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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

ARMENIA

JOINT OPINION

ON THE DRAFT LAW ON REFERENDUM

Adopted by the Council for Democratic Elections at its 60th meeting (Venice, 7 December 2017)

and by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017)

on the basis of comments by

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A Table of Contents

I. Introduction

1. On 25 October 2017, the Minister of Justice of the Republic of Armenia requested the Council of Europe's European Commission for Democracy through Law (Venice Commission) to give an opinion on the draft constitutional law of the Republic of Armenia on referendum (CDL-REF(2017)049). The request relates to the entire draft law, which was prepared as a result of amendments made to the Constitution of Armenia, endorsed by referendum on 6 December 2015. The Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) decided to provide a joint legal opinion on the draft law.

2. Mr Endzins, Ms Khabrieva, Mr Maiani and Mr Vilanova Trias were appointed as rapporteurs for the Venice Commission. Mr Vashchanka was appointed as legal expert for the OSCE/ODIHR.

3. A delegation of the Venice Commission and OSCE/ODIHR composed of Mr Vilanova Trias, Mr Vashchanka, Mr Pierre Garrone from the Venice Commission secretariat and Mr Alexey Gromov from the OSCE/ODIHR Election Department visited Yerevan, Armenia on 17 November 2017 to meet with the Vice-President of the National Assembly and parties represented in the National Assembly (Parliament), the Central Electoral Commission (CEC), the Minister of Justice, and relevant non-governmental organisations (NGOs). This Joint Opinion takes into account the information obtained during the above-mentioned visit.

4. The present Joint Opinion was adopted by the Council for Democratic Elections at its 60th meeting (Venice, 7 December 2017) and, by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017).

5. This Joint Opinion was prepared with the goal of assisting Armenia in its efforts to develop legislation that is in line with key international standards and obligations, as well as relevant OSCE commitments. The OSCE/ODIHR and the Venice Commission remain at the disposal of the Armenian authorities for any further assistance that they may require.

II. Executive Summary

6. The draft law on referendum is intended to give effect to the new constitutional provisions on different types of national referendums and to regulate their conduct. The Venice Commission and OSCE/ODIHR welcome that the Armenian authorities have prepared a draft aiming to bring the legislation on referendums in conformity with the Constitution and international standards. The draft law provides details on issues such as collection of support signatures, the conduct of referendum campaigns, referendum campaign financing, voting procedures and summarisation of referendum results. With the new Electoral Code, the legal framework removed provisions on mandatory CEC testing of observers and introduced effective solutions to improve the accuracy of the voter register, addressing prior Venice Commission and OSCE/ODIHR recommendations.

7. A number of prior OSCE/ODIHR and Venice Commission recommendations, relating also to similar provisions in the Electoral Code, remain unaddressed, including in respect of the effectiveness of complaints and appeals procedures, the transparency and accountability of campaign finance, the clarity of the role and oversight of media, and safeguards against potential abuse of public resources. While the parliamentary parties did not raise main objections, the process of drafting the law so far did not involve inclusive discussions and meaningful engagement with all stakeholders.

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

- clearly address the unity of content of the referendum proposal and the requirement for the question of referendum to be clear and not misleading;
- clarify and further develop the provisions on complaints and appeals, to ensure an effective system of appeal enabling electoral stakeholders to appeal the decisions that affect them;
- require the authorities to provide objective information about the proposals put to referendum;
- provide for submission of draft popular initiative for the Constitutional Court's review prior to the collection of additional signatures; entitle the Constitutional Court to provide a nuanced ruling on the constitutionality of each proposed amendment, and allow for the valid provisions of a popular initiative to be submitted to the people's vote without a new collection of signatures;
- clearly regulate the collection of a referendum initiative support signatures and their verification and ensure that these rules do not restrict the right of eligible citizens to sign popular initiatives;
- allow more than one structure for the "yes" and the "no" votes, respectively, – including for financial reporting - while ensuring equality of opportunity between supporters and opponents of the referendum.

9. Furthermore, the Venice Commission and OSCE/ODIHR recommend to:

- expressly provide for the duty of neutrality of administrative authorities, as well as for effective sanctions for breaching it, in order to prevent the misuse of administrative resources; prohibit public sector employees from taking part in campaigns while performing official duties;
- provide for the formation of precinct electoral commissions with representation of the referendum proposal's supporters and opponents;
- strengthen transparency of all funds collected and spent on the campaign;
- extend the free airtime allocated on public radio and television, and consider requiring the public broadcaster to organise campaign debates with the referendum "parties";
- allow observation by NGOs created less than one year before the referendum and whose charter objectives relate to the issues put to referendum or to any of the issues listed in Article 21.1(3) of the draft law.

10. A number of additional recommendations included throughout the text of this Joint Opinion (highlighted in italics) are aimed at further improving the compliance of the draft law on referendum with Council of Europe and other international human rights standards and obligations, OSCE commitments, and recommendations contained in previous Joint Opinions and election observation reports.

