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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PERU

OPINION

ON

**THE DRAFT AMENDMENT OF ARTICLE 99 OF THE CONSTITUTION
CONCERNING THE IMPEACHMENT
OF MEMBERS OF ELECTION MANAGEMENT BODIES**

**Approved by the Council for Democratic Elections
at its 82nd meeting (Venice, 13 March 2025) and adopted by the
Venice Commission at its 142nd Plenary Session
(Venice, 14-15 March 2025)**

on the basis of comments by

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I. Introduction

1. By letter of 5 August 2024, Mr Jorge Luis Salas Arenas, the then-President of Peru's National Election Board (Jurado Nacional de Elecciones, or JNE), requested an opinion of the Venice Commission on the issue of dismissal and accountability of senior electoral officials in Peru in light of the proposed reform of Article 99 of the Constitution of Peru (CDL-REF(2025)008).

2. Messrs Rafael Bustos Gisbert, Srdjan Darmanović, Oliver Kask, Warren Newman and Ms Inga Milašiūtė acted as rapporteurs for this opinion.

3. On 29 and 30 January 2025, a delegation of the Commission composed of Messrs Bustos Gisbert, Darmanović and Kask accompanied by Ms Granata-Menghini, Director, Secretary of the Commission, and Mr Kouznetsov, member of the Secretariat, visited Lima and had meetings with the President of the Council of Ministers, Minister for Foreign Affairs, First Vice-President and representatives of the Congress of the Republic, the Minister of Justice and Human Rights, the President and judges of the Constitutional Court, judges of the Supreme Court, the Prosecutor General, the new President of the National Election Board (JNE) and its members, the Head of the National Office of Electoral Processes (ONPE), the Head of the National Registry of Identification and Civil Status (RENIEC) as well as several professors of law, representatives of civil society organisations, and the international community. The Commission is grateful to the Ministry of Foreign Affairs of Peru for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the draft constitutional amendments and relevant legislation. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 29 and 30 January 2025. The draft opinion was examined at the 82nd meeting of the Council for Democratic Elections on 13 March 2025 and Sub-Commissions on the Judiciary, the Rule of Law and Latin America at their joint meeting on 13 March 2025. Following an exchange of views with Ms Carmen Patricia Juárez Gallegos, First Vice President of the Congress of Peru and Mr Aaron Oyarce Yuzzelli, Member of the Plenary of the National Election Board it was adopted by the Venice Commission at its 142nd Plenary Session (Venice, 14-15 March 2025).

II. Background and scope of the opinion

A. Political developments and electoral management bodies

6. The current Constitution of Peru, enacted on 31 December 1993, is Peru's fifth in the 20th century and replaced the 1979 Constitution. The Constitution was drafted by the Democratic Constituent Congress that was convened by President Alberto Fujimori during the Peruvian constitutional crisis of 1992 after he had dissolved the Congress (the national legislature) as well as the judiciary and assumed full legislative and judicial powers. The text of the new constitution was published on 4 September 1993. It limited the President to two terms of five years, created a unicameral Congress and allowed constitutional amendments either through a referendum or a vote by a two-thirds majority of MPs in two successive Congresses. Referendums would also be possible if a petition had 0.3% of voters' signatures. Peru remained a presidential republic but with important elements of parliamentary control of the government.¹ The new constitution was approved by 52% of voters and came into force on 29 December 1993.

¹ After 2019, the practice and constitutional developments reinforced this trend (see also the Opinion CDL-AD(2019)022, notably par 7). During the meetings with the representatives of the Peruvian authorities and other interlocutors in Lima on 29 – 30 January 2025, the rapporteurs had the impression that after the dismissal of President Pedro Castillo in December 2022, the predominance of parliamentary features in the form of government had increased significantly.

7. The system of checks and balances enshrined in the Constitution has ensured the stability of the State institutions for more than 20 years. However, since the 2016 general elections, Peru has had six different presidents as a result of the growing stand-off between the executive and the legislative branches. The country's political instability has significantly increased following the 2021 general elections.² Between the first to the second round of the presidential elections (held, respectively, on April 11 and June 6), various candidates began to accuse the electoral administration, specifically the JNE, of being partial. Pedro Castillo was elected President, but with a narrow victory of 44,253 votes.

8. President Castillo lacked a strong group in the legislature which contributed to increasing tensions with different political forces in the Congress.³ In December 2022, he attempted to dissolve Congress and called for a constituent assembly. On 7 December the Congress impeached President Castillo by a majority of 102 votes and his Vice-President, Dina Boluarte, was installed as the new President. Several attempts calling for early general elections were submitted to Congress during 2023; however, none of them succeeded.⁴

9. Political instability resulting from the 2021 presidential elections had a direct impact on the electoral management bodies of Peru. Different election observation missions reported on the campaigns targeting JNE and its President, starting during the run-off of the 2021 presidential elections. For example, the preliminary statement for the second round of elections by the Election Observation Mission (EOM) of the Organization of American States (OAS)⁵ noted that *"in the weeks before the election, the electoral institutions were subject to attacks intended to undermine their credibility. Attempts were made using some media outlets and—fundamentally—social media to put in question the impartiality of the electoral authorities, particularly the National Board of Elections and its president. Civil society organisations, international bodies, the Honor Tribunal, and the President of Peru publicly expressed support for the Board's work, highlighting its track record, professionalism, and independence."* Similarly, the final report issued by the Election Expert Mission (EEM)⁶ of the European Union (EU) acknowledged that the *"National Electoral Board (JNE) and the National Office for Electoral Processes (ONPE) delivered a well-organised process, despite unproven allegations of lack of independence, unprecedented smear campaigns and attacks, including harassment to their presidents, that were disruptive to the process."*

10. The final election observation report by the OAS⁷ pointed out that most of the criticism concerned the way in which JNE dealt with the complaints that followed the second round of the 2021 presidential elections.⁸ The OAS described the climate as characterised by high political tension and called for the disagreement to be channelled through legal procedures

² The general elections were held on April 11 and allowed voters to choose their President and two Vice-Presidents, the 130 members of the legislature (Congress) and 5 representatives to the Andean parliament. Since none of the contenders for the presidential election received more than 50 percent of valid votes required, a second round was held on 6 June for these elections only.

³ The largest number of representatives in the Congress were achieved by Pedro Castillo's Perú Libre (PL), with 37 seats (13.41 per cent of the votes) and Keiko Fujimori's Fuerza Popular (FP), with 24 (11.34 per cent). The remaining 69 seats were obtained by Acción Popular (16), Alianza para el Progreso (15) Renovación Popular (13), Avanza País (7), Juntos por el Perú (5), Somos Perú (5), Podemos Perú (5) and Partido Morado (3).

⁴ After the attempted 2021 coup, fragmentation within the Congress has significantly increased. The new composition of the parliamentary groups shows the reduction of one third of the formal largest presidential group. See: <https://www.congreso.gob.pe/integrantes-grupos-parlamentarios/?idPeriodo=13>.

⁵ Preliminary statement for the second round of elections by the EOM of the OAS. www.oas.org/eomdatabase/MoeReport.aspx?Lang=es&Id=433&MissionId=515

⁶ Final report issued by the Election Expert Mission (EEM).

⁷ Final election observation report by the OAS pages 19-20.

⁸ The JNE was called to examine whether the total number of votes cast in different polling stations, as expressed in the respective tally sheets, was in line with the number of voters registered in the electoral roll for those polling stations. The JNE found those appeals inadmissible unless the complaint had been raised during the counting of the votes at the polling stations, given that the validity of the tally sheets themselves could not be challenged.

and in accordance with the regulatory requirements.⁹ The findings by the EU's expert mission were similar to those of the OAS.¹⁰

11. In 2021 the Inter-American Commission on Human Rights (IACHR) granted Precautionary Protection Measures to Mr. Arenas and his immediate family.¹¹ In turn, the Inter-American Court of Human Rights granted him Provisional Measures on 4 September 2023.¹²

12. In 2021, the Subcommittee of constitutional accusations of the Congress of the Republic formulated three constitutional accusations against the President of the JNE. The first one was based on the complaint presented on 16 February 2021 against the JNE's Resolution 0907-2021-JNE rejecting complaints against the National Directorate of Registries of Political Organisations (complaint n°229/2021-2026). The second one related to the Prosecutor General Luis Carlos Arce Córdova's constitutional complaint filed on 31 August 2021 (complaint n°107/2021-2026) against the then President of the JNE for allegedly violating articles 3, 176, 178 numeral 3, 179 and 180 of the Constitution, as well as for allegedly committing the crimes of abuse of authority and usurpation of functions. The third constitutional complaint against the President of JNE concerning the dismissal of one of the JNE members was filed on 24 May 2021 (complaint n°267/2021-2026). On 4 May 2022, the Subcommittee of constitutional accusations of the Congress of the Republic notified the President of the JNE of the Constitutional complaints formulated against him.

13. On 6 June 2022, the President of the JNE filed an application for amparo (i.e., protection) against the Congress of the Republic, invoking the threat of violation of the Constitution.

14. On 26 July 2022, the Constitutional Chamber of the High Court of Justice of Arequipa issued Resolution 6 declaring (i) the amparo claim to be well founded, essentially because, in accordance with the provisions of Article 99 of the Constitution, it was not possible to accuse the President of the JNE and, therefore, the congressional decision represented a threat of violation of the full exercise of the public function and the plaintiff's right to independence in the administration of electoral justice; (ii) ordered the cessation of the threat of violation of these rights, ordering the suspension of the processing of constitutional complaints 107, 229 and 267 by the Subcommittee on constitutional accusations of the Congress; and, (iii) ordered the immediate execution of the sentence.¹³

15. On 18 October 2022, the Standing Committee of the Congress of the Republic voted in favour of the Final Report of the Constitutional Complaint 107 issued by the Subcommittee of constitutional accusations which recommended that it be filed among other reasons because the President of the JNE could not be impeached or be subject to political trial in accordance with Article 99 of the Constitution. However, shortly before the filing of the case against the President of JNE, on October 10, 2022, the President of the Congress of the Republic filed a complaint with the Constitutional Court of Peru against the Judiciary (*demanda competencial*) on conflict of competence, alleging that the latter, by exercising its powers in the area of the administration of justice, had undermined the exclusive powers of the Congress to exercise political control over high-ranking State officials, as established in Article 99 of the Constitution of the Republic.

