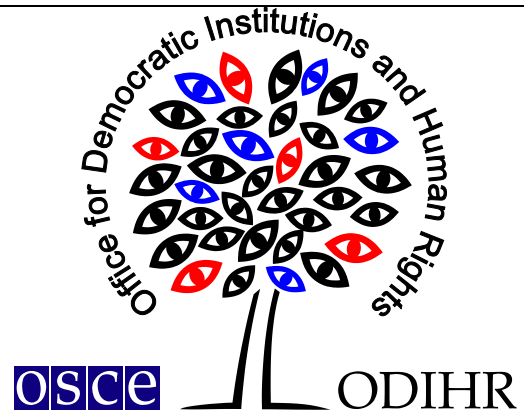


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**COMMENTS**

**ON THE DRAFT CONSTITUTION OF**

**TURKMENISTAN**

**based on an unofficial English translation of the Draft Constitution provided by  
the OSCE Centre in Ashgabat**

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**Annex: Draft Constitution of Turkmenistan** (provided as a separate document, available at [www.legislationline.org](http://www.legislationline.org))

## **I. INTRODUCTION**

1. *On 16 May 2014, the Constitutional Commission on Improvement of the Constitution of Turkmenistan was established to develop constitutional reform proposals for the country. In the course of its regular session held on 2 February 2016, the Commission adopted a Resolution on approval and submission of the Draft Constitution of Turkmenistan (hereinafter “the Draft Constitution”) for nation-wide discussion. The Turkmen and Russian versions of the Draft Constitution were thereafter published in governmental mass media for nation-wide discussion on 15 February 2016.*
2. *On 25 March 2016, the Head of the OSCE Centre in Ashgabat sent a letter to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) asking the OSCE/ODIHR to prepare a legal review of the Draft Constitution of Turkmenistan (hereinafter “the Draft Constitution”).*
3. *On 1 April 2016, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare legal comments on the compliance of the Draft Constitution with international human rights standards and OSCE human dimension commitments.*
4. *Previously, in 2008, the OSCE/ODIHR had already reviewed and issued an Opinion on Constitutional Reform Proposals submitted on 22 May 2008 by the Constitutional Commission on Improvement of the Constitution of Turkmenistan (hereinafter “the 2008 ODIHR Opinion”).<sup>1</sup>*
5. *The following Comments were prepared in response to the above-mentioned request as part of OSCE/ODIHR’s general mandate of supporting OSCE participating States and OSCE field operations in legal reform efforts related to the OSCE human dimension. The Comments have also been the subject of informal consultations with the OSCE High Commissioner on National Minorities.*

## **II. SCOPE OF REVIEW**

6. The scope of these Comments covers only the Draft Constitution submitted for review. At the same time, given the magnitude of the task that the review of the full text of a Constitution implies, the Comments focus on some, but not all, potential key areas of concern in terms of compliance with international human rights and rule of law standards and OSCE human dimension commitments. Thus limited, the Comments do not constitute a full and comprehensive review of the Draft Constitution nor of the entire legal and institutional framework pertaining to the protection and promotion of human rights in Turkmenistan.
7. The Comments raise key issues and provide indications of areas of concern. In the interest of conciseness, they focus more on areas that require amendments or improvements rather than on the positive aspects of the Draft Constitution. The ensuing recommendations are based on international standards relating to human rights and fundamental freedoms, as well as relevant OSCE commitments. The Comments also highlight, as appropriate, good practices from other OSCE participating States in this

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<sup>1</sup> OSCE/ODIHR, *Opinion on Constitutional Reform Proposals submitted on 22 May 2008 by the Constitutional Commission on Improvement of the Constitution of Turkmenistan*, 23 June 2008, available at <http://www.legislationline.org/documents/id/15352>.

field. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Comments analyse the potentially different impact of the Draft Constitution on women and men.<sup>2</sup>

8. These Comments are based on an unofficial English translation of the Draft Constitution, provided by the OSCE Centre in Ashgabat, which is available at [www.legislationline.org](http://www.legislationline.org). Errors from translation may result.
9. In view of the above, the OSCE/ODIHR would like to make mention that the Comments are without prejudice to any written or oral recommendations and comments related to this and other related legislation of Turkmenistan that the OSCE/ODIHR may make in the future.

### **III. EXECUTIVE SUMMARY**

10. While the Draft Constitution contains a number of positive features, notably some new provisions pertaining to fair trial guarantees, the practical implementation of all provisions will greatly depend upon the adoption of implementing legislation and the existence of proper enforcement mechanisms, including judicial review and access to independent and impartial courts. The OSCE/ODIHR hopes that these Comments will provide useful insights, which may eventually lead to more comprehensive and fundamental changes, involving a clearer division of competencies, more efficient state institutions and a system of effective checks and balances.
11. A number of key ODIHR recommendations made in 2008 remain relevant, particularly as regards (i) the need for a clear hierarchy of norms and for clarifications on the status of international treaties in the Turkmen legal order, (ii) the inclusion of adequate mechanisms to review the constitutionality of laws and other decisions or acts, (iii) the establishment of institutional mechanisms to ensure the separation of powers, (iv) the introduction of new provisions to counter-balance the quite extensive presidential powers, and (v) the need to reform the prosecution service, by removing its general supervisory powers and confining its powers to the field of criminal prosecution. The constitutional provisions on the judiciary should also be enhanced to guarantee the independence and impartiality of judges and of the judiciary as a whole.
12. Overall, the willingness to introduce a first-ever national human rights institution in Turkmenistan (i.e., the Commissioner for Human Rights of Turkmenistan) is very welcome, although the appointment and dismissal procedures may raise some concerns as to the Commissioner's independence from the executive. In any case, to ensure the institutional independence of this new body, the Draft Constitution should be supplemented to specify the role of this institution, as well as its functions, powers, functional immunity, funding and lines of accountability; new provisions on the appointment mechanism for, and terms of office of the Commissioner should likewise be introduced.
13. A number of provisions of the Draft Constitution are not entirely compliant with international human rights standards. Such provisions should therefore be removed from the current text, particularly where they link the exercise of individual human rights and freedoms with the fulfilment of certain duties, or where they unduly restrict the right to

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<sup>2</sup> See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at <http://www.osce.org/mc/23295?download=true>.

vote and to stand for elections. The complete ban on political parties with religious or ethnic attributes should likewise be revoked. The Draft Constitution should also clearly list those human rights and fundamental freedoms that are absolute and non-derogable under any circumstances, and strictly circumscribe potential restrictions to human rights and fundamental freedoms.

14. In order to further improve the compliance of the Draft Constitution with international human rights standards and OSCE commitments, the OSCE/ODIHR makes the following key recommendations:

A. to state more explicitly the principle of hierarchy of norms, including a clearer and consolidated provision specifying:

- 1) that the Constitution is a fundamental law that prevails over any other laws and legal acts; [par 23]
- 2) the clear hierarchical priority for international treaties that have been ratified by Turkmenistan (and “universally accepted norms of international law”) over general laws and other legal norms adopted by the President and other executive bodies, while clarifying their relationship with the Constitution; [pars 28-30]
- 3) that the laws passed by the Mejlis should prevail over any other legal norms (except the Constitution), including decrees, regulations and orders issued by the President and the Cabinet of Ministers; [par 24]
- 4) the hierarchical relationship (i) between legal norms issued by the Cabinet of Ministers and legal acts issued of the President and (ii) between legal acts that are issued by local state and self-government bodies and central legal acts; [pars 25-26]

B. to consider establishing a separate constitutional review body, that would be independent from the executive and legislative branches, in order to secure a uniform interpretation of the Constitution and compliance with the principle of hierarchy of norms; [pars 34-36]

C. to explicitly provide in Article 9 that provisions of international treaties ratified by Turkmenistan are part of the national legal order, have direct effect and may be invoked before domestic courts; [pars 30 and 40]

D. to specify which organs or persons have the right to initiate laws, the material scope of laws as opposed to other normative acts, the legislative procedure, and the publication in an official journal, while adding that legislation should be formulated and adopted as the result of an open and inclusive process reflecting the will of the people; [pars 50, 53 and 74]

E. *as to the provisions pertaining to the President and his/her powers:*

- 1) to retain the presidential term of office of five years, instead of seven years, and introduce express limitations to re-election; [par 58]
- 2) to specify that the President is bound by the Constitution and by law; [par 59]
- 3) to narrowly prescribe those cases in which the President may declare a state of emergency, while specifying the respective competences of institutions during such times, and including a mechanism for regular review of the continued necessity and proportionality of the state of emergency and adopted measures; [pars 63-64, 79 and 148]
- 4) to remove the reference to the “motion of non-confidence” in Article 75 and consider another mechanism to engage the legal responsibility (impeachment) of the President in case of *grave* violations of the Constitution or the law, involving a lower parliamentary threshold to initiate the procedure as well as a court or

other independent body to ensure compliance with fair trial standards; [pars 66-69]

- 5) to introduce institutional mechanisms to ensure the separation of powers, particularly provisions to counter-balance the quite extensive presidential powers; [pars 34-36, 58-59, 63-65, 68-69, 78-79, 81, 96, 102, 113-114, 118-120 and 130]

*F. as to the provisions pertaining to the Mejlis and its powers:*

- 1) to supplement Article 81 to ensure that the Mejlis has the power to approve and/or control executive decisions to impose a state of public emergency and other acts undertaken by the executive during such times; [par 79]
- 2) to circumscribe more strictly in Article 82 the conditions and modalities of the transfer of legislative powers to the President, while providing that such a transfer shall always be temporary in nature; [par 81]
- 3) to remove the right of the Mejlis to deprive a deputy of his/her mandate under Article 86 par 1, while specifying that deputies shall act in the interest of the people; [par 83]
- 4) to supplement Article 86 to the effect that a deputy shall not be held liable for opinions expressed and votes cast in the discharge of parliamentary duties (functional immunity/non-liability), while circumscribing more strictly the scope of parliamentary inviolability and detailing clear, objective and impartial criteria and procedures for lifting immunity; [pars 84-86]
- 5) to consider introducing provisions permitting the use of temporary special measures to promote the participation of women in political and public life; [par 91]

*G. as to the provisions pertaining to the judiciary:*

- 1) to specify the selection criteria or broad principles regulating the appointment procedure for judges, as well as the basic elements, grounds and procedures for suspension, dismissal or resignation of judges, while adding the right for individual judges to appeal against the involuntary termination of their mandate to an independent body; [par 94]
- 2) to consider the establishment of an independent judicial council or similar body, which would in particular exercise decisive influence over judicial appointments and thus limit the powers of the executive in that respect; [pars 95-96]
- 3) to specify in Article 98 that judges shall be impartial and in Article 99 that they shall enjoy functional immunity for acts performed in the exercise of their judicial functions, with the exception of intentional crimes; [pars 97-98]
- 4) to explicitly state under Article 100 that judges are permanently appointed until retirement, unless they are exceptionally removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, in which case they should be able to appeal such decision before a court; [par 100]
- 5) to elaborate the constitutional provisions regarding the Supreme Court's competence and key principles regulating its status, composition and appointment modalities, roles and responsibilities, while ensuring its independence; [pars 101-104]

*H. as to the provisions pertaining to the prosecution service:*

- 1) to consider reforming the prosecution service, by removing its general supervisory powers and confining its powers to the field of criminal prosecution; [pars 108-111]
- 2) to specify that prosecutors are bound by the Constitution and laws; [par 110]

- 3) to explicitly refer to the principle of prosecutorial independence or autonomy from external influence and interference, while also specifying the basic rules on the appointment or election of the Prosecutor General, eligibility criteria and incompatibilities, rules pertaining to functional immunity and accountability as well as the duration and termination of mandate; [pars 112 and 114]
- I. to reconsider and specify in greater detail the procedures and modalities for the appointment and dismissal of the Commissioner for Human Rights of Turkmenistan, to ensure his/her independence from the executive, legislative and judicial branches, while supplementing Section III of the Draft Constitution with a new Chapter specifying the institution's role, functions, powers, functional immunity, funding and lines of accountability; [pars 118-120]
- J. to consider amending the appointment modalities for the Central Commission for Elections and Referenda to ensure greater independence and impartiality for such a body; [pars 129-130]
- K. *as to the provisions pertaining to human rights and fundamental freedoms:*
  - 1) to supplement the Draft Constitution by expressly referring to the protection of the freedom of the press and media (including an express prohibition of censorship), the right to freedom of thought and conscience, the right to form and join trade unions and the right to strike; [pars 131, 165, 172 and 174]
  - 2) to replace the reference to "citizens" by the term "everyone" throughout the Draft Constitution, except in Article 45 (right to participate in public affairs) and Article 46 (right to vote and to be elected, and access to public service); [par 132]
  - 3) to remove the first paragraph of Article 57 which links the exercise of rights with the fulfillment of duties; [par 135]
  - 4) to include under a single provision the elements of the three-pronged test (i.e., legality, necessity and proportionality), which circumscribe the nature of possible restrictions to human rights and fundamental freedoms; [pars 137-138]
  - 5) to specify under Article 65 or another provisions that certain human rights and fundamental freedoms<sup>3</sup> are absolute and non-derogable under any circumstances, even in a state of emergency or under martial law; [pars 140-144]
  - 6) to amend Article 33 par 3 so as to reflect some form of judicial control of arrests authorized by a prosecutor; [par 150]
  - 7) to supplement Article 33 to specify that an arrest should be carried out according to the procedure precisely specified by law, while specifying key safeguards such as the obligation to inform the arrested individual of any charges and reasons for the arrest, the possibility for any arrested person to appeal to court to decide, without delay, on the lawfulness of the detention or order the release if unlawful, and the obligation for the authorities to bring persons alleged to have committed a criminal offence promptly before a judge or similar official; [pars 151-152]

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<sup>3</sup> Including the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation, the principle of legality in the field of criminal law, the recognition of everyone as a person before the law, the freedom of thought, conscience and religion, the right to be tried by an independent and impartial tribunal, the presumption of innocence, the right of persons arrested or detained for allegedly committing a criminal offence to be brought promptly before an (independent and impartial) judicial authority and to be tried within a reasonable time or released; the right to a remedy, the right to be tried by an independent and impartial tribunal, the right of any person detained to have access to an effective and speedy mechanism to challenge the lawfulness of their arrest or detention before a court without delay/right to habeas corpus, the right of persons of marriageable age to marry, and the right of minorities to enjoy their own culture, profess their own religion, or use their own language.

- 8) to specify how long, at a maximum, an individual may be deprived of his/her liberty before being brought before a judicial authority, while guaranteeing prompt access to a lawyer, the right of a person to have the fact of his detention notified to a third party of his/her choice, the right to request a medical examination and the right to be tried within a reasonable time; [pars 153-154]
- 9) to supplement Article 18 by referring to the right of each individual to give and receive religious education in the language of their choice, and to the right to cultural expression in the field of religion, with specific reference to the rights of members of registered and unregistered religious groups to freely exercise their religion and culture, while ensuring that religious organizations are not precluded from taking part in public affairs; [pars 160-161]
- 10) to specify in Article 58 an exception to the compulsory character of military service (with the possibility of an alternative to military service, of a non-combatant or civilian nature) where such service cannot be reconciled with an individual's religion or beliefs; [par 162]
- 11) to remove from Article 44 par 2 the complete ban on political parties with religious or ethnic attributes as well as the reference to "opposing the constitutional rights and freedoms of citizens" and to "morals" as legitimate grounds for prohibiting the establishment or activities of a political party or a public association; [pars 167-171]
- 12) to change the restriction of individuals' voting rights due to prior criminal convictions so that such limitations only apply to prisoners serving sentences for serious crimes; [par 177]
- 13) to delete the restriction on the right to vote of persons "recognized by the court as legally incapable" from Article 120; [par 178]
- 14) to remove the residency restrictions to stand for presidential and parliamentary elections in Articles 69 and 121; [pars 179-180]
- 15) to specifically mention in Article 124 the right for independent candidates to run for elections, regardless of their political affiliation or lack thereof; [par 181]
- 16) to expressly include in Article 28 reference to additional discriminatory grounds, including "other opinion", "national or social origin" (instead of "origin"), "birth", "descent", "ethnic origin", "age", "nationality", "health status", "marital and family status", "beliefs" (since the provision currently only refers to religion), disability, "gender", "sexual orientation" and "gender identity"; [par 183]
- 17) to supplement the provisions of the Draft Constitution to ensure adequate protection of the right of persons belonging to national minorities, with special references to their rights to (i) maintain and develop their cultural, linguistic or religious identity, (ii) use their native language in relations with the public administration, (iii) to disseminate, have access to, and exchange information and ideas in their native language, (iv) to learn and to be instructed in the minority language, (v) to set up and to manage their own private educational and training establishments, and (vi) to participate in public affairs; [pars 188-191] and
- 18) to supplement Article 39 by referring to the right of everyone to leave Turkmenistan and of Turkmen citizens to return to their country. [par 196]

*Additional Recommendations, highlighted in bold, are also included in the text of the opinion.*



#### IV. ANALYSIS AND RECOMMENDATIONS

##### 1. Main International Human Rights Standards Applicable in Turkmenistan

15. Turkmenistan has ratified, and is thus bound to comply with seven out of the nine core international human rights treaties that exist today, i.e., the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>4</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>5</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>6</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>7</sup> the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT),<sup>8</sup> the Convention on the Rights of the Child (CRC)<sup>9</sup> and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>10</sup> They are all relevant to the current review of the Draft Constitution.
16. Moreover, as an OSCE participating State, Turkmenistan has undertaken to adhere to key OSCE human dimension commitments, including those pertaining to a pluralistic democracy, the rule of law and democratic institutions;<sup>11</sup> the independence of the judiciary;<sup>12</sup> democratic elections;<sup>13</sup> independent national human rights institutions;<sup>14</sup> the fulfilment of international obligations;<sup>15</sup> the protection from arbitrary arrest or detention;<sup>16</sup> the prohibition of torture and other cruel, inhuman or degrading treatment

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<sup>4</sup> UN International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “the CERD”), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965. Turkmenistan acceded to the CERD on 29 September 1994.

<sup>5</sup> UN International Covenant on Civil and Political Rights (hereinafter “the ICCPR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. Turkmenistan acceded to the ICCPR on 1 May 1997.

<sup>6</sup> UN International Covenant on Economic, Social and Cultural Rights (hereinafter “the ICESCR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. Turkmenistan acceded to the ICESCR on 1 May 1997.

<sup>7</sup> UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “the CEDAW”), adopted by the UN General Assembly by Resolution 34/180 of 18 December 1979. Turkmenistan acceded to the CEDAW on 1 May 1997.

<sup>8</sup> UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “the CAT”), adopted by the UN General Assembly by Resolution 39/46 of 10 December 1984. Turkmenistan acceded to the CAT on 25 June 1999.

<sup>9</sup> UN Convention on the Rights of the Child (hereinafter “the CRC”), adopted by the UN General Assembly by Resolution 44/25 of 20 November 1989. Turkmenistan acceded to the CRC on 20 September 1993.

<sup>10</sup> UN Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD”), adopted by the UN General Assembly by Resolution 61/106 of 13 December 2006. Turkmenistan acceded to the CRPD on 4 September 2008.

<sup>11</sup> See in particular the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen, 5 June - 29 July 1990) (hereinafter “OSCE Copenhagen Document (1990)”, par 5, available at <http://www.osce.org/fr/odihr/elections/14304>; the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991) (hereinafter “OSCE Moscow Document (1991)”, pars 19 and 20, available at <http://www.osce.org/fr/odihr/elections/14310>; and OSCE Ministerial Council Decision No. 12/05 on Upholding human Rights and the Rule of Law in Criminal Justice Systems, Ljubljana Ministerial Council Meeting on 6 December 2005, available at <http://www.osce.org/mc/35494?download=true>.

<sup>12</sup> See *ibid.* par 5 (OSCE Copenhagen Document (1990)); and pars 19 and 20 (OSCE Moscow Document (1991)). See also Document of the Istanbul Meeting (19 November 1999), *Charter for European Security: IV. Our Common Instruments*, par 45, available at <http://www.osce.org/node/39569>. See also the OSCE/ODIHR *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, available at <http://www.osce.org/odihr/KyivRec?download=true>.

<sup>13</sup> See e.g., *ibid.* pars 5 to 8 (OSCE Copenhagen Document (1990)); and par 25 (OSCE Charter for European Security (1999)). See also OSCE Ministerial Council Decision No. 7/02 on Election Commitments, Porto, 7 December 2002, available at <http://www.osce.org/mc/40521>.

<sup>14</sup> *ibid.* par 27 (OSCE Copenhagen Document (1990)).

<sup>15</sup> See e.g., Principle X of the Declaration on Principles Guiding Relations between Participating States, Helsinki 1975, available at <http://www.osce.org/mc/39501?download=true>; and OSCE Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area, Helsinki Ministerial Council Meeting on 5 December 2005, available at <http://www.osce.org/mc/17347?download=true>.

<sup>16</sup> See par 23 of the OSCE Vienna Document (1989). See also OSCE Moscow Document (1991) where OSCE participating States committed to guarantee that no one will be deprived of one’s liberty except on such grounds and in accordance with procedures established by law and that persons deprived of their liberty shall be promptly informed about their rights (par 23.1.).

or punishment;<sup>17</sup> commitments pertaining to the rights to a fair trial and to an effective remedy;<sup>18</sup> tolerance and non-discrimination;<sup>19</sup> and gender equality,<sup>20</sup> among others.

17. While Turkmenistan is not a Member State of the Council of Europe (hereinafter “the CoE”), the Comments will also refer, as appropriate, to the European Convention on Human Rights and Fundamental Freedoms (hereinafter “the ECHR”), the case law of the European Court of Human Rights (hereinafter “the ECtHR”), and other Council of Europe’s instruments that may serve as useful and persuasive reference documents on human rights and fundamental freedoms. For the same reason, the Comments will likewise mention, as relevant, opinions and publications of the European Commission for Democracy through Law of the CoE (hereinafter “Venice Commission”), including those prepared jointly with the OSCE/ODIHR.
18. Finally, the ensuing recommendations will also make reference, as appropriate, to other specialized documents of a non-binding nature, which have been elaborated in various international/regional fora and may prove useful as they contain a higher level of detail on key issues addressed in the Comments.

## 2. General Comments

19. At the outset, it is noted that the Draft Constitution introduces a number of positive features that are not part of the Constitution currently in force.<sup>21</sup> A number of the modifications address recommendations from the 2008 ODIHR Opinion, and contribute

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<sup>17</sup> See in particular par 23 of the OSCE Vienna Document (1989); and the Istanbul Charter for European Security of 1999 where OSCE participating States committed to eradicate torture and other cruel, inhumane or degrading treatment or punishment in the OSCE area and to “promote legislation to provide procedural and substantive safeguards and remedies to combat these practices” (par 21).