11. The present draft does not address local referendums, although they are provided for in the Constitution. The Venice Commission and OSCE/ODIHR invite the Armenian authorities to draft legislation on this issue in a timely manner as a future step.

III. Scope of the Joint Opinion

12. The scope of this Joint Opinion covers only the draft law submitted for review. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing referendums in Armenia.

13. The Joint Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses primarily on areas that require amendments or improvements rather than the positive aspects of the draft law. The ensuing recommendations are based on relevant Council of Europe and other international human rights standards and obligations,

OSCE commitments, and good international practices. In particular, they are based on the reference document of the Council of Europe in the field, the Code of Good Practice on Referendums drafted by the Venice Commission.[1]

14. This Joint Opinion is based on an unofficial English translation of the draft law provided by Ministry of Justice of Armenia. It should be noted that any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

15. In view of the above, the OSCE/ODIHR and the Venice Commission would like to note that this Joint Opinion may not cover all aspects of the draft law, and that it does not prevent them from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation in Armenia in the future.

IV. General remarks

16. The draft law has been prepared following the adoption of a new Constitution in Armenia in December 2015. This draft is a Constitutional Law, which, based on Article 103.2 of the Constitution, requires a qualified majority of 3/5 of the deputies of the Parliament to be adopted. It is intended to regulate national referendums as foreseen by Article 103 of the Constitution. It thus complements the basic rules found in Article 202 of the Constitution.

17. The Constitution of Armenia provides for mandatory referendums to enact a new Constitution or to make constitutional amendments to enumerated constitutional provisions (Article 202.1), optional referendums for amendments to constitutional provisions that may by amended by the Parliament (Article 202.2), optional referendums on draft laws submitted upon popular initiative (Article 204), as well as mandatory referendums on accession of Armenia to supranational organisations and on territorial changes (Article 205). The Constitution also sets out timelines for holding referendums (Article 206) and establishes turnout and approval quorums (Article 207). In addition to these provisions on nationwide referendums, the Constitution also provides for local referendums (Article 183), which are not regulated by the present draft law. *The Venice Commission and OSCE/ODIHR recommend the timely drafting of legislation on local referendums* as referendum at the local level is an important way to ensure citizens' participation in political life due to its concrete implications.

18. A number of provisions of the draft law – for example, on the right to participate in a referendum (Article 3) on issues put or not to referendum (Article 4-5) on the number of signatures required for requesting referendum (Articles 7,8,10) – are directly derived from the Constitution and, as such, reference will be made when necessary to comments issued by the Venice Commission on such constitutional provisions.[2] Reference will also be made to the Joint Opinions of the Venice Commission and OSCE/ODIHR on the electoral legislation of Armenia when the draft law refers to it or contains similar provisions, as well as to OSCE/ODIHR election observation reports and recommendations.[3]

19. The draft law regulates the main issues related to the procedure for holding a referendum in Armenia, *inter alia*: the procedure for initiating the referendum, the procedure for collecting signatures in support of the referendum, campaigning in and financing of the referendum, organisation and administration of the referendum, the procedure for counting votes and determining the results of voting.

20. In line with the Constitution, the draft introduces a form of popular initiative, while suppressing the possibility for the President to initiate a referendum. The latter modification is

[1] CDL-AD(2007)008rev. (Code of Good Practice on Referendums)
[2] See CDL-AD(2015)038, in particular par. 74ff.
[3] CDL-AD(2016)031 ; CDL-AD(2016)019; http://www.osce.org/odihr/elections/armenia.

linked to the introduction of a parliamentary system and in line with the practice in a number of parliamentary democracies, such as Andorra, Belgium, Bulgaria, Cyprus, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Norway, Poland, Spain, or Sweden,[4] where the head of state has no authority to convene a referendum, or only after approval or another form of endorsement by the Parliament. In conformity with the Code of Good Practice on Referendums,[5] the Parliament takes a position before a draft proposal resulting from a popular initiative is submitted to the people.

21. Referendum, as provided for by the Constitution, is to be considered as a complement to representative democracy. Moreover, control of the constitutionality of the questions submitted is entrusted to the Constitutional Court, thus avoiding a political body to take a decision on this issue.

22. A successful reform is built on at least the following three elements: 1) clear and comprehensive legislation that meets international standards and addresses prior recommendations; 2) adoption of legislation by broad consensus after extensive public consultations with all the stakeholders; and 3) political commitment to fully implement the electoral legislation in good faith. Paragraph 5.8 of the 1990 OSCE Copenhagen Document states commits participating States to adopt legislation "at the end of a public procedure". Concerning public consultations, the Venice Commission and OSCE/ODIHR delegation was informed by the authorities that the draft law was posted on the Internet and available for public comments but that few comments were made. It did not appear that the authorities have initiated any discussion events of the draft law with NGOs, political parties, and other stakeholders. The Venice Commission and OSCE/ODIHR reiterate their encouragement for the Armenian authorities to reach out to and engage electoral stakeholders *in inclusive and substantive discussions of the draft law, including through dialogue platforms in the Ministry of Justice and the Parliament*.