⁹ According to this EOM, for the first time in the history of the OAS' missions that an electoral authority itself had complained about the attacks during the campaign and saw this event as evidence of what was happening (OAS, 2021b: 13).

¹⁰ For example, it noted that "[t]he transparency and adherence to the law that all electoral institutions showed through all stages of the process, in particular during the resolution of post-electoral disputes, indicated that those allegations were unsubstantiated." (2021: 1). See also the report of the EU's Election Follow-up Mission (EFM), which took place from 15 January to 10 February 2024. [EU Election Missions](#).

¹¹ Resolution 56/21, Precautionary Protection Measures Num. 607-21, of 26 July 2021.

¹² Following an application from the IACHR of 20 July 2023.

¹³ Case (*Expediente*) 00400-2022-0-0401-JR-DC-01.

16. In its decision of 23 February 2023,¹⁴ the Constitutional Court ruled that the complaint was well founded and annulled the decisions issued in the amparo proceedings brought by the President of the JNE. The Court found that according to the Peruvian Constitution, the political control of high officials is an inherent power of Congress that cannot be limited by the Judiciary, as it was the case in the amparo proceedings challenged by the Congress. The President of the JNE is a life-career Supreme Court judge and these judges, according to the Peruvian Constitution, can be subject to political control. In the same decision, the Constitutional Court reiterated the exhortation made to the Congress of the Republic in one of its previous decisions adopted in 2012,¹⁵ to reform Article 99 of the Political Constitution of 1993, as well as to reform its Regulations, in accordance with its decision and the jurisprudence of the Constitutional Court.¹⁶

17. Following this decision of the Constitutional Court, the political groups (*bancadas*) of the Congress registered several bills concerning possible amendments to Article 99 of the Constitution aiming at including the members of the electoral management bodies to the list of officials that can be subject to impeachment. On 9 April 2024, the Constitutional Committee of the Congress issued an opinion that brought together a total of six bills introduced by various groups of MPs, which opened the way for the submission of the text to the plenary session of the legislature.

18. The explanatory memorandum accompanying the bills gives the following rationale and purpose for this draft constitutional reform: *“to comply with the exhortation made by the Constitutional Court in repeated rulings, in order to incorporate the autonomous constitutional bodies of the electoral system within the scope of Article 99 of the Political Constitution of the State”*. After citing several extracts from judgments of the Constitutional Court that appear to encourage the enactment of a constitutional amendment or an enabling power to this effect, it is said that it is *“therefore necessary for Congress to implement this exhortation in order to strengthen the democratic regime and the rule of law.”*¹⁷

19. In March 2024, the Congress of the Republic adopted a broad constitutional reform changing 58 of 206 Articles of the Constitution, which was promulgated by President Dina Boluarte on 20 March. This reform introduced substantial changes, including the transformation of the unicameral Congress into a bicameral one by reinstating a 60-member Chamber of Senators alongside a 130-member Chamber of Deputies (Article 90). Senators and deputies may seek re-election without term limits (a 2019 law that prevented legislators from running for two consecutive terms was repealed). The Chamber of Deputies will be elected via proportional representation, in one national constituency, and there is a minimum age requirement of 25 years for candidates (Article 90). The Chamber of Senators will use a system of mixed representation: 33 senators will be elected by a national constituency and 27 by departmental constituencies, with a minimum age requirement of 45 years.

20. The new constitutional provisions give MPs extensive oversight powers, including the possibility of establishing investigative committees (Article 97); they can further question and censure State ministers and grant or refuse confidence to State ministers at their request (Articles 102-B, 132), as well as begin impeachment proceedings before the Senate (Article 99).

¹⁴ Case 0003-2022-CC/TC.

¹⁵ Case 00156-2012-PHC/TC.

¹⁶ One of the judges of the Constitutional Court emitted a dissenting opinion arguing that in the application of the principle that political activity in Congress is not fully exempted from constitutional control and judicial decisions were rendered under a formal process and by competent judges. The opinion also pointed out that at the moment of the decision, the President of the JNE was not mentioned in Article 99 of the Political Constitution of Peru.

¹⁷ See Opinion of the Committee on Constitution and Rules of procedure of the Congress on bills 4333/2022-CR, 4347/2022-CR, 4430/2022-CR, 4435/2022-CR, 4477/2022-CR, AND 4495/2022-CR on the Law of constitutional reform of Article 99 of the Political Constitution of Peru.

21. The Senate will have the power to review legislative initiatives and constitutional accusations (to bring impeachment proceedings) introduced by the Chamber of Deputies, as well as legislative decrees, emergency decrees, and supreme decrees on treaties and states of exception issued by the Executive power (Article 102-A). The Senate may also ratify and elect high authorities of independent institutions such as directors of the Central Reserve Bank, the judges of the Constitutional Court, the Superintendent of Banking, Insurance and Private Pension Funds, as well as elect and remove the members of the National Board of Justice, the Ombudsman and the Comptroller General (new Article 87; Article 102-A).

22. Moreover, on 20 November 2024, the Congress adopted in first reading constitutional amendments to Articles 179, 180, 182 and 183 aimed at “*strengthening the neutrality, independence and impartiality of the electoral system*”. The reform focuses on the procedure for nominating JNE members, the election of its President, and a limitation to a single term of two years of the mandate of the members of the JNE. During the visit to Lima in January 2025, several interlocutors of the Commission delegation expressed their concern with this initiative that might, in their opinion, and notably taking into account the March 2024 constitutional reform, undermine the independence of the JNE and the other electoral management bodies.

23. The 2024 constitutional amendments will enter into force after the next general elections which will take place on 12 April 2026.

B. Scope of the opinion

24. The request that was transmitted by the President of Peru’s National Election Board on 5 March 2024 raises the following questions: (i) the compatibility with international standards of the application of the impeachment procedures to the President of the JNE (as Head of an independent electoral management body; as judge of the Supreme Court) and (ii) to the other members of the JNE; (iii) whether constitutional accusations filed against the President of the JNE are consistent with the principle of judicial independence in general, given that there are other constitutional provisions regarding disciplinary matters, such as, if applicable, criminal liability.

25. The Commission will examine these questions in terms of whether and to what extent the impeachment of the members of the constitutional electoral institutions which would be introduced by the amendment of Article 99 of the Constitution of Peru would affect the independence of the electoral administration.

26. Even though the procedure of impeachment under Article 99 of the Constitution concerns other institutions, according to its practice concerning requests coming from specialised constitutional bodies, the Commission will limit its analysis to the issues relating to the JNE and the electoral bodies.

III. Constitutional and legal background

A. Impeachment

27. Impeachment is, generally speaking, a trial-like procedure whereby a house of parliament (or a house of congress) brings charges of wrongdoing against high officers of government with a view to holding them accountable. If the legislative body finds that the charges are founded, it may vote to remove the official from office.

28. A number of European countries have special procedures under their constitutions for holding government ministers legally responsible. These are often referred to as “impeachment” proceedings, and may cover all aspects of the procedure, from the first inquiries and investigations, the decision to initiate proceedings, the rules on prosecution, the composition of

the forum, court, or tribunal, and the rules on the procedure itself, including the procedural rights of the defendants. Typically the rules are more “political” than ordinary criminal procedure, with one or more of the stages involving political institutions and actors, most often parliament.¹⁸

29. The mechanism of impeachment, as an instrument to put under check the holders of the highest offices of executive power but also some other high public officials, including Supreme Court judges, exists in several countries in the world and has a long tradition in the Americas (notably the US¹⁹ and Canada²⁰). There are significant differences among the different systems. In some countries, like Peru and the USA, the procedure of impeachment, if it is upheld by Congress, may result in the removal from office and disqualification of the high official concerned, but not in criminal sanctions. The impeachment of the heads of the electoral bodies does not appear to be common in Latin American countries, as many of them (besides Peru, Argentina, Brazil, Bolivia, Colombia, Panama) do not provide for it.

B. General aspects of the constitutional system relevant to the operation of electoral management bodies in Peru.

30. The Constitution of Peru establishes Peru as a sovereign, democratic, social, and independent state, with a unitary, representative and decentralised form of government, “organised pursuant to the principle of the separation of powers” (Article 43) and which also contemplates “the democratic rule of law” and “a republican form of government” (Article 3). The power of the State is declared to emanate from the people, “within the limitations and under the responsibilities of the Constitution and the law” (Article 45). “Citizens are entitled to take part in public affairs by means of referendum, legislative initiative, removal or revocation of authorities, and demands for accountability. They also have the right to be elected and to freely elect their representatives in accordance with the provisions and procedures set forth by the organic act.” Moreover, “The law establishes the mechanisms to guarantee the neutrality of the State during elections and citizen participation processes” (Article 31).

31. The legislative branch is vested in Congress, which is unicameral (Article 90). Congress elects members to serve on the Permanent Assembly (Article 101) and committees (Article 94). Members of the Constitutional Court, the Judicial Branch, the National Election Board (amongst others) may not be elected to Congress if they have not resigned their offices at least six months before the election (Article 91).

¹⁸ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)001-e), § 21.

¹⁹ The US Constitution grants Congress authority to impeach and remove the President, Vice President, and other federal “civil officers” for “Treason, Bribery, or other high Crimes and Misdemeanors.” Responsibility and authority to determine whether to impeach an individual rests in the hands of the House of Representatives. Should a simple majority of the House approve articles of impeachment, the matter is then presented to the Senate, to which the Constitution provides the sole power to try an impeachment. A conviction on any one of the articles of impeachment requires the support of a two-thirds majority of the Senators present and results in that individual's removal from office. The Senate also has discretion to vote to disqualify that official from holding a federal office in the future. The Constitution imposes several additional requirements on the impeachment process. When conducting an impeachment trial, Senators must be “on oath or affirmation,” and the right to a jury trial does not extend to impeachment proceedings. If the President is impeached and tried in the Senate, the Chief Justice of the United States presides at the trial. The Constitution bars the President from using the pardon power to shield individuals from impeachment or removal from office. <https://www.congress.gov/crs-product/R46013>

²⁰ In Canada, the Canadian *Constitution Act* of 1867 contemplates the possibility of removal of a judge of a court of law by the Governor General on the address (resolution) of the Senate and House of Commons). However, no impeachment has ever taken place. Instead, the *Judges Act*, a law enacted by Parliament, provides for an elaborate process with extensive procedural fairness guarantees: the Minister of Justice cannot introduce a resolution for impeachment until after a report and a recommendation of the Canadian Judicial Council (made up of supreme and appellate federal and provincial court judges) to that effect, itself after a full hearing before a separate tribunal. Even after the Council has recommended the removal from office of a judge, no Minister of Justice has ever instituted impeachment proceedings in Parliament against a judge, and it has not even been envisaged until all avenues of appeal and judicial review have been denied or exhausted.