<sup>18</sup> See in particular par 13.9 of the OSCE Vienna Document (1989); and *op. cit.* footnote 11, pars 5.10, 5.11, 5.21, 11 and 40.5 of the OSCE Copenhagen Document (1990).

<sup>19</sup> See pars 6 and 9 of the OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination, Maastricht Ministerial Council Meeting on 2 December 2003, available at <http://www.osce.org/mc/19382>.

<sup>20</sup> See OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at <http://www.osce.org/mc/23295?download=true>.

<sup>21</sup> These include, among others:

- the express reference to the commitment to rule of law in Turkmenistan (new paragraph 1 of Article 8);
- the recognition of political diversity and multi-party system (new paragraph 1 of Article 17);
- the state’s commitment to ensuring that an enabling environment for the development of civil society is in place (new paragraph 2 of Article 17);
- the personal scope of certain constitutional provisions being applicable to everyone as opposed to only citizens (see e.g., Article 42 on the freedom of opinion and expression and the right to free search of information; and Article 60 on the judicial protection of rights and freedoms and the right to appeal to court), although many provisions still refer exclusively to “citizens”, whereas their scope should extend to any individual (see section 5.1.1. of the Comments);
- the express reference to universally recognized norms of international law and the fact that the rights and freedoms recognized therein shall be guaranteed by the Constitution and law (new Article 25);
- the fact that rights and freedoms shall be directly applicable and guide all acts of public authorities (Article 27);
- a revised provision on equality between men and women which is no longer limited to “equal civil rights” (new Article 29), a provision largely criticized by international human rights monitoring bodies (see e.g., Committee on the Elimination of Discrimination against Women, *Concluding Observations on Turkmenistan*, CEDAW/C/TKM/CO/3-4, 9 November 2012, pars 12-13, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/TKM/CO/3-4&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/TKM/CO/3-4&Lang=En)) but now expanding to all rights and freedoms;
- a reference to certain key guarantees pertaining to the rights to security and to a fair trial in new Articles 34 to 36, including the presumption of innocence, the principle of *in dubio pro reo* (i.e., that a defendant may not be convicted by the court when doubts about his or her guilt remain), some aspects of the principle of *nullum crimen, nulla poena sine lege* (i.e., a person cannot face criminal punishment if his/her behaviour did not constitute a criminal offence at the time when such act was committed); and the principle of *ne bis in idem* (i.e., the prohibition of double jeopardy meaning that one person cannot be subjected to legal action twice for the same act), as well as the guaranteed right to obtain professional legal assistance, with legal aid being provided free of charge in cases stipulated by law (new Article 63), all of which are not mentioned in the current Constitution;
- enhanced provisions pertaining to the protection of the right to private and family life (Articles 37 and 38);
- an express prohibition of forced labour (new paragraph 2 of Article 49);
- the deletion of parts of Article 101 stating that judges should be “guided by belief”, which clearly contradicts the principle of impartiality of judges; and
- the reference to a first-ever national human rights institution, the Commissioner for Human Rights of Turkmenistan (mentioned in new Articles 71 par 16 and 81 par 7), although these Comments contain some recommendations to render this body more compliant with relevant international standards (see sub-section 4.6. *infra*).

to bringing the Constitution of Turkmenistan more in line with international human rights standards and obligations. At the same time, the practical implementation of these new provisions will greatly depend on the adoption of implementing legislation and other programmes, as well as the existence of proper mechanisms, including judicial review and access to independent and impartial courts to enforce rights and freedoms. It is generally recognized that “even a good Constitutional text cannot ensure stability and democratic development of society without there also being relevant political will of different political forces, further legislation in line with democratic standards and a sound system of checks and balances that sets the basis for its implementation”.<sup>22</sup>

20. OSCE/ODIHR would also like to take this opportunity to once more reiterate some of the main recommendations of the 2008 ODIHR Opinion that have not been reflected, or reflected fully in the current Draft Constitution. These are, among others, the following:
  - the introduction of a clear hierarchy of norms and specification of the status of international law in the Turkmen legal order, as well as the implementation of international human rights treaties in domestic law (see Section 3.1. *infra*);
  - the creation of institutional mechanisms to ensure the separation of powers, particularly provisions to counter-balance the quite extensive presidential powers (see also pars 34-36, 58-59, 63-65, 68-69, 78-79, 81, 96, 102, 113-114, 118-120 and 130 *infra*);
  - considerations concerning an overall reform of the prosecutor’s office (see also Section 4.5. *infra*);
  - the inclusion of mechanisms to review the constitutionality of laws and other decisions or acts (see also Section 3.2. *infra*); and
  - an express reference to absolute and non-derogable rights and freedoms, even during a state of emergency or martial law (see also sub-section 5.1.4. *infra*).
21. Overall, while the Draft Constitution introduces some 30 new articles, a number of which include notable improvements, it does not foresee fundamental changes in terms of its overall institutional set-up and balance of powers. These OSCE/ODIHR Comments aim to provide recommendations and useful insights in this respect that may eventually lead to even more comprehensive and fundamental changes including a clearer division of competencies, more efficiency of state institutions and a system of more effective checks and balances.
22. Finally, the overall structure of the Constitution is at times inconsistent and/or repetitive, e.g., certain issues are addressed several times throughout the Draft Constitution, and may thus benefit from some consolidation.

### **3. The National Legal Order and Compliance with International Standards**

#### **3.1. Hierarchy of Norms and International Standards**

23. Overall, the Draft Constitution does not establish a clear hierarchy of norms, although the matter is addressed partially in several articles. Namely, Article 8 specifies that the Constitution is “the Basic Law of the state” and that laws and other legal acts contradicting it shall be null and void; Article 141 par 1 provides that “laws, other legal acts of state authorities and officials shall be adopted on grounds of and in compliance with the Constitution”; Article 141 par 2 specifies that where other legal provisions

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<sup>22</sup> See Venice Commission, *Opinion on the Draft Constitution of the Kyrgyz Republic*, CDL-AD(2010)015, 8 June 2010, par 70, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)015](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)015).

diverge from those of the Constitution, constitutional provisions shall prevail. While it is noted that the hierarchy of norms is established also in Article 3 of the Law of Turkmenistan on Normative Legal Acts, it is important that the basic principles of such hierarchy are clearly established in the Constitution. It may thus be advisable to consolidate all provisions pertaining to the hierarchy of norms under a single article. Further, unless already implied by Article 8 of the Draft Constitution, it would be advisable **to state more explicitly that the Constitution is a fundamental law that prevails over any other laws and legal acts.**

24. Article 72 states that the President shall issue decrees, regulations and orders binding on the entire territory of Turkmenistan; the Cabinet of Ministers within its competence likewise approves decrees and issue binding orders (Article 93 par 2). However, the hierarchical relationship between such legal norms and the Constitution, as well as laws enacted by the Mejlis (Article 81 par 1) is not clear, except for the mention that laws and other legal contradicting the Constitution shall be null and void (Article 8 par 3); the mechanism and modalities for resolving a potential conflict between such norms are likewise not specified. Overall, the principles of popular sovereignty (mentioned in Article 3 of the Draft Constitution) and of the separation of powers (Article 6 par 1), as well as the newly introduced statement that Turkmenistan shall be a rule of law state (Article 8 par 1) indicate that **hierarchically, the laws passed by the Mejlis should prevail over any other legal norms (except the Constitution), including decrees, regulations and orders issued by the President and the Cabinet of Ministers** (see also par 74 *infra*). To avoid any ambiguity, it is recommended **to specify this clearly in the Draft Constitution.**
25. Additionally, it is recommended **to specify in Articles 72 and 93 that legal acts issued by the executive may not contradict the Constitution and laws or replace laws, and shall not reduce the protection or scope of human rights.**<sup>23</sup> Moreover, the **hierarchical relationship between legal norms issued by the Cabinet of Ministers (listed in Article 93 and the Constitution) and legal acts issued by the President is not clear. This should also be specified.**
26. Articles 111 par 2, 114 par 2 and 118 par 2 also refer to other legal acts that are issued by local state and self-government bodies. Their place in the hierarchy of norms is similarly not specified. It is recommended that **the hierarchical relationship of these legal norms vis-à-vis central legal acts and between one another be explicitly prescribed.**
27. As regards the status of international law in the domestic hierarchy of norms, Article 9 of the Draft Constitution states that “Turkmenistan shall recognize the priority of the universally accepted norms of international law”. While the precedence of international norms is welcome in principle, the hierarchy between national and international norms should be more clearly defined.
28. First, the meaning of what is covered by “universally accepted norms of international law” is ambiguous. It is assumed that the phrase refers to customary international law and general principles of law mentioned in the Statute of the International Court of Justice.<sup>24</sup> However, as also stated in the 2008 ODIHR Opinion, there is little agreement about the meaning of the phrase “general principle of law” and proving that a principle is common to most or all legal systems is often quite difficult.<sup>25</sup> It may thus be clearer

<sup>23</sup> See e.g., *ibid.* the recommendations made by the Venice Commission pertaining to similar provisions contained in the Draft Constitution of the Kyrgyz Republic in par 29 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic).

<sup>24</sup> Statute of the International Court of Justice, Article 38.1, available at <http://www.icj-cij.org/documents/?p1=4&p2=2>.

<sup>25</sup> *Op. cit.* footnote 1, par 14 (2008 ODIHR Opinion).

and more comprehensive **to not only refer to “universally accepted norms of international law” in Article 9, but also to international treaties that have been ratified by Turkmenistan** (which are currently not mentioned at all). Similarly, **Article 11** of the Draft Constitution on the rights of foreigners, stateless persons, and refugees **should refer to international treaties relating to refugee status and other related binding international agreements.**

29. In this context, it is worth noting that in constitutions in a number of OSCE participating States, it is common practice to declare that international treaties constitute part of the national legal order, without always explicitly mentioning the status of other sources of international law (e.g., general principles, or customary rules).<sup>26</sup> At the same time, some countries refer not only to international treaties but also to other sources of international law, and consider that generally accepted rules of international law shall prevail over laws and secondary legislation.<sup>27</sup> In some cases, international *human rights* treaties are recognized as having constitutional status.<sup>28</sup> To avoid any ambiguity, it is generally advisable to make it clear that international treaties shall prevail over domestic law, as well as clarify their hierarchical relationships with the Constitution.<sup>29</sup>
30. The current version of the Constitution specifies that “[i]f an international treaty (contract) of Turkmenistan establishes rules other than those stipulated by the laws of Turkmenistan, the rules of international treaty will apply” (current Article 6 par 2).<sup>30</sup> The Draft Constitution proposes to delete such wording. In this context, it should be noted that whatever the conditions and modalities for implementing norms of international law in a country, a State remains bound by international law. Indeed, pursuant to Article 27 of the Vienna Convention on the Law of Treaties, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. The proposed deletion thus weakens the status of international legal norms in relation to national laws and should be reconsidered. Additionally, to avoid uncertainty, it is recommended **to set out in the Draft Constitution a clear hierarchical priority for international treaties that have been ratified by Turkmenistan (and “universally accepted norms of international law”) over general laws and other legal norms adopted by the President and other executive bodies, while also stating that they are part of the national legal order and specifying their hierarchical relationship with the Constitution.**
31. Finally, the drafters may also **consider including a provision in the Draft Constitution that would set out a special legal status in the national legal order for international human rights treaties**, e.g. indicating that they have constitutional status.

### **3.2. Control of Constitutionality and Judicial Review System**

32. Article 8 par 3 of the Draft Constitution specifies that laws and other legal acts contradicting the Constitution shall be null and void; Article 141 par 2 specifies that in

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<sup>26</sup> See e.g., Article 6 par 4 of the Constitution of the Republic of Armenia; Article 10 of the Constitution of the Czech Republic; Article 138 of the Constitution of the Republic of Lithuania; Article 15 par 4 of the Constitution of the Russian Federation. For constitutions of OSCE participating States that are also Council of Europe member states, see also Venice Commission, *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts*, CDL-AD(2014)036, 8 December 2014, par 20, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)036-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e).

<sup>27</sup> See e.g., Article 194(4) of the Constitution of Serbia; and Article 15 par 4 of the Constitution of the Russian Federation, available at <http://www.legislationline.org/documents/section/constitutions>.

<sup>28</sup> For constitutions of OSCE participating States that are also Council of Europe member states, see *op. cit.* footnote 26, par 27 (2014 Venice Commission Report on the Implementation of International Human Rights Treaties).

<sup>29</sup> See e.g., *ibid.* pars 25-28 (2014 Venice Commission Report on the Implementation of International Human Rights Treaties).

<sup>30</sup> Available at <http://www.legislationline.org/documents/section/constitutions>.

case of divergence between provisions of the Constitution and laws, the provisions of the Constitution shall prevail. At the same time, the Draft Constitution does not set out a mechanism whereby laws and acts that contradict the Constitution (and international treaties) will be declared null and void, and does not specify which organ should be responsible for reviewing and deciding on such cases.

33. Similarly, Article 8 par 4 of the Draft Constitution mentions that normative legal acts affecting the rights and freedoms of a person and a citizen, if not made public, shall be invalidated from the time of their adoption, but does not specify how this should be done. As a rule, all laws should be published.<sup>31</sup> If that does not happen, then it is questionable whether they are actually in force. This should apply to all laws, not only to those “affecting the rights and freedoms of a person and a citizen”. Article 8 par 4 should be clarified accordingly (see also par 53 *infra* on publication).
34. Article 81 par 9 provides that the Mejlis shall “determine conformity or divergence from the Constitution and the normative legal acts by the state authorities and administration”. First, it is not clear whether this also involves the decrees, regulations and orders issued by the President or those approved by the Cabinet of Ministers. Second, Article 81 par 9 has the potential to encroach on the principle of separation of powers (set out in Article 6 of the Draft Constitution). Third, while there are various models of constitutional review across the OSCE region, such review should, as a general rule, take place outside the legislative and executive branches of power.<sup>32</sup> A majority of countries have established constitutional jurisdictions for this purpose<sup>33</sup> and constitutional justice is generally considered as a key component of a constitutional democracy.<sup>34</sup> As noted by the Venice Commission, while there is no general requirement to establish a constitutional court,<sup>35</sup> the establishment of such an organ as a separate institution is generally recommended and has often proved to be a motor in implementing the rule of law in a given country.<sup>36</sup> In any case, “access to judicial review must be open to all interested persons, that is to all persons potentially exposed to the danger of unlawful violations of their rights, and, on the other hand, the decisions of the competent judicial authorities must be capable of producing effects which comply with the principle of the certainty of law”.<sup>37</sup>
35. Where such courts exist, the respective constitution establishes their overall jurisdiction, the parties entitled to appeal, as well as the constitutional principles on which the

<sup>31</sup> *Op. cit.* footnote 11, par 5.8 (OSCE Copenhagen Document (1990)), which states that “legislation, adopted at the end of a public procedure, and regulations will be published [...]”; and OSCE Moscow Document (1991), par 18.1, which provides that “legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives”.

<sup>32</sup> See e.g., Venice Commission, *Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine*, CDL-AD(2013)014, 15 June 2013, par 13, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)014-e); and *Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan*, CDL-AD(2014)017, 16 June 2014, par 12, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)017-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)017-e). See also the *Report on « Constitutional Review Design and Functions: Implications for the Separation of Powers »*, by Mr. Evgeni Tanchev (Member of the Venice Commission, Bulgaria), as part of the Conference on Relations of the Constitutional Court with Other Public Authorities, organized by the Venice Commission in cooperation with the Constitutional Court of the Republic of Moldova, 28 September 2015, CDL-JU(2015)021, page 2, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2015\)021-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2015)021-e).

<sup>33</sup> *Op. cit.* footnote 1, par 53 (2008 ODIHR Opinion).

<sup>34</sup> See Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, CDL-PI(2015)002, 1 July 2015, page 5, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)002-e).

<sup>35</sup> See Venice Commission, *Opinion on the Constitution of Finland*, CDL-AD(2008)010, 7 April 2008, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)010-e).

<sup>36</sup> OSCE/ODIHR and Venice Commission, *Joint Opinion on the Draft Law “On Introduction of Changes and Amendments to the Constitution” of the Kyrgyz Republic*, CDL-AD(2015)014, 21 June 2015, pars 81 and 84, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)014-e). See also *op. cit.* footnote 22, par 59 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic).

<sup>37</sup> *ibid.* par 59 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic).

- activity of the constitutional court shall be based; more concrete norms on procedural matters are then set out in laws, and rules of procedure, with the latter usually being drafted by the constitutional court itself.<sup>38</sup> The institutional independence of such a body should be guaranteed in the constitution.<sup>39</sup> In order to avoid overburdening a constitutional court, such court should generally be in charge of verifying the constitutionality of statutory acts only, while leaving the review of lower-ranking texts to ordinary courts.<sup>40</sup>
36. In light of the above, and as already recommended in ODIHR's 2008 Opinion, the drafters should therefore **consider establishing a separate constitutional review body that would be independent from the executive and legislative branches, in order to secure a uniform interpretation of the Constitution and primary legislation and a consistent approach to implementing international human rights treaties and other instruments.**<sup>41</sup> The competence of such a body should be set out in the Draft Constitution.
37. It is noted that Article 60 par 2 refers to the "right to appeal in court against the decisions and actions of state bodies, public associations, local self-government and officials"; this seems to imply a certain form of review of lower-ranking norms by courts. It is recommended **to supplement Article 60 to also include a reference to "omissions" of state authorities.**
38. Finally, regarding specifically the status of international treaties in the national legal order (see par 30 *supra*), it would also be advisable **to establish a mechanism that would reiterate their precedence over national legislation and ensure that there is no contradiction between the international treaties and the Constitution. This means in particular that when ratifying or acceding to a treaty, a mechanism for reviewing the compliance of international treaties with constitutional norms should be in place.**<sup>42</sup>
39. As to the direct effect of international law (i.e., the legal mechanism which enables a domestic body (especially a court) to apply international rule directly),<sup>43</sup> this is generally recognized as an additional legal factor which shapes the relevance of international human rights treaties in the domestic legal order.<sup>44</sup> In this context, it may also be useful to look at Article 25 of the Draft Constitution, which states that the "rights and freedoms of a person and a citizen in Turkmenistan shall be recognized in accordance with the universally recognized norms of international law and shall be guaranteed by this Constitution and laws". A newly introduced Article 27 further states that the "[r]ights and freedoms of a person and a citizen shall be directly applicable [...] and shall be guaranteed by law".
40. Read together with Article 25, this would imply that "universally recognized norms of international law" shall be directly applicable in Turkmenistan. However, recent reports from UN human rights monitoring bodies have shown that courts in Turkmenistan tend

<sup>38</sup> Venice Commission, *Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan*, CDL-AD(2004)023, pars 5-6, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2004\)023-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)023-e).

<sup>39</sup> *Op. cit.* footnote 34, Section 4.8 (2015 Venice Commission Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice).

<sup>40</sup> Venice Commission, *Study on Individual Access to Constitutional Justice*, CDL-AD(2010)039rev, 27 January 2011, par 6, available at [http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e).

<sup>41</sup> *Op. cit.* footnote 1, Recommendation p and pars 53-54 (2008 ODIHR Opinion).

<sup>42</sup> See e.g., Article 87 of the Constitution of the Czech Republic (Constitutional Court's jurisdiction to decide concerning a treaty's conformity with the constitutional order).

<sup>43</sup> *Op. cit.* footnote 26, par 29 (2014 Venice Commission Report on the Implementation of International Human Rights Treaties).

<sup>44</sup> *ibid.* par 29 (2014 Venice Commission Report on the Implementation of International Human Rights Treaties).

to not cite international treaties and rules actively in their practice,<sup>45</sup> which may indicate that such general statements in the Constitution may not be sufficient. In addition to stating in the Draft Constitution that international treaties (and “universally recognized norms of international law”) are part of the domestic legal order (see par 30 *supra*), **it is therefore recommended to explicitly provide that international treaty provisions have direct effect and may be invoked before domestic courts; at the same time, such provision should specify that as a consequence, laws and other regulatory acts that contradict international treaties should be set aside or annulled.**<sup>46</sup>

### **3.3. Provisions on Amending the Constitution**

41. The Draft Constitution contains only very limited references to the procedures and modalities for amending it once adopted. Article 81 par 1 states that the Mejlis has the competence to adopt the Constitution and make amendments to it, except in cases where the duties of the President have been temporarily assigned to the Chairperson of the Mejlis as per Article 76 par 2 (see the new par 4 of the same article). Also, Article 142 specifies that the provisions of the Constitution on state government in the form of a presidential republic may not be changed. Under Article 143, a new Constitution or amendments to the Constitution shall be adopted by “no less than two thirds of the established number of deputies of the Mejlis or more than half of the citizens of Turkmenistan participating in national referendum”; in such cases, the President has no veto right (Article 71 par 10). Article 126 specifies that the Mejlis may conduct a national referendum “upon proposal of at least two-thirds of its established deputies, or on petition of no less than 250,000 eligible voters”.
42. As highlighted by the OSCE/ODIHR and the Venice Commission in one of their previous opinions, “provisions outlining the power to amend the Constitution [...] may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself”<sup>47</sup>.
43. Although Article 143 mentions how a new constitution or constitutional amendments are adopted (either by qualified majority of the total number of deputies or by referendum), it is not clear which persons, bodies and/or institutions have the right of initiative for constitutional amendments. Also, it is not clear whether Article 126 pertaining to referenda or Article 83 on the right to legislative initiative is applicable in such cases. While practice varies greatly from country to country in the OSCE region, constitutions generally have rules on such a right of initiative.<sup>48</sup> This may be granted to

<sup>45</sup> See e.g., *op. cit.* footnote 21, pars 12-13 (2012 CEDAW Committee’s Concluding Observations on Turkmenistan); and Committee against Torture, *Concluding observations on Turkmenistan*, 15 June 2011, par 7, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/TKM/CO/1&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/TKM/CO/1&Lang=En).

<sup>46</sup> *Op. cit.* footnote 26, pars 29-32 (2014 Venice Commission Report on the Implementation of International Human Rights Treaties).