23. The draft law mixes direct repetition of provisions found in the Constitution with slightly different formulations (for example, Articles 4.2(2) and 4.3 of the draft law). The draft law repeats twice (in Articles 7.1 and 8.1) provisions to be found in Article 202.1 of the Constitution, while a shorter reference is made to Article 202.2 of the Constitution in Article 9 of the draft law. Moreover, a very general cross-reference to the Electoral Code is made on the important topic of complaints and appeals (Article 15.3), while other aspects of the process are addressed in detail, especially in chapters 4-7. *It would be preferable to develop in all chapters those rules that are specific to referendums and to make cross-references to the Electoral Code only where there is no risk of ambiguity*.

24. In particular, there is no section "Basic terms and concepts" in the draft constitutional law. Some terminological and conceptual inconsistencies could be avoided by including such a section in the constitutional law.

V. Analysis and recommendations

A. Formulation of the question

25. Substantive validity of the draft law is already dealt with by the Constitution insofar as texts submitted to a referendum must comply with all superior law.[6] Concerning unity of form of the referendum proposal,[7] it appears that only specifically-worded drafts may be submitted to referendum. However, no provision addresses the issue of unity of content of the referendum

[4] Cf. CDL-AD(2005)034, p. 7.
[5] Code of Good Practice on Referendums, III.6.
[6] Article 204.1 of the Constitution; Code of Good Practice on Referendums, III.3.
[7] Code of Good Practice on Referendums, III.2.

proposal.[8] Moreover, the draft law does not deal with the formulation of the question put to referendum. In order to provide legislative guarantees preventing the distortion of the will of the voters, the Code of Good Practice on Referendums recommends that "the question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum; voters must be able to answer the questions asked solely by yes, no or a blank vote".[9] That is to say, the question should be formulated in a way to enable an unambiguous answer and to provide clarity about the legal consequences of the decision taken by referendum. *The Venice Commission and OSCE/ODIHR recommend introducing the principles of unity of content and clarity of the question into the law.*

B. Information provided to the voters

26. The draft law does not include an obligation of the authorities to provide objective information about the proposal put to referendum. In addition to the text submitted to the referendum, the Code of Good Practice recommends that an explanatory report or balanced information material from the proposal's supporters and opponents should be made available to the voters sufficiently in advance.[10] *Consideration should be given to including in the draft law an explicit obligation of the authorities to provide objective information about the proposal put to referendum*. *An explanatory report could be made available at each polling station, instead of the Constitutional Court's ruling on the constitutionality of the draft proposal, as envisioned in Article 25.2(2) of the draft law*.

C. An effective system of appeal

27. The draft law contains few provisions on referendum-related complaints and appeals. A general reference is made to the Electoral Code in Article 15.3 of the draft law with regard to the procedure for appeal against decisions, actions, and omissions of the electoral commissions. The draft law does not provide for a procedure for appeals against referendum results: Articles 34 and 35 of the draft law only make reference to such appeals for the purpose of summarising referendum results. This approach would not ensure effective remedies for "parties" to the referendum and other stakeholders.[11]

28. In particular, Article 48.3 of the Electoral Code grants legal standing to appeal against decisions of electoral commissions with respect to the subjective right of suffrage, as well as rights of proxies, observers, visitors, mass media representatives, and authorised representatives of political parties running in elections. These provisions do not mention referendum "parties", campaign participants, or other stakeholders whose rights and legal interests may be affected by decisions of electoral commissions.

29. Articles 48.5 and 48.6 of the Electoral Code establish different avenues of appeal for decisions of electoral commissions with respect to election results and on other issues. It is not clear how these provisions would apply to referendums. Article 48.12 of the Electoral Code grants legal standing to challenge voting results in a precinct to political parties running in elections, proxies present at the precinct, and members of the Precinct Election Commission (PEC). This provision does not ensure the same right applies to parties to the referendum and voters.[12] Applicants challenging voting results should also be entitled to request recounts of

[8] Code of Good Practice on Referendums, III.2.
[9] Code of Good Practice on Referendums, I.3.1.c.
[10] Code of Good Practice on Referendums, I.3.1.d.
[11] See also Recommendation 2 of the 2015 OSCE/ODIHR Final Report.
[12] Code of Good Practice on Referendums, II.3.3.f.

ballots. *The deadline for summarising referendum results in Article 34.7 of the draft law should follow the resolution of all challenges to voting results*.[13]

30. *The Venice Commission and OSCE/ODIHR recommend that the draft law provide for specific provisions on complaints and appeals during the referendum process, including designated avenues of redress and procedural deadlines. The system of appeal should safeguard, inter alia, the right of referendum parties, campaign participants, voters and other stakeholders to complain about the conduct of the referendum campaign and misuse of administrative resources; appeal against decisions of electoral commissions and other authorities that violate electoral legislation; challenge voting results in specific precincts; and appeal against the referendum result in court*. *The Venice Commission and OSCE/ODIHR recommend that all voters be entitled to appeal. A reasonable quorum may be imposed for appeal by voters against the results of a referendum.*[14]

D. General provisions (Articles 1-6, 12)

31. 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 copied in the draft law (Article 3.2) and thereby addresses earlier recommendations made by the OSCE/ODIHR and the Venice Commission.[15] Article 3.2 should be understood as applying only in case the sentence is final and no longer subject to appeal.