32. The judicial branch consists of jurisdictional bodies which administer justice and include the Supreme Court of Justice and other courts and tribunals (Article 143). *“Decisions of the National Election Board are not subject to [judicial] review”* (Article 142). Judges are guaranteed *“their independence”*, subject only to the Constitution and the law; the *“irrevocability of their office”*; and *“their continuance in office, as long as they show proper conduct and qualification for their function”* (Article 146).

33. Article 206 provides that any constitutional reform *“must be approved by Congress with an absolute majority of the legal number of its members and ratified by referendum.”* The referendum may be omitted when the agreement of Congress is obtained in two successive ordinary legislatures with a favourable vote, in each case, of more than two-thirds of the legal number of members of the Congress.²¹

C. Constitutional and legal framework for the JNE and other electoral management bodies.

34. The legal framework regulating electoral processes in Peru comprises the Constitution, at least 14 laws, 24 regulations as well as the decisions by the election administration.

35. Chapter XIII of the Constitution of Peru deals specifically with the electoral system, and many of its provisions relate to the National Election Board (articles 177 to 185).

36. The Constitution provides that Peru’s election administration is composed of the National Election Board (*Jurado Nacional Electoral*, JNE), the National Office of Electoral Processes (*Oficina Nacional de Procesos Electorales*, ONPE), and the National Identity and Civil Status Registry (*Registro Nacional de Identificación y Estado Civil*, RENIEC).

37. According to Article 179 of the Constitution, the JNE has five members, each appointed by one institution or group of institutions: (1) the magistrates of the Supreme Court; (2) the Board of Chief Prosecutors; (3) the Lima Bar Association; (4) the Board of public law faculties; and (5) the Board of private law faculties. The same article provides that the member appointed by the magistrates of the Supreme Court acts as President of the JNE. The plenary of the JNE requires a quorum of four members to operate. In cases when only four members are present, the President has a casting vote.²²

38. Article 180 sets the restrictions for the candidates, assuming that such a requirement is an effort to guarantee the independence of members: *“Candidates for elected office and citizens who hold national leadership positions in political organisations or who have held such positions in the four years prior to their nomination are not eligible to be members of the Jury Plenary.”* Organic Law on the JNE (Article 12) reiterates the limitations, slightly expanding the restrictions, for example to armed forces and national police officers.

39. The Heads of the National Office of Elections (ONPE - in charge of organising elections) and National Office of Identification and Civil Status Registration (RENIEC – in charge, among other

²¹ The proposed reform of Article 99 of the Constitution should be considered in light of the 2017 Law n° 30682 (Amending the Organic Law on Elections, Ley N° 26859), which provides in its Article 4 that *“All regulations with the status of law, related to electoral or referendum processes, which are published one (1) year prior to the day of the election or popular consultation, are effective the day after the publication of the resolution declaring the completion of the corresponding electoral process.”*

²² In 2021, the JNE operated with four members because the Lima Bar Association failed to appoint their representative. The legislature amended the law on JNE on 4 May 2021 to allow the temporary replacement of any of the five JNE members with an expired mandate by their alternates, addressing the JNE four-member situation and its reliance on the casting vote of the president.

matters of keeping and updating the electoral roll) are appointed by the National Judicial Council (Articles 182 and 183 of the Constitution).²³

40. Duties and tasks of the JNE are established by Article 178:

“It is the duty of the National Election Board:

- 1. To oversee the legality of suffrage and the conduct of elections, referendum, and other popular vote, as well as to prepare electoral rolls.*
- 2. To maintain and oversee the register of political organisations.*
- 3. To ensure the enforcement of rules on political organisations and other provisions concerning electoral matters.*
- 4. To administer justice on election matters.*
- 5. To declare the winners in elections and issue their credentials, as well as to announce the results of referendum or another popular vote.*
- 6. To perform other functions provided for in the law.”*

41. Article 181 is also noteworthy in this regard:

“The Plenary Assembly of the National Election Board examines facts with discretionary judgment and resolves disputes based on the law and the general principles of law. On issues concerning elections, referendum, or other popular vote, its decisions are final, definitive, and non-reversible. No appeal may be filed against them.”

42. In addition, according to Article 142 of the Constitution, decisions of JNE concerning election matters are not subject to review before the Court. National legislation, notably Article 13 of the Organic Law on JNE, provides that its members have the same status as judges of the Supreme Court. According to Article 154 paragraph 3 of the Constitution, the power to sanction and dismiss members of the judiciary belongs to the National Justice Board.²⁴

43. JNE’s role is twofold, as according to Article 178 paragraph 2, it has also the power to initiate legislation and submit the draft budget of all election management bodies to the legislature, in addition to tasks mentioned in Article 178 paragraph 1. Article 96 contemplates the right of the members of Congress to request a report from JNE. Article 177 of the Constitution provides that the different election management bodies, including JNE, are autonomous²⁵ but have to cooperate.²⁶

D. Constitutional provisions on impeachment.

44. The current Article 99 of the Constitution provides the following:

²³ After the constitutional reform adopted on 20 March 2024, this power will be exercised by the National Justice Board (JNJ).

²⁴ Article 154.3 of the Constitution establishes that the National Justice Board “Apply the sanction of dismissal to Supreme Court judges and Chief Prosecutors; and, ex officio or at the request of the Supreme Court or the Board of Chief Prosecutors, respectively, to judges and prosecutors of all instances. In the case of supreme judges and Chief Prosecutors, a reprimand or suspension of up to one hundred and twenty (120) calendar days is also possible, applying criteria of reasonableness and proportionality. The final resolution must be reasoned and with prior hearing of the interested party. It cannot be challenged.”

²⁵ Provisions enshrining the autonomy of the election administration are to be found, amongst others, in Article 1 of the Organic Law on Elections (n° 26859); Article 3. of the Organic Law on the National Election Board (*Ley Orgánica del Jurado Nacional de Elecciones* (n°26486); Article 3 of the law on the National Office for electoral Processes (*Ley Orgánica de la Oficina Nacional de Procesos Electorales* (n°26487); Article 3 of the Organic law on National Identification Register (*Ley Orgánica del Registro Nacional de Identificación y Estado Civil* (n° 26497).

²⁶At the same time, the JNE has the power to oversee the entire electoral process, and therefore has the power and the obligation to point out any processes that were carried out incorrectly by the other two authorities. Furthermore, it is the body which reviews the appeals filed against the ONPE and RENIEC.

“It is the responsibility of the Standing Committee to accuse before Congress: the President of the Republic; members of the Congress; Ministers of State; members of the Constitutional Court; members of the National Council of the Magistracy; members of the Supreme Court; Chief Prosecutors; the Ombudsman and the Comptroller General for violation of the Constitution and for any crime they commit in the exercise of their functions and up to five years after they have ceased these functions.”

45. Article 99 of the 1993 Constitution provided a precise list of State officials who could be subject to accusation by the Permanent Committee of the Congress for any violation of the Constitution or any crime committed during the performance of their duties. In comparison, Article 183 of the 1979 Constitution included a broader provision on accusation of public officials for violation of the Constitution or any crime committed during the performance of their duties referring the matter to corresponding legislation.²⁷ The question of whether the non-inclusion of the high electoral officials from the list in Article 99 was deliberate or an omission is subject to controversy.

46. Article 100 contemplates the sanctions that may be taken against high officials:

“It is the duty of the Congress, without participation of the Standing Committee, to decide whether or not to suspend an accused official or to declare him ineligible for public service up to 10 years or remove from his office without prejudice to any other responsibility.

During these proceedings, the accused official has the right to defend himself or to be assisted by a council before the Standing Committee and Congress as a whole.

In case of a criminal indictment, the Prosecutor General files criminal charges with the Supreme Court within five days. The Justice of the Supreme Court charged of criminal affairs then initiates the criminal instruction.

Acquittal by the Supreme Court restores the political rights to the accused official.

The terms of the Prosecutor’s accusation and the order to open proceedings may not go beyond or reduce the terms of the Congress charges.”

E. Rules of procedure of the Congress concerning impeachment.

47. In Peru the impeachment (*acusación constitucional*) is a process carried out by Congress against high-ranking State officials (as defined in Article 99 of the Constitution) with the aim of holding them accountable and possibly disqualifying them from holding office. It can take two forms. Impeachment (*juicio político*) in Article 99 implies that such officials may be disqualified from office (and therefore dismissed) by a 2/3 majority of the Congress for ‘infringement of the Constitution’ and for ‘crimes committed in the exercise of their duties’. It is an exclusively political process that imposes political sanctions that affects both politicians (the President of the Republic, members of Congress and government ministers) and members of other bodies: the Constitutional Court, the Supreme Court, the Judicial Council, the Chief Prosecutors, as well as the Ombudsman and the Comptroller General. The pre-impeachment (*ante juicio político*) of Article 100 refers to the same officials but only in the case of the possible commission of criminal offences.²⁸ These officials can only be subjected to criminal proceedings if the Congress acts as

²⁷ Article 183: “It is incumbent upon the Chamber of Deputies to impeach before the Senate the President of the Republic, members of both Houses, Ministers of State, members of the Supreme Court of Justice and members of the Court of Constitutional Guarantees, as well as high-ranking officials of the Republic as specified by law for infringement of the Constitution and for any offence committed by them in the exercise of their functions, even if they have ceased to hold office”.