<sup>47</sup> *Op. cit.* footnote 36, par 23 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

<sup>48</sup> See e.g., Article 89 par 1 of the Constitution of the French Republic (*President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament*); Article 134 of the Constitution of the Russian Federation (*President of the Russian Federation, Council of the Federation, State Duma, Government of the Russian Federation, legislative (representative) bodies of the subjects of the Russian Federation, and groups numbering not less than one fifth of the number of the members of the Council of the Federation or of the deputies of the State Duma*); Article 202 of the Constitution of the Republic of Armenia (*which depending on the articles to be amended grants the right to initiative to at least one third of the total number of parliamentarians, the Government, or 200,000 citizens having voting right; or at least one quarter of the total number of parliamentarians, the Government, or 150,000 citizens having voting right*); Article 147 par 1 of the Constitution of the Republic of Lithuania (*a group of not less than 1/4 of all the Members of the Seimas or not less than by 300,000 voters*); Article 166 read together with Article 87 pars 1 and 2 on general right to legislative initiative of the



each individual member of parliament or to a qualified minority or majority, to the Government, the Head of State or local authorities; several constitutions also allow a certain number of citizens entitled to vote with the possibility to introduce proposals for constitutional amendments. It is recommended **to specify the persons or entities having the right to initiate constitutional amendments in the text of the Draft Constitution.**

44. It is generally considered that a proper balance must be struck between constitutional rigidity and flexibility,<sup>49</sup> although this also depends on the national country context. The Venice Commission considers that “[a] good amendment procedure will normally contain (i) a qualified majority in parliament which should not be too strict, and (ii) a certain time delay, which ensures a period of debate and reflection”<sup>50</sup> or another type of obstacle such as an additional decision by other actors, e.g., through referendum.<sup>51</sup>
45. When reviewing modalities for constitutional amendments similar to those stated under Article 143 (requiring one vote at 2/3 majority of the total number of parliamentarians), the Venice Commission recommended the option of having two votes by the Parliament, with at least three months of interval between the two votes, each time with the same majority.<sup>52</sup> The drafters may **consider introducing such a modality in Article 143 of the Draft Constitution to ensure a stable yet flexible mechanism that will allow the Constitution of Turkmenistan to be adapted to future, new developments.**<sup>53</sup>
46. As regards the requirements for popular referenda to amend the constitution, the practice varies greatly from country to country, with such a procedure being either mandatory or optional.<sup>54</sup> Generally, referenda are required for amendments to provisions enjoying special protection, or on issues of a fundamental nature, or where a new constitution is adopted.<sup>55</sup> Article 143 refers to two possible procedures for amending the constitution, either by the Mejlis or by referendum; however, the provision does not **specify whether a constitutional referendum is permissible in all cases, or only on certain issues.** It is recommended **to clarify this matter in Article 143.**
47. At the same time, the OSCE/ODIHR and the Venice Commission have also warned against constitutional referenda without a prior qualified majority vote in Parliament; indeed, the fact that no parliamentary debate can take place prior to the referendum procedure may expose this instrument of direct democracy to polemics, misleading information and abuse of democracy if not carefully managed in accordance with

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Spanish Constitution (*Government, Congress; Senate; or Assemblies of the Autonomous Communities which can request the Government*); available at <http://www.legislationline.org/documents/section/constitutions>. See also Venice Commission, *Report on Constitutional Amendment*, CDL-AD(2010)001, 19 January 2010, pars 29-34, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e).

<sup>49</sup> *ibid.* pars 104-108 (2010 Venice Commission Report on Constitutional Amendment).

<sup>50</sup> *ibid.* par 241 (2010 Venice Commission Report on Constitutional Amendment).

<sup>51</sup> See e.g., Venice Commission, *Opinion on three Draft Constitutional Laws amending Two Constitutional Laws amending the Constitution of Georgia*, CDL-AD(2013)029, 15 October 2013, par 31, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)029-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)029-e).

<sup>52</sup> *ibid.* par 58 (2013 Venice Commission Opinion on three Draft Constitutional Laws amending Two Constitutional Laws amending the Constitution of Georgia); see also Venice Commission, *Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia*, CDL-AD(2010)028, 15 October 2010, pars 107-110, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)028-e).

<sup>53</sup> *ibid.* pars 107-110 (2010 Venice Commission Final Opinion on Draft Amendments to the Constitution of Georgia).

<sup>54</sup> See e.g., Article 89 par 3 of the Constitution of the French Republic; and Article 202 pars 1 and 2 of the Constitution of the Republic of Armenia, available at <http://www.legislationline.org/documents/section/constitutions>.

<sup>55</sup> See e.g., Article 202 pars 1 and 2 of the Constitution of the Republic of Armenia, available at <http://www.legislationline.org/documents/section/constitutions>. *Op. cit.* footnote 48, pars 46-50 (2010 Venice Commission Report on Constitutional Amendment). See also Venice Commission, *Interim Opinion on Constitutional Reform in the Republic of Armenia*, CDL-AD(2004)044, 6 December 2004, par 70, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2004\)044-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)044-e).

generally accepted democratic rules.<sup>56</sup> It is not clear **whether the general provision on referenda which provides that initiatives for a referendum may be proposed following the vote of 2/3rd of the total number of deputies, or upon petition of no less than 250 000 eligible voters (Article 126), also applies to constitutional referenda. This should be clarified.** If yes, 250,000 voters could potentially initiate a constitutional amendment procedure followed by a referendum in accordance with Article 143; this would ultimately mean that draft amendments could be proposed, debated and adopted outside of the relevant executive and legislative bodies, with no involvement of relevant government, presidential or parliamentary constitutional experts (see also comments in par 54 *infra* regarding referenda). To avoid this, **Article 143 should specify that a constitutional referendum shall be preceded by a qualified majority vote of the Mejlis** (see also comments on the need to ensure openness, transparency and inclusiveness of the process in par 199 *infra*).

48. Finally, the adoption of a *new* constitution, which is not mentioned in the current version of the Constitution, is now contemplated in Article 81 on the powers of the Mejlis and Article 143 on the procedure for amending the constitution. It is noted that these provisions do not differentiate between the rules and procedure pertaining to the amendment of the Constitution and the proposals for total revision and adoption of a new constitution. It may, however, be problematic to provide in a constitution, which should ensure the political and institutional stability of a country, the possibility of completely substituting this constitution with the adoption of a new Constitution. The practice in OSCE participating States varies in that respect; in a number of constitutions, the amendment procedure is the same regardless of whether the amendment only relates to a single provision, or to the adoption of a new Constitution,<sup>57</sup> but more stringent requirements or a different procedure may apply to the adoption of a new constitution.<sup>58</sup> The constitutional drafters should discuss whether to maintain the new provisions on the adoption of a new constitution; if yes, they may want to supplement them accordingly.

### 3.4. Law-Making Procedure and Referenda

49. The Draft Constitution does not specifically elaborate the procedure for adopting regular legislative acts, although it does set out the power of legislative initiative (Article 83) and the fact that normative legal acts shall be “published in the state mass media or made public through other means stipulated by law” (Article 8 par 4).
50. It is generally considered as a good practice to include clear rules on the legislative procedure in a Constitution,<sup>59</sup> and also to provide clear criteria for judicial review. In particular, constitutional provisions should specify **the competent organ, the material scope of laws as opposed to other normative acts, the procedure, the requirement to comply with the principle of hierarchy of norms and the publication in an official journal.** Further, pursuant to OSCE commitments, legislation should be **formulated and adopted as the result of an open and inclusive process, including public consultations, reflecting the will of the people.**<sup>60</sup> The drafters could consider

<sup>56</sup> *Op. cit.* footnote 36, par 25 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

<sup>57</sup> See e.g., *op. cit.* footnote 48, par 56 (2010 Venice Commission Report on Constitutional Amendment).

<sup>58</sup> See e.g., Articles 153 to 163 of the Constitution of Bulgaria (available at <http://www.legislationline.org/documents/action/popup/id/8933/preview>); see also *ibid.* pars 44 and 56 (2010 Venice Commission Report on Constitutional Amendment).

<sup>59</sup> Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, page 13, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

<sup>60</sup> *Op. cit.* footnote 11, par 5.8 (OSCE Copenhagen Document (1990), which states that “legislation, adopted at the end of a public procedure, and regulations will be published [...]”; and OSCE Moscow Document (1991), par 18.1 which provides that “legislation will

**supplementing the Draft Constitution accordingly by stating the overall principles pertaining to legislative procedure** (more detailed provisions can then still be included in underlying legislation, such as the Laws of Turkmenistan “On Normative Legal Acts” and “On the Mejlis of Turkmenistan”). **The Draft Constitution should also provide that the law is either invalid (null and void) or may be challenged before a court if any of these conditions are not fulfilled.**

51. Article 83 grants the power of legislative initiative to the President, the deputies, the Cabinet of Ministers and the Supreme Court of Turkmenistan. The power of the President or Cabinet of Ministers to propose or to introduce legislative bills reflects the tendency of contemporary presidential constitutions granting certain legislative initiative powers to the executive.<sup>61</sup> It is welcome that the power to legislative initiative is also given to the Cabinet of Ministers, since channelling all legislative initiatives through the President may easily lead to a bottleneck.
52. As regards the possibility for organs of the judiciary (Supreme Court) to be involved in the drafting of laws, this may in some countries be seen as a violation of the separation of powers and judicial independence.<sup>62</sup> If the highest courts participate in the drafting of laws, this may also raise doubts as to their objective impartiality when they are called upon to interpret and apply that law in a given case before them.<sup>63</sup> At the same time, international standards or instruments do not prohibit the involvement of judges in law-drafting *per se*. On the contrary, certain regional standards or soft law instruments consider that judges’ voices should be heard in the preparation of legislation relating to the status of judges, the administration of justice, procedural law and more generally, all draft legislation likely to have an impact on the judiciary<sup>64</sup> or even matters outside judicial policy.<sup>65</sup> However, the Supreme Court as one of the main bodies composing the judiciary in Turkmenistan should not be involved in political processes which take place when discussing draft laws in parliament.<sup>66</sup> Therefore, it is recommended **to remove the reference to the Supreme Court in Article 83**; this should not necessarily impede consultations with judges during the law-drafting process, providing that this does not jeopardize their independence and impartiality.
53. Article 8 par 4 provides that “normative legal acts shall be published in the state mass media or made public through other means, stipulated by law”. However, publication in the state media or via other means by itself does not guarantee the continued accessibility of adopted legal texts to everyone, as required by key OSCE

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be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives”.

<sup>61</sup> See e.g., International Institute for Democracy and Electoral Assistance (International IDEA), *Presidential Powers: Legislative Initiative and Agenda-setting* (October 2015), available at <http://www.idea.int/cbp/loader.cfm?csModule=security/getfile&pageid=75596>.

<sup>62</sup> See e.g., OSCE/ODIHR, *Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic*, 19 October 2005, par 75, available at <http://www.legislationline.org/documents/id/1963>.

<sup>63</sup> *Op. cit.* footnote 35, par 110 (2008 Venice Commission Opinion on the Constitution of Finland); see also e.g., European Court of Human Rights in the case of *Procola v. Luxembourg*, judgment of 28 September 1995 (Application no. 14570/89), par 41, available at <http://hudoc.echr.coe.int/eng?i=001-57944>.

<sup>64</sup> Consultative Council of European Judges (CCJE), *Opinion no. 3 to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality*, par 34, available at [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%203\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%203_EN.pdf); and *Opinion no.10 to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society* (2007), par 87, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2007\)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

<sup>65</sup> CCJE, *Opinion no. 18 on the position of the judiciary and its relation with the other powers of state in a modern democracy* (2015), par 31, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2015\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864#P206\\_46653](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2015)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864#P206_46653).

<sup>66</sup> See e.g., *op. cit.* footnote 62, par 75 (2005 ODIHR Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic).

commitments.<sup>67</sup> Unhindered access to legislation is one of the basic conditions for the functioning of a rule of law-based society; the main way to achieve this goal is to ensure the *official* publication of all laws and other regulations in an official journal.<sup>68</sup> It is recommended **to amend Article 8 to provide for such official publication, at least for laws and other national legal norms**, while some ‘other means stipulated by law’ could eventually be considered for legal norms adopted at the local level by local governments.

54. Finally, regarding referenda, it is noted that the Draft Constitution provides for the possibility of popular initiatives (Article 126), which is welcome in principle. In that respect, it is generally considered a good practice to provide that, prior to the vote, **a public authority corrects potentially faulty drafting of the respective question.**<sup>69</sup> At a minimum, the **Parliament should also be able to give a non-binding opinion on the text put to the vote.**<sup>70</sup> It is recommended **to consider supplementing Article 126 of the Draft Constitution accordingly.**

#### **4. The Institutional Framework and Balance of Powers**

##### **4.1. General Comments**

55. Article 6 of the Draft Constitution states that state power is “divided in the legislative, executive and judicial branches, [...] which shall operate independently, balancing each other”; a new paragraph 1 of Article 8 (former Article 5) proclaims that “[t]he rule of law shall be established in Turkmenistan”. At the same time, to ensure the prevalence of democracy governed by rule of law and functioning checks and balances, it would be advisable to include proper mechanisms to ensure the strict separation of state powers (with no delegation of powers possible between the branches, see par 74 *infra*), set out a proper procedure for holding the president accountable via an impeachment procedure (Article 75 par 2) (see pars 66-69 *infra*), allow for proper judicial review to limit the exercise or abuse of powers of the executive and legislature (see pars 34-36 *supra*), enhance provisions guaranteeing the independence of the judiciary and proper judicial proceedings (see Section 4.4. *infra*), and protect other independent institutions (see particularly Sections 4.6. and 4.8. *infra*), among others.
56. The allocation of mandates for oversight, rule-making, representation, and reporting among the three branches and the various levels would help create a web of checks and balances that constitutes the basic framework for democratic accountability.<sup>71</sup>

##### **4.2. The Executive Branch**

57. Article 1 par 1 of the Draft Constitution states that Turkmenistan is a presidential Republic. Overall, the provisions pertaining to the executive branch are substantially the

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<sup>67</sup> *Op. cit.* footnote 11, par 5.8 (OSCE Copenhagen Document (1990), which states that “legislation, adopted at the end of a public procedure, and regulations will be published, that being condition for their applicability. Those texts will be accessible to everyone.”

<sup>68</sup> OSCE/ODIHR, *Assessment of the Legislative Process in the Republic of Armenia* (October 2014), par 71, available at <http://www.legislationline.org/documents/id/19365>. See also OSCE/ODIHR, *Assessment of the Law-Drafting and Legislative Process in the Republic of Serbia* (December 2011), Section 4.10, available at <http://www.legislationline.org/documents/id/16808>.

<sup>69</sup> For example: (i) when the question is obscure, misleading or suggestive; or (ii) when rules on procedural or substantive validity have been violated; see Venice Commission, *Code of Good Practice on Referendums*, CDL-AD(2007)008, 19 March 2007, page 12, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008-e).

<sup>70</sup> *ibid.* page 13 (2007 Venice Commission Code of Good Practice on Referendums).

<sup>71</sup> Venice Commission, *Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions*, CDL-AD(2012)027rev, 31 January 2013, par 18, available [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)027rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)027rev-e).

same as in the current Constitution. The President continues to exercise control over the administration in general and the power structures in particular; he or she remains at the head of the executive and has decisive influence on appointments to and dismissals from judicial and other independent positions (see pars 58-63, 93, 101, 113, 117-118 and 129-130 *infra*). OSCE/ODIHR takes this opportunity to reiterate the comments made in its 2013 Parliamentary Election Assessment Mission Final Report, where it found that although the principle of separation of powers between the executive, legislative and judiciary is enshrined in the Constitution, the president is granted quite extensive powers.<sup>72</sup>

58. According to the Draft Constitution, the president is elected for a term of seven years (as opposed to five years in the current Constitution) without a limitation to the number of terms that he/she may serve (Article 70). As regards the length of the mandate, the OSCE/ODIHR would like to reiterate the comments made in its 2008 Opinion **to retain the presidential term of office of five years**, as set out in the current Constitution, and **to not extend it to seven years, considering the potential impact that such a longer term of office could have on the overall balance of powers.**<sup>73</sup> Further, in most countries in the OSCE region, constitutions limit the mandates and the right to re-election of presidents of state.<sup>74</sup> Given the risk of potential long-term monopoly of state power in the hand of the head of state and its consequences on the balance of powers,<sup>75</sup> it is recommended for the legal drafters **to consider introducing express limitations to re-election in Article 70 of the Draft Constitution** (see additional comments on eligibility requirements for presidential candidates in par 180 *infra*).
59. Article 68 of the Draft Constitution provides that the President acts as a “guarantor of [...] the compliance with the Constitution and fulfilment of international obligations”, which is also understood to cover international human rights norms. While other constitutions of Central and Eastern European countries contain similar provisions, the judiciary, as a rule, should be considered to be the **main guarantor of human rights and fundamental freedoms and of the constitutional order as a whole** (see comments regarding the control of constitutionality and judicial review in Section 3.2. *supra*). Although Article 96 par 2 states that “judicial power shall be aimed to guard the citizens’ rights and freedoms”, **this broader role of the judiciary should be set out more explicitly in the Draft Constitution, and consideration should be given to revising Article 68, to avoid misunderstandings in this respect.**<sup>76</sup> In addition, **Article 68 (or another provision) should explicitly state that the President is bound by the Constitution and by law.**

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<sup>72</sup> OSCE/ODIHR, *Turkmenistan - Parliamentary Election Assessment Mission Final Report*, 15 December 2013, page 3, available at <http://www.osce.org/odihr/elections/116011?download=true>. These include the right to form and preside over the Cabinet of Ministers and the National Security Council, and to appoint and dismiss governors (Hyakims) of regions, cities and districts, all judges of the Supreme Court and of other courts, as well as the 15 members of the Central Election Commission.

<sup>73</sup> See *op. cit.* footnote 11, pars 6 and 7.1 (OSCE Copenhagen Document (1990)). See also *op. cit.* footnote 1, pars 55-57 (2008 ODIHR Opinion).

<sup>74</sup> This is a common practice in most of the OSCE participating States, see e.g., Article 88 of the Constitution of the Republic of Albania (5 years with the right to be re-elected only once); Section 54 of the Constitution of Finland (no more than two consecutive terms of office of six years); Article 81 par 3 of the Russian Constitution (maximum two six year terms running); Article 6 par 2 of the French Constitution (no more than two consecutive five-year terms); Article 42 par 5 of the Kazakh Constitution (maximum two five year terms in a row, although such a restriction does not apply to the First President of the Republic of Kazakhstan); Article 65 of the Constitution of the Republic of Tajikistan (maximum two seven year terms running); Article 90 of the Constitution of the Republic of Uzbekistan (five years with no more than two consecutive terms); Article 80 of the Constitution of the Republic of Estonia (no more than two consecutive terms of five years). See also *op. cit.* footnote 71, par 49 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

<sup>75</sup> See e.g., *ibid.* pars 66-70 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

<sup>76</sup> See e.g., the comments made by the Venice Commission concerning the deletion from the Draft Constitution of the Kyrgyz Republic of a provision similar to Article 68 of the Draft Constitution in *op. cit.* footnote 22, par 24 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic).

60. Article 71 of the Draft Constitution lists the roles and responsibilities of the President which, even if Turkmenistan is a presidential Republic according to Article 1, tend to be somewhat overly extensive. This includes the nomination of certain public bodies which should in principle be independent, such as the Central Election Commission or the first-ever Commissioner for Human Rights of Turkmenistan. Such modalities for nomination which are controlled by the President raise concerns with regard to the independence of these bodies, which would be better ensured if they were appointed in a more open and transparent manner (see additional comments on this issue in Sections 4.6 and 4.8 *infra*).
61. The President's power to grant pardon and amnesty is set out in Article 71 par 17.<sup>77</sup> Within the OSCE region, granting amnesty is usually considered to fall within the realm of the legislature, while the power to grant a pardon is seen as one of the prerogatives of the head of State.<sup>78</sup> Given that amnesties have a potentially quite broad personal scope, an amnesty should comply with certain fundamental principles of the rule of law, namely legality (including transparency), the prohibition of arbitrariness, non-discrimination and equality before the law.<sup>79</sup> For this reason and to limit potential for arbitrary application, **it would be more appropriate to vest such a prerogative with the Mejlis as representative of the people, rather than with the President.**
62. Moreover, the Constitution does not limit the power to grant amnesties or pardons. A number of international human rights and humanitarian law treaties explicitly require State parties to ensure the punishment of specific offences, which means that in such cases, amnesties or pardons would not be permissible. Notably, amnesties have been expressly recognized as incompatible with the duty of States parties to investigate acts of torture, to guarantee freedom from such acts within their jurisdiction and to ensure that they do not occur in the future.<sup>80</sup> Similarly, Article 18 of the 1992 UN Declaration states that convicted or alleged perpetrators of enforced disappearance shall not benefit from amnesty laws, and that in the exercise of the right to pardon,<sup>81</sup> the "extreme seriousness" of the act should be taken into account. **The drafters should consider introducing similar limitations regarding the granting of amnesties and pardons into the Draft Constitution, or refer to limitations established in primary law.**
63. Additionally, Article 71 par 16 refers to the President's power to "order a state of emergency and martial law" while specifying that the "legal regime for the state of emergency or martial law shall be governed by law". While the Laws of Turkmenistan "On the Regime of Emergency" and "On Martial Law" specify such legal regimes, the

<sup>77</sup> A "pardon" refers to an official individual act that exempts a convicted person from serving a sentence, in whole or in part, without expunging the underlying conviction from the criminal record. An "amnesty" usually refers to a general measure which is impersonal and applies to all persons or to a class of persons, which may be granted before criminal proceedings have commenced or at any stage thereafter.

<sup>78</sup> See e.g., Articles 117 and 135 of the Constitution of the Republic of Armenia; Articles 17 and 34 of the Constitution of the French Republic; Articles 44 and 54 of the Constitution of the Republic of Kazakhstan; Section 105 of the Constitution of Finland; Articles 64 par 10 (4) and 74 par 2 (7) of the Constitution of the Kyrgyz Republic; Articles 81 and 98 of the Constitution of the Republic of Croatia; Articles 75 and 93 of the Federal Constitutional Law of the Federal Republic of Austria; see <http://www.legislationline.org/documents/section/constitutions>. See also e.g., Venice Commission, *Opinion on the Provisions Relating to Political Prisoners in the Amnesty Law of Georgia*, CDL-AD(2013)009, 11 March 2013, par 20, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)009-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)009-e).

<sup>79</sup> See e.g., *ibid.* par 58 (2013 Venice Commission Opinion on the Provisions Relating to Political Prisoners in the Amnesty Law of Georgia).

<sup>80</sup> UN Committee against Torture, *General Comment No. 2 on Implementation of Article 2 of the UNCAT*, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (24 January 2008), par 5, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en); and *General Comment No. 3 on the implementation of Article 14 of the UNCAT (2012)*, UN Doc. CAT/C/GC/3, par 38, available at [http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf). See also UN Human Rights Committee (UN HRC), *General Comment No. 20 on Article 7 of the ICCPR (1992)*, par 15, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/422/35/PDF/G0842235.pdf?OpenElement> (page 200).