32. Article 3.2 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.[16]

33. Article 5.1(2) of the draft law states it is not permissible to submit to referendum proposals that relate to the rules of procedure of the Government of the Republic of Armenia (an exception not provided for by the Constitution). This restriction should be interpreted narrowly, in order not to lead to the prohibition of putting to the referendum any issues that deal with bills related to the activities of the Government, putting it in a special position in relation to other state organs in the system of separation of powers and reducing the importance of the referendum as a tool for resolving issues of significant national importance. In order not to allow referendums against specific elected or other officials, the rule could refer to internal procedures and personal composition of the public authorities.

E. Mandatory constitutional referendums (Articles 7-8)

34. The Constitution (Article 202.1) establishes that a new Constitution and amendments to specific provisions of the current Constitution may be enacted only through a referendum, initiated by at least one third of Members of Parliament (MPs), the government, or 200,000 voters. The constitutional provisions subject to this procedure are reproduced in Article 4.1(2) of the draft law. Amendments to the Constitution under Article 4.1(2) of the draft law are submitted to the Constitutional Court for its ruling on the constitutionality of the proposal (Article 8.2). As

[13] In the 2017 Final Report, OSCE/ODIHR noted that at the time of the announcement of final election result by the CEC, some challenges to voting results remained unresolved.
[14] Code of Good Practice on Referendums, II.3.3.f. See also Recommendation Rec (2004)20 of the Council of Europe's Committee of Ministers to member states on judicial review of administrative acts, paragraph B.2.a.
[15] CDL-AD(2011)032, paragraph 11; Recommendation 8, 2012 OSCE/ODIHR Final Report; Recommendation 7, 2013 OSCE/ODIHR Final Report.
[16] 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 five others v. Hungary*).

constitutional amendments, by definition, exceed the scope of the current Constitution, *the scope of review of the Constitutional Court in such instances could be made clearer*.

35. The Constitutional Court also appears to have only the option to validate or invalidate the entire proposal (Articles 8.3 and 8.4 of the draft law). In case of multiple amendments, there is a risk that a limited unconstitutionality leads to the invalidation of the whole text. It is true that a new initiative for constitutional revision may be introduced by one third of the MPs. *Nonetheless the Venice Commission and OSCE/ODIHR recommend that the Court be entitled to provide a nuanced ruling on the constitutionality of each proposed amendment, indicating also where the draft could be changed to ensure its constitutionality.*

36. The draft law further provides that after the Constitutional Court's positive ruling, the Parliament shall adopt a decision on putting the draft to a referendum within 15 days by at least two-thirds vote (Article 8.3). It is understood that, if the draft complies with the Constitution, the Parliament cannot amend it. *It should also be clarified, what happens if the Parliament fails to adopt the decision on putting the draft to referendum within the prescribed time and/or by the necessary majority.*

F. Optional constitutional referendums (Article 9)

37. Constitutional provisions other than those listed in Article 202.1 of the Constitution may be amended by a two-thirds majority in Parliament, at the initiative of at least one fourth of MPs, the government, or 150,000 voters. If the Parliament does not adopt such amendments with a two-thirds majority, they may be put to referendum by a decision adopted by at least three-fifths of all MPs (Articles 202.2 and 202.3 of the Constitution). Article 9.2 of the draft law specifies that the deadline for Parliament to take a decision is one month. Here again, *it should be clarified what happens if the Parliament fails to adopt such a decision within the prescribed time and/or by the necessary majority.*

38. The intervention of the Constitutional Court in Article 8.3-4 of the draft law should aim to ensure that the limits to constitutional revision foreseen in Article 203 and the procedural rules established in Article 202 of the Constitution are respected. *Such an intervention is not foreseen in cases of total revision covered by Article 7 of the draft law, or in cases of partial revision covered by Article 9 of the draft law; this should be reconsidered.*

G. Referendums on draft laws initiated through popular initiative (Article 10)

39. Under Article 109.6 of the Constitution, a draft law may be submitted to the Parliament at the initiative of at least 50,000 voters. The Constitution further provides that if Parliament rejects the adoption of a draft law submitted by such popular initiative, the draft shall be put to referendum if 300,000 additional voters join the initiative within a period of sixty days following the rejection, and where the Constitutional Court recognises the given draft as complying with the Constitution (Article 204.1 of the Constitution).