²⁸ The Constitutional Court of Peru in its 2023 judgment (Case. N.O 0006-2003-AITC) established that “In pre-impeachment (*ante juicio político*), which must deal with strictly legal matters, Congress can only accuse and lift the official's functional prerogative, but not sanction. The pre-impeachment must be approved by half plus one of

an accuser. Thus, for such an official to be subject to criminal prosecution, he or she must first be disqualified by the Congress, and the latter must also act as accuser in the criminal case. This would not be a form of political responsibility, but a case of investigating the criminal conduct of those holding qualified positions of state power.

48. According to Article 89 of the Rules of Procedure of the Congress,²⁹ Members of the Congress, the Chief Prosecutor of the Nation or any person who considers himself or herself directly affected by decisions of high State officials falling within the scope of Article 99 of the Constitution, may file a constitutional complaint against them. These complaints are immediately transmitted to the Subcommittee on constitutional accusations of the Congress for processing. The Subcommittee on constitutional accusations is the body responsible for assessing the admissibility and provenance of constitutional accusations presented, as well as conducting the investigation³⁰ in constitutional accusation processes, issuing the corresponding final report. The number of members and their composition correspond to the principles of plurality and proportionality of all parliamentary groups. Its members, including its President, are appointed by the Standing Committee of the Congress. The Subcommittee has 10 days to decide on the admissibility of the case.

49. If the case is declared admissible, the Subcommittee presents a report to the Standing Committee. If the recommendations of the report are approved, the Subcommittee conducts an investigation, which should not exceed 15 days, followed by a hearing on its findings. The report on the hearing and its conclusions are debated at a meeting of the Subcommittee. If the accusation of the public official is confirmed the case is presented to the Standing Committee of the Congress and if the latter approves the accusation, a special Accusation Subcommittee (*Subcomisión Acusadora*) is established. It includes at least one member of the Subcommittee on Constitutional Accusations.³¹

50. After the report has been substantiated and the constitutional accusation has been formulated and debated by the Accusation Subcommittee, the Plenary of the Congress votes, deciding whether there exist or not the grounds for further processing the case based on the accusation. If the grounds for accusation are confirmed, the Plenary of the Congress debates and votes, in the same session, on suspension of the accused in the exercise of his/her function, rights and duties subject to trial according to law. If the accusation is not approved the case is archived.

51. The approval agreement of a constitutional accusation, for the alleged commission of crimes in the exercise of his or her functions, requires the favourable vote of half plus one of the number of members of the Congress, without participation of the members of the Standing Committee. The approval for a suspension requires the same majority.

52. The approval of a sanction of suspension, disqualification or dismissal for constitutional violation, in a political trial provided for in the first paragraph of article 100 of the Constitution, is adopted with 2/3 majority of members of the Congress, without the participation of the Standing Committee.

the legal number of members. Once the official has been judicially sanctioned, the Congress may apply the sanctions referred to in the first paragraph of Article 100 of the of the Constitution.” As for impeachment it stressed that “Impeachment is an eminently political procedure, conducted in its entirety before the Congress of the Republic, in which it has the power to sanction the official for strictly political reasons” (par 25).

²⁹ Reglamento del Congreso de la Republica. Edición Oficial. Noviembre 2023. Page 141.

³⁰ Procedures for conducting an investigation are established in Article 88 of the Rules of procedure of the Congress.

³¹ The complaint is notified to the accused by the president of the Subcommittee within three (3) business days following the acknowledgment, by the plenary of the Subcommittee on constitutional accusations, of the approved period to conduct its investigation.

53. The constitutional reform of Article 99 proposes to include members of electoral bodies in Article 99 as individuals who can be subjected to constitutional impeachment (*acusación constitucional*). This means granting them both the ‘privilege’ of pre-impeachment (*ante juicio*) and subjecting them to the ‘burden’ of impeachment (*juicio político*).

F. Accountability of the members of the JNE and the other electoral management bodies.

54. Peru has three distinct electoral management institutions with different mechanisms of accountability of their members, which are enshrined in the legislation on the responsibility of members of the judiciary.

55. Article 13 of the Organic Law on the JNE provides that its members “*shall enjoy, during the exercise of their functions, the same honours and status as the members of the Supreme Court of Justice of the Republic*” and that “*regulations on accountability and sanctions provided for these are applicable to them as appropriate*”. The accountability of and sanctions against judges of the Supreme Court are regulated by the Organic Law on Judicial Power (Articles 19, 20 and 102-A). Following the logic of Article 13 of the Law on JNE, the body in charge of the investigation and disciplinary measures against the President (and other members) of the JNE should be the National Justice Board.³² However, there is no specific mention of JNE or its members in this Organic Law.³³

56. JNE is the only electoral management body in Peru composed of appointed officials from different institutions as provided for in the Constitution. In case of ONPE and RENIEC only their Heads are appointed to their positions and dismissed from office on the basis of a constitutional provision.³⁴

57. In the case of the ONPE and RENIEC their respective Heads are appointed by the National Justice Board in accordance with Articles 2.d and 2.e of the Organic Law on the National Justice Board. Provisions on their accountability are included in Articles II (Preliminary Title), 2.f and 45.2 of the same law:

Article II : “The purpose of this organic law is to establish the legal requirements for the appointment of the members of the members of the National Justice Board, judges and prosecutors at all levels, except when they come from judges and prosecutors at all levels, except when they have been elected by popular election and of the Head of the National Office of Electoral Processes (ONPE) and the Head of the National Register of Identification and Civil Status (RENIEC); as well as to guarantee, in accordance with the constitutional principle of equality and non-discrimination, suitable, meritocratic and impartial procedures for appointments, ratifications, partial evaluations and disciplinary procedures for judges, prosecutors, the Head of the National Office of Electoral Processes (ONPE) and the Head of the National of Identification and Civil Status (RENIEC) and keep a transparent, suitable and free of corruption system.”

58. In accordance with Article 2.f. of the Law the National Justice Board (JNJ) has the power “*to dismiss judges and prosecutors of all levels, both permanent and provisional, as well as the Head of the National Office of Electoral Processes (ONPE)*³⁵ *and the Head of the National Register of National Registry of Identification and Civil Status (RENIEC).*³⁶

³² Organic Law on the National Justice Board (n° 30916).

³³ The case-law of the National Justice Board shows that this body dealt with several complaints against the President of JNE. For example, the most recent ones are Resolutions n°1299-2024-JNJ and n° 652-2023-JNJ.

³⁴ Article 182 of the Constitution establishes that he/she can be removed from office by the JNJ for serious offence. Article 183 establishes the same sanction against the head of RENIEC.

³⁵ Also mentioned in Article 8 of the Organic Law on ONPE (Ley N° 26487).

³⁶ Also mentioned in Article 12 of the Organic Law on RENIEC (Ley N° 26497).

59. Article 45.2 of the same law provides that: “Judges and prosecutors at all levels, the Head of the National Office of Electoral Processes and the Head of the National Registry of Identification and Civil Status may be suspended from office by means of a provisional measure, issued by means of a duly motivated resolution of the National Board of Justice, provided that there are well-founded elements of conviction regarding the commission of a disciplinary offence punishable by dismissal and it is indispensable to ensure the normal conduct of the case, to prevent obstruction of the proceedings, to ensure the effectiveness of any decision which may be handed down, or to prevent the continuation or repetition of the facts under investigation or other facts of similar significance.”

60. According to the Rules on disciplinary procedures of the JNJ, if the Head of ONPE or of RENIEC is found guilty of committing an offence, they can be dismissed, receive a warning or be suspended for up to 120 days (pending investigation). The resolution must be motivated and include a hearing attended by the party concerned.³⁷ The decision cannot be appealed.

61. Article 13 of the Rules on disciplinary procedure of the JNJ on “Constitutional accusation or transfer of the case to the Prosecutor’s office” provides that “once the disciplinary proceedings against a judge or a prosecutor are concluded, if there is a presumption of a crime committed during the exercise of their mandate, the decision is transmitted to the Prosecutor’s office. If there is a presumption of a violation of the Constitution, the case is transmitted to the Congress. In the case of presumption of the offence imputable to the Head of ONPE or RENIEC, the Head of the National Authority of the Control of the Judiciary or the Public Prosecutor’s Office, judges and prosecutors of other instances, specialised and temporary, the action is to be taken by the Public Prosecutor’s Office in accordance with the law.”

62. According to the Constitution, the Office of the Controller General of the Republic can also start a procedure engaging the functional administrative responsibility of JNE members and Heads of ONPE and RENIEC. JNE members as well as the Heads of ONPE and RENIEC have to submit to the Office of the Controller General of the Republic a declaration of interests as provided in the Law.³⁸ Failure to submit, or late, incomplete or false sworn declarations of interests are sanctioned in accordance with the Organic Law of the National Control System and the Comptroller General of the Republic (Law 27785). Article 11 of this law establishes that “where functional administrative responsibility is identified, the Office of the Comptroller General shall identify actions for the determination of responsibility and the imposition of the respective sanctions”. If civil or criminal liabilities are identified, the competent authorities, in accordance with the law, shall transmit the case to the competent jurisdiction. In the case of criminal liabilities, the Head of the Internal Audit Body will shall simultaneously inform the Public Prosecutor of the committed offence.

G. Decisions of the Constitutional Court of Peru concerning the application of Article 99 of the Constitution to the President of the JNE and the Heads of ONPE and RENIEC.

63. On 26 July 2022, the Constitutional Chamber of the High Court of Justice of Arequipa issued a resolution (Resolution 6) declaring that the amparo claim presented by the then-President of the JNE against the constitutional accusation by the Congress was well founded and that it was not possible to accuse the President of the JNE because it violated the plaintiff’s right to independence in the administration of electoral justice. On 10 October 2022, the President of the Congress of the Republic brought an action for conflict of competence against the Judiciary, alleging that the latter, in the exercise of its powers in the area of the administration of justice,

³⁷ R. Nº 008-2020-JNJ (Resolution approving the Rules on disciplinary procedure of the JNJ).

³⁸ Article 3.f of the Organic Law Nº 31227 on presentation to the Office of the Controller General of the Republic of the declaration of interests.

undermined the exclusive powers of the Congress to exercise political control over senior State officials as established in Article 99 of the Peruvian Constitution.

