<sup>39</sup> Moreover, citizen observers are required to take the same test and obtain the same qualification certificate for carrying out observation activities that Articles 32.1 and 3 prescribe for members of election commissions. Although, according to Article 32.1, national observers “can be present at the sittings of election commissions”, they are not members of election commissions. Furthermore, Article 32.2 prohibits observers to make claims or intervene in the activities of election commissions and the voting process. It is clear that the role of observers and of members of the election commissions during the elections is substantially different. *Therefore, the testing and certification requirements for citizen observers should be removed.*

88. Furthermore, additional restrictions found in the draft code may impede the activity of citizen observers and undermine transparency of the electoral process. For example, Article 51.2(21) allows the CEC to revoke the qualification certificate of an observer for violating “the requirements of this Code”, which could open the door to revoking certificates for any minor violations. As in the current code, the draft code provides that Armenian citizen observer organisations may carry out observation only if their charter includes as one of its aims issues related to democracy and protection of human rights and if they do not support electoral

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<sup>37</sup> Recommendation 14, OSCE/ODIHR Election Observation Mission Final Report (2013).

<sup>38</sup> Including: those aimed at ensuring that any campaign material prepared by or on behalf of electoral contestants is clearly marked as such when it is broadcast; further defining the mandate of the National Commission on Television and Radio (NCTR) with regard to media-related complaints and enforcement mechanisms; providing general guidelines for the media regarding coverage of campaigns, based on the existing requirements of impartiality and balance; and ensuring full transparency of media ownership. See Recommendations 17 and 18, OSCE/ODIHR Election Observation Mission Final Report (2012); Recommendation 17, OSCE/ODIHR Election Observation Mission Final Report (2013), Recommendations 11 and 12, OSCE/ODIHR Referendum Expert Team Final Report (2016).

<sup>39</sup> CDL-AD(2011)032, paras. 55 and ff.

contestants. Moreover, the draft code provides as a new requirement that these charter's aims should have been in effect for at least 3 years preceding the call of elections (Article 30.1.2). *The latter requirement deprives new organisations of the possibility to observe elections, and should be reconsidered.*

89. In a new provision, Article 65.7 limits the number of citizen observers to one per local organisation per polling station. Article 65.8 provides that the PEC may limit the total number of citizen observers and media representatives at a polling station where their number (but no less than 15) may hinder the smooth voting process. The OSCE/ODIHR has previously recommended that overcrowding be addressed by identifying more appropriate polling location. *It is recommended that any measures to address overcrowding in polling stations must be proportionate and safeguard transparency of the electoral process.*

90. Greater clarity of regulation could safeguard observers' rights. The draft code lists the right of proxies and observers to be present in the voting room during the entire voting process, but does not mention the right of observers to be present during the counting of ballots and tabulation of results (in contrast with proxies in Article 34.1(7)). Article 68.2, providing that all persons with the right to attend the commission meeting are allowed to be present during the count, means that observers are not excluded. However, *it would be suitable that the right to observe the counting and tabulation of results be listed explicitly. Observers could also be included in Article 67.14.*

91. Article 31 does not provide for a possibility of new observers to be accredited to observe the second round of parliamentary elections. The deadlines for applications for accreditation of observers and media representatives (15 days before election day) and for the CEC to issue certificates to observers and media representatives (within 12 days after request) are overly generous, especially for a potential second round. *It is recommended that the deadlines mentioned be reasonably shortened and possibility for additional accreditation for the second round be envisaged.*

92. A previous OSCE/ODIHR recommendation to avoid the possibility of arbitrary withdrawal of accreditation of an observer organisation in case of violation by individual observers has been addressed.<sup>40</sup> However, Article 31.5 now provides for the possibility to deprive an observer organisation of accreditation if it supports any candidate or political party running in elections, but it is not clear how such support could be assessed in practice. As such, this provision creates room for arbitrary decisions regarding the accreditation of observers that may negatively impact the transparency of elections. *It is recommended that this provision be reconsidered.*

### **I. Voting procedures and tabulation of results**

93. Article 59.1 provides for individual ballot papers for each contestant in parliamentary elections, to be given to the voter in a pile. The reason behind introducing this feature seems to be to address concerns in previous elections that ballots were sorted into incorrect piles during the count. However, given the novelty of this procedure to Armenian elections, the introduction of separate ballots for each electoral contestant and the use of voting passes certifying receipt of the ballot should be carefully considered so as to avoid potential confusion among voters.