<sup>81</sup> i.e., an official act that exempts a convicted person from serving a sentence, in whole or in part, without expunging the underlying conviction from the criminal record.

basic circumstances leading to such a proclamation should still be set out in the Constitution, given the serious consequences of states of emergency and martial law on the separation of powers, and the overall human rights situation in a country. The relevant procedures and the formal, material and temporal limits of states of emergency should ideally also be mentioned, or at least referred to in the Draft Constitution. Overall, a state of emergency should be a temporary measure triggered by exceptional circumstances, such as war or other similar emergencies which ‘threaten the life of the nation’ (Article 4 of the ICCPR). In this context, due consideration should be given to the intensity of the potential or actual harm.<sup>82</sup> This means that not every disturbance or catastrophe will be considered grave enough to warrant a declaration of a state of emergency – even in wartime, a situation must be extremely serious (e.g. an imminent threat to the independence of a state, armed aggression, etc.) before it may be considered as a threat to the life of the nation.<sup>83</sup> For this reason, and to limit possibilities of abuse, **the cases in which declarations of a state of emergency are possible** (which will invariably lead to a suspension of the usual system of checks and balances that constitutes a living democracy) **should be narrowly prescribed.**

64. Moreover, constitutions should **outline the formal, material and temporal limits to such declarations.**<sup>84</sup> In this context, temporal limits are particularly relevant, as is an adequate mechanism to regularly review and assess the need for a state emergency, and its duration and scope.<sup>85</sup> Under no condition should emergency measures be used to justify the institutionalization of derogations to international human rights standards over long periods of time.<sup>86</sup> The Draft Constitution should **be supplemented accordingly, and should also specify the respective competences of institutions during such times of emergency** (see also additional comments on parliamentary scrutiny in par 79 *infra*). Finally, as detailed in sub-sections 5.1.4 and 5.1.5. *infra*, it is also important **to expressly mention that there are rights from which no derogation is possible during a state of emergency and that any law on emergency powers must safeguard these.**<sup>87</sup>
65. According to Article 73 of the Draft Constitution, the President shall not be a deputy of the Mejlis, which is certainly a means to enhance, to a certain degree, the separation of powers. At the same time, there are other incompatibilities which should be regulated at

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<sup>82</sup> See page 107 of the Article “*Limits to Counter-Terrorism: Comparing Derogation from the ICCPR and the ECHR*” (2011) by Julian M. Lehmann, Essex Human Rights Review Volume 8 Number 1, October 2011, available at <http://projects.essex.ac.uk/ehrr/vol8no1.html>.

<sup>83</sup> UN HRC, *General Comment No. 29 on States of emergency* (Article 4 of the ICCPR), CCPR/C/21/Rev.1/Add. 11 (2001), par 3, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en), where it is stated that “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by Article 4 paragraph 1 [of the ICCPR]”.

<sup>84</sup> See *ibid.* par 4 (UN HRC General Comment No. 29 (2001)), which states that “measures derogating from the Covenant are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency”; see also e.g., UN OHCHR, “*Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*”, Chapter 16 “The Administration of Justice During States of Emergency”, pages 823-824, available at <http://www.ohchr.org/Documents/Publications/training9chapter16en.pdf>. See also *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1984), available at <http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/ParisMinimumStandards.pdf>. See also Venice Commission, *Opinion on the Draft Constitutional Law on « Protection of the Nation » of France*, CDL-AD(2016)006, 14 March 2016, par 54, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)006-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)006-e); and *Opinion on the protection of human rights in emergency situations*, CDL-AD (2006)015, 4 April 2006, par 10, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)015-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)015-e).

<sup>85</sup> See *ibid.* par 4 (UN HRC General Comment No. 29 (2001)).

<sup>86</sup> For instance, the UN HRC has expressed concern when constitutional provisions allow for the proclamation of states of emergency without time limits and without judicial oversight and has recommended that the necessity of the continued renewal of the state of emergency should be reviewed with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights. See also *op. cit.* footnote 84, pages 823-824 (UN OHCHR Manual on Human Rights in the Administration of Justice).

<sup>87</sup> Venice Commission, *Emergency Powers, Science and Technique of Democracy* (1995), No. 12, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e).

the constitutional level, such as **the incompatibility of the presidential mandate with other public office, engagement in profit-making activities or any other state, public or economic activity, or participation in the leadership of a political party.**<sup>88</sup> The drafters should **consider supplementing the provision accordingly.**

66. Article 75 par 2 of the Draft Constitution allows the Mejlis to pass a motion of non-confidence in the President in cases where he/she “[violates] the constitution and laws of Turkmenistan”. This would appear to somewhat confuse the concept of legal responsibility/”impeachment” (for violation of the Constitution and laws) with political responsibility. The vote of non-confidence is a tool that is generally used in parliamentary systems to determine whether trust still exists between the majority of the parliament and the government.<sup>89</sup> **The terminology that is used (“non-confidence”) is thus misleading and should be reconsidered.**
67. If, as assumed, Article 75 par 2 is actually meant to engage the legal responsibility (impeachment) of the President, the right to initiate a motion on this vote is given to a 2/3<sup>rd</sup> majority of deputies, which is a very high ratio; such right of initiative typically lies with a smaller group of members of parliament, also to respect the rights of the minority in parliament. Indeed, parliamentary supervision and scrutiny of the executive is first and foremost a function for the opposition, and serves to guarantee the principle of separation of powers inherent in constitutional theory.<sup>90</sup> Additionally, it is noted that the parliamentary decision on the removal of the President requires 3/4<sup>th</sup> of the total number of deputies of the Mejlis to pass. This renders it *de facto* impossible for the Mejlis to initiate and complete any such removal procedure. Moreover, the final decision as to whether a President shall be removed is left to the people via a referendum. Such an impeachment procedure which assesses the legal responsibility of the President is by its very nature a complex legal procedure and it is doubtful whether the people would be well equipped to assess whether the President actually violated provisions of the Constitution and laws. In such circumstances, this risks turning an impeachment procedure into a plebiscite on the leadership of the country, which will then focus less and less on the legal responsibility of the President.
68. Given the above inconsistencies, the drafters should **consider another mechanism to engage the legal responsibility of the President in case of grave violations of the Constitution or the law. Such a procedure could be initiated by the Mejlis (with a lower threshold) but should ideally also involve a court (e.g., the Supreme Court) or other independent body, which should then conduct the respective trial in full compliance with fair trial standards.**<sup>91</sup>

<sup>88</sup> See e.g., Article 95 of the Constitution of Bulgaria which states that “The President and the Vice President shall not serve as Members of the National Assembly or engage in any other state, public or economic activity, nor shall they participate in the leadership of any political party”; Article 103 par 4 of the Constitution of Ukraine which states that “[t]he President of Ukraine shall not have another representative mandate, hold office in State power bodies or associations of citizens, perform any other paid or entrepreneurial activity, and shall not be a member of an administrative body or board of supervisors of an enterprise aimed at making profit”; Article 83 par 1 of the Constitution of the former Yugoslav Republic of Macedonia which states that “[t]he duty of the President of the Republic is incompatible with the performance of any other public office, profession or appointment in a political party”; Article 103 pars 4 and 5 of the Constitution of Slovakia which states that “(4) should a deputy of the National Council of the Slovak Republic, member of the Government of the Slovak Republic, judge, prosecutor, member of the armed forces of another armed corps, or member of the Supreme Control Office of the Slovak Republic be elected president, he will cease executing his previous function from the day of his election; (5) [t]he president must not perform any other paid function, profession, or entrepreneurial activity and must not be a member of the body of a juridical person engaged in entrepreneurial activity”.

<sup>89</sup> See, although in relation to ministerial responsibility, Venice Commission, *Report on the Relationship between Political and Criminal Ministerial Responsibility*, 11 March 2013, pars 10-12, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)001-e).

<sup>90</sup> Venice Commission, *Report on the Role of the Opposition in a Democratic Parliament*, CDL-AD(2010)025, 15 November 2010, pars 117 and 119, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)025-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)025-e).

<sup>91</sup> See Venice Commission, *Opinion on the Compatibility with Constitutional Principles and the Rule of Law of Actions taken by the Government and Parliament of Romania in respect of Other State Institutions*, CDL-AD(2012)026, 17 December 2012, par 78, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)026-e).



69. As regards the reasons for initiating such a procedure, the general reference in Article 75 par 2 to “violation of the constitution and laws of Turkmenistan” allows for an unnecessary broad interpretation of the cause for removal of the President. In ODIHR’s 2008 Opinion, it was recommended **to limit the grounds for applying this kind of procedure “to serious crimes and misdemeanors only”**.<sup>92</sup> **The Draft Constitution should also specify the general procedure for cases where the President commits criminal offences,**<sup>93</sup> particularly where these are of a serious nature (e.g., treason, crimes against humanity, etc.). It should be possible to remove or lift the inviolability or immunity of a President in such cases (with relevant safeguards in place to prevent abuse while ensuring that fair trial standards are respected).<sup>94</sup>
70. Further, Article 75 par 1 provides for the possible termination of the presidential mandate where he/she is not able to fulfil his duty in case of illness, but does not specify how long such an illness would need to last to warrant an end of his/her mandate, and how the medical board to assess this is set up. **To ensure that the mandate of the President is indeed only terminated in exceptional and serious cases, it is recommended to supplement this article in that respect.** Moreover, as not every inability to perform his/her duties needs to immediately lead to a replacement of the President as per Article 76 par 2, **a provision on the temporary replacement of the President should be introduced, covering for instance cases of short-term illness or accident.**
71. Additionally, nothing is said in the Draft Constitution as to **the possible death, resignation or other legal causes of early termination of the President’s term of office** (such as incompatibility, loss of citizenship, loss of the right to vote if this is included as an eligibility criteria or if any other preconditions for election do no longer exist). It is recommended **to supplement Article 75 or 76 of the Draft Constitution in that respect.**
72. Article 76 par 2 states that “[i]f the President, for whatever reason, shall be unable to perform his/her duties, pending the election of the new President, the duties of the President of Turkmenistan shall be assigned to the Chairperson of the Mejlis”, with the new presidential election to be organized with 60 days. While the term “whatever reason” is most probably meant to cover the circumstances specified in Article 75 (illness or vote of non-confidence), **it should be specified to enhance clarity and foreseeability of this provision.** In this context, other circumstances mentioned in par 71 *supra* may also be contemplated. The modalities for dealing with potential vacancy in the office of the President vary greatly among countries of the OSCE region. In presidential systems, in such circumstances the office is sometimes temporarily held by a vice-president or another high-level ranking official from the executive branch,<sup>95</sup> and/or by the Chairperson of the Parliament,<sup>96</sup> including when the first person contemplated as interim president is unable to exercise such powers.

<sup>92</sup> *Op. cit.* footnote 1, par 44 (2008 ODIHR Opinion).

<sup>93</sup> See e.g., *op. cit.* footnote 89, par 80 (2013 Venice Commission Report on the Relationship between Political and Criminal Ministerial Responsibility).

<sup>94</sup> *ibid.* par 109 (2013 Venice Commission Report on the Relationship between Political and Criminal Ministerial Responsibility).

<sup>95</sup> See e.g., Article 44 of the Constitution of Cyprus; Article 2, Section I, par 6 of the Constitution of the United States, which states that: “In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”

<sup>96</sup> See Article 48 of the Constitution of Kazakhstan which states that: “In case of premature release or discharge of the President of the Republic of Kazakhstan from office as well as in case of his death the powers of the President of the Republic shall be transmitted to the Chairperson of the Senate of the Parliament for the rest of the term; if the Chairperson of the Senate is unable to assume the powers of the President they shall be transmitted to the Chairperson of the Majilis of the Parliament; if the Chairperson of the Majilis is unable to assume the powers of the President they shall be transmitted to the Prime Minister of the Republic”.

73. Chapter IV of the Draft Constitution regulates the composition, roles and responsibilities of the Cabinet of Ministers of Turkmenistan. The title of the Chapter seems to suggest that this is an organ of the state while the rules regarding its role, functioning and composition imply that it is body that is under the purview of the President.<sup>97</sup> The accountability of cabinet ministers, as well as their responsibilities are not specified. Generally, in a presidential system of government, members of the government are appointed and revoked by the president and accountable to him/her only; at the same time, presidential systems may require legislative approval of presidential nominations to the cabinet and to other key governmental posts.<sup>98</sup> Article 91 provides that the Cabinet of Ministers “shall be the executive and administrative body”; as such, it is a body that supports the work of the President; the Draft Constitution further specifies the division of labour between the President and Cabinet of Ministers. As such, it may not be necessary **to regulate the Cabinet of Ministers under a separate section; rather, its role and responsibilities could be set out under the Chapter on the President of Turkmenistan.** Additionally, while the President should be able to invite **other participants to attend the meetings of the Cabinet of Minister, Article 92 should make it clear that they do not have the right to vote in the Cabinet.** Otherwise, the President could easily influence majorities.
74. As mentioned in par 24 *supra*, the President issues decrees, regulations and orders, binding on the entire territory of Turkmenistan (Article 72). The Cabinet of Ministers within its competence also approves decrees and issues binding orders (Article 93). At the same time, the nature and possible scope of such decrees and regulations, which appear to be a common practice,<sup>99</sup> is not specified in the Constitution. As mentioned in the 2008 ODIHR Opinion, the central element of a presidential system is the separation of powers between the executive and legislative branches of government; it is thus crucial that all legislative powers be vested in the legislature.<sup>100</sup> As such, **the scope of legislative powers versus regulatory powers should therefore be clearly delineated, and in particular, the respective constitutional provisions should specify that the presidential powers in this field amount to a delegated responsibility.**<sup>101</sup>

#### **4.3. The Parliament**

75. Article 77 of the Draft Constitution states that the Mejlis (parliament) is “the highest representative body, exercising the legislative authority”. Pursuant to Article 79, the Mejlis may be prematurely dissolved on the basis of “a decision through national referendum, [self-dissolution] or by the President in case where the formation of Mejlis office bearers (including chairperson, deputy chairperson, etc.) was not done within six months”. As already recommended in the 2008 ODIHR Opinion, **the use of a referendum for the purposes of dissolving Parliament should be reconsidered,** to avoid paralyzing relevant political institutions and prolonging political deadlock.<sup>102</sup>

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<sup>97</sup> The President is the chairperson of the Cabinet of Ministers (Article 91) which is formed by the President (Article 92 par 2). It also includes the Minister of Internal Affairs and the Minister of Justice who are appointed and dismissed by the President with the consent of the Mejlis (Article 71 par 16). At the same time, Article 95 specifies that the powers of the Cabinet of Ministers, procedures of its activities, and its relations with other state bodies are specified by law.

<sup>98</sup> *Op. cit.* footnote 1, par 42 (2008 ODIHR Opinion).

<sup>99</sup> *Op. cit.* footnote 72, page 5 (2013 ODIHR Parliamentary Election Assessment Mission Final Report - Turkmenistan).

<sup>100</sup> *Op. cit.* footnote 1, par 45 (2008 ODIHR Opinion). See e.g., Title V of the Constitution of the French Republic on “Relations between Parliament and the Government” which provides an exhaustive list of areas for the adoption of statute laws (Article 34) while Article 37 of the Constitution specifies that “[m]atters other than those coming under the scope of statute law shall be matters for regulation” (see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>).

<sup>101</sup> *Op. cit.* footnote 1, par 45 (2008 ODIHR Opinion).

<sup>102</sup> *ibid.* par 43 (2008 ODIHR Opinion).

76. Moreover, the provisions pertaining to the dissolution of the Mejlis should **specify the consequences of such an early dissolution, including within which time-frame a new Mejlis should be elected and how an interim parliament would function.**
77. The powers of the Mejlis are detailed in Article 81 of the Draft Constitution. As noted in the 2013 OSCE/ODIHR Parliamentary Election Assessment Mission Final Report on Turkmenistan, the Constitution grants only limited powers to the Mejlis, including the right to initiate laws, to consider for approval the programme of activities of the Cabinet of Ministers and to make inquiries to the Cabinet of Ministers and other state bodies.<sup>103</sup> This is also implied by the terminology used in Article 81, which uses terms such as “consider”, “examine” or “address” without specifying who has the power to decide on these issues.
78. **Notably, Article 81 par 3 refers to the examination of issues related to the approval of the state budget** without clearly stating that the Mejlis shall approve it, while Article 71 par 9 stipulates that the President shall submit the state budget for approval of the Mejlis. Parliaments habitually have a significant role to play in budgetary matters<sup>104</sup> and, to avoid ambiguity, it is thus recommended **to specify in Article 81 par 3 that the Mejlis shall not only examine budget issues but also approve the budget.** Similarly, Article 81 par 7 does not, as opposed to Article 71 par 16, mention consent of the Mejlis with respect to the appointment and dismissal of certain public entities. Such inconsistencies should be rectified. **Additional controlling powers for the Mejlis should be introduced to Article 81; in particular, the Mejlis should be able to put questions to the President and other parts of the executive, as part of its parliamentary oversight role.**
79. In light of the President’s powers to declare a state of emergency and martial law (Article 71 par 18), parliamentary scrutiny of such acts and related procedures are also important guarantees of the rule of law and democracy.<sup>105</sup> OSCE commitments specifically require that **in cases where executive authorities may lawfully declare a state of public emergency, such decision should be subject to approval or control by the legislature within the shortest possible time.**<sup>106</sup> **Article 81 should be supplemented accordingly.**
80. Article 82 specifies that in certain areas (excluding the adoption of and amendments to the Constitution, criminal and administrative law and legal proceedings), the Mejlis may transfer its legislative powers to the President “with subsequent consideration by the Mejlis of their approval”. Such a transfer is not limited to any particular conditions or circumstances, aside from the subsequent parliamentary approval. As highlighted by the Venice Commission, “[i]n a democracy, one key aspect is a properly functioning and directly elected legislature [...] [which] needs to have primary rulemaking power [...]. Transfer of legislative power to the executive should be limited in scope, with strictly defined conditions”.<sup>107</sup>
81. The transfer of the right to enact laws in the Draft Constitution is relatively vaguely defined and not explicitly temporary in nature; it entails an alteration in the distribution

<sup>103</sup> *Op. cit.* footnote 72, page 3 (2013 ODIHR Parliamentary Election Assessment Mission Final Report - Turkmenistan).

<sup>104</sup> See e.g., *op. cit.* footnote 51, par 49 (2013 Venice Commission Opinion on three Draft Constitutional Laws amending Two Constitutional Laws amending the Constitution of Georgia).

<sup>105</sup> *Op. cit.* footnote 84, par 62 (2016 Venice Commission Opinion on the Draft Constitutional Law on « Protection of the Nation » of France).

<sup>106</sup> See *op. cit.* footnote 11, par 28.2 (OSCE Moscow Document (1991)).

<sup>107</sup> Venice Commission, *Opinion on the Balance of Powers in the Constitution and the Legislation of the Principality of Monaco*, CDL-AD(2013)018, 18 June 2013, pars 19 and 21, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)018-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)018-e).

of functions and powers among the executive and the legislative branches of powers that can only adversely affect the balance of powers.<sup>108</sup> It is thus recommended **to define more clearly when such a transfer would be possible (e.g., during war or other public emergency), while noting the temporary nature of such transfer.**<sup>109</sup> **Even then, Article 82 should subject such cases to certain conditions (for instance that the legislation that is adopted should not negatively impact on human rights and fundamental freedoms).**<sup>110</sup>

82. Article 80 par 2 refers to the termination of the mandate of deputies from an outgoing legislature when the first session of the newly elected Mejlis takes place. However, **no other causes of termination are established, be they natural (death or resignation) or legal** (e.g. incompatibility, loss of citizenship or right to vote or if preconditions for election no longer exist, or the failure to participate in the work of the Mejlis for a determined period of time). In this context, it is noted that the grounds of termination of a deputy's mandate are listed in Article 33 of the Law of Turkmenistan "On the Mejlis of Turkmenistan". However, for the sake of completeness and to ensure consistency of constitutional provisions, it is recommended to expand Article 80 par 2 accordingly (see also additional comments on incompatibility in par 87 *infra*).
83. Article 86 par 1 of the Draft Constitution states that "[a] deputy shall be deprived of his/her parliamentary powers only by the Mejlis" and that "the decision shall be taken by at least 2/3<sup>rd</sup> of the established members of the Mejlis". The provision does not specify the grounds, conditions and criteria for depriving a deputy of his or her mandate, which may lead to uncertainty and/or abuse and is not in line with the principle of a deputy's free and independent mandate.<sup>111</sup> Further, deputies are elected by votes cast by citizens and in principle, only voters should therefore have the right to end the mandate of a parliamentarian through elections in line with the principle of popular sovereignty mentioned in Article 3 of the Draft Constitution. It is thus recommended **to remove the possibility for the Mejlis of depriving a deputy of his/her mandate under Article 86 par 1.** Moreover, the Draft Constitution should also be supplemented to clearly state that **deputies of the Mejlis shall act in the interest of the people (which constitutes one of the components of free mandate).**
84. Under par 2 of the same provision, "a deputy shall not be held criminally or administratively liable, detained or otherwise deprived of liberty without the consent of Mejlis". Article 86 thereby provides for certain "inviolability"/"procedural immunity" (i.e., special legal protection/procedural safeguards for parliamentarians accused of breaking the law, typically against arrest, detention and prosecution).<sup>112</sup> Depending on the country context, such "inviolability" may at times help protect the parliament as an institution, and particularly the parliamentary opposition, from undue pressure or harassment from the executive, courts or other political opponents,<sup>113</sup> although this does

<sup>108</sup> *Op. cit.* footnote 1, par 45 (2008 ODIHR Opinion).

<sup>109</sup> See e.g., Venice Commission, *Opinion on the Draft Amendments to the Constitution of Kyrgyzstan*, 18 December 2002, CDL-AD(2002)033, par 20, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)033-e), where it is considered that "[t]he period for which law-making powers may be turned over to the president, i.e. for a full year, also appears to be too long".

<sup>110</sup> *Op. cit.* footnote 1, par 45 (2008 ODIHR Opinion). See also e.g., Article 38 of the Constitution of the French Republic, whereby "the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law. Ordinances shall be issued in the Council of Ministers, after consultation with the Conseil d'État. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act. They may only be ratified in explicit terms. At the end of the period referred to in the first paragraph hereinabove Ordinances may be amended solely by an Act of Parliament in those areas governed by statute law".