40. The draft law restates that a popular initiative supported by at least 50,000 voters shall be submitted to the Parliament. The draft law could be clearer on what constitutes rejection of the proposal by the Parliament and whether that includes, for example, failure to vote on the proposal within a particular timeframe. *The Venice Commission and OSCE/ODIHR recommend that, if Parliament does not take a position within a specified deadline, the project be considered as rejected.* This would make it clear that Parliament is not in a position to delay the procedure indefinitely by its silence.

41. Following the Parliament's rejection, the authors of a popular initiative must, according to the draft law, first collect 300,000 additional signatures, seek their certification by the Central Electoral Commission (CEC), and then apply to the Constitutional Court to rule on the

constitutionality of the proposal (Articles 10.1 and 10.2 of the draft law). If the proposal is found unconstitutional, it shall be not put to referendum (Article 10.3).

42. The government officials met with by the Venice Commission and OSCE/ODIHR experts confirmed that the additional signatures cannot come from the voters who signed the initial initiative, whatever their number. Representatives of civil society raised concerns that this provision *de facto* makes an initiative to hold a referendum unduly burdensome. The long sequence of institutions intervening also makes the whole procedure very burdensome.

43. Moreover, submitting the text to the Constitutional Court after the second collection of signatures may lead to an ineffectual use of resources by the authors of a popular initiative and by the CEC. *It is recommended that the authors of a popular initiative be required to submit their draft for the Constitutional Court's ruling after its rejection by Parliament but before they embark on the collection of additional 300,000 signatures.* The referendum should then be called after the certification of additional signatures by the CEC.

44. As noted above, it would be advisable to give the Constitutional Court an opportunity for a nuanced conclusion on the validity of the proposed draft, and an authority – for example, the CEC – must have the power to propose corrections to faulty drafting, in accordance with the Court's ruling, for acceptance from the initiative group.[17] *The Venice Commission and OSCE/ODIHR recommend that the Constitutional Court be entitled to provide a nuanced ruling on the constitutionality of the proposed draft, indicating also where the draft could be changed to ensure its constitutionality, and to allow for the valid provisions to be submitted to the people's vote without a new collection of signatures.* This would avoid starting the burdensome procedure of collecting signatures from scratch; the initiative group should be asked whether it agrees with proceeding with a revised text.

45. If the draft proposal put forward through a popular initiative is rejected by the Parliament but receives sufficient additional voter support to be put to referendum, *it may be advisable to give the Parliament an opportunity to submit an alternative question to the same referendum*.[18]

H. Membership of supranational organisations, changes of territory (Article 11)

46. While membership of supranational organisations and change of territory are addressed in the same constitutional provision (Article 205), they should preferably be dealt with in two different articles of the law.

47. The notion of supranational organisations is not clearly defined.[19] In particular, a more precise definition could provide that the accession to supranational organisations entails the transfer of some of the powers of the Republic of Armenia to a supranational organisation (such rules, in particular, exist in the law of Latvia and Denmark).

48. Article 11 (like Article 4.1(3)) of the draft law, deals with "the *accession* of the Republic of Armenia to supranational international organisations",[20] while Article 205 of the Constitution uses the terms "questions of membership". According to the Armenian authorities, the original text makes it clear that withdrawal from such organisations requires a referendum.

[17] Cf. Code of Good Practice on Referendums, III.4.g; Explanatory Memorandum, 40.
[18] Code of Good Practice on Referendums, III.6.
[19] During the visit, it was made clear that territorial change refers to the modification of the external boundaries of the country, not to the modification of internal divisions of the territory.
[20] Similar provisions providing for a referendum on membership in international and supranational organisations and unions with other States are really common and are contained in the laws of Lithuania, Denmark, Croatia, Switzerland, "the former Yugoslav Republic of Macedonia", etc. See CDL-AD(2005)034, p. 11.

I. Collection and certification of signatures (Articles 13 and 14)

49. Article 13 of the draft law covers the procedure for collection of support signatures for draft laws initiated through popular initiative (Articles 109.6 and 204 of the Constitution). Procedures for collecting support signatures for constitutional amendments initiated by citizens (Articles 202.1 and 202.2 of the Constitution) do not appear to be regulated by Article 13. *The Venice Commission and OSCE/ODIHR recommend that these procedures be spelled out clearly after an open debate with the stakeholders, in a manner that facilitates citizens' opportunity to support referendum initiatives.*

50. The three-day deadline for an initiative group to decide whether to take forward a legislative initiative after rejection by Parliament seems unduly short (Article 13.2), since it may involve relatively complex appreciations (for example, on the means necessary to continue the collection of signatures).

51. The draft law limits the right to participate in the collection of signatures to citizens who have attained the age of 18 (Article 13.7). This does not appear as a justified restriction.[21] *It is recommended that foreigners, stateless individuals, as well as youth above a certain age also be entitled to collect signatures*.