94. Articles 68-72 regulate counting procedures and compiling results protocols. The provisions would benefit from additional review to improve consistency and clarity of the process. It should be clearly stated whether ballots cast without envelopes are valid, what the

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<sup>40</sup> Recommendation 23, OSCE/ODIHR Election Observation Mission Final Report (2012); Recommendations 23 and 24, OSCE/ODIHR Election Observation Mission Final Report (2013).

meaning of the term 'unnecessary entries' used in Articles 68.6 and 69.2(3) is, as well as the appropriate place for stamping the ballots.

95. Article 69.1 is too general when stating that a ballot paper shall be invalid where it contains an unnecessary entry. This could open the possibility for arbitrarily invalidating ballots. *It is recommended to reconsider this provision.*

96. Article 73.3 provides that the DEC shall immediately post a copy of the tabulated voting results in a place visible to all. The OSCE/ODIHR has previously expressed concerns about overcrowding at DEC's, impeding the opportunity to follow the tabulation process. *It is recommended that the code provide for the location of DEC's in sufficiently large premises and introduce additional measures to enhance the transparency of the tabulation process, such as the prompt posting of tabulated results by precinct online and/or on large boards or screens visible to all those following the tabulation process.*

97. Article 75.1 provides for publication of preliminary and final election results by the CEC, but it is silent on what data should be published. *To enhance transparency and confidence in the election results, it is recommended that preliminary and final results be published on the CEC website in a user-friendly format, disaggregated by precinct and district.*

98. In addition, in line with the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), *it is recommended to publish sex-disaggregated data on voter lists, candidates, as well as members of election administration at all levels.*<sup>41</sup>

## **J. Local elections**

### **Overview**

99. The general constitutional principles in Article 7 of the Constitution apply to elections to community councils in the same manner as they apply to National Assembly elections.

100. Article 181 of the Constitution leaves the electoral system for local bodies with the Electoral Code:

"1. The bodies of local self-government are the community council and the community mayor, which shall be elected for a five-year term. The Electoral Code may prescribe direct or indirect election of the community mayor. In case of direct election of the community mayor, the principles of electoral law prescribed by Article 7 of the Constitution shall be applied.

2. The election procedure of local self-government bodies shall be prescribed by the Electoral Code."

101. There are only two levels of elected bodies in Armenia: the national level and the community level. The community council of elders may have from 5 to 33 members, depending on the size of the population (Article 105.3 of the draft code).

102. There are two systems of representation for the councils: a majoritarian system for all councils but three and a proportional system for the councils of these three, which are the biggest cities: Yerevan, Gyumri, and Vanadzor. It does not seem to be specified how many votes the voter may cast in the plurality system, but the rapporteurs were informed during their visit that it is meant to be one. Should the intention be to establish a single non-transferable vote system (SNTV) system, this should be clearly stated in the law. The local community will, in both cases, constitute one multi-member constituency (Articles 105.2 and

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<sup>41</sup> See Paragraph 48 of the 1997 CEDAW, General Recommendation 23.

124.2). The head of the communities (mayors) are in most cases directly elected, with the three exceptions in Yerevan, Gyumri, and Vanadzor, where the council elect the mayor.

### **The proportional system for the election of Councils in Yerevan, Gyumri, and Vanadzor**

103. The council of Yerevan shall have 65 members and in Gyumri and Vanadzor there will be 33 members (Article 123). In these cities, a proportional system with closed lists is applied (Articles 124 and 141.2). The largest party or alliance is given the absolute majority of the seats, provided it wins more than 40 per cent of the seats (Article 141.4). Article 141.2 establishes a threshold of 6 per cent for parties and 8 per cent for alliances at the local level. If there are less than three contestants, there is no threshold.

104. Only registered, national parties can run for the councils in Yerevan, Gyumri, and Vanadzor. Allowing local initiatives to form lists or local parties in a simple manner should be considered, in order to strengthen the local accountability of the councils. There can be self-nominated non-party candidates at community level, but not to the Councils of Elders in Yerevan, Gyumri, and Vanadzor (*see the recommendation contained in paragraph 49 on this*).

105. Political diversity is important at both the local and national levels and it is difficult to justify higher thresholds at the local level than at the national level. The introduction of a majority bonus in local elections, together with the higher thresholds and the current impossibility to establish parties at the local level, may further reduce political diversity and negatively impact the formation of coalitions. *It is therefore recommended to reduce the thresholds at the local level and to introduce the possibility of forming coalitions instead of establishing a majority bonus to a single party, like for parliamentary elections.* It is unclear why the system for those three cities should have closed lists or why the party or alliance which gets over 40 per cent (but not an overall majority) should be given an artificial 'absolute majority'. It is constitutionally mandated at the national level to give a stable parliamentary majority, but the same logic does not apply at the local level. A better correlation between the voters' will and the actual results of the elections could reinforce the voters' trust at the local level, improving accountability.