<sup>111</sup> *Op. cit.* footnote 36, par 51 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

<sup>112</sup> Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities*, CDL-AD(2014)011, 14 May 2014, par 11, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

<sup>113</sup> *ibid.* par 185 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

not mean that office-holders should be beyond the reach of the law. This is to be distinguished from the functional immunity/non-liability of deputies (i.e., the protection enjoyed by a parliamentarian for opinions expressed and votes cast in the discharge of parliamentary duties, which should remain even when the mandate ends).<sup>114</sup> At the same time, the “procedural immunity” is generally intended to provide the means of maintaining the substantive functional immunity/non-liability.<sup>115</sup> The Draft Constitution currently does not foresee such immunity/non-liability for deputies. Given the importance of freedom of opinion and speech for elected representatives and for democratic systems in general,<sup>116</sup> it is recommended **to supplement Article 86 to explicitly provide that a deputy shall not be held liable for opinions expressed and votes cast in the discharge of parliamentary duties, while specifying the personal and temporal scope and acts covered by such immunity.**

85. Moreover, the parliamentary inviolability/procedural safeguard mentioned in Article 86 par 2 is not clearly and strictly regulated. Should the current wide immunity/inviolability of deputies be retained, consideration may be given to more strictly circumscribing its material and temporal scope, to avoid abuse by individual deputies. For instance, Article 86 par 2 could then be supplemented **to specify that in case a deputy leaves the Mejlis before the end of tenure, such inviolability ends with his/her mandate**<sup>117</sup> (as mentioned in par 84 *supra*, this would not apply to the functional immunity which extends beyond his/her mandate and should constitute a ground for inadmissibility of any claim before courts). Additionally, the provisions could state that **immunity/inviolability does not apply to preliminary investigations in cases where a deputy is caught in flagrante delicto, or for minor or administrative offences (e.g. traffic violations), or on the contrary where the alleged offence is of a particularly serious nature.**<sup>118</sup> **In both of the latter cases, the categories of crimes in the Criminal Code that this refers to should be clearly specified.**<sup>119</sup>
86. Article 86 par 2 provides that in order to lift such immunity/inviolability, “the consent of the Mejlis” is required. While it is assumed that this implies prior consent, **this provision should specify which type of majority is required to actually lift a deputy’s immunity, and include clear, objective and impartial criteria and procedures for such cases.**<sup>120</sup> **Article 86 should also allow deputies to defend themselves according to basic principles of procedural law before the Mejlis may lift their immunity.**<sup>121</sup> **In any case, a deputy’s immunity should never be lifted when the allegations involve words spoken or written, votes cast or similar acts covered by the functional immunity (see par 84 *supra*).**
87. Article 87 provides for certain incompatibilities between the parliamentary mandate and posts such as those of “[c]abinet member, governor, village leader, judge and prosecutor”. Generally, the primary purpose of incompatibility provisions is to ensure

<sup>114</sup> *ibid.* pars 52-54 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

<sup>115</sup> See e.g., regarding the immunity of judges, Venice Commission, *Amicus Curiae Brief on the Immunity of Judges for the Constitutional Court of Moldova*, CDL-AD(2013)008, 11 March 2013, par 21, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)008-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)008-e).

<sup>116</sup> See *op. cit.* footnote 112, par 174 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

<sup>117</sup> *Op. cit.* footnote 36, par 46 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

<sup>118</sup> *ibid.* par 45 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic). See also *op. cit.* footnote 112, pars 187-189 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

<sup>119</sup> *Op. cit.* footnote 22, par 43 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic). See also *ibid.* pars 187-190 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

<sup>120</sup> *Op. cit.* footnote 36, par 45 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic). See also *ibid.* pars 187-194 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

<sup>121</sup> *ibid.* pars 40 and 169 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

the separation of powers and to guarantee that parliamentarians' public or private occupations do not influence their role as representatives of the nation, to avoid or limit conflicts of interest.<sup>122</sup> Constitutional practice is quite diverse when it comes to this latter issue, often combining rules on incompatibility of functions with some form of obligation to disclose all sources of income, employment and/or assets.<sup>123</sup> On the other hand, private occupations are in principle compatible with parliamentary mandates, and are also viewed as a means of preventing such a mandate from becoming a fully-fledged profession and of enabling professional groups to be represented in parliament; however, certain countries have also in certain cases introduced incompatibilities with private functions to prevent collusion between politics and finance.<sup>124</sup> The drafters should **contemplate introducing the above-mentioned safeguards to prevent possible conflicts of interest. Additionally, the legal consequences of infringements of incompatibility rules, including a possible termination of mandate, should be specified in the Draft Constitution** (see also comments on Article 80 of the Draft Constitution in par 82 *supra*).

88. Article 90 of the Draft Constitution provides that “[t]he procedure for the activity of the Mejlis and its committees and commissions, deputies, their functions and powers, shall be established by law”. Given the President’s extensive right to veto (and potentially to amend legislation if the reference to “objections” in Article 71 par 10 is to be construed as “amendments” to the original parliamentary text),<sup>125</sup> this may *de facto* allow the President to influence the manner in which the legislature regulates its own activities, which is problematic in terms of the separation of powers, as mentioned in the 2008 ODIHR Comments.<sup>126</sup> To avoid this, the drafters could consider excluding the possibility for the President to veto these types of laws in Article 71 par 10 or should specify that **parliamentary rules should be governed by an internal act of legislature** (which should take precedence over any act adopted by the President or the Cabinet); **it is recommended to amend the Draft Constitution accordingly.**<sup>127</sup>
89. On a more general note, the drafters should also ensure that Article 90 indicates more clearly the basic principles governing the legislative process (see par 50 *supra*), as well as the quorum for decision-making. **This should be stated in the Constitution.**<sup>128</sup>
90. Finally, it is noted that a parliament should not only to reflect the will of the people but also the social diversity of the population in terms of gender, language, religion, ethnicity, or other politically significant characteristics, including representation of persons with disabilities, socially excluded and minorities of all kinds.<sup>129</sup> In this context, it is reiterated that women’s representation in the Mejlis currently amounts to only to 25.81 per cent.<sup>130</sup> This falls short of achieving key international targets of increasing the

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<sup>122</sup> See OSCE/ODIHR, *Background Study: Professional and Ethical Standards for Parliamentarians* (2012), page 43-46, available at <http://www.osce.org/odihr/98924?download=true>. See also *op. cit.* footnote 71, par 76 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

<sup>123</sup> *ibid.* pages 43-46 (2012 ODIHR Background Study on Professional and Ethical Standards for Parliamentarians); and par 120 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

<sup>124</sup> *ibid.* page 46 (2012 ODIHR Background Study on Professional and Ethical Standards for Parliamentarians); and par 81 (2013 Venice Commission Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions).

<sup>125</sup> *Op. cit.* footnote 1, par 45 (2008 ODIHR Opinion).

<sup>126</sup> *ibid.* par 47 (2008 ODIHR Opinion).

<sup>127</sup> *ibid.* par 47 (2008 ODIHR Opinion).

<sup>128</sup> *ibid.* par 47 (2008 ODIHR Opinion).

<sup>129</sup> Inter-Parliamentary Union, *Guide on Parliament and Democracy, Parliament in the Twenty-First Century, A Guide to Good Practice*, Chapter 2 (2006), available at <http://www.ipu.org/dem-e/guide/guide-2.htm>.

<sup>130</sup> Inter-Parliamentary Union, *Women in National Parliaments*, situation as of 1 May 2016, available at: <http://www.ipu.org/wmn-e/classif.htm>. See also *op. cit.* footnote 72, page 5 (2013 ODIHR Parliamentary Election Assessment Mission Final Report - Turkmenistan), where the OSCE/ODIHR considered that the Turkmen electoral legal framework included unclear or insufficiently detailed provisions promoting women’s and national minorities’ participation in the electoral process.

representation of women in public institutions.<sup>131</sup> In this context, temporary special measures or other specific measures, including legislative ones, may be necessary to achieve greater gender balance in public bodies and decision-making positions.<sup>132</sup> The electoral system for parliamentary elections in Turkmenistan (i.e., 125 single-mandate constituencies, each returning one deputy under a majoritarian electoral system for a five-year term) may also not be conducive to ensuring a higher level of female political representation.<sup>133</sup>

91. In order to ensure a more balanced representation of men and women in political life, good practices often include relevant constitutional amendments.<sup>134</sup> Hence, the drafters may **consider introducing provisions permitting the use of temporary special measures to promote the participation of women in political and public life.**<sup>135</sup>
92. Similarly, while single member constituencies may provide sufficient representation for minorities, depending on how the constituencies are drawn and the concentration of minority communities, proportional representation might help guarantee adequate minority representation.<sup>136</sup> Hence, when drawing the boundaries of electoral districts, **the concerns and interests of national minorities should be taken into account with a view to assuring their representation;**<sup>137</sup> **the drafters may consider specifying such a principle under Article 78 of the Draft Constitution.**

#### **4.4. The Judiciary**

93. Chapter V of the Draft Constitution deals with the judicial power. Article 100 provides that “[j]udges shall be appointed and dismissed by the President”, which, as also noted

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<sup>131</sup> See e.g., the UN Economic and Social Council’s target to increase the proportion of women in leadership positions to at least 30% by 1995 (Recommendation VI of the UN Economic and Social Council Resolution (E/RES/1990/15), adopted on 24 May 1990), or the strategic objective mentioned in the Beijing Declaration and Platform for Action to integrate women in elective and non-elective public positions in the same proportion and at the same levels as men; see Strategic Objective G.1. “Take measures to ensure women’s equal access to and full participation in power structures and decision-making” of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), par 190 (b), available at <http://www.un.org/womenwatch/daw/beijing/platform/decision.htm>.

<sup>132</sup> See Article 7 of CEDAW which obliges State Parties to “take all appropriate measures to eliminate discrimination against women in the political and public life of the country” and to “ensure to women, on equal terms with men, the right [...] to be eligible for election to all publicly elected bodies” (Article 7 (a)), read together with Article 4 par 1 of CEDAW (Temporary Special Measures) which contemplates the “[a]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women”. See also Committee on the Elimination of Discrimination against Women, *General Recommendation No. 23: Political and Public Life (1997)*, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/4736&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/4736&Lang=en); *General Recommendation No. 25: Article 4 par 1 of CEDAW (Temporary Special Measures)* (2004), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3733&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3733&Lang=en); and *op. cit.* footnote 21, pars 18-19 (2012 CEDAW Committee’s Concluding Observations on Turkmenistan). See also OSCE Ministerial Council Decision No. 07/09 on Women’s Participation in Political and Public Life, adopted by Decision No. 07/09, MC.DEC/07/09 (2 December 2009), available at <http://www.osce.org/mc/40710?download=true>, which refers to “specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies” and “possible legislative measures, which would facilitate a more balanced participation of women and men in political and public life and especially in decision-making” (Articles 1 and 2).

<sup>133</sup> OSCE/ODIHR and Venice Commission, *Joint Opinion on the Draft Law Amending the Electoral Legislation of the Republic of Moldova*, CDL-AD(2014)003, 24 March 2014, par 46, available at <http://www.osce.org/odihr/elections/116887?download=true>. See also European Parliament, *Differential impact of electoral systems on female political representation (1997)*, Directorate-General for Research, Working document, Women’s rights Series, W-10, Electoral Systems, available at [http://www.europarl.europa.eu/workingpapers/femm/w10/4\\_en.htm](http://www.europarl.europa.eu/workingpapers/femm/w10/4_en.htm).

<sup>134</sup> UN Working Group on the Issue of Discrimination against Women in Law and in Practice, *2013 Report*, A/HRC/23/50, 19 April 2013, pars 78-83 and 97, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50_EN.pdf).

<sup>135</sup> *ibid.* par 80 (2013 Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice). See also OSCE/ODIHR, *Compendium of Good Practices for Advancing Women’s Political Participation in the OSCE Region (2016)*, page 60, available at <http://www.osce.org/odihr/224206?download=true>.

<sup>136</sup> OSCE High Commissioner on National Minorities (HCNM), *Explanatory Note to the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999)*, page 24, available at <http://www.osce.org/hcnm/32240?download=true>.

<sup>137</sup> *ibid.* page 24 (OSCE HCNM Explanatory Note to the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999)). See also OSCE, *Existing Commitments for Democratic Elections in OSCE participating States* (October 2003), pars 3.2. and 3.3., available at <http://www.osce.org/odihr/elections/13956>.

- by UN human rights monitoring bodies, may raise concerns with regard to the independence of the judiciary.<sup>138</sup>
94. The Draft Constitution does not specify the selection criteria or broad principles regulating the appointment procedure. While there is no requirement as such that the procedure for appointments to the judiciary be detailed in the Constitution itself,<sup>139</sup> **setting such principles out in the supreme law of the land is paramount for guaranteeing the independence and impartiality of judges and the judiciary *per se* and as such generally recommended.**<sup>140</sup> Similarly, **the basic elements, grounds and procedures for suspension, dismissal or resignation of judges should likewise be stipulated in the Constitution,**<sup>141</sup> **as should the possibility for the judges whose mandate is terminated involuntarily to seek review of this decision by an independent body.**<sup>142</sup>
95. In principle, all decisions concerning the appointment and the professional career of judges should be based on merit, following pre-determined objective criteria set out in law, and open and transparent procedures.<sup>143</sup> **The establishment of an independent judicial council or similar body is generally considered to be an appropriate method to guarantee judicial independence; the composition, appointment or election, powers and independence of such a body should ideally be mentioned in a constitution, and bodies such as these should exercise decisive influence over judicial appointments.**<sup>144</sup> **The drafters should consider introducing such an independent judicial council in the Draft Constitution, with adequate constitutional provisions to guarantee its independence.**
96. As recommended in OSCE/ODIHR's Kyiv Recommendations (2010),<sup>145</sup> in cases where **the final appointment of a judge lies with the President, his/her discretion to appoint should be limited to those candidates nominated by an independent selection body; any refusal to appoint such a candidate should be based on procedural grounds only and would need to be reasoned. Another suggested option is to give the selection body the power to overrule a presidential veto by a qualified majority vote.**<sup>146</sup> It is recommended to discuss these options, and to reflect some of these principles under Chapter V of the Draft Constitution. As far as an independent judicial council or similar body is concerned, a pluralistic composition should be ensured, with a substantial part, if not the majority, of members being judges who should be elected or appointed by their peers.<sup>147</sup>
97. Article 98 expressly states that “[j]udges shall be independent” and that “interference with the work of judges, by whichever side, shall be unacceptable and punishable by

<sup>138</sup> See e.g., *op. cit.* footnote 45, pars 10 and 13 (2012 Committee against Torture's Concluding Observations on Turkmenistan).

<sup>139</sup> See e.g., Venice Commission, *Opinion on the Draft New Constitution of Iceland*, CDL-AD(2013)010, 11 March 2013, par 135, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)010-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)010-e).

<sup>140</sup> See *op. cit.* footnote 11, par 5.12 (OSCE Copenhagen Document (1990)). See also *op. cit.* footnote 35, par 112 (2008 Venice Commission Opinion on the Constitution of Finland).

<sup>141</sup> *ibid.* par 113 (2008 Venice Commission Opinion on the Constitution of Finland).

<sup>142</sup> OSCE/ODIHR, Venice Commission, OSCE Mission to Georgia and HCNM, *Joint Opinion on the Draft Amendments to the Constitution of the Republic of Georgia*, 9 February 2005, par 38, available at <http://www.legislationline.org/documents/id/1945>.

<sup>143</sup> *Op. cit.* footnote 12, pars 21-23 (ODIHR Kyiv Recommendations on Judicial Independence (2010)). See also Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)*, CDL-AD(2010)004, pars 23-32, available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx).

<sup>144</sup> See *op. cit.* footnote 142, par 102 (2005 ODIHR-Venice Commission-OSCE Mission to Georgia-HCNM Joint Opinion on the Draft Amendments to the Constitution of the Republic of Georgia), which states that “[g]iven their crucial role in appointing judges, the composition of the Supreme Council [of the Judiciary], as well as their appointment or election, should be defined in the Constitution”. See also *ibid.* pars 23-32 (2010 Venice Commission Report on the Independence of the Judicial System Part I – The Independence of Judges); and Venice Commission, *Report on Judicial Appointments*, CDL-AD(2007)028, 22 June 2007, par 48, available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2007\)028.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2007)028.aspx).

<sup>145</sup> *Op. cit.* footnote 12, par 23 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).

<sup>146</sup> *ibid.* pars 21-23 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).

<sup>147</sup> *Op. cit.* footnote 22, par 55 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic).



law”. While the reference to judges’ independence is welcome, judges also need to act in a manner that offers sufficient guarantees to exclude legitimate doubt as to their impartiality.<sup>148</sup> Article 98 should therefore be **supplemented to also mention judges’ impartiality**. While the reference to “sides” in this provision could be understood to refer only to parties in law suits, it is assumed that this provision wishes to preclude interference from all external actors, including the executive and the legislature. To clarify this point, it is recommended **to broaden the scope of Article 98 to explicitly cover undue interference by any external actor**.

98. Article 99 provides that “the immunity of judges shall be guaranteed by law”. Also here, it is not clear whether this refers to the non-liability/functional immunity of judges (i.e., non-liability for acts performed in the exercise of their judicial functions) or to the wider concept of “inviolability”/“procedural immunity” (see par 84 *supra*). Overall, the protection of judges from liability for their judicial decisions (functional immunity) is an essential corollary to judicial independence. In particular, it helps ensure that judges can engage in the proper exercise of their functions without their independence being compromised through fear of prosecution or civil action by an aggrieved party, including state authorities.<sup>149</sup> The UN Basic Principles on the Independence of the Judiciary provide that “[w]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.”<sup>150</sup> This should however only cover “lawful” acts performed in their functions and not acts that could objectively be regarded as intentional crimes (e.g., accepting bribes) even if committed in the conduct of their office.<sup>151</sup> It is recommended **to specify in Article 99 that judges shall enjoy functional immunity for acts performed in the exercise of their judicial functions, with the exception of intentional crimes; this should be a ground for inadmissibility of any claim in that respect**.
99. In many countries, “inviolability”/“procedural immunity” is not considered necessary to guarantee judicial independence and judges are liable under civil, criminal and administrative law in the same way as any other citizen.<sup>152</sup> However, in certain countries, such “inviolability”/“procedural immunity” exists to avoid potentially frivolous or false accusations, vexatious or manifestly ill-founded complaints from being brought against a judge in order to exert pressure on him or her.<sup>153</sup> Should the drafters decide to retain such general immunity/“inviolability” in light of the national context in order to avoid such risks, then, the scope of such immunity should be strictly circumscribed. **In any case, the procedure for lifting immunity should include procedural safeguards to protect judicial independence (e.g. the decision to lift**

<sup>148</sup> See UN Special Rapporteur on the independence of judges and lawyers, 2013 Report, A/68/285, 7 August 2013, par 44, available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/68/285>; the UN Bangalore Principles of Judicial Conduct (2002), available at [http://www.unrol.org/files/Bangalore\\_principles.pdf](http://www.unrol.org/files/Bangalore_principles.pdf); and UN HRC, General Comment No. 32 on Article 14: Right to Equality before Courts and Tribunals and to Fair Trial, 23 August 2007, par 19, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en). See also OSCE/ODIHR, *Legal Digest of International Fair Trial Rights* (Warsaw: OSCE/ODIHR, 2012), page 58, available at <http://www.osce.org/odihr/94214?download=true>.

<sup>149</sup> OSCE/ODIHR and Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, par 37, available at <http://www.legislationline.org/documents/id/19099>.

<sup>150</sup> UN Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, par 16, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

<sup>151</sup> *Op. cit.* footnote 149, par 40 (2014 ODIHR-Venice Commission Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic). See also *op. cit.* footnote 143, par 61 (2010 Venice Commission Report on the Independence of the Judicial System Part I – The Independence of Judges).

<sup>152</sup> See e.g., *op. cit.* footnote 115, pars 53-54 (2013 Venice Commission Amicus Curiae Brief on the Immunity of Judges for the Constitutional Court of Moldova).

<sup>153</sup> *ibid.* pars 23-27 and 52 (2013 Venice Commission Amicus Curiae Brief on the Immunity of Judges for the Constitutional Court of Moldova).

**immunity 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.**<sup>154</sup>

100. Article 100 further specifies that legislation will determine judges' terms of office while removal from office prior to the expiration of their term can only be done based on the grounds specified by law. This provision is relatively vague and does not state the conditions, modalities and procedures for judges' removal from office; this may impinge on their overall security of tenure and jeopardize the independence of the judiciary in Turkmenistan. Even if some of these aspects are partially covered in Chapter II of the Law of Turkmenistan "On Court", the overall basic principles pertaining to the status of judges and ensuring the independence of the judiciary should be stated in the Constitution. In principle, "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".<sup>155</sup> A well-defined term of office in the judiciary is also a safeguard against outside pressures and contributes to guaranteeing the independence of the judiciary.<sup>156</sup> The OSCE/ODIHR and the Venice Commission generally favour permanent appointment until retirement, which is also reflected in European practice.<sup>157</sup> It is recommended **to explicitly state under Article 100 that judges are permanently appointed until retirement, unless they are removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties. In particular, the Draft Constitution should specify that early dismissal shall only be permissible exceptionally, in extreme cases, in accordance with fair procedures ensuring objectivity and impartiality, and decisions on removal should be subject to a review by a competent, independent and impartial tribunal established by law.**<sup>158</sup>
101. The Supreme Court is listed under Article 66 as one of the highest state authorities in Turkmenistan. The Draft Constitution specifies that the Chairperson of the Supreme Court is appointed and dismissed by the President with the consent of the Mejlis (Articles 71 par 16 and 81 par 7), that the Supreme Court has the right to legislative initiative (Article 83, see also pars 51-52 *supra*), and that judicial power shall be exercised by the Supreme Court and other courts stipulated by law (Article 97 par 2). As it stands, the Draft Constitution does not further **outline this Court's status and powers**. The drafters should consider **supplementing the Draft Constitution in that respect, even if further details are then provided in other legislation, such as the Law of Turkmenistan "On Court"**.
102. As regards the appointment of the Supreme Court's Chairperson, it is not unusual to grant the executive a role (or even the right to take decisions) in the appointment of

<sup>154</sup> See e.g., *op. cit.* footnote 149, pars 54-62 (2014 ODIHR-Venice Commission Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic).

<sup>155</sup> *Op. cit.* footnote 150, par 12 (1985 UN Basic Principles on the Independence of the Judiciary).

<sup>156</sup> See e.g., UN Special Rapporteur on the independence of judges and lawyers, *2014 Annual Report*, A/HRC/26/32, 28 April 2014, par 83, available at [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A\\_HRC\\_26\\_32\\_ENG.DOC](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_32_ENG.DOC), referring to ECtHR case law which states that "in order to establish whether a body can be considered independent, regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressure and to the question of whether the body presents an appearance of independence".

<sup>157</sup> See also OSCE/ODIHR, *Opinion on the Law concerning the Judicial System, the Supreme Council of the Judiciary, and the Status of Judges in Tunisia*, 21 December 2012, pars 11 (Q) and 32, available at <http://www.legislationline.org/documents/id/17846>. See also *op. cit.* footnote 143, pars 34-38 (2010 Venice Commission Report on the Independence of the Judicial System Part I – The Independence of Judges).