64. This was not the first appeal to the Constitutional Court to determine whether the President of the JNE was accountable under Article 99 of the Constitution. In 2003, the Constitutional Court in one of its decisions urged the Congress of the Republic to reform Article 99 of the Constitution, including members of JNE and Heads of ONPE and RENIEC among those dignitaries who enjoy the privilege of pre-impeachment (*ante juicio político*), or, as the case may be, including a provision allowing for the privilege of pre-impeachment, as did Article 183 of the Constitution of 1979.³⁹

65. In 2012, the Constitutional Court reiterated its position concerning the reform of Articles 99 and 100 of the Constitution.⁴⁰ The Congress took no action aimed at adopting any changes to these articles until 2023.

66. On 23 February 2023, the Constitutional Court rendered a new decision concerning the conflict of competence against the Judiciary filed by the President of the Congress on 20 October 2022.⁴¹ The Constitutional Court established that the complaint was well founded and overturned the decision of the High Court of Arequipa since its “resolutions have the effect of preventing the conduct of parliamentary investigations into matters of public interest, as well as the conduct of impeachment and pre-impeachment proceedings.” The Constitutional Court stressed that it “understands that the competence to process constitutional accusations corresponds to the Congress of the Republic, and that, in the nature of the representation exercised by the member of the Supreme Court of Justice of the Republic who holds the position of president of the JNE by express mandate of the Fundamental Text must be assessed.”(par. 98) The Court also insisted that in no way the congressional power should be carried out in disregard of principles and rights enshrined in the Constitution. On the contrary, the Court underlined that *amparo* is appropriate insofar as fundamental rights are affected in the processing of the pre-impeachment procedure; but it must be clear that it cannot be used as an instrument for impeding the exercise of powers constitutionally reserved to the Congress of the Republic.

67. The Court referred to its 2012 decision and insisted “on the need to update the 1993 Political Constitution to formalise political control, not only in the case of the President of the JNE, but also for the members of the plenary and the Heads of the ONPE and the RENIEC”,⁴² and exhorted the Congress to amend Article 99 and its Rules of Procedure, in accordance with that judgment and the case law of the Constitutional Court.

IV. International Standards

A. The standards of independence of judicial bodies

68. The Venice Commission has consistently stressed that as the judiciary, including a Constitutional Court, has the task of deciding matters before it impartially, on the basis of facts and in accordance with the law, the judiciary must not be subject to any improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason. The principle of the independence of the judiciary entitles, and requires, the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. As reiterated in previous opinions and reports of the Venice Commission, the

³⁹ Decision of the Constitutional Court. Case 0006-2003-AI/TC.

⁴⁰ Decision of the Constitutional Court. Case 00156-2012-PHC/TC.

⁴¹ Decision of the Constitutional Court. Case 00003-2022-PCC/TC.

⁴² Para. 105.

independence of the judiciary is an issue that affects all countries, whatever their systems, and is essential for any democratic system and the respect for the separation of powers. It is a fundamental guarantee of the rule of law, democracy and the respect for human rights.⁴³ It ensures that justice can be done and seen to be done without undue interference by any other branch of power, other bodies inside the judiciary, other judges or by any other actors.

69. An independent judiciary also means that judges are accountable for their work. In this sense, when the key tasks of judges that have been specified in Opinion No. 17 (2014) of the CCJE are examined, it is clear that they carry out essential duties in every democratic society that respects the rule of law: judges must protect the rights and freedoms of all persons equally. Judges must take steps to provide efficient and affordable dispute resolution and decide cases in a timely manner, independently and must be bound only by the law. They must give cogent reasons for their decisions and must write in a clear and comprehensible manner. If judicial power is abused and misused, it cannot serve its purpose. As concerns impeachment of judges, the Commission has expressed the view that “the introduction of [...] a procedure [of impeachment] is a clear contradiction of the principle of the independence of the judiciary and would make the position of the judges dependent on a political organ”.⁴⁴ It is indisputable that judges must be protected against undue external influence. To this end they should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes).⁴⁵

70. The Commission has expressed the view that inviolability, “[...] a ‘procedural immunity’, in other words a special legal protection/procedural safeguard for judges accused of breaking the law, typically directed against arrest, detention and prosecution, would help ensure that judges can properly exercise their functions without their independence being compromised through fear of prosecution or other judicial actions by an aggrieved party, including state authorities. In a number of countries, such ‘inviolability’ or ‘procedural immunity’ exists to protect judges from potentially frivolous or false accusations, vexatious or manifestly ill-founded complaints that could exert pressure on them. [...] the scope of such immunity should be strictly circumscribed. In any case, the procedure for lifting the immunity should include procedural safeguards to protect judicial independence and the requisite decision should be taken by an independent judicial body or other independent entity, while ensuring that conditions and mechanisms for lifting such immunity do not put judges beyond the reach of the law.”⁴⁶ Where it exists, judicial inviolability should be lifted only by organs of the judicial system. Therefore, the Commission has welcomed the lifting of immunity by the Supreme Judicial Council or the Constitutional Court,⁴⁷ rather than by parliament.⁴⁸

71. The Commission has expressed the view that “[...] [D]isciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, which include the following: the liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there

⁴³ Rule of Law Checklist.

⁴⁴ CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§31-32.

⁴⁵ CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §61. See also CDL-AD(2018)022, Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts of “the former Yugoslav Republic of Macedonia”, §79; CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal liability of judges, §9; CDL-AD(2015)013, Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine, §23.

⁴⁶ CDL-AD(2016)025, Endorsed joint opinion on the draft law “on Introduction of amendments and changes to the Constitution” of the Kyrgyz Republic, §§77 and 78.

⁴⁷ CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, §154.

⁴⁸ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)013-e), § 24.

should be a right to appeal to a higher judicial authority.”⁴⁹ While acknowledging that “there is no uniform approach to the organisation of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations”, [...] the Venice Commission favours specific and detailed description of grounds for disciplinary proceedings, [...] whereas it recognised that, to a certain degree, it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility.⁵⁰ Vague provisions (such as the ‘breach of oath’ or ‘unethical behavior’) increase the risk of their overbroad interpretation and abuse, which may be dangerous for the independence of the judges. This is why the Venice Commission has always been in favour of a more specific definition of disciplinary offences in the legislation itself. [...]”⁵¹

72. In sum, disciplinary or criminal proceedings against judges must provide the following procedural guarantees:

- Clear grounds of serious disciplinary offences that are clearly, restrictively and exhaustively set out in the law;
- Fair trial, with the right to submit evidence and right to be heard;
- Investigating body must be non-partisan and non-political;
- Investigation should be carried out by an institution that is separate and distinct from the one which decides on the dismissal;
- Such decision should be reasoned;
- Appeal to a court of final jurisdiction within a reasonable time-limit should be provided.

B. The standards of independence of election management bodies

73. The basic standards on the independence of election management bodies are stipulated in the Code of Good Practice in Electoral Matters:

II.3.1. “a. An impartial body must be in charge of applying electoral law.

b. Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

f. The bodies appointing members of electoral commissions must not be free to dismiss them at will.”

74. According to the Guidelines:

“68. Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.

74. The composition of a central electoral commission can give rise to debate and become the key political issue in the drafting of an electoral law. Compliance with the following guidelines should facilitate maximum impartiality and competence on the part of the commission.

77. Broadly speaking, bodies that appoint members to electoral commissions should not be free to recall them, as it casts doubt on their independence. Discretionary recall is unacceptable, but recall for disciplinary reasons is permissible – provided that the grounds for this are clearly and restrictively specified in law (vague references to “acts discrediting the commission”, for example, are not sufficient).”

⁴⁹ CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §34

⁵⁰ CDL-AD(2023)015, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Superior Council of Magistracy and the Status of the Judiciary as Regards Nominations, Mutations, Promotions and Disciplinary Procedures of France, §56

⁵¹ CDL-AD(2018)032, Opinion on the Concept Paper on the reform of the High Judicial Council of Kazakhstan, §78

75. Similar standards are recommended for organizing referenda. In order to better avoid political influence, it is crucial that at least the central election management bodies have sufficient guarantees of independence. EMBs must also work transparently and impartially.

76. The same principles are not less important for the institutions dealing with electoral complaints. These institutions have the central role in guaranteeing the legality of electoral processes. According to the Report on election dispute resolution,⁵² if the appeal procedure is made before a non-judicial body, the procedure should ensure that the competent body offers sufficient guarantees of its impartiality and afford effective guarantees of a fair, objective and sufficiently reasoned decision.

77. The Venice Commission has previously addressed the matter of the accountability of the members of the CEC and other electoral bodies. The Commission has acknowledged that members of EMBs may be dismissed by the bodies that have appointed them under certain conditions. The Code of Good Practice in Electoral Matters provides that “the bodies appointing members of electoral commissions must not be free to dismiss them at will.”⁵³ The explanatory report adds that: “*Broadly speaking, bodies that appoint members to electoral commissions should not be free to recall them, as it casts doubt on their independence. Discretionary recall is unacceptable, but recall for disciplinary reasons is permissible - provided that the grounds for this are clearly and restrictively specified in law (vague references to “acts discrediting the commission”, for example, are not sufficient).*”⁵⁴ In several opinions, the Commission has added that commission members must be expressly protected from arbitrary removal, setting out under what grounds a removal is justified.⁵⁵ Such grounds must not be vague, which would risk that they be used for dismissal based on subjective and inappropriate reasons: in order to uphold the independence of the CEC members, the grounds for dismissal need to be serious and clearly, restrictively and exhaustively specified in law. The law needs to set out the procedure for ascertaining the existence of such grounds and a clear possibility of judicial review of the dismissal decision.⁵⁶ The decision of dismissal needs to be reasoned.⁵⁷

78. In sum, members of an Electoral Management Body may be dismissed:

- For serious disciplinary reasons;
- On grounds that are clearly, restrictively and exhaustively set out in the law;
- Through a procedure set out in law;
- On the basis of a reasoned decision;
- With the possibility of judicial review by an appellate court of the dismissal decision.

V. Analysis

A. General comments

79. The pending reform of Article 99 of the Constitution of Peru aims at adding the members of the National Election Board (JNE), the Head of the Oficina Nacional de Procesos Electorales (ONPE) and the Head of the Registro Nacional de Identificación y Estado Civil (RENIEC) to the high-ranking State officials whom Congress, pursuant to Article 100, may suspend, dismiss and/or disqualify from holding office for up to ten years.⁵⁸ The aim of the reform, which has been

⁵² [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)025-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)025-e), § 115.