52. Positively, the draft law provides that the collection of signatures may be carried out by signing forms on the spot or electronically (Article 13.11). While signature collection using electronic means is welcome, *care should be taken to ensure that it does not restrict the right of eligible citizens to sign popular initiatives and that it does not pose an administrative barrier for the initiators of signature collection* (through insufficient or deficient equipment, etc.). *Alternative paper-based mechanisms should be clearly provided for in the law. Moreover, the new system should make the mechanism for verification of signatures quick and reliable.*

53. Article 13.13 of the draft law prescribes that the collection of signatures shall be carried out within 45 days or, in the case of Article 10 of the draft law, within 60 days from the registration of the initiative group. In case of electronic collection of signatures, any deadlines should be calculated from the time the requisite equipment is made available to the signature collectors. At any rate, the (constitutional) deadline of 60 days for the collection of 300,000 signatures is very tight, which makes the requirement to simplify the procedure still more important.

54. It is not clear what time limits – if any – apply to the collection of signatures to initiate constitutional amendments under Articles 202.1 and 202.2 of the Constitution. The absence of any provision of the law should be understood in the sense there is no deadline, since such an important issue should not be dealt with by secondary legislation in the absence of a clear legislative delegation.

55. Article 14.7 of the draft law provides that the procedure for verifying the validity of the collected signatures shall be prescribed by the CEC. It may be advisable to provide the general framework for this procedure in the law, including the main criteria for invalidation of individual signatures, acceptable number of invalid signatures, and appeal mechanisms, as well key principles such as transparency. In particular, all signatures must be checked.[22] The legislative delegation to the CEC to define the verification procedure appears too broad, and *main criteria, timelines and procedural guarantees for signature verification should be included in the law.*

[21] Code of Good Practice on Referendums, III.4.c; Explanatory Memorandum, 36.
[22] Code of Good Practice on Referendums, III.4.f.

J. Referendum administration (Article 15)

56. Referendums are to be administered by the CEC, district electoral commissions (DEC), and PECs formed in accordance with the Electoral Code (Article 15.1). Under the Electoral Code, DECs are appointed by the CEC from among self-nominated qualified voters (Article 43 of the Electoral Code), while PECs are formed through appointments by parliamentary political parties and DECs (Article 44 of the Electoral Code). In the past electoral processes observed by the OSCE/ODIHR in Armenia, the lack of trust in impartiality of PECs was noted. A recommendation was made to reconsider the formula for distribution of leadership positions in the PECs to enhance their independence and impartiality.[23] This recommendation is valid also in the context of the administration of referendums.

57. Referendums envisioned by the Constitution and the draft law may not necessarily entail a divide along party lines and may well involve political and civic actors not represented in the Parliament, especially in case of popular initiatives.[24] In light of these considerations, and to ensure confidence in the election administration, *it is recommended to provide for the formation of precinct electoral commissions through representation of the referendum proposal's supporters and opponents*, for example, through nomination by the "parties" defined in Article 17.5 – 17.8 of the draft law.

K. Referendum campaigns (Articles 17 and 18)

58. Article 17.3 states that one party to "YES" and one party to "NO" campaign may exist. According to the information provided by the authorities during the visit, "party" means "side" or "group" and not a political party.[25] The creation of such parties is intended at ensuring equality of opportunities between the "yes" and "no" camps, as recommended by the Code of Good Practice on Referendums.[26]

59. However, Article 17.4 determines that "other persons may use public means for conducting a campaign only upon the written consent of the authorised representative of a party to the campaign". These provisions entail a risk of excessive limitations of the freedom of expression (see for example Article 10 ECHR), since all supporters of the "yes" and the "no" votes have to be integrated into two opposing structures. *The Venice Commission and OSCE/ODIHR recommend allowing more than one structure for the "yes" and the "no" votes, respectively, while ensuring equality of opportunity between supporters and opponents of the referendum*.

60. Article 17.8 states that a group consisting of at least 50 citizens may form a party to the "NO" campaign within a period of seven days following the promulgation of the decree of the President of the Republic on holding a referendum. It is a very short deadline, which could prevent the creation of such a party and then lead to an unbalanced campaign. Moreover, a party to the "NO" campaign shall –"within a period of three days from the moment of formation thereof – submit a letter to the Central Election Commission for the purpose of registration" (Article 17.10). In that time limit the party to "NO" must appoint an authorised representative and submit the carbon copies of the identification documents of the members of the party to the "NO" campaign. If the party to the "NO" campaign submits a letter after seven days, the CEC has the right to refuse the registration. However, the creation of such a "party" implies a detailed reflection on the issue put to referendum. Such a burdensome procedure in a limited timeframe entails a risk of discrimination, going against the principle of equality of opportunity. *The Venice*

[23] Recommendation 8 of the 2017 OSCE/ODIHR Final Report.
[24] Code of Good Practice on Referendums, II.3.1.e; Explanatory Memorandum, 21.
[25] Moreover, Articles 17.5 and 17.7 are not very clear about what such "party" is, but this may be an issue of translation.
[26] See Code of Good Practice on Referendums, I.2.2.a: "Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This entails a neutral attitude by administrative authorities…".