<sup>158</sup> *Op. cit.* footnote 150, pars 17-20 (1985 UN Basic Principles on the Independence of the Judiciary). See also UN HRC, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, par 20, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en), which states that "[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary."

court leadership; at the same time, new constitutional orders tend to introduce more balanced mechanisms for the appointment of all judges and judicial leadership.<sup>159</sup> Generally, the **election of a court chairperson by his/her peers**, the judges of the particular court, seems to be a good option.<sup>160</sup> In case of executive appointment, the 2010 OSCE/ODIHR Kyiv Recommendations specify that this should happen **upon the recommendation of an independent advisory body** (such as a Judicial Council or Qualification Commission), **which the executive body may only reject by reasoned decision.**<sup>161</sup> While the Draft Constitution does give the Mejlis a role in appointing the Chairperson of the Supreme Court, a parliament would not appear to provide the necessary guarantee of independence, nor does the term ‘consent’ imply a proposing role of the Mejlis. For this reason, the drafters should **consider amending the modalities for appointment and dismissal of the Chairperson of the Supreme Court to reflect one of the options proposed above.**

103. Such a supreme judicial body generally plays a key role in a country, by, among others, providing legal certainty, foreseeability, and uniformity in the interpretation and application of laws.<sup>162</sup> It would therefore be advisable for the drafters to further **elaborate in the Draft Constitution the Supreme Court’s competence and key principles pertaining to its status, composition and appointment modalities, roles and responsibilities.** At the same time, while a supreme court should have the authority to set aside or modify judgments of lower courts, it should not supervise them nor issue guidelines, directives, explanations, or resolutions that would be binding on lower court judges.<sup>163</sup>
104. To ensure the Supreme Court’s independence, it is further recommended **to provide its judges, in unequivocal terms, with permanent appointment until retirement.**<sup>164</sup> Moreover, the executive branch should preferably not have the leading role in the process of appointing the judges of the Supreme Court and the right to propose candidates should be held by an independent entity, such as an independent high council for the judiciary if it were to be established (see par 95 *supra*).<sup>165</sup>
105. Overall, **Article 96 par 2** adopts a rather narrow meaning of “judicial power” which “shall be aimed to guard the citizens’ rights and freedoms, [and] state and public interests protected under the laws”. This provision **should be expanded to cover not only citizens’ rights and freedoms but also those of any individual. Moreover, judicial power should also more specifically encompass the settling of criminal matters, disputes between individuals and between individuals and the state/state organs, as well as the review of decisions of administrative bodies** (see pars 34-37 *supra*). The scope of Article 96 par 2 should be broadened accordingly.
106. Finally, it is noted that the Draft Constitution does not set out a general framework on the overall court system in Turkmenistan. As this is a very relevant structural part of each state, such a framework (without going necessarily the individual elements of court

<sup>159</sup> *Op. cit.* footnote 36, par 76 (2015 ODIHR-Venice Commission Joint Opinion on Draft Amendments to the Constitution of the Kyrgyz Republic).

<sup>160</sup> *Op. cit.* footnote 12, par 16 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).

<sup>161</sup> *ibid.* par 16 (ODIHR Kyiv Recommendations on Judicial Independence (2010)).

<sup>162</sup> See e.g., Venice Commission, *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, CDL-AD(2012)014, 18 June 2012, pars 64-65, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)014-e).

<sup>163</sup> *Op. cit.* footnote 12, par 35 (ODIHR Kyiv Recommendations on Judicial Independence (2010)); and *op. cit.* footnote 143, pars 70-71 (2010 Venice Commission Report on the Independence of the Judicial System Part I – The Independence of Judges).

<sup>164</sup> See e.g., *op. cit.* footnote 52, par 86 (2010 Venice Commission Final Opinion on Draft Amendments to the Constitution of Georgia).

<sup>165</sup> *ibid.* par 87 (2010 Venice Commission Final Opinion on Draft Amendments to the Constitution of Georgia).

organization) should be provided at the constitutional level; the drafters should consider supplementing the Draft Constitution accordingly.<sup>166</sup>

#### **4.5. The Prosecution Service**

107. Section VI of the Draft Constitution deals with the Prosecutor's Office. Article 130 par 1 defines the function of the prosecutor's office which consists of "[t]he supervision of precise and uniform enforcement of the laws of Turkmenistan, acts of the President and Cabinet of Ministers, resolutions of the Mejlis". Articles 130 par 2 and 131 further states that the Prosecutor "shall participate in court proceedings on grounds of and in the manner prescribed by law" and that "[t]he Prosecutor's office shall supervise the legality of operational and criminal investigations". This reveals, from the very outset, that the prosecution service of Turkmenistan is still construed, first and foremost, as an organ of "supervision", rather than of criminal prosecution.
108. Such a "supervisory" prosecution model is rather prevalent among a number of post-Soviet states, and is in fact reminiscent of the old Soviet *prokuratura* model.<sup>167</sup> At the same time, over the last decades, many post-communist democracies have sought to deprive their prosecution services of extensive powers in the area of general supervision, by transferring such prerogatives over to courts and to national human rights institutions (such as an Ombudsperson).<sup>168</sup> The rationale for such reforms was to abolish what was considered to be an over-powerful and largely unaccountable prosecution service.<sup>169</sup> Maintaining the prosecution service as it is in the Turkmen Constitution could mean retaining a system where vast powers are vested in only one institution, which poses a serious threat to the separation of powers in the state and to the rights and freedoms of individuals.<sup>170</sup> In particular, the prosecution service's wide supervisory powers have the potential to encroach upon the independence of the judiciary. In this context, it is noted that in principle, it should be up to a supreme judicial body to ensure uniformity in the interpretation and application of laws in a country (see also par 103 *supra*).<sup>171</sup>
109. The maintenance of such wide prosecutorial supervisory powers has been repeatedly criticized by international and regional organizations, including the OSCE/ODIHR and the Venice Commission. In numerous opinions on this topic,<sup>172</sup> OSCE/ODIHR and the Venice Commission have recommended, for the above reasons, that the supervisory role of prosecutors be abandoned and that their hitherto very broad roles be restricted to the

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<sup>166</sup> Venice Commission, *Opinion on the regulatory concept of the Constitution of the Republic of Hungary*, CDL-INF(1996)002, par 32, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(1995\)073rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(1995)073rev-e); and *op. cit.* footnote 142, par 102 (2005 ODIHR-Venice Commission-OSCE Mission to Georgia-HCNM Joint Opinion on the Draft Amendments to the Constitution of the Republic of Georgia).

<sup>167</sup> See e.g., OSCE/ODIHR, *Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic*, 18 October 2013, par 13, available at <http://www.legislationline.org/documents/id/18547>.

<sup>168</sup> *ibid.* par 13 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic). See also OSCE/ODIHR, Venice Commission and DGI, *Joint Opinion on the Draft Law on the Prosecution Service of Moldova*, 23 March 2015, par 42, available at <http://www.legislationline.org/documents/id/19747>.

<sup>169</sup> See e.g., *ibid.* par 13 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic).

<sup>170</sup> See e.g., *op. cit.* footnote 168, par 42 (2015 ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova).

<sup>171</sup> See e.g., *op. cit.* footnote 162, pars 64-65 (2012 Venice Commission Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina).

<sup>172</sup> See, for instance, *op. cit.* footnote 168 (2015 ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova); *op. cit.* footnote 167 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic); Venice Commission, *Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine*, CDL-AD-(2012)019, 15 October 2012, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)019-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)019-e); and Venice Commission, *Opinion on the Federal Law on the Prokuratura (prosecutor's office) of the Russian Federation*, CDL-AD(2005)014, 13 June 2005, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)014-e).

- criminal sphere.<sup>173</sup> This was also one of the recommendations made by the OSCE/ODIHR on a previous Draft Constitution of Turkmenistan in its 2008 Opinion.<sup>174</sup>
110. It is therefore recommended that the drafters consider **reforming their prosecution service, by removing its general supervisory powers and confining its powers to the field of criminal prosecution.**<sup>175</sup> This would not only align the service with international standards and good practices, but would also help increase its efficiency.<sup>176</sup> At a minimum, “appropriate steps should be taken to ensure that this role is carried out with special regard to the protection of human rights and fundamental freedoms and in full accordance with the rule of law, in particular with regard to the right to a fair trial [...]”<sup>177</sup> Any related powers should be defined in a clear and restrictive manner and be subject to judiciary control.<sup>178</sup> **Article 133 should also set out that prosecutors are bound by the constitution and laws.**
111. In any case, it would be advisable to **supplement Section VI by further specifying the functions and powers of prosecutors in the context of criminal proceedings,** including in relation to the investigation and prosecution of crimes; supervision of investigations, participation in criminal and, subject to certain conditions, in civil proceedings before courts.
112. Moreover, prosecutors are required to perform their functions impartially and independently from external influence, be it from the executive, the media or interest groups.<sup>179</sup> The drafters should also **explicitly refer in the Draft Constitution to the principle of prosecutorial independence or autonomy from external influence and interference from any sources.**<sup>180</sup>
113. Articles 71 par 16 and 81 par 7 of the Draft Constitution imply that the Prosecutor General is appointed and dismissed by the President, with the consent of the Mejlis. In this context, it is unclear whether the “consent of the Mejlis” is provided by simple majority of the deputies present at the session or by the majority of all elected deputies, or by a qualified majority thereof; even if the voting modalities of the Mejlis are detailed in other legislation, these basic elements should be clarified in the text of the Draft Constitution.<sup>181</sup> It is further noted that the procedures for the appointment and dismissal of the Prosecutor General are fully controlled by the executive and legislative powers, with no involvement whatsoever by any professional, non-political bodies; a more pluralist, transparent and inclusive approach for his/her appointment could help

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<sup>173</sup> See Venice Commission, *Report on the European Standards As Regards the Independence of the Judicial System: Part II – the Prosecution Service* (Study N° 494 / 2008, adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010), par 73, available at [http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic\\_reform/europeanStandards\\_en.pdf](http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf). See also e.g., *ibid.* pars 39-44 (2015 ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova); and *ibid.* par 15 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic). See also Resolution 1896 (2012) of the Parliamentary Assembly of the Council of Europe on “the honouring of obligations and commitments by the Russian Federation”, pars 25.4-25.5, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19116&lang=en>.

<sup>174</sup> *Op. cit.* footnote 1, pars 7 (o) and 50 (2008 ODIHR Opinion).

<sup>175</sup> See similar recommendations made in e.g., *op. cit.* footnote 168, pars 22 and 40-44 (2015 ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova); and *op. cit.* footnote 167, par 15 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic).

<sup>176</sup> *ibid.* par 15 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic).

<sup>177</sup> See e.g., Council of Europe Committee of Ministers, *Recommendation on the role of public prosecutors outside the criminal justice system*, Recommendation CM/Rec(2012)11, 19 September 2012, available at [https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2012\)11E\\_public%20prosecutors.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2012)11E_public%20prosecutors.pdf).

<sup>178</sup> *Op. cit.* footnote 168, par 43 (2015 ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova).

<sup>179</sup> *Op. cit.* footnote 173, par 73 (2010 Venice Commission Report on the Independence of the Judicial System Part II – Prosecution Service). See also OSCE/ODIHR, HDIM Annotated Agenda, 15 September 2015, pages 14-15, available at <http://www.osce.org/odihr/179066?download=true>.

<sup>180</sup> See e.g., *op. cit.* footnote 168, par 33 (2015 ODIHR-Venice Commission-DG I Joint Opinion on the Draft Law on the Prosecution Service of Moldova).

<sup>181</sup> *Op. cit.* footnote 167, par 21 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic).

ensure that such proceedings are fair and impartial.<sup>182</sup> For instance, and as recommended by the OSCE/ODIHR and the Venice Commission when reviewing similar provisions, **consideration may be given to creating a commission of appointment comprised of persons who would be respected by the public (professional non-political experts) and trusted by the Government<sup>183</sup> or of a Prosecution Council.<sup>184</sup>** The latter would be a representative, professional, non-political and self-governance body of the prosecution service as a whole, entitled to make proposals for the appointment and dismissal of prosecutors, including the Prosecutor General; general principles of balanced ethnic, regional and gender representation should also be duly considered to ensure the representativeness of such a body.<sup>185</sup>

114. Accordingly, Section VI of the Draft Constitution should **specify basic rules for the appointment or election of the Prosecutor General, eligibility criteria and incompatibilities, the rules pertaining to functional immunity (as opposed to general immunity)<sup>186</sup> and accountability as well as the duration and termination of mandate. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period.<sup>187</sup>** In light of these recommendations, Article 134, which provides that “[c]ompetences, order of formation and activity of public prosecution bodies shall be determined by law”, should also be revised.

#### ***4.6. The Commissioner for Human Rights of Turkmenistan***

115. The Draft Constitution introduces a new public body, the Commissioner for Human Rights of Turkmenistan (hereinafter “the Commissioner”), which is understood as the entity intended to become the national human rights institution (hereinafter “NHRI”) of Turkmenistan. NHRIs are independent bodies with a mandate to protect and promote human rights and constitute a “key component of effective national human rights protection systems and indispensable actors for the sustainable promotion and protection of human rights at the country level”.<sup>188</sup> The willingness to introduce a first-ever NHRI in Turkmenistan is very welcome and is a key first step in addressing recommendations made to Turkmenistan by various human rights monitoring bodies.<sup>189</sup>

<sup>182</sup> See *op. cit.* footnote 173, pars 84-87 (2010 Venice Commission Report on the Independence of the Judicial System Part II – Prosecution Service). See also *op. cit.* footnote 179, pars 14-15 (2015 OSCE/ODIHR HDIM Annotated Agenda); and Section 6 e), on Empowerment, of the Standards of Professional Responsibility and Statement of the essential duties and rights of prosecutors, adopted by the International Association of Prosecutors (23 April 1999), available at [http://www.iap-association.org/getattachment/34e49dfe-d5db-4598-91da-16183bb12418/Standards\\_English.aspx](http://www.iap-association.org/getattachment/34e49dfe-d5db-4598-91da-16183bb12418/Standards_English.aspx). See also *op. cit.* footnote 167, par 22 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic).

<sup>183</sup> *ibid.* pars 34-35 (2010 Venice Commission Report on the Independence of the Judicial System Part II – Prosecution Service).

<sup>184</sup> *Op. cit.* footnote 167, pars 22-23 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic). This has recently been done, for instance, in Poland, Slovenia, Croatia, Moldova, Spain and other countries.

<sup>185</sup> *ibid.* pars 22-23 (2013 ODIHR Opinion on Key Legal Acts Regulating the Prosecution Service of the Kyrgyz Republic). This has recently been done, for instance, in Poland, Slovenia, Croatia, Moldova, Spain and other countries. See also *op. cit.* footnote 172 (2012 Venice Commission Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine).

<sup>186</sup> As recommended by the Venice Commission, “[p]rosecutors should not benefit from a general immunity”; see *op. cit.* footnote 173, par 87 (17) (2010 Venice Commission Report on the Independence of the Judicial System Part II – Prosecution Service).

<sup>187</sup> *ibid.* par 87 (4) (2010 Venice Commission Report on the Independence of the Judicial System Part II – Prosecution Service).

<sup>188</sup> See UN High Commissioner for Human Rights, 2007 Annual Report, A/62/36, par 15, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/461/09/PDF/N0746109.pdf?OpenElement>.

<sup>189</sup> See in particular Recommendations 113.22 to 113.29 of the Report of the Working Group on the Universal Periodic Review (UPR) for Turkmenistan, A/HRC/24/3, 5 July 2013, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/154/49/PDF/G1315449.pdf?OpenElement>; and the Views on conclusions and/or recommendations, voluntary commitments and replies presented by Turkmenistan (including list of UPR recommendations accepted by Turkmenistan), A/HRC/24/3/Add.1, 4 September 2013, available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session16/TM/A\\_HRC\\_24\\_3\\_Add.1\\_Turkmenistan\\_E.doc](http://lib.ohchr.org/HRBodies/UPR/Documents/Session16/TM/A_HRC_24_3_Add.1_Turkmenistan_E.doc).

116. At the same time, the Draft Constitution does not elaborate on the institutional status and competence assigned to this new entity, and does not provide the required safeguards to guarantee its institutional independence in line with the UN Principles relating to the status of national institutions for the promotion and protection of human rights (hereinafter “the Paris Principles”).<sup>190</sup>
117. Although part of the state apparatus, NHRIs’ independence from the executive, legislative and judicial branches ensures that they are able to fulfil their mandate to protect individuals from human rights violations, particularly when such violations are committed by public authorities or bodies.<sup>191</sup> Under Article 71 par 16 of the Draft Constitution, the President shall appoint and dismiss the Commissioner with the consent of the Mejlis; Article 81 par 7 further states that the Mejlis considers the recommendations of the President on issues related to the appointment and dismissal of the Commissioner.
118. First, such an appointment and dismissal procedure clearly has an impact on the Commissioner’s perceived independence from the executive, which is as important as its actual independence.<sup>192</sup> The Commissioner does not only need to be independent, he or she must also be “seen” to be independent and the Commissioner’s appointment/dismissal by the executive may be harmful in that respect, all the more given that one of the tasks of an NHRI should also be to supervise executive state bodies.<sup>193</sup> Similarly, the executive should not be able to dismiss NHRI leadership before the expiry of its term of office, without any specific reasons given and without the explicit benefit of effective functional immunity to contest such dismissal; such powers would be incompatible with the independence of an NHRI.<sup>194</sup> The drafters should therefore **reconsider and specify in greater detail the procedures, conditions and modalities for the appointment and dismissal of the Commissioner, to ensure its independence from the executive, legislative and judicial branches** (see the recommendations provided in that respect in pars 120-122 *infra*).
119. Pursuant to section A.2 of the Paris Principles, “[a] national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional *or* legislative text, specifying its composition and its sphere of competence”. Given the crucial role that national human rights institutions play in the domestic human rights protection system and to protect them from political fluctuation, it is generally advisable that key provisions outlining an NHRI’s competences be constitutionally enshrined.<sup>195</sup> As noted by the Venice Commission, this is preferable to regulating the issue in ordinary legislation or statutes to ensure “the consolidation and strengthening of this

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<sup>190</sup> Defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7-9 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>191</sup> See e.g., OSCE/ODIHR, *Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland*, 16 February 2016, par 11, available at <http://www.legislationline.org/documents/id/19896>.

<sup>192</sup> See General Observation 2.5. in the latest revised General Observations issued by the Sub-Committee on Accreditation (hereinafter “the SCA”) and adopted by the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (hereinafter “the ICC”) at its meeting in Geneva on 6-7 May 2013, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20GENERAL%20OBSERVATIONS%20ENGLISH.pdf>.

<sup>193</sup> Venice Commission, *Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro*, CDL-AD(2009)043 , 13 October 2009, par 12, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)043-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)043-e).

<sup>194</sup> *Op. cit.* footnote 192, Justification to General Observation 2.1 (ICC General Observations (2013)).

<sup>195</sup> Venice Commission, *Compilation of Venice Commission Opinions concerning the Ombudsman Institution*, CDL-PI(2016)001, 5 February 2016, Section 1 on “Constitutional guarantee for the institution of the Ombudsman”, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)001-e). See also *op. cit.* footnote 91, pars 80-82 (2013 Venice Commission Opinion on the Compatibility with Constitutional Principles and the Rule of Law of Actions taken by the Government and Parliament of Romania); and Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, *Joint Opinion on the Draft Law on the Ombudsman of Serbia*, 4 December 2004), CDL-AD(2004)041, 6 December 2004, par 9, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2004\)041-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)041-e).

institution and its efficiency, [...] its stability and its independence, as well as [...] its appearance of independence and impartiality”.<sup>196</sup>

120. In light of the above, drafters **should supplement Section III of the Draft Constitution with a new Chapter on the Commissioner for Human Rights of Turkmenistan**. This should **specify the institution’s role, functions, powers, funding and lines of accountability, as well as the appointment mechanism for, and terms of office of the Commissioner**.<sup>197</sup> In particular, also to address some of the main concerns raised by human rights monitoring bodies,<sup>198</sup> such chapter should include, among others:

- a clear statement regarding **the independence of the Commissioner**;
- a provision **specifying the eligibility requirements**, including the professional qualifications of the candidate (e.g., a certain number of years of experience in the human rights field, or other professional pre-conditions);
- a clear **guarantee of functional immunity**,<sup>199</sup> stating that the Commissioner as well as his or her staff shall be protected from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities;<sup>200</sup>
- a **clear, transparent and participatory selection and appointment process** of the Commissioner and other Senior leadership that promotes merit-based selection and ensures pluralism;<sup>201</sup>
- a **clear and broad mandate**,<sup>202</sup> **including both the promotion and the protection of human rights**, potentially also on issues related to the equality of women and men<sup>203</sup> and including a role as a national preventive mechanism the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments (hereinafter “the OPCAT”);<sup>204</sup> such institutions should ideally also be **vested with the competence to hear and consider complaints and petitions alleging human rights violations**;<sup>205</sup>
- an **independent and objective dismissal** process, similar to that accorded to members of other independent State agencies, with the grounds for dismissal clearly defined and appropriately confined to only those actions which impact adversely on the capacity of the member to fulfil their mandate;<sup>206</sup> and

<sup>196</sup> Venice Commission, *Opinion on the Law on the People’s Advocate (Ombudsman) of the Republic of Moldova*, CDL-AD(2015)017, 23 June 2015, par 22, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)017-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)017-e).

<sup>197</sup> *Op. cit.* footnote 192, General Observation 1.1. (ICC General Observations (2013)).

<sup>198</sup> UN HRC, *Concluding Observations on Turkmenistan*, CCPR/C/TKM/CO/1, 19 April 2012, par 7, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/TKM/CO/1&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/TKM/CO/1&Lang=En); *op. cit.* footnote 21, pars 16-17 (2012 CEDAW Committee’s Concluding Observations on Turkmenistan); UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations on Turkmenistan*, E/C.12/TKM/CO/1, 13 December 2011, par 7, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/TKM/CO/1&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/TKM/CO/1&Lang=En); and *op. cit.* footnote 45, par 12 (2012 Committee against Torture’s Concluding Observations on Turkmenistan). See also *op. cit.* footnote 189, Recommendations 113.22 to 113.29 (2013 UPR Report for Turkmenistan), which were accepted by Turkmenistan.

<sup>199</sup> *ibid.* General Observation 2.3. (ICC General Observations (2013)).

<sup>200</sup> *Op. cit.* footnote 191, pars 10 A (3) and 30-40 (2016 ODIHR Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland).

<sup>201</sup> *Op. cit.* footnote 192, General Observation 1.8. (ICC General Observations (2013)).

<sup>202</sup> *ibid.* General Observation 1.2. (ICC General Observations (2013)).

<sup>203</sup> As expressly recommended to Turkmenistan by the Committee on the Elimination of Discrimination against Women; see *op. cit.* footnote 21, par 17 (2012 CEDAW Committee’s Concluding Observations on Turkmenistan).

<sup>204</sup> *Op. cit.* footnote 45, par 7 (2012 Committee against Torture’s Concluding Observations on Turkmenistan).

<sup>205</sup> *ibid.* par 7 (2012 Committee against Torture’s Concluding Observations on Turkmenistan).