### **The mayors**

106. According to Article 118.2 of the draft code, the candidate with the highest number of votes is elected. If there is only one candidate, the candidate needs more votes in favour than against. If there is an equal number of votes, the result is determined by drawing lots. *A provision for a re-count before such lots are drawn should be included, also in Article 119.2.*

### **Campaign**

107. Elections at the community local self-government bodies and Councils of Elders are run by the DEC's according to Article 52. The extent to which campaign rules and funding rules also apply to local elections should be specifically set out in the code. Weaving such references into some provisions but not others leads to uncertainty.

## **K. Complaints and appeals**

108. The Venice Commission and the OSCE/ODIHR have made a number of prior recommendations with respect to handling electoral complaints and appeals, as well as investigating and prosecuting electoral offenses.<sup>42</sup> In particular, the OSCE/ODIHR recommended amending the Electoral Code to permit citizens, accredited citizen observers, and civil society groups to file complaints against decisions and actions of election

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<sup>42</sup> See for example CDL-AD(2011)032, paragraphs 81-92.

commissions, unlawful conduct in campaigning, and election results; simplifying election-related complaints and appeals process; and allowing more time to prepare complaints and challenges to voting day violations and election results.<sup>43</sup> Regulations related to complaints and appeals in the draft code retain most of the rules in the current code, and only partially address the relevant prior recommendations.

109. Article 169.11 of the Constitution provides that parties and party alliances can bring disputes about parliamentary elections to the Constitutional Court. This is not open to candidates and voters. The grounds or timeframes are not set out. This might be in the Law on the Constitutional Court or in another law, but it should be clearly stated and regulated.

110. Article 14.1 provides, positively, that applications about any inaccuracies in voter lists can be made to the authorised body by anyone. However, this approach to legal standing is not matched in other provisions of the draft code. Article 48.1 grants legal standing to different stakeholders but only with respect to specific rights or issues. This may result in an inability to challenge unlawful decisions (omissions) of election commissions and other violations of electoral law. A new provision in this Article allows authorised representatives of political parties to appeal against violations of rights of proxies or the party.

111. Article 48.3 regulates who may challenge voting results in electoral precincts. It allows proxies and candidates to do so only if they were present at the precinct concerned. *This limitation should be reconsidered. As previously recommended by the OSCE/ODIHR and the Venice Commission, the list of those entitled to bring challenges should also include groups of voters.*<sup>44</sup>

112. Article 48.10 provides that complaints against PEC decisions on voting day, as well as applications to declare voting results in electoral precincts invalid may be submitted to the relevant DEC at the latest by 18:00 on the day following election day. *Considering the need to substantiate such applications properly and the formal requirements for legal representation, this deadline is short and should be reconsidered.*<sup>45</sup>

113. Article 48.12 provides that applications for revoking or declaring candidate or candidate list registration invalid may be submitted on the second day preceding election day by 18:00. *This window is narrow and a longer time period should be allowed.* In addition, a possibility to appeal the decision of the DEC on registration of a candidate both to the CEC and the Administrative Court does not exclude conflicts of jurisdiction.<sup>46</sup>

114. Article 48.13, paragraph 2, provides that election commissions shall respond to the applications received on the day preceding and on election day within four days following the vote. This deadline is long and does not facilitate provision of an effective remedy to the applicants.<sup>47</sup> *It is recommended that these applications be dealt with by PECs before summarising voting results.*

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<sup>43</sup> Recommendations 15 and 16, OSCE/ODIHR Election Observation Mission Final Report (2012); Recommendations 18 – 22, OSCE/ODIHR Election Observation Mission Final Report (2013); Recommendation 2, OSCE/ODIHR Referendum Expert Team Final Report (2016).

<sup>44</sup> CDL-AD(2011)032, paragraph 86. See also the Code of Good Practice in Electoral Matters, para. 99.

<sup>45</sup> Paragraph 95 of the Code of Good Practice in Electoral Matters (CDL-AD (2002)023rev) states: "The time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision."

<sup>46</sup> Cf. the Code of Good Practice in Electoral Matters, II.3.3.c, "Neither the appellants nor the authorities should be able to choose the appeal body".

<sup>47</sup> Paragraph 5.10 of the 1990 OSCE Copenhagen Document states: "...everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity."

115. Article 49.1 provides that where an application is submitted through a representative, a power of attorney issued in the manner prescribed by law should also be submitted. The power of attorney shall be submitted in the original form. *This second sentence may lead to excessive formalism and it is recommended that it be deleted.* The reference to abuses of the right to appeal seems quite vague and consideration should be given to avoiding possible misinterpretations.