Commission and the OSCE/ODIHR recommend extending these deadlines in order to ensure the effectiveness of the right to create a "party" to the "NO" campaign.

61. Article 17.14(1) of the draft law provides that public servants and officials holding political and discretionary positions are prohibited from campaigning while performing their official duties, except when they are the authors of the initiative of holding a referendum. The same rule applies to the pedagogical staff of education institutions, but without an exception. Extensive mobilisation of public resources for campaign by the authorities, which negatively impacted on the equality of opportunity for the supporters and opponents of the proposal, was noted by the OSCE/ODIHR in the 2015 constitutional referendum in Armenia. Recommendations were made to regulate the use of public funds to ensure equality of opportunity for referendum supporters and opponents, as well as to impose stricter limits on campaigning by public officials.[27] The draft law does not sufficiently address these recommendations.

62. The Venice Commission and OSCE/ODIHR recommend that the law explicitly provide for the duty of neutrality of administrative authorities, as well as for effective sanctions for breaching it.[28] *The Venice Commission and OSCE/ODIHR further recommend to prohibit public servants and public sector employees from taking part in campaigns while performing official duties; if officials holding political and discretionary positions are permitted to campaign in the course of their official duties, the list of such officials should be communicated to the CEC and made public, and the other party to the referendum campaign should be provided with commensurate direct public funding to balance the equality of opportunity. The use of public funds by the authorities for campaigning purposes must be prohibited.*[29]

63. The authorities informed the Venice Commission and the OSCE/ODIHR experts that they are planning to tighten the existing criminal sanctions for misuse of administrative resources, which is a welcome step. Considering the importance of this issue, *consideration should be given to including specific prohibitions on misuse of administrative resources in the law*, for example in Article 17.15. Prohibition of misuse of administrative resources, as well as sanctions for such misuse, should be established in a clear and predictable manner.[30] Consideration could also be given to including in the law an explicit entitlement for observers to observe respect by the administrative authorities of their duty of neutrality.[31]

64. Article 17.14(5) prohibits conducting a referendum campaign and disseminating any campaign materials to foreign and stateless persons, thus introducing excessive limitations on the freedom of expression of foreigners, at least of those with a residence in Armenia. *The Venice Commission and OSCE/ODIHR recommend reconsidering this provision.* This is without prejudice to rules setting limits to the funding of campaigns for "YES" or "NO" by foreign interests, as laid down in Article 19 of the draft law.

65. Article 18 of the draft law provides for different forms of campaigning, including through the mass media, public campaign events, and distribution of campaign materials. Positively, it allows for the use of public premises free of charge to the referendum "parties". The list of such premises is to be submitted by the local governors and published on the CEC website (Article 18.4).

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[27] Recommendation 9 of the 2015 OSCE/ODIHR Final Report.
[28] Code of Good Practice on Referendums, I.2.2.a and I.3.1.f.
[29] Code of Good Practice on Referendums, I.3.1.b.
[30] See 2016 OSCE/ODIHR and Venice Commission's Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources During Electoral Processes (CDL-AD(2016)004), II.A.1.1. and related provisions.
[31] Code of Good Practice on Referendums, II.3.2.d.

66. Parties to the campaign are provided with free airtime on public television and on public radio. However, the amount of this airtime is limited to 60 minutes on television and 120 minutes on the radio (Article 18.12(1)). Considering the potential complexity of draft laws and other issues put to referendum, *this free airtime could be insufficient to convey the parties' positions, and consideration could be given to increase the available time*. In line with a previous OSCE/ODIHR recommendation, *consideration could also be given to requiring the public broadcaster to organise campaign debates with the referendum "parties".*[32]

67. Article 18.10 of the draft makes a cross-reference to the rules of the Electoral Code on the election campaign including through the mass media. This Joint Opinion only assesses the draft law and it is recommended to ensure that legislation addresses prior OSCE/ODIHR and Venice Commission recommendations.[33]

L. Campaign financing (Articles 19 and 20)

68. Citizens of Armenia, the author of the initiative for holding a referendum, political parties and alliances, and NGOs are entitled to conduct referendum campaigns (Article 17.1). Since only one party to "YES" and one party to "NO" campaign may exist with regard to each issue put to referendum (Article 17.3), only one fund for the "YES" campaign and one fund for the "NO" campaign may be set up to finance referendum campaigns (Article 19.1). According to the authorities, this regulatory approach provides for an easier distribution of public resources, such as provision of premises for campaign events (Article 18.3) and free airtime (Article 18.12). "Other persons participating in the campaign shall not have the right to create a separate fund" (Article 19.1). This could again pose a problem of freedom of expression – unless unregulated and unmonitored spending by unregistered parties is authorised, which would also be problematic. *It would be advisable to require any civic or political group that wishes to campaign in a referendum separately from the two registered referendum parties, using mass media or campaign events, to set up a separate campaign fund that will be subject to the same rules as campaign funds of the referendum parties.*