⁵³ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e)

⁵⁴ Ibidem, § 77.

⁵⁵ CDL-AD(2009)001, Joint Opinion on the Election Code of Georgia

⁵⁶ CDL-AD(2022)025, Republic of Moldova - Joint opinion on the draft electoral code approved by the Council for Democratic Elections, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2022\)036-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2022)036-e)

⁵⁷ CDL-AD(2011)021, Joint interim opinion on the new draft electoral code of Armenia

⁵⁸ This addition entails, in principle, the need to amend also Article 39 of the Constitution which lists and ranks the high civil servants, and currently does not include the members of the plenary of the National Jury of Elections, the Head of the National Office of Electoral Processes and the Head of the National Registry of Identification and Civil Status.

encouraged by the Constitutional Court (see above), is to extend the powers of the Congress under Articles 99 and 100 of the Constitution to the electoral bodies. The main argument in support of the reform is that these high state officials perform fundamental functions in a democratic state, and it is necessary to control the due exercise of these powers, by those officials and to exercise adequate and legitimate oversight in relation to possible accusations, notably of corruption, made against them; instead, they are currently the only such high state officials who do not fall under the impeachment powers of Congress set out in Articles 99 and 100 of the Constitution. In addition, some of the interlocutors consulted by the Commission Delegation stressed that only two members of the JNE, the President (who is a judge of the Supreme Court) and the senior Prosecutor, benefit from the protections accorded by Article 99, while the other members of the JNE, the Head of the ONPE and the Head of RENIEC, do not.

80. The Venice Commission is of the view that in a state governed by the rule of law, all holders of a public function should be held accountable for their actions, and the members of the Electoral Management Bodies are no exception. Free and fair elections are an essential feature of a democratic state, and only transparency, impartiality and independence from politically motivated manipulation will ensure the proper administration of the election process throughout the entire election cycle, and especially from the pre-election period to the end of the counting of the votes and the processing of the results. The question then arises as to what is the most appropriate form of accountability which will preserve their independence and the smooth holding of free and fair elections.

B. The nature of the National Board of Elections (the JNE)

81. According to Article 178 of the Constitution, the JNE is vested with the usual tasks of central election management bodies (including oversight of the equality of suffrage and the conduct of elections, referenda, and other popular election processes; preparing electoral rolls; ensuring the enforcement of rules on political organizations and other provisions concerning elections; declaring the winners in elections, and issuing their credentials; announcing the results of referenda or other popular consultations). However, the JNE is also tasked with the administration of justice on election matters, and, according to Article 142 of the Constitution, its decisions are “based on the law and the general principles of law”, rather than simply on the basis of policy or expediency and are not subject to review before the Court. Finally, the JNE has the additional power, according to Article 178 paragraph 2, to initiate legislation and submit the draft budget of all election management bodies to Congress; Article 96 contemplates the right of the members of Congress to request a report from the JNE, which is not common in relation to courts. Such a right is not contemplated in relation to courts in Peru as well. Article 177 of the Constitution provides that different election management bodies, including the JNE, have to cooperate. Such cooperation foreseen at the constitutional level is uncommon between courts and administrative bodies. The same can be concluded from the Organic law of the JNE, Articles 1 and 5.

82. The Commission observes that the JNE, which is specifically competent to “administer justice in electoral matters”, has just five members, whose main task cannot be mainly related to coordination and general oversight not based on complaints and appeals; the number of cases to be adjudicated by the JNE is high; and while the Constitution does not expressly name it a court of law, (preferring the title of “Jurado Nacional de Elecciones”, rather than “Tribunal”), Article 142 of the Constitution is in Chapter 8 on “Judicial Power”. The Commission is therefore of the view that the JNE should be considered a judicial body, even if the appointment procedure of the members of JNE is largely different from that of judges.

83. The Venice Commission also observes that in the case of *Aguinaga Aillón v. Ecuador* concerning the Supreme Electoral Tribunal (TSE), the Inter-American Court of Human Rights held that “although the TSE did perform administrative, organizational, and management duties for electoral processes, it was also tasked with hearing and adjudging matters pertaining to electoral justice. The Court concludes that the TSE conducted materially judicial functions in the

sphere of elections, and its members, such as Mr. Aguinaga Aillón, therefore enjoyed the same guarantees of judicial independence as judges generally, given the materially judicial nature of their duties”.⁵⁹

84. In the light of the foregoing, the Commission is of the view that the JNE is both an electoral management body (EMB) and a judicial body.⁶⁰

C. The compatibility with international standards of the inclusion of the members of the JNE in Article 99 of the Constitution of Peru

1. In general

85. The Venice Commission wishes to stress once again that free and fair elections are an essential feature of a democratic state, and that only transparency, impartiality and independence from politically motivated manipulation will ensure the proper administration of the election process throughout the entire election cycle, and especially from the pre-election period to the end of the counting of the votes and the processing of the results. Both the central electoral commission and the electoral tribunal should be duly shielded from political pressure. Mechanisms of criminal and disciplinary accountability of electoral commissions and tribunals should be established and should be effective, but they should not expose their members to political pressure. It should be underlined that neither members of the EMBs nor electoral judges need political trust; they have to act in accordance with the law, and this is the basis for public trust in them and in the electoral bodies.

86. The Commission recalls that there also exist institutional mechanisms to safeguard the due conduct of the members of the EMBs or electoral tribunals and to prevent misconduct. One of these mechanisms is the appointment of these officials for a specific term.⁶¹ This is a safeguard that ensures that after the election, there is a possibility of changing the composition of the institution. During the electoral process, minor alleged misconduct may be tolerated to a greater extent, as the removal of the person and the appointment of a new person may not only cause administrative difficulties, but also lead to loss of trust in the impartiality of the institution. Another mechanism to guarantee that the persons holding positions in electoral tribunals or central election administration bodies act in accordance with the law is providing a prior assessment of the candidates and selection of the persons by highly qualified experts.

⁵⁹ Inter-American Court of Human Rights, case of Aguinaga Aillón v. Ecuador judgment of 30 January 2023, § 59.

⁶⁰ Speaking of “the modern development of non-curial adjudicative agencies which play so important a role in our society”, the Supreme Court of Canada stated in the *Blaikie* case, “If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy, they are judicial bodies, however some of their procedures may differ not only from those of Courts but also from those of other adjudicative bodies. In the rudimentary state of administrative law in 1867, it is not surprising that there was no reference to non-curial adjudicative agencies. Today, they play a significant role in the control of a wide range of individual and corporate activities, subjecting them to various norms of conduct which are at the same time limitations on the jurisdiction of the agencies and on the legal position of those caught by them.” *Attorney General of Quebec v. Blaikie et al.*, [1979] 2 S.C.R. 1016, <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/2637/1/document.do>, at page 1028. With respect to the principles of judicial independence and the separation of powers as they have evolved in Canadian jurisprudence, see Warren J. Newman, “The Principles of the Rule of Law, the Separation of Powers and Judicial Independence in Canada”, *Oxford Handbook of the Canadian Constitution*, Oxford University Press, 2017, chapter 48.

⁶¹ In countries with a system based on the UK Westminster Parliament model, judges of courts of law benefited from life or at least long tenure; in Canada, for example, judges enjoyed life tenure until the Constitution was amended in 1960 to provide for tenure until an age of retirement of 75 years. In the United States, Supreme Court judges still enjoy life tenure. With the guarantee of life (or lengthy) tenure came the possibility of abuse of office, and thus the Canadian Constitution provided that judges were guaranteed their tenure during good behaviour but were removable from office by the executive on address by the Houses of Parliament.

87. As the Commission has concluded that the JNE is both an electoral management body and a judicial body, it will examine this matter against the background of the international standards of judicial independence, which are more demanding than those on the independence of electoral management bodies.

88. The Commission notes at the outset that there exist several mechanisms of accountability of the members of the JNE: they may be the object of criminal investigations by the Prosecutor's Office; they are subject to a procedure of control of the legality of implementation of the national budget, public debt operations, and activities by the Office of Comptroller General (Article 82 of the Constitution). Furthermore, alleged acts of corruption involving the JNE may be the object of *denuncias ciudadanas*.⁶² The Commission also notes that the President of the JNE (as a judge of the Supreme Court) and the member of the JNE nominated by the Prosecutors (as a senior prosecutor) are also subject to disciplinary responsibility before the National Justice Board, as well as to the so-called "ratification" every seven years (Article 154 of the Constitution). The other members of the JNE, however, are not. While the law essentially equates the members of the JNE to judges (see above), it is unclear whether the other members of the JNE are subject to any disciplinary liability before the Junta del Poder Judicial.

89. It should be noted that the President of the JNE and the prosecutor member of the JNE are already subject to Article 99 in their individual capacity of judge of the Supreme Court and senior prosecutor respectively: but the three other members of the JNE are not. This overlap and difference in treatment is both confusing and unsatisfactory.

90. The accountability system set out by Article 99 and 100 of the Constitution of Peru is *sui generis*. It is twofold: on the one hand, it entails the possibility for the Congress to "impeach" certain high-ranking officials for so-called "constitutional offences" ("violation of the Constitution") through a political process: the impeachment process allows the initiation of parliamentary proceedings against the officials listed in Article 99 of the Constitution, on the ground of constitutional infractions of a political nature committed by them in the exercise of their functions; if the responsibility of the official is determined, the Congress of the Republic itself is authorised to sanction him/her and even disqualify him/her from the exercise of the public function. On the other hand, and at the same time, the impeachment confers on the same high-ranking officials a functional prerogative, with the purpose of preventing them from being prosecuted for ordinary crimes committed in the exercise of their functions, without prior proceedings with the due process guarantees before the Congress of the Republic. The Peruvian interlocutors referred to the first as a "burden" and to the second as a "privilege". These two procedures stem from the same provisions of the Constitution, Articles 99 and 100: the supporters of the reform stressed the "privilege" aspect, while the opposers stressed the "burden" aspect, but the two aspects cannot be dissociated from each other, because being subject to Article 99 means being subject to both *juicio político* and *ante juicio* within the meaning of Article 100.