116. Article 50.12 limits the duration of a recount of election results of one electoral precinct to four hours. This limitation may prevent completion of an ongoing recount. *It is recommended that this provision be reconsidered.*<sup>48</sup>

#### **L. Women's representation**

117. The draft code increases the previously used gender quota. While the former system provided for a 20 per cent quota within brackets, but starting from bracket 2-6, the new one introduces a 25 per cent quota, starting from bracket 1-4. However, it might have limited impact. Indeed, it is only imposed on the first part of the national electoral lists for the National Assembly, which are closed lists, starting from the top of the list (Article 83.4). For the district lists, the requirement is that not more than 75 per cent of the total number of candidates can be of the same gender (Article 83.10), but there is no requirement concerning the placement on the list since the lists are open. As such, it is likely that every party passing the threshold will have at least one woman elected from the national list, but there is no such guarantee concerning district lists. In a positive step, Article 100.3 assures that, when filling vacancies in the first part of the national list, the underrepresented gender should get the seat if the gender in that party would otherwise be less than 20 per cent.

118. Article 130.2 has the same requirement for gender balance for the councils of elders of Yerevan, Gyumri and Vanadzor as there is for the National Assembly. In addition, Article 141.5 guarantees that every party will not have all its seats filled by candidates of the same gender. Since the rule is applied to all the seats in the council, the balance may be better than in the parliament. It is again positive that Article 141.7 assures that when filling vacancies, the underrepresented gender should get the seat if the share of the gender of that party would otherwise be less than 20 per cent.

119. For candidates to council of elders, other than Yerevan, Gyumri and Vanadzor there are no gender requirements.

120. The Venice Commission and the OSCE/ODIHR have stated, on several occasions, that “the small number of women in politics remains a critical issue which undermines the full functioning of democratic processes”.<sup>49</sup> In line with the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>50</sup> the *Report on the Method of Nomination of Candidates within Political Parties*, electoral quotas are regarded as temporary special measures that can act as an “appropriate and legitimate measure to increase women’s parliamentary representation”<sup>51</sup>. It is for each country to decide how to improve gender equality. However, the Venice Commission considers that, if legislative quotas are imposed, they “should provide for at least 30 per cent of women on party lists, while 40 or 50 is preferable”,<sup>52</sup> in order to be effective.

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<sup>48</sup> CDL-AD(2011)032, paragraph 74.

<sup>49</sup> See the Venice Commission and OSCE/ODIHR Guidelines on Political Parties Regulation (CDL-AD(2010)024), para. 99. See also: paragraph 40 of the 1991 OSCE Moscow Document, which commits OSCE participating States to a range of measures to enhance women’s participation.

<sup>50</sup> CEDAW, para 4. See also CEDAW General Recommendations 23 on political participation and 25 on temporary special measures.

<sup>51</sup> *Ibid.* para. 102.

<sup>52</sup> *Report on the method of nomination of candidates within political parties (CDL-AD(2015)020, para. 43)*



121. *It is therefore recommended that the draft code provide a more effective quota for women's representation on candidate lists, such as placing women among every two or three candidates. The draft code should also ensure that the chosen quota is effective not only for the registration of the candidate list, but also when distributing mandates.*

**M. Other issues concerning the structure, clarity and consistency of the draft code**

122. The provisions listed below would benefit from additional review to improve consistency and clarity of regulation. The code could also include a glossary of terms or an introductory chapter, which would help to clarify the meaning of a number of provisions and terminology used. *It is recommended that the technical drafting issues identified below are addressed.*

123. Identified inconsistencies and ambiguities include:

- Article 8.2 does not make it clear when secondary legal acts of the CEC enter into legal force during elections – whether from the moment of their state registration (and what is the timeline for such registration) or from the moment of publication. The total number of voters included in the Register of Voters (Article 8.7) should be disaggregated by districts (communities) and published in advance, as the number of candidates on district party lists is determined on the basis of the number of voters in the district (see Article 83.9).
- It is not clear whether Article 26.7 is also applicable to elections to the councils of elders. The deadline for the Oversight and Audit Service to draw up statements of information and post them on the website of the CEC is not specified.
- Articles 32.6 and 34.5 are superfluous, as all election participants must comply with the law.
- There seems to be a contradiction between Article 118.6(1) and Article 118.6(2) with regard to an election with only one candidate.
- Article 145 states that all the provisions concerning political parties, with the exception of several norms, shall be applicable to alliances. On this basis, a number of references to alliances have been deleted from the draft code, but some others are kept or have been added, which is confusing (e.g., Article 25).