<sup>206</sup> *Op. cit.* footnote 192, General Observation 2.1. (ICC General Observations (2013)).



- the **duty of the state to ensure the financial independence of this body, including adequate financial resources;**<sup>207</sup> this would also involve guaranteed sufficient human, financial and material resources to allow such an institution to properly exercise its functions as a human rights promotion and protection mechanism.
121. Additionally, pluralism of the institution should be ensured, which for a single-head institution would imply ensuring pluralism through staff that are representative of the diverse segments of society.<sup>208</sup> This should, however, in no way impinge on the ability of the leadership of the NHRI to retain full control over staffing issues, which should be free from outside influence.
122. Finally, the drafters may **consider including the Commissioner for Human Rights in Article 66, which lists the highest state authorities in Turkmenistan; this would symbolically enhance the importance and relevance of such institution.** This would be an important and essential element to address some of the main concerns raised by human rights monitoring bodies.<sup>209</sup>

#### 4.7. Local State and Self-Government Bodies

123. At the outset, the OSCE/ODIHR would like to reiterate that the current section only provides some key general comments and recommendations and does not purport to provide a comprehensive analysis of the legal and institutional framework pertaining to local governance in Turkmenistan.
124. Chapter VI regulates local state government, with local state representative bodies (Halk Maslahatys) established at the provincial and district levels, whose members are elected by the citizens. Section IV regulates local self-government competencies over a specific administrative-territorial unit as defined by law (Article 23), with members of representative bodies (Gengeshes) also elected by citizens. Both types of representative bodies have the same legitimacy, as they are both composed of elected members. It must be noted that the division of tasks and responsibilities between the Halk Maslahatys and Gengeshes listed respectively in Article 111 and Article 118 tend to overlap<sup>210</sup> and that the relationship between the two categories of bodies is not always clear. In this context, Article 117 states that their mutual relations shall be established by law. It would, however, be helpful **to specify the key tasks and responsibilities of both types of bodies in the Draft Constitution, along with the requisite safeguards such as subsidiarity, autonomy and independence, as appropriate,** and as also recommended in pars 125-127 *infra*.
125. Article 7 of the Draft Constitution states that “[l]ocal self-government shall be acknowledged and guaranteed [...] [and] be independent within the limits of its competence”. At the same time, the Draft Constitution does not outline the **principle of local self-government in detail, i.e., the right and the ability of the said local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local**

<sup>207</sup> *ibid.* General Observation 1.10. (ICC General Observations (2013)).

<sup>208</sup> *ibid.* General Observation 1.8. (ICC General Observations (2013)).

<sup>209</sup> *Op. cit.* footnote 198, par 7 (2012 UN HRC’s Concluding Observations on Turkmenistan) and par 7 (2011 CESCR’s Concluding Observations on Turkmenistan). See also *op. cit.* footnote 21, pars 16-17 (2012 CEDAW Committee’s Concluding Observations on Turkmenistan); *op. cit.* footnote 45, par 12 (2012 Committee against Torture’s Concluding Observations on Turkmenistan); and *op. cit.* footnote 189, Recommendations 113.22 to 113.29 (2013 UPR Report for Turkmenistan), which were accepted by Turkmenistan.

<sup>210</sup> See e.g., issues pertaining to budget, the maintenance of public order, and issues related to economic, cultural and social development.

**population.**<sup>211</sup> The absence of an explicitly stated/defined general principle of local self-government may in practice allow local state governments to take decisions or intervene in areas of local administration, which are actually under the mandate of the local self-governing bodies.<sup>212</sup> It is thus recommended **to supplement Article 7 or Section IV accordingly.**

126. **Additionally, the Draft Constitution should explicitly state that local self-government bodies shall not be subject to administrative supervision by state authorities, except with respect to the constitutionality and legality of their actions where local self-government bodies are exercising their independent (non-delegated) powers listed in Article 118 par 1 of the Draft Constitution.**<sup>213</sup> With respect to the delegated powers mentioned in Article 118 par 3, it is generally considered that administrative supervision may be exercised not only with regard to constitutionality and legality, but also with regard to expediency (i.e., compliance with the rules, criteria and standards determined by the central level in the general interest).<sup>214</sup>
127. The Draft Constitution should also **introduce the principle of subsidiarity (i.e., each level of organisation must receive as many powers as it is capable of exercising satisfactorily) as one of the bases of a functioning public administration, to reinforce and protect local autonomy.**<sup>215</sup>
128. It is welcome that the newly introduced paragraph 3 of Article 118 specifies that any delegation of state powers to the local self-government shall be accompanied by the necessary material and financial means for their realization. It is also positive that Article 118 par 1 (3) provides for the power of Gengeshes to “set local taxes and fees, and their treatment (administration)” which should contribute to their financial autonomy, providing that they are bound in their determination by the national law.<sup>216</sup> At the same time, setting “local taxes and fees, and their treatment (administration)” should still take place within the general framework set forth by law.<sup>217</sup> In addition to the necessary material and financial means for the execution of delegated state powers, **the principle of financial support by the State for the discharge of non-delegated/own powers of local self-government authorities should also be expressly stated in the Draft Constitution.**<sup>218</sup>

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<sup>211</sup> See e.g., *European Charter of Local Self-Government*, 15 October 1985, ETS No. 122, Article 3 (1), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a088>. See also Venice Commission, *Compilation of Venice Commission Opinions concerning Constitutional and Legal Provisions for the Protection of Local Self-Government*, CDL-PI(2016)002, 15 March 2016, Section I on “Constitutional guarantees for local self-government”, Section I “Constitutional guarantees for local self-government” on pages 4-10, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)002-e).

<sup>212</sup> *Op. cit.* footnote 109, par 41 (2002 Venice Commission Opinion on the Draft Amendments to the Constitution of Kyrgyzstan).

<sup>213</sup> Venice Commission, *Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia*, CDL-INF(2001)015-e, 13 July 2001, page 6, available at [http://www.venice.coe.int/webforms/documents/CDL-INF\(2001\)015-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-INF(2001)015-e.aspx).

<sup>214</sup> *Op. cit.* footnote 211, sub-section B on “The principle of subsidiarity” on pages 7-8 (2016 Venice Commission’s Compilation of Opinions concerning Constitutional and Legal Provisions for the Protection of Local Self-Government). See also e.g., *op. cit.* footnote 211, Article 8 (1985 European Charter of Local Self-Government).

<sup>215</sup> Venice Commission, *Opinion on the Draft Revision of the Constitution of Romania*, CDL-AD(2003)004, 18 March 2003, page 7, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2003\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2003)004-e); and *Opinion on the Draft Constitutional Law on changes and amendments to the Constitution of Georgia (Chapter VII - Local Self-Government)*, CDL-AD(2010)008, 15 March 2010, par 48, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)008-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)008-e).

<sup>216</sup> Venice Commission, *Second Opinion on the Draft Amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16) of the Republic of Armenia*, CDL-AD(2015)038, 28 October 2015, par 60, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)038-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)038-e).

<sup>217</sup> See e.g., *op. cit.* footnote 211, Article 9 (3) (1985 European Charter of Local Self-Government).

<sup>218</sup> *Op. cit.* footnote 211, sub-section C on the “Adequacy between powers and financial resources” on pages 8-10 (2016 Venice Commission’s Compilation of Opinions concerning Constitutional and Legal Provisions for the Protection of Local Self-Government).

#### 4.8. Central Commission for Elections and Referenda

129. Article 71 par 12 of the Draft Constitution puts the President in charge of forming a Central Commission for Elections and Referenda and for changing its composition. In principle, the administration of democratic elections requires that election administration commissions/bodies are independent and impartial<sup>219</sup> and this should be guaranteed by the Constitution. This is important given that election administration bodies make and implement key decisions that can influence the outcome of elections. The procedures for creating election commissions/bodies as well as the methods of selecting and appointing their members differ greatly across the OSCE region; however, the majority of relevant laws are guided by the ultimate need to ensure that such bodies are able to carry out their duties in an independent and impartial manner; only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the entire electoral process.<sup>220</sup>
130. Hence, and as recommended in the 2008 ODIHR Opinion,<sup>221</sup> the drafters **should consider other appointment modalities (e.g., involving, in addition to the President, other institutions such as the Mejlis or certain independent bodies) according to the specifics of the Turkmen institutional system**, in a manner that ensures the independence and impartiality of the Central Commission for Elections and Referenda. Moreover, the independence and impartiality of this body should be stated explicitly in the Draft Constitution.<sup>222</sup> In addition, the appointment of commissioners should take into account gender and diversity considerations.<sup>223</sup>

### 5. Human Rights and Fundamental Freedoms

#### 5.1. General Comments

131. Section II of the Draft Constitution includes a catalogue of human rights and fundamental freedoms, which contains some new provisions. These include, in particular, new articles with respect to the protection of the rights to security and liberty, and to a fair trial (Articles 34 to 36 and 63) and the right to the protection of private life (Article 38), along with express references to economic, social and cultural rights (Articles 5, 47 and 48). At the same time, it is noted that certain human rights (the **freedom of the press and media**,<sup>224</sup> the **right to freedom of thought and conscience**,<sup>225</sup> the **right to form and join trade unions**,<sup>226</sup> as well as the **right to strike**<sup>227</sup>) are not mentioned in the Draft Constitution (see also pars 165, 172 and 174

<sup>219</sup> See UN HRC, General Comment No. 25 on Article 25 of the ICCPR, 27 August 1996, par 20, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en), which provides that: “An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant”.

<sup>220</sup> *Op. cit.* footnote 137, Section 4 (OSCE Existing Commitments for Democratic Elections in OSCE participating States (2003)). See also Venice Commission, *Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report*, 18-19 October 2002, par 68, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e).

<sup>221</sup> *Op. cit.* footnote 1, par 49 (2008 ODIHR Opinion).

<sup>222</sup> *Op. cit.* footnote 137, Section 4 (OSCE Existing Commitments for Democratic Elections in OSCE participating States (2003)).

<sup>223</sup> *Op. cit.* footnote 72, page 8 (2013 ODIHR Parliamentary Election Assessment Mission Final Report - Turkmenistan).

<sup>224</sup> OSCE Copenhagen 1997 (Annex 1: Permanent Council Decision No. 193, Mandate of the OSCE Representative on Freedom of the Media); and OSCE Lisbon 1996 (Summit Declaration), par 9, which states that “[f]reedom of the press and media are among the basic prerequisites for truly democratic and civil societies”. See also *op. cit.* footnote 219, par 25 (UN HRC General Comment No. 25 (1996)), where it is stated that “[i]n order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”

<sup>225</sup> Article 18 par 1 of the ICCPR.

<sup>226</sup> Article 22 par 1 of the ICCPR.

<sup>227</sup> Article 8 par 1 (d) of the ICESCR.

*infra*). The Draft Constitution should be supplemented to include references to these rights, to ensure the full enjoyment of all human rights and freedoms in Turkmenistan, as also recommended by international human rights monitoring bodies.<sup>228</sup>

*5.1.1. Citizens' v. Individuals' Human Rights and Fundamental Freedoms and Legal Persons as Right-Holders*

132. The title of Section II, which currently only refers to the “Rights, Freedoms and Duties of Citizens of Turkmenistan”, has been changed to the “Rights, Freedoms and Duties of *Persons and* Citizens of Turkmenistan”. Certain provisions that currently refer only to “citizens” have been amended to cover “everyone”<sup>229</sup> (which is welcome), while others refer to both “a person and a citizen”.<sup>230</sup> At the same time, a number of provisions of the Draft Constitution continue to grant certain rights exclusively to “citizens” instead of “everyone” or “all individuals”. In this context it is noted, as also specified in Article 25 of the ICCPR, that certain rights may apply only to citizens, e.g., the right to take part in the conduct of public affairs, to vote and to be elected, and to access public services. On the other hand, guarantees of fundamental rights and freedoms should apply to everyone, and not just to citizens.<sup>231</sup> Thus, and although Article 11 par 1 of the Draft Constitution states that foreign national and stateless persons shall enjoy the same rights and freedoms and bear the same responsibilities as citizens, it would be advisable to consolidate the wording of key provisions,<sup>232</sup> which currently refer to citizens, a person, everyone or individuals. These different terms **should be replaced by the term “everyone” throughout the Draft Constitution,**<sup>233</sup> **except in cases where this involves the above-mentioned rights directly linked to citizenship.**<sup>234</sup>
133. On the other hand, in the case of Article 52 par 1, which includes the right to *free* use of the network of public health institutions, there may be a legitimate interest of the state to limit such free services to citizens, although recent studies show that overall, this may not necessarily be advantageous for the state from an economic perspective.<sup>235</sup> At the

<sup>228</sup> See in particular *op. cit.* footnote 189 (2013 UPR Report for Turkmenistan).

<sup>229</sup> These include new Article 42 (current Article 28) on freedom of opinion and expression, and access to information; and new Article 60 (current Article 43) on guarantee to judicial protection “of honour and dignity, rights and freedoms as stipulated by the Constitution and laws” and right to appeal.

<sup>230</sup> See e.g., Article 8 par 3 (invalidity of legal acts affecting the rights and freedoms of a person and a citizen), Article 25 (guarantee of rights and freedoms of a person and a citizen by the Constitution and laws), Article 27 (direct applicability of rights and freedoms) and Article 28 (equality before the law).

<sup>231</sup> See e.g., Venice Commission, *Opinion on the Draft Law on the Review of the Constitution of Romania*, CDL-AD(2014)010, 24 March 2014, par 49, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)010-e); *Opinion on the Constitution of Bulgaria*, CDL-AD(2008)009, 31 March 2008, pars 55-57, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)009-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)009-e).

<sup>232</sup> See e.g., *ibid.* pars 55-57 (2008 Venice Commission Opinion on the Constitution of Bulgaria).

<sup>233</sup> Particularly Article 4 par 2 (state protection of the life, honour, dignity and freedom, personal inviolability, natural and inalienable rights), Article 21 (use of native language, see also comments on the rights of national minorities in pars 188-191 *infra*), Article 39 (freedom of movement and right to choose place of residence, guaranteed to everyone under Article 12 of the ICCPR), Article 43 (freedom of peaceful assembly, guaranteed to everyone under Article 21 of the ICCPR), Article 44 (freedom of association, guaranteed to everyone under Article 22 of the ICCPR), Article 48 (right to private property, stated in Article 17 of the Universal Declaration of Human Rights as applying to everyone), Articles 49 and 50 (right to work and chose profession, and enjoyment of just and favourable conditions of work, recognized to everyone under Articles 6 and 7 of the ICESCR), Article 51 (on the right to living accommodation, which is related to the right an adequate standard of living guaranteed to everyone in Article 11 of the ICESCR), Article 52 (right to healthcare and free use of the network of public health institutions, which is linked to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health protected under Article 12 of the ICESCR), Article 54 (right to social security, recognized to everyone under Article 9 of the ICESCR), Article 55 (right to education, recognized to everyone under Article 13 of the ICESCR), Article 56 (right to participate in cultural life, to freedom of artistic, scientific and technical creativity, recognized to everyone under Article 15 of the ICESCR), Article 61 (right to seek redress in courts, which is granted to any person under Article 2 par 3 of the ICCPR), Article 96 (on the judicial power, which should involve the protection of any individual's rights and freedoms), and Article 107 (legal aid, for which Article 14 par 3 of the ICCPR specifies that this constitutes a minimum guarantee for everyone being charged with a criminal charge).

<sup>234</sup> Article 45 (right to participate in public affairs), Article 46 (right to vote and be elected, and access to public service).

<sup>235</sup> See e.g., EU Fundamental Rights Agency, *Report on the Cost of exclusion from healthcare – The case of migrants in an irregular situation (September 2015)*, available at <http://fra.europa.eu/en/publication/2015/cost-exclusion-healthcare-case-migrants-irregular-situation>.

same time, Article 12 of the ICESCR recognizes **the right of everyone to enjoy the highest attainable standard of physical and mental health; it would be advisable to enhance Article 52 also in this respect**, to recognize this right for everyone and not only for citizens.

134. Moreover, while at times also mentioning ‘persons’, and hence potentially applying to both ‘natural’ and ‘legal’ persons, the Draft Constitution does not clearly specify whether certain human rights and freedoms can be exercised also by legal persons. In this context, it should be noted that legal persons are generally not considered to be beneficiaries of the rights recognized in the ICCPR.<sup>236</sup> At the same time, certain rights may be enjoyed individually or by a legal entity, e.g., companies, associations or political parties.<sup>237</sup> While it is not the purpose of these Comments to take a stand on this issue, it must be noted that violations of the rights of legal persons, such as enterprises/businesses, associations, non-governmental organizations, political parties or other legal entities may have a direct impact on individual human rights, e.g. of employees, clients, founders or members.<sup>238</sup> It would thus be advisable to specify from the outset that, unless specified otherwise, **the provisions of the Draft Constitutions are applicable to legal entities as well. Alternatively specific provisions could explicitly state that they also protect the exercise of certain rights by legal persons.**

#### 5.1.2. *Linking the Exercise of Rights with the Fulfilment of Duties*

135. The first paragraph of Article 57 (current Article 37) establishes a direct link between the exercise of the rights afforded under the Draft Constitution and the fulfillment of duties “as a citizen and human being” “to society and state”. This would suggest that human rights are conceived as “privileges” rather than “rights”, which is fundamentally opposed to the essence of human rights.<sup>239</sup> Such an approach also fails to acknowledge that certain human rights and fundamental freedoms are absolute and non-derogable, irrespective of the circumstances, including the non-fulfillment of duties (see subsection 5.1.4. *infra*). As already noted in the 2008 ODIHR Opinion, this is incompatible with the rule of law and misconstrues the nature of human rights; **Article 57 par 1 should be removed.**<sup>240</sup>

<sup>236</sup> See par 9 of the UN HRC, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR*, 29 March 2004, available at <http://daccess-ods.un.org/TMP/853963.196277618.html>. For the issue of protection of legal persons under international human rights standards, see e.g., the article P.H.P.H.M.C. van Kempen, *Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR*, vol 14.3 Electronic Journal of Comparative Law (December 2010), available at <http://www.ejcl.org/143/art143-20.pdf>.

<sup>237</sup> See e.g., OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Association (2015)*, pars 16, 19, 31, 67 and 259, available at <http://www.osce.org/odihr/132371?download=true>, where it is stated that “the right to freedom of expression and opinion, the right to freedom of peaceful assembly, the right to freedom of religion or belief, the right to be free from discrimination, the right to property, the right to an effective remedy, the right to a fair trial, the right to freedom of movement and the right to privacy and data protection” belong to both individuals and associations as entities (par 67); and *Guidelines on Political Party Regulation (2011)*, pars 22, 33-41 and 231, available at <http://www.osce.org/odihr/77812>. In addition, for instance, the European Court of Human Rights (ECtHR)’s case law recognizes that a company or other entity benefits from the protection of Articles 6 (fair trial rights) and 8 (right to respect for private and family life) of the ECHR, particularly as they relate to search and seizures and other fair trial guarantees. See e.g., pars 65-58 in the case of *Vinci Construction and GTM Genie Civil et Services v. France*, ECtHR judgment of 2 April 2015 (Application nos. 63629/10 & 60567/10), available at <http://hudoc.echr.coe.int/eng?i=001-153318>. See also case of *Sallinen and others v. Finland*, ECtHR judgment of 27 September 2005 (Application no. 50882/99), available at <http://hudoc.echr.coe.int/eng?i=001-70283>.

<sup>238</sup> *Op. cit.*, footnote 236, page 8 (2010 Article on Human Rights and Criminal Justice Applied to Legal Persons). See also e.g., *ibid.*, par 242 (2015 ODIHR-Venice Commission Guidelines on Freedom of Association).

<sup>239</sup> See e.g., in relation to the right to freedom of peaceful assembly and of association, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, *Joint compilation report on practical recommendations for the proper management of assemblies*, based on best practices and lessons learned, A/HRC/31/66, 4 February 2016, par 21, available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/31/66](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/66).

<sup>240</sup> *Op. cit.* footnote 1, par 30 (2008 ODIHR Opinion).

5.1.3. *Restrictions to Human Rights and Fundamental Freedoms*

136. In the Draft Constitution, the various provisions pertaining to human rights do not contain specific clauses of limitation. However, reference to the possibility of such restrictions is contained in certain articles: Article 26 par 2 of the Draft Constitution provides that “no one shall deprive persons of their rights and freedoms or restrict [them] except in accordance with the Constitution and laws”; and Article 30 further provides that “[t]he exercise of rights and freedoms must not violate the rights and freedoms of others, as well as the requirements of morality, law, public order, [or] cause damage to national security”.
137. As recommended in ODIHR’s 2008 Opinion, **these two provisions, which are closely interrelated, could be merged into a single article.**<sup>241</sup> At the same time, **international human rights treaties/norms should be mentioned next to the Constitution and laws as relevant benchmarks under Article 26 par 2.**
138. In general, restricting human rights in order to protect certain general public interests is permissible under international human rights law; however, certain conditions for doing so must be met. Thus, the review of situations where human rights are limited applies a three-pronged test to examine whether such state interference is justified in each individual case. The three elements of the test are: (i) the interference must be prescribed by law;<sup>242</sup> (ii) it must be necessary in a democratic society in order to achieve a number of specific legitimate aims set out in international human rights instruments; and (iii) it must be proportionate to such legitimate aims, and should never completely extinguish the right or deprive it of its essence. The legitimate aims that may be pursued when imposing restrictions are public safety, public order, the protection of health or morals, national security, territorial integrity, and the protection of the rights and freedoms of others.<sup>243</sup> A single provision reflecting the contents of Articles 26 par 2 and 30 (see pars 136-137 *supra*) should also **clearly specify the above-mentioned elements of the three-pronged test on permissible restrictions to human rights and fundamental freedoms.**<sup>244</sup> Additionally, those rights and freedoms that are absolute and non-derogable, even in a state of emergency or martial law, should be specified (see sub-section 5.1.4. *infra*).
139. At the same time, since the limitation clauses in the ICCPR vary slightly for the rights to **freedom of religion or belief, freedom of expression, and freedom of peaceful assembly and of association, it is recommended to reflect these differences by introducing parallel language in the respective provisions of the Constitution.**<sup>245</sup>

5.1.4. *Absolute and Non-derogable Rights and Freedoms*

140. Article 4 par 2 of the ICCPR states that, regardless of the circumstances, certain rights are non-derogable, such as **the right to life,**<sup>246</sup> **the prohibition of torture or cruel, inhuman or degrading treatment or punishment,**<sup>247</sup> **the prohibition of slavery and servitude,**<sup>248</sup> **the prohibition of imprisonment merely on the ground of inability to**

<sup>241</sup> *ibid.* par 33 (2008 ODIHR Opinion).

<sup>242</sup> This means that there should be a basis in domestic law for the restriction, that the law is accessible and that it is foreseeable. It further requires that those affected by the law are clearly identified, that the circumstances in which the restriction is made, and the procedures to be followed are defined as precisely as possible.