2. Juicio político

91. The Venice Commission has previously expressed the view that judges should not be subject to political impeachment, because it exposes them to undue interference by parliament. However, the interlocutors of the Commission delegation in Peru, including academics and civil society activists, took it almost for granted and did not challenge this legal instrument as such. Having acknowledged however that impeachment of judges is an accepted feature of certain democratic systems in the Americas, the Commission, while maintaining its position that it represents a potential, if not an actual threat to the independence of the judges, wishes to underline that, to align with the standards of independence of the judiciary, the procedure of impeachment of members of the JNE by the Congress, if it is introduced, should meet certain requirements.

⁶² <https://www.gob.pe/21129-denunciar-un-presunto-acto-de-corrupcion?child=883>

92. In the first place, it should be based on clear grounds of serious disciplinary offences that are clearly, restrictively and exhaustively set out in the law.⁶³ The Commission considers that the notion of “violation of the constitution” on which the *juicio político* is based is extremely vague, and as such could be interpreted in a very subjective manner. It may be interpreted in a non-predictable manner using generally worded arguments such as ‘unreasonable’, ‘illegal’, ‘unconstitutional’ not being explained in more detail; or the political reasons used by considering only one of the applicable constitutional or legal principles without due consideration of all the applicable principles. Furthermore, even if the impeachment may be based on a violation of constitutional principles by the JNE member, such legal ground can relate to the work of the JNE member only to a small extent. The Commission delegation during its exchanges of views in Lima failed to obtain a list of examples of such so-called constitutional offences. There is no criminal offence of “violation of the constitution”. In the absence of clear grounds for the constitutional accusation, the merits of the accusation, hence the seriousness of the offence, will only depend on the majority within Congress supporting it (the impeachment requires a two-thirds majority).⁶⁴ The Commission notes that the Inter-American Commission, in its 2023 report on the human rights situation of Peru, recommended to “refrain from adopting constitutional or legal reforms which weaken the autonomy and independence of the National electoral system or of the judiciary” and to “define the types of constitutional accusations [...] in a manner that defines with clear and objective criteria the behaviours that may be sanctioned and the relevant consequences.”⁶⁵

93. The Peruvian authorities argued that the abstract nature of this concept allows each case to be evaluated according to its context. Establishing a strict definition would limit the ability of Congress to exercise its oversight role. It is the Constitution itself the normative parameter to evaluate whether or not any of the high officials have committed an infraction against it. The Venice Commission recalls that it has previously acknowledged that “there is no uniform approach to the organisation of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations”.⁶⁶ However the Venice Commission favours specific and detailed description of grounds for disciplinary proceedings,⁶⁷ whereas it recognised that, to a certain degree, it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility.⁶⁸

94. The Commission wishes to stress in this respect that it is essential that a constitutional offence must not relate to the content of a specific decision. Some interlocutors of the Commission delegation in Lima stated that it would not be possible for Congress to impeach a member of the JNE based on the content of a decision taken by it; however, there is no express guarantee in this sense, and instead other interlocutors referred to a decision by the President of the JNE not to disqualify a presidential candidate as a clear ground for an impeachment procedure. Certain

⁶³ In Lithuania, for example, the mandate of the Chair, Deputy Chair and member of the Central Electoral Commission may be terminated through a non-confidence vote by the majority vote of all Members of the Seimas (Article 37 of the Constitution of Lithuania) but only for grounds exhaustively listed in the electoral code.

⁶⁴ See, *mutatis mutandis*, Constitutional Court of Peru, Order EXP. N.º 00003-2022-PCC/TC of 16 April 2024, no. 28.

⁶⁵ Interamerican Commission on Human Rights, Situation of human rights in Peru in the context of the social protests, 23 April 2023.

⁶⁶ Venice Commission, CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, para. 23.

⁶⁷ See, for example, Venice Commission, CDL-AD(2014)006, Republic of Moldova, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, para. 15.

⁶⁸ See, for example, Venice Commission, CDL-AD(2017)018, Bulgaria, Opinion on the Judicial System Act, para. 108; and Venice Commission, CDL-AD(2019)024, Armenia, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI), on the amendments to the Judicial Code and some other Laws, para. 40. See also ECtHR, *Oleksandr Volkov v. Ukraine*, 9.01.2013, application n. 21722/11, para. 175 et seq.

interlocutors in Lima stated that if the JNE were included in Article 99, it would be like “subjecting a referee to the judgment of the players”.

95. If “misconduct in office”, including a breach of electoral law, were considered to be a violation of the Constitution, the law should stipulate in detail what is considered as misconduct, as in most cases the unlawfulness of the application of law can be cured by the election dispute resolution mechanism. Not every misapplication of electoral law should be a ground for potential removal. A different understanding or interpretation of electoral law has to be tolerated within the bounds of reasonableness. Broad and unspecified allegations of unethical behaviour, incompetence, incapacity, non-presence in the meetings of the EMB for a specific period without justifiable reason, or engagement in partisan activities should not lead automatically to the dismissal of the EMB member: such grounds are generally too vague without additional particulars and may lead to unforeseeable or unequal application of the law. Procedural guarantees need to be in place, including the right of the person to submit evidence and appeal the decision before a court, unless the decision is made by the highest-level court.

96. The Commission underlines that it would be particularly dangerous for the independence of the electoral bodies if members of Congress could retaliate against the JNE, because fear of such retaliation could affect the JNE’s decisions. The use or threat to use impeachment *during* the elections would be particularly dangerous. In this context it should be stressed that even if such impeachment mechanisms are not widely used, as seems to be the case, the possibility of being impeached could have a chilling effect, and the JNE members could avoid making decisions or act in a manner which does not follow the expectations of the political majority for fear of being impeached.

97. The Commission wishes to underline the importance of providing *explicit* guarantees against possible political retaliation by Congress. While some interlocutors pointed to the commitment of Congress not to abuse of impeachment against JNE members and to the relatively rare use of this mechanism against other high officials, the Commission has previously stressed that informal norms should complement and support, and not substitute formal safeguards altogether. “[...] Experience from other countries has shown that in a polarised political context, informal norms sustaining the rule of law offers little resistance against powerful forces determined to use all available legal and constitutional provisions.”⁶⁹

98. In the Commission’s view, in order to be in line with the principle of legal certainty, the notion of “violation of the constitution” should be clarified and defined, including through a list of examples of acts of the JNE which could amount to such an offence, which should be a serious one, and should exclude explicitly that an impeachment may be based on the reasoning or substantive content of specific decisions rendered by the JNE.

99. Furthermore, the Commission is of the view that it should be expressly provided that no impeachment procedure may be carried out against a member of the JNE during the period of the election campaign, until after the announcement of the election results and after the resolution of all challenges to the election results. If an impeachment procedure is pending, it should be suspended. This ban should apply to all such procedures, independently of the evidence in support of the alleged offence.

100. The Commission acknowledges that the impeachment procedure before the Peruvian Congress is quite inclusive and provides for the possibility of being assisted by counsel, of submitting evidence and of being heard, as required by the Constitution. However, considering in particular the severity of the consequences of the impeachment, the Commission considers that in addition, even though the decision by Congress to impeach is inherently a political one, there should be judicial review of its conformity with the procedural (due process) and substantive

⁶⁹ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2023\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)029-e), § 10.

(committal of a constitutional offence) requirements set out in the Constitution. Such review could take place either before formal impeachment proceedings are undertaken,⁷⁰ or after. The ex-ante control would not raise issues of parliamentary privilege, but might present certain shortcomings: if it takes place at the very beginning, the court would assess the case before the facts and the full reasoning are provided, so without being able to fully assess the proportionality of the decision; if judicial control takes place just before the final vote in the parliament, it could postpone the final decision by Congress for a very long time. The choice between ex ante and ex post review would at any rate belong to the Peruvian authorities. Judicial review could be carried out by the Supreme Court or by the Constitutional Court (even though the judges of both these judicial bodies are themselves subject to impeachment under Article 99). In order for such an appeal to be meaningful, the decisions of Congress should be duly reasoned.

101. The Peruvian authorities have submitted that the right of the high officials to question before a judicial instance the parliamentary procedure in case they consider a violation of the due process is always recognized. The Commission observes however that such possibility is not explicitly set forth in the Constitution. As concerns a possible *recurso de amparo*, the Commission notes that the Constitutional Tribunal has recognised⁷¹ that if a parliamentary act directly affects a fundamental right, judicial review of such political act should be possible. However, if it is a pure political act “*acto político puro*”, due process does not have the same scope and is admissible only on the form and not the substance: *amparo* must not empower to substitute for the exercise of competences which are constitutionally reserved to the Congress. A recent amendment of the Code of Constitutional Procedure introduced a special procedure for *amparo* requests on the question of the exercise of the exclusive attributions and exclusions of the Congress, referred to the election, designation, ratification and removal of senior officials, as well as on those linked to *juicio* and *ante juicio*. Precautionary measures and immediate execution of the judgments are not applicable.⁷² In the Commission’s view, it is not clear whether there is a possibility to challenge the existence of a “constitutional offence” through a *recurso de amparo*. In addition, the Commission has not been provided with any example of *amparo* reviews of *juicios políticos* after March 2024.

102. The Commission therefore is of the view that to align with generally recognized international standards, the possibility for the members of the JNE to appeal to a judicial body (the Supreme Court or the Constitutional Court for example), either ex ante or ex post, should be explicitly provided.

3. Ante juicio

103. The Commission notes that the procedural protection of the *ante juicio* corresponds to a mechanism of “inviolability”, with the notable feature, however, that in the *ante juicio* the Congress performs itself the prosecution function if it upholds the accusation. The Venice Commission has previously expressed the view that inviolability is a useful guarantee for high judges, but the lifting of inviolability should be within the competence of a judicial body such as the Judicial Council or the Constitutional Court, and not of the Congress. The Commission therefore makes this recommendation to the Peruvian authorities, even if, as the authorities have argued, a similar competence does not exist as such in the constitutional system of Peru.

104. In Peru, the investigation into the alleged crimes is not carried out by the prosecution office but by Congress itself, even though the proceedings provide procedural guarantees (see above). Congress may suspend the member of JNE from office during the investigation, at its discretion. It is legitimate to demand that persons having committed a crime should not hold public office,

⁷⁰ This is the case in Canada (see footnote 20 above) and in Lithuania (see Chapter XXVII of the Statute of the Seimas).