69. Referendum campaigns may be funded from voluntary contributions by natural and legal persons (Article 19.3). The draft law establishes the limit for each contribution by natural persons (500 times the minimum salary, Article 20.2) and by political parties, NGOs or alliances of political parties (25,000 times the minimum salary, Article 20.1), as well as a total limit for contributions to the campaign fund (100,000 times the minimum salary, Article 20.1). *Consideration could be given to replacing the latter limit with a limit on campaign spending, applicable to each registered campaign fund.* It is difficult to see from Article 19 whether other legal persons than those enumerated above are entitled to finance the campaigns. If this is the case, their contributions should be submitted to the same limits. *This should be clarified.*

70. The draft law does not provide for direct public funding of referendum campaigns. *Such funding could be considered in light of the particular public importance of referendums, and also as a means to equalise opportunities of referendum parties, especially if officials occupying political and discretionary positions are allowed to campaign for one party to the referendum.*

71. The draft law does not contain specific provisions on transparency of campaign financing, only making a reference to the Electoral Code (Article 19.1). *Consideration should be given to including explicit requirements for all campaign funds to make public the sources of their*

[32] Recommendation 20 of the 2017 OSCE/ODIHR Final Report.

[33] Including: those aimed at 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, 2017 OSCE/ODIHR Final Report; Recommendations 11 and 12, 2015 OSCE/ODIHR Final Report.

campaign financing and disclose donations that exceed a certain limit on a continuing basis.[34] The reporting requirements should cover all campaign-related expenses.[35]

72. There is a clear public interest in avoiding that foreign interests may influence the outcome of a national referendum. Still, a blanket prohibition on stateless and foreign natural persons to support the yes or no campaign (e.g. by modest donations) seems excessive (Article 19.4(3-4)).

M. Observers and proxies (Articles 21 and 22)

73. The draft law provides for international and citizen observers (Article 21.1), visitors from the diplomatic community and foreign electoral bodies (Article 21.3 and 21.4), as well as proxies of parties to the campaign (Article 21.9). Rights and obligations of observers, visitors, proxies, and media representatives are regulated by the Electoral Code (Article 22 of the draft law). Positively, reports on referendum by observation missions are to be posted on the CEC website (Article 21.7).

74. Article 21.1(3) of the draft law provides that Armenian NGOs are entitled to field observers only if their statutory objectives include, for a minimum one year preceding the day of calling a referendum, issues related to democracy and protection of human rights, as well as economic or environmental protection issues. Representatives of civil society informed the Venice Commission and OSCE/ODIHR experts that the unclear wording of the provision could lead to its arbitrary implementation. *The Venice Commission and OSCE/ODIHR recommend that the draft law make it clear that the presence of any of the issues listed in Article 21.1(3) in the organisation's charter is sufficient for the entitlement to observation*. *Consideration should also be given to allowing observation by NGOs whose charter objectives relate to the issues put to referendum*. *The Venice Commission and OSCE/ODIHR have previously recommended reconsidering the one-year requirement, which effectively excludes newly created NGOs from observation.*[36] *This recommendation is reiterated.*

N. Summarisation of referendum results and entry into force of the text adopted in a referendum (Articles 35 and 36)

75. Article 35.2 of the draft law provides for an approval quorum of 25% of registered voters. Pursuant to the Code of Good Practice on Referendums "[i]t is advisable not to provide for b) an approval quorum […] since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold".[37] This quorum which appears in Article 207 of the Constitution, is therefore not in line with the Code of Good Practice on Referendums.[38]

76. Article 35.5 provides for the possibility to cancel referendum results if such violations of the law have taken place that might have affected the referendum results "while in the course of preparation and holding of referendum". Such provision should not be understood as applying only to violations during the final stages of the process. Moreover, in conformity with the principle of proportionality, milder sanctions should be provided for in case the violations of the law did not affect the results.

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[34] See UN Convention Against Corruption, Article 7.3; Council of Europe's Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns, Articles 3, 13, 14; Code of Good Practice on Referendums, II.3.4.a and Explanatory Report, 24; OSCE/ODIHR and Venice Commission's Guidelines on Political Party Regulation (CDL-AD(2010)024), 193-194, 198-206.
[35] Recommendation 16 of the 2017 OSCE/ODIHR Final Report.
[36] CDL-AD(2016)031, par. 64 ; Recommendation 22 of the 2017 OSCE/ODIHR Final Report.
[37] CDL-AD(2015)038, par. 79-80.
[38] CDL-AD(2007)008rev, III.7.