⁷¹ Constitutional Tribunal, Judgment 96/2024 of 30 March 2024.

⁷² Law 321053 of 18 October 2024, Articles 52 and 52-A.

especially higher positions. Criminal liability has to apply to everyone, including judges and EMB members. It is in the public interest that persons under criminal investigation should not fulfil the role of a judge or EMB member. The possibility to suspend the person from office during the criminal proceedings is thus in accordance with international standards. However, this mechanism should be used impartially, either as an automatic consequence of the initiation of the criminal proceedings or based on a decision of the court or prosecutor, not of a politically charged body such as a parliament, or in this case, the Congress. It is true that in Peru the final decision to remove a member of JNE from office is ultimately made by the Supreme Court, and the rehabilitation is then automatic, but the procedure may last several months. In case the ante juicio proceedings are initiated before the start of the electoral processes, the suspension of the JNE member may last well beyond the election results are promulgated; thus, the suspension, even though temporary in nature, may cause the member not to take part in the decision-making during the elections. Nothing in the law prohibits such proceedings to be following each other in a manner that the Congress in fact suspends the appointed person from office until the end of his or her term of office, even if the Supreme Court ultimately decides to dismiss the case brought before it (which has often happened, according to the information provided to the Commission). The publicity of the proceedings in Congress risks harming the reputation of the member if the JNE, which a final acquittal cannot fully repair.

105. The Venice Commission is of the view that the investigation into the criminal responsibility of the members of the JNE should be carried out only by the prosecution service; the suspension should be decided by a judicial body. The possibility of holding hearings in camera should be considered. At any rate, Congress should not have the possibility of suspending any member of the JNE during the course of an electoral process (the suspension, including in flagrant cases of a serious offence, should be ordered by a judge).

106. The authorities of Peru have stressed that the power to suspend high officials is given to Congress by the Constitution, because staying in office could allow to interfere with the judicial proceedings. However, the Commission finds that Congress could self-limit this power, excluding the period of electoral campaign.

D. Compatibility with international standards of the inclusion in Article 99 of the Heads of ONPE and RENIEC

107. ONPE and RENIEC are electoral management bodies, and as such they benefit from the guarantees of independence of electoral bodies (see paras. 85 and 86 above). Disciplinary proceedings against their members should therefore meet the following guarantees (see paras 73- 77 above):

- Be based on serious disciplinary reasons;
- On grounds that are clearly, restrictively and exhaustively set out in the law;
- Be carried out through a procedure set out in law;
- Decisions should be reasoned;
- The possibility of judicial review by an appellate court of the dismissal decision should be provided.

108. As was noted above for the electoral judicial bodies, mechanisms of criminal and disciplinary responsibility of the EMBs should be in place and be effective, but EMBs should be duly shielded from political pressure, Institutional mechanisms such as a mandate of a limited duration can prevent misconduct.

109. As for Peru, the Commission notes that the possible unlawful application of the law by ONPE and RENIEC in most cases can be remedied by the election dispute resolution mechanism (the JNE). Potential disciplinary offences are already under the jurisdiction of the JNJ and criminal offences under the jurisdiction of the Public Prosecutor's Office (see above).

110. As concerns political responsibility and accountability, the Commission recalls that the duty of these bodies is to apply the law and to act in accordance with the law, and this is the basis for public trust in them; they do not need to be held directly accountable to political institutions. For this reason, the Commission is of the view that the Heads of ONPE and RENIEC should not be subject to political impeachment pursuant to Article 99 of the Constitution. As concerns their inviolability, if deemed necessary, the competence to lift it should be given to the Junta Nacional de Elecciones or to the Supreme Court.

111. If the Peruvian authorities decide to include the Heads of ONPE and REINIEC in Article 99 of the Constitution, the Venice Commission considers that it would be necessary to provide certain guarantees. As explained in the Guidelines to the Code of Good Practice in Electoral matters (see paras 77-78 above), discretionary recall of the members to electoral commissions would cast doubt on the independence of the commissions, while “recall for disciplinary reasons is permissible provided that the grounds for this are clearly and restrictively specified in law”: it follows that the offence of “violation of the Constitution” should be clarified and defined, and should not relate to the content of the decisions, in order to rule out the possibility of political retaliation by Congress. Furthermore, in order to prevent direct interference or even a chilling effect on the electoral process, Congress should not have the power to carry out impeachment proceedings during the period of electoral campaign, until all the electoral challenges have been resolved. Finally, even though impeachment by Congress is an inherently political decision, in view of the severity of its consequences, the Commission is of the view that ex ante or ex post judicial review of the conformity of the decision with the procedural and substantive requirements set out in the constitution should be provided.

VI. Conclusion

112. Upon a request by the Jurado Nacional de Elecciones (National Board of Elections, JNE); the Venice Commission has examined the compatibility with international standards of the draft amendment of Article 99 of the Constitution of Peru, aiming to include the members of the JNE and the Heads of ONPE and RENIEC, the two other electoral bodies, in the list of high-level public office holders whom the Congress has the power to suspend, dismiss and/or disqualify from holding office for up to ten years for violations of the Constitution.

113. The Venice Commission is of the view that in a state governed by the rule of law, all holders of a public function should be held accountable for their actions, and the members of the Electoral Management Bodies and Electoral Tribunals are no exception. Free and fair elections are an essential feature of a democratic state, and only transparency, impartiality and independence from politically motivated manipulation will ensure the proper administration of the election process throughout the entire election cycle, and especially from the pre-election period to the end of the counting of the votes and the processing of the results. The question therefore arises as to what the most appropriate form of accountability of the members of the electoral bodies and tribunals is, which will preserve their independence and the smooth holding of free and fair elections. There exist, in the first place, institutional mechanisms to safeguard the due conduct of the members of the EMBs or electoral tribunals and to prevent misconduct, including their appointment for a limited, specific term, and the prior assessment of the candidates and the selection of the members of these bodies by highly qualified experts.

114. Mechanisms of criminal and disciplinary accountability of electoral commissions and tribunals should be established and should be effective, without exposing their members to political pressure. It should be underlined that neither members of the EMBs nor electoral judges need maintain political trust through direct accountability; they have to act in accordance with the law, and this is the basis for public trust in them and in the electoral bodies.

115. In the opinion of the Commission, the JNE is both an electoral management body and a judicial body, and the international standards of judicial independence apply to it. These

standards require, in a nutshell, that disciplinary or criminal proceedings against the members of the JNE must provide the following procedural guarantees:

- Clear grounds of serious disciplinary offences that are clearly, restrictively and exhaustively set out in the law;
- Fair trial, with the right to submit evidence and right to be heard;
- Investigating body must be non-partisan and non-political;
- Investigation should be carried out by an institution that is separate and distinct from the one which decides on the dismissal;
- Such decision should be reasoned;
- Appeal to a court of final jurisdiction within a reasonable time-limit should be provided.

116. In Peru there already exist mechanisms of criminal and disciplinary responsibility. Inclusion in Article 99 would add a mechanism of political responsibility (*juicio politico*) and a mechanism of procedural immunity or inviolability (*ante juicio*).

117. Impeachment of judges goes against European standards: the Venice Commission is therefore of the view that the members of the JNE should not be subjected to *juicio politico*. The Commission acknowledges, however, that impeachment of judges is an accepted feature of certain democratic systems in the Americas and is not challenged as such in Peru. The Commission is of the view that at any rate and at the very least, to align with the standards of independence of the judiciary certain guarantees should be provided (see below).

118. ONPE and RENIEC are electoral management bodies, and as such their members benefit from the guarantees of independence of electoral bodies, which provide that disciplinary and criminal proceedings against their members should meet the following guarantees, in a nutshell:

- Be based on serious disciplinary reasons;
- On grounds that are clearly, restrictively and exhaustively set out in the law;
- Be carried out through a procedure set out in law;
- Decisions should be reasoned;
- The possibility of judicial review by an appellate court of the dismissal decision should be provided.

119. Possible unlawful application of law by the members of ONPE and RENIEC can be remedied by the election dispute resolution mechanism. There already exist procedures for establishing their criminal and disciplinary responsibility. They do not need to enjoy political trust: their faithful application of the law is the basis for public trust in them.

120. In conclusion, the Venice Commission wishes to make the following recommendations:

- a) The members of the JNE should not be subject to *juicio politico* and *ante juicio*, within the meaning of Article 99 of the Constitution of Peru;
- b) If the members of the JNE are nonetheless added to Article 99 of the Constitution, the following guarantees should be introduced:
 - i. The notion of “violation of the constitution” should be clarified and defined, including through a list of examples of acts of the JNE which could amount to such an offence, which should be a serious one; the definition of “violation of the constitution” should exclude explicitly that an impeachment may be based on the reasoning or substantive content of specific decisions rendered by the JNE;
 - ii. It should be expressly provided that no *juicio politico* procedure may be carried out against any member of the JNE during an election campaign, until after the announcement of the election results and after the resolution of all challenges to

the election results. If an impeachment procedure is pending, it should be suspended;

- iii. The possibility for the members of the JNE to appeal to a judicial body (the Supreme Court or the Constitutional Court for example), either ex ante or ex post, against a decision of impeachment should be explicitly provided;
 - iv. The lifting of inviolability of the members of the JNE should be within the competence of a judicial body such as the Judicial Council or the Constitutional Court, and not of the Congress;
 - v. The investigation into the criminal responsibility of the members of the JNE should be carried out only by the prosecution service; their suspension should be decided by a judicial body. The possibility of holding hearings in camera should be considered. At any rate, Congress should not have the possibility of suspending any member of the JNE during the course of an electoral process;
- c) The Heads of ONPE and RENIEC should not be subject to juicio politico and ante juicio within the meaning of Article 99 of the Constitution;
 - d) If impeachment of the Heads of ONPE and RENIEC is introduced, guarantees concerning the definition of the offence of violation of the constitution, the suspension of impeachment during the period of the electoral campaign, judicial review, either ex ante or ex post of the impeachment decision, should be provided;
 - e) The competence to lift their inviolability should be given to the Junta Nacional de Elecciones or to the Supreme Court.

121. The Venice Commission remains at the disposal of the Peruvian authorities for further assistance in this matter.