<sup>243</sup> There is only one significant difference common to all those instruments: “national security” is not listed as a permissible legitimate aim that would allow limitations of the freedom of religion or belief.

<sup>244</sup> *Op. cit.* footnote 1, par s 32-33 (2008 ODIHR Opinion).

<sup>245</sup> *Op. cit.* footnote 62, pars 11 (b) and 16 (2005 ODIHR Opinion on the Draft Amendments to the Constitution of the Kyrgyz Republic).

<sup>246</sup> Article 6 of the ICCPR.

<sup>247</sup> Article 7 of the ICCPR.

<sup>248</sup> Article 8 of the ICCPR.

**fulfil a contractual obligation,<sup>249</sup> the principle of legality in the field of criminal law,<sup>250</sup> the recognition of everyone as a person before the law<sup>251</sup> and the freedom of thought, conscience or religion.<sup>252</sup>**

141. To ensure that the protection of key non-derogable rights is not circumvented before courts, the fundamental principles of a fair trial have also been recognized as non-derogable.<sup>253</sup> Moreover, since international humanitarian law provides for a number of fair trial guarantees in the context of armed conflicts, these rights should *a fortiori* be part of the guarantees ensured in any emergency situations that is less severe than an armed conflict.<sup>254</sup> Consequently, these non-derogable rights include first and foremost **the right to be tried by an independent and impartial tribunal,<sup>255</sup> the presumption of innocence,<sup>256</sup> and the right of arrested or detained suspects to be brought promptly before an (independent and impartial) judicial authority and tried within a reasonable time or otherwise released.<sup>257</sup>** Additional rights that have also been recognized as non-derogable include the **right to a remedy,<sup>258</sup>** which is a procedural guarantee that secures the recognition of non-derogable rights,<sup>259</sup> and **the right of any detained person to have access to an effective and timely mechanism to challenge the lawfulness of their arrest or detention before a court /right to *habeas corpus*.<sup>260</sup>**
142. Additionally, **the right of persons of marriageable age to marry, and the right of minorities to enjoy their own culture, profess their own religion, or use their own language** have been considered to be peremptory norms,<sup>261</sup> which are non-derogable.
143. The prohibition of torture and of ill-treatment “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” (Article 1 of the UNCAT) is recognized as absolute and non-derogable.<sup>262</sup> No

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<sup>249</sup> Article 11 of the ICCPR.

<sup>250</sup> Article 15 of the ICCPR.

<sup>251</sup> Article 16 of the ICCPR.

<sup>252</sup> Article 18 of the ICCPR.

<sup>253</sup> *Op. cit.* footnote 148, par 6 (UN HRC General Comment No. 32 (2007)).

<sup>254</sup> These include, among others, the independence and impartiality of the courts, the presumption of innocence, access to a lawyer, the right to an interpreter, the right to be informed without delay of the offence and the right to be tried in one’s presence; see also *op. cit.* footnote 84, pages 869-870 (UN OHCHR Manual on Human Rights in the Administration of Justice).

<sup>255</sup> Article 14 of the ICCPR; it is generally considered that while derogations from some provisions of Article 14 of the ICCPR on the right to a fair trial are permissible during emergencies, the fundamental principles of a fair trial are non-derogable (see UN HRC, *General Comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, par 8, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.6&Lang=en);

*op. cit.* footnote 83, par 16 (UN HRC General Comment No. 29 (2001)); and *op. cit.* footnote 148, par 5 (UN HRC General Comment No. 32 (2007)). While the nature of these “fundamental principles” has not been clearly defined, the right to be tried by an independent and impartial tribunal has been expressly considered to be non-derogable (see par 19 of UN HRC General Comment No. 32 (2007)).

<sup>256</sup> *ibid.* par 8 (UN HRC General Comment No. 24 (1994)); pars 11 and 16 (UN HRC General Comment No. 29 (2001)); and par 6 (UN HRC General Comment No. 32 (2007)).

<sup>257</sup> Article 9 par 3 of the ICCPR; see *ibid.*, par 16 (UN HRC General Comment No. 29 (2001)); and UN HRC, *General Comment No. 35 on Article 9 (Liberty and security of person)*, 16 December 2014, par 67, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11); see also UN, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*, U.N. Doc. E/CN.4/1985/4, Annex (1985), available at <http://hrlibrary.umn.edu/instore/siracusaprinciples.html>, according to which procedural rights secured in Article 9 (4) of the ICCPR (i.e. supervision by a judicial body of the lawfulness of detention) are functionally non-derogable as this is indispensable to protect other non-derogable rights.

<sup>258</sup> Article 2 of the ICCPR.

<sup>259</sup> *Op. cit.* footnote 83, pars 14 and 15 (UN HRC General Comment No. 29 (2001)), which states that “[i]f this clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.”

<sup>260</sup> Article 9 par 4 of the ICCPR; and *op. cit.* footnote 257, pars 32 and 64-68 (UN HRC General Comment No. 35 (2014)).

<sup>261</sup> *Op. cit.* footnote 255, par 8 (UN HRC General Comment No. 24 (1994)).

<sup>262</sup> *Op. cit.* footnote 80, pars 1 and 3 (UN Committee against Torture’s General Comment No. 2 (2008)); and par 3 (UN HRC General Comment No. 20 (1992)). See also par 3 of the OSCE Ministerial Declaration on the Occasion of the 25th Anniversary of the Adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Athens, 2009).

exceptional circumstances whatsoever may be invoked by a State to justify acts of torture, even in a state of emergency or war, internal political instability or any other public emergency and even under threat of terrorist acts or violent crimes.<sup>263</sup> In that respect, the UN Committee against Torture has raised some concerns with regard to Article 47 of the current Constitution on state of emergency and martial law (Article 65 of the Draft Constitution) and explicitly recommended to “ensure that the absolute prohibition against torture is non-derogable”.<sup>264</sup>

144. In light of the above, it is recommended that the drafters **clearly state in the Draft Constitution that the above-mentioned rights and freedoms are non-derogable under any circumstances, even in a state of emergency or under martial law imposed pursuant to Article 65 of the Draft Constitution.**

*5.1.5. State of Emergency and Martial Law*

145. Article 65 of the Draft Constitution provides for the possibility to suspend the implementation of rights and freedoms during a state of emergency or martial law “in a manner and within the limits established by the Constitution and laws”.
146. Article 4 par 2 of the ICCPR contains a derogation clause foreseeing the possibility, under certain conditions, of non-compliance with certain international human rights obligations “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed”.<sup>265</sup> Similarly, the 1990 Copenhagen Document confirms that any such derogations “must remain strictly within the limits provided for by international law, in particular the relevant international instruments by which they are bound, especially with respect to rights from which there can be no derogation”.<sup>266</sup>
147. Certain overall conditions need to be fulfilled when a State is seeking to derogate according to these provisions,<sup>267</sup> namely: (i) the existence of an emergency; (ii) the temporary nature and exceptional character of the emergency and of the derogation; (iii) certain procedural requirements to be followed by the requesting State, including an official proclamation of a state of emergency;<sup>268</sup> and (iv) the necessity and proportionality of the measures in terms of their temporal, geographical and material scope, while excluding certain non-derogable rights from their scope of application.
148. As far as the official proclamation of a state of emergency is concerned, this includes informing international and regional human rights bodies, notably the UN.<sup>269</sup> OSCE participating States shall also inform the OSCE,<sup>270</sup> in particular the OSCE/ODIHR (see par 5 (b) of the 1992 Helsinki Document). **This requirement to inform international**

<sup>263</sup> *ibid.* par 5 3 (UN Committee against Torture’s General Comment No. 2 (2008)).

<sup>264</sup> *Op. cit.* footnote 45, par 8 (2012 Committee against Torture’s Concluding Observations on Turkmenistan).

<sup>265</sup> Article 4 par 1 of the ICCPR provides that “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties [...] may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” In addition, the ICCPR provides that “[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision” (Article 4 par 2) and that “[a]ny State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation” (Article 4 par 3 of the ICCPR).

<sup>266</sup> See *op. cit.* footnote 11, par 25 (OSCE Copenhagen Document (1990)).

<sup>267</sup> *Op. cit.* footnote 83 (UN HRC General Comment No. 29 (2001)).

<sup>268</sup> *ibid.* par 2 (UN HRC General Comment No. 29 (2001)); see also the OSCE Copenhagen Document (1990) which states that “the imposition of a state of public emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law” (par 25.2).

<sup>269</sup> Article 4 par 3 of the ICCPR.

<sup>270</sup> See *op. cit.* footnote 11, par 28.10 (OSCE Moscow Document (1991)).



**human rights bodies about states of emergency and derogations to international human rights standards could be expressly stated in Article 65 of the Draft Constitution.**

149. Article 4 par 1 of the ICCPR requires that derogatory measures be limited “*to the extent strictly required by the exigencies of the situation*”. This means, amongst others, that **such measures should be regularly reviewed in terms of their duration, geographical coverage and material scope in light of the state of emergency to assess their continued necessity and proportionality.**<sup>271</sup> **Article 65 of the Draft Constitution should clearly state this.**

## 5.2. *Specific Comments on Certain Human Rights and Fundamental Freedoms*

### 5.2.1. *Right to Liberty and Security, and Fair Trial Standards*

150. Article 33 par 3 provides that a person “can be arrested only on the grounds precisely specified by law on the basis of a judicial order or with the authorization of the prosecutor”. This provision, once more, demonstrates the dominant position of prosecutors (see Section 4.5. *supra*). Generally, given the importance of guaranteeing the right to liberty of persons, international standards require some form of judicial oversight over arrests.<sup>272</sup> As noted by the UN Human Rights Committee, a prosecutor cannot be considered “an officer exercising judicial power” due to the lack of independence and impartiality of such a body.<sup>273</sup> Hence, while it is thus appropriate and positive that decisions on arrest are taken by a court, the prosecutor should not be involved in decisions on an individual’s deprivation of liberty. He/she may, however, request a court to take such a decision, although the court should then not be bound by his/her motion. **The drafters should consider supplementing Article 33 par 3 of the Draft Constitution by adding reference to some form of judicial control of the arrests authorized by the prosecutor,** which would also be part of the general reform of the prosecution service recommended in Section 4.5 *supra*.
151. Article 33 par 3 presents a number of other pitfalls and should be revised in order to be fully compliant with international standards. Namely, and first, it is important **to specify that the arrest should be carried out according to a procedure explicitly set out in law** (Article 9 par 1 of the ICCPR).
152. Second, the provision should be supplemented to include a number of other safeguards required under Article 9 of the ICCPR, including the **obligation (i) to inform, at the time of arrest, the respective individual of the reasons for his/her arrest and of any charges against him/her; (ii) to entitle an arrested and detained person to take proceedings before a court, in order to decide without delay on the lawfulness of the detention and order a release if the detention is not lawful; and (iii) to promptly bring persons alleged to have committed a criminal offence before a judge or other officer authorized by law to exercise judicial power. Depending on the outcome, such individuals are then entitled to trial within a reasonable time or should be released.**

<sup>271</sup> *Op. cit.* footnote 83, par 4 (UN HRC General Comment No. 29 (2001)).

<sup>272</sup> See Article 9 par 3 of the ICCPR (regarding any person arrested or detained *on a criminal charge*, who shall be brought promptly before a judge or other officer authorized by law to exercise judicial power) and Article 9 par 4 of the ICCPR (entitling anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful).

<sup>273</sup> *ibid.* par 32 (UN HRC General Comment No. 29 (2001)).

153. Third, to prevent any abuse in that respect, it may be advisable **to specify**, as done in the constitutions of certain OSCE participating States,<sup>274</sup> **the maximum duration of the deprivation of liberty or arrest before the respective individual is brought before a judicial authority.**<sup>275</sup>
154. Fourth, additional, more detailed measures should be introduced to prevent and combat torture and other forms of ill-treatment from the moment when a person is under arrest or police custody, irrespective of whether the person has been charged with a criminal offence or not. Human rights monitoring bodies generally consider that such safeguards (such as **prompt access to a lawyer,**<sup>276</sup> **the right of a person to inform a third party of his/her choice (relative, friend, consulate) about the arrest, and the right to request a medical examination),**<sup>277</sup> are one of the best ways for States to fulfil their obligation to effectively prevent torture and other breaches of fundamental human rights during detention.<sup>278</sup>
155. In light of the above, it is recommended **to expressly include the above-mentioned safeguards under Article 33 or other provision of the Draft Constitution.** This also corresponds to some of the recommendations made in 2008 ODIHR Opinion.<sup>279</sup>
156. Moreover, it is welcome that the Draft Constitution introduces key guarantees pertaining to the right to a fair trial, the presumption of innocence, the principle of *in dubio pro reo*,<sup>280</sup> the principle of *nullum crimen, nulla poena sine lege*,<sup>281</sup> and the principle of *ne bis in idem*<sup>282</sup> (new Articles 34 to 36). Articles 63 and 107 further guarantee professional legal assistance, which is provided free of charge in cases stipulated by law, although this should be extended to everyone and not only citizens (see par 132 *supra*). At the same time, a number of key fair trial guarantees are missing and could be added, including e.g., (i) the right to be tried within a reasonable time;<sup>283</sup> (ii) the right to a public hearing;<sup>284</sup> and (iii) the right to a public, reasoned and timely judgment.<sup>285</sup> The drafters could consider supplementing the Draft Constitution accordingly.
157. **Article 46** gives the citizens of Turkmenistan **the right to participate in the administration of justice. This wording is unclear as it does not specify whether this refers to having lay judges, or perhaps even to citizens' participation in jury trials. It is recommended to clarify this provision in that respect.**

<sup>274</sup> See e.g., Article 28 of the Constitution of Albania; Article 25 of the Constitution of the Republic of Moldova; Articles 29-30 of the Constitution of the Republic of Serbia; and Article 104 of the Basic Law for the Federal Republic of Germany, available at <http://www.legislationline.org/documents/section/constitutions>.

<sup>275</sup> *Op. cit.* footnote 257, par 33 (UN HRC General Comment No. 35 (2014)).

<sup>276</sup> *Op. cit.* footnote 148, par 34 (UN HRC General Comment No. 32 (2007)) which states that the right to communicate with counsel in Article 14 of the ICCPR "requires that the accused is granted prompt access to counsel".

<sup>277</sup> See e.g., Article 28 of the Constitution of Albania; Article 25 of the Constitution of the Republic of Moldova; Articles 29 and 33 of the Constitution of the Republic of Serbia; and Article 104 of the Basic Law for the Federal Republic of Germany, available at <http://www.legislationline.org/documents/section/constitutions>.

<sup>278</sup> *Op. cit.* footnote 80, par 11 (UN HRC General Comment No. 20 (1992)); and par 13 (Committee against Torture's General Comment No. 2 (2008)).

<sup>279</sup> *Op. cit.* footnote 1, par 31 (2008 ODIHR Opinion).

<sup>280</sup> i.e., that a defendant may not be convicted by the court when doubts about his or her guilt remain.

<sup>281</sup> i.e., a person cannot face criminal punishment if his/her behaviour did not constitute a criminal offence at the time when such act was committed.

<sup>282</sup> i.e., the prohibition of double jeopardy meaning that one person cannot be subjected to legal action twice for the same act.

<sup>283</sup> Article 14 pars 1 and 3 (c) of the ICCPR.

<sup>284</sup> Article 14 par 1 of the ICCPR; and *op. cit.* footnote 11, pars 5.16 and 12 (OSCE Copenhagen Document (1990)).

<sup>285</sup> Article 14 par 1 of the ICCPR; and par 13.9 of the OSCE Vienna Document (1989).

5.2.2. *Freedom of Religion or Belief*

158. Article 18 par 1 refers to the “freedom of religion and belief”; this provision should be amended to state “religion *or* belief”, to also encompass non-religious beliefs, in line with Article 18 of the ICCPR.
159. Article 18 par 1 of the Draft Constitution further provides that “[r]eligious organizations shall be separate from the state, their interference in the state affairs and carrying out the state functions shall be prohibited”. The separation of religious organisations and the State is characteristic for a secular state. While the modalities for separation vary from state to state (from a strict separation to a more collaborative model in affairs of public interest), such a separation generally also means that **the State shall refrain from interfering with the work and activities of religious organizations. The provision should be modified accordingly.**
160. Article 18 of the Draft Constitution should also not preclude religious or belief communities and organizations from participating in public affairs.<sup>286</sup> The state should provide for regular and open dialogue with religious or belief organizations and communities to facilitate their effective participation (for example via consultation meetings) in public decision-making, including in law-making. Such consultations or engagements should be inclusive and equal, and reflective of the diversity of religious or belief communities in the country. **The prohibition of “interference with state affairs” mentioned in Article 18 par 1 could be misinterpreted to exclude religious organizations and communities from any type of public participation, and should thus be re-considered or clarified.**
161. Article 18 par 2 provides that “[t]he public education system shall be separate from religious organizations and secular”. However, the right to freedom of religion or belief includes **the right of each individual to give and receive religious education in the language of his/her choice, whether individually or in association with others, in places suitable for these purposes.**<sup>287</sup> **Parents should be able to educate their children in private religious schools or in other schools emphasizing ideological values.**<sup>288</sup> To avoid uncertainty in that respect, it is recommended **to explicitly provide for such rights in Article 18 par 2 of the Draft Constitution.**
162. Article 58 provides that the “[p]rotection of Turkmenistan shall be the sacred duty of every citizen” and that “[g]eneral conscription shall be compulsory for the male citizens of Turkmenistan”. It is noted that Turkmen legislation does not recognize a person’s right to exercise conscientious objection to military service or provide for alternatives to military service.<sup>289</sup> While the ICCPR does not explicitly refer to a right of conscientious objection, such right may be derived from Article 18 of the ICCPR on freedom of thought, conscience and religion, since the obligation to be involved in the use of lethal force could seriously conflict with the rights protected under Article 18 of the

<sup>286</sup> See e.g., pars 16.5 and 16.11 of the OSCE Vienna Document (1989); and *op. cit.* footnote 11, par 33 (OSCE Copenhagen Document (1990)).

<sup>287</sup> *ibid.* par 16.6 (OSCE Vienna Document (1989)).

<sup>288</sup> OSCE/ODIHR and Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief (2004)*, Part II – Section C, available at <http://www.osce.org/odihr/44455>.

<sup>289</sup> See UN HRC, *Ahmet Hidaybergenov v. Turkmenistan*, Communication no. 2222/2012, 29 October 2015, pars 7.4-7.6, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f115%2fD%2f2222%2f2012&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f115%2fD%2f2222%2f2012&Lang=en); *Mahmud Hidaybergenov v. Turkmenistan*, Communication no. 2221/2012, 29 October 2015, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f115%2fD%2f2221%2f2012&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f115%2fD%2f2221%2f2012&Lang=en); *Sunnet Japparow v. Turkmenistan*, Communication no. 2223/2012, 29 October 2015, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f115%2fD%2f2223%2f2012&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f115%2fD%2f2223%2f2012&Lang=en); and *Zafar Abdullayev v. Turkmenistan*, Communication no. 2218/2012, 25 March 2015, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/113/D/2218/2012&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/113/D/2218/2012&Lang=en).

ICCPR.<sup>290</sup> OSCE commitments also recognize a right to conscientious objection to military service.<sup>291</sup> It is thus recommended, as done in certain OSCE participating States,<sup>292</sup> **to include in Article 58 of the Draft Constitution an exception to the compulsory character of military service where such service cannot be reconciled with an individual's religion or beliefs (and to include references to possible alternatives of a non-combatant or civilian nature).**<sup>293</sup>

163. **Article 41** of the Draft Constitution states that “each person shall independently determine his/her attitude toward religion”. Such a wording should be **expanded to cover religions (in plural)**<sup>294</sup> as well as **non-religious beliefs**.
164. It is worth noting that in relation to Turkmenistan, the UN Committee on Economic, Social and Cultural Rights has raised concerns that members of some religious groups do not fully enjoy **the right to cultural expression in the field of religion, and that worship in private homes is banned, as is the public wearing of religious garb, except by religious leaders; the Committee has also urged Turkmenistan to respect the rights of members of registered and unregistered religious groups to freely exercise their religion and culture.**<sup>295</sup> Under international human rights law, religious or belief communities should not be obliged to acquire legal personality if they do not wish to do so; the enjoyment of the right to freedom of religion or belief must not depend on whether a group has sought and acquired legal personality status.<sup>296</sup> These, and the other above-mentioned rights and guarantees **could be enshrined in the Draft Constitution in order to ensure that the implementing legislation is compliant with international law in that respect** (see also comments on political parties with religious attributes in pars 167-168 *infra*).
165. Finally, **as this is missing in the Draft Constitution**, it is also recommended to **expressly protect the right to freedom of thought and conscience.**<sup>297</sup>

### 5.2.3. *Freedoms of Assembly and of Association, and Political Parties*

166. **Articles 43** provides citizens with the right to freedom of assembly, while **Article 44** allows them to form political and other public associations. As mentioned in sub-section 5.1.1., **such guarantees should apply to everyone and not only to citizens**.
167. Article 44 par 2 prohibits political parties with ethnic or religious attributes. In this context, it is noted that Turkmenistan, as an OSCE participating State, has committed to uphold key values of democracy, including political pluralism and the freedom of

<sup>290</sup> See paragraph 11 of the UN HRC's General Comment No. 22(48) on Article 18 of the ICCPR. With respect to this matter the UN HRC has also stated that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it does provide certain protection, consistent with Art. 18 par. 3 ICCPR, against being forced to act against genuinely-held religious belief (see UN HRC, *Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi v. Republic of Korea*, Communications nos. 1321/2004 and 1322/2004 (CCPR/C/88D/1321-1322/2004), par 8.3, available at <http://hrlibrary.umn.edu/undocs/1321-1322-2004.html>).

<sup>291</sup> See *op. cit.* footnote 11, pars 18.1 and 18.4 (OSCE Copenhagen Document (1990), whereby the OSCE participating States agreed to consider “introducing, where this has not yet been done, various forms of alternative service, which are compatible with the reasons for conscientious objection, such forms of alternative service being in principle of a non-combatant or civilian nature, in the public interest and of a non-punitive nature”.

<sup>292</sup> See e.g., Article 30 of the Constitution of Spain; Article 15 of the Charter of Fundamental Rights and Basic Freedoms of the Czech Republic; Article 10 par 3 (b) of the Cyprus Constitution, available at <http://www.legislationline.org/documents/section/constitutions>.

<sup>293</sup> See also OSCE/ODIHR, *Comments on the Law of Turkmenistan on Religious Freedom and Religious Organizations*, 25 June 2010, pars 30-32, available at <http://legislationline.org/download/action/download/id/3196/file/Comments%20on%20the%20Turkmenistan%20Law%20on%20Religious%20Organizations%2025%20June%202010.pdf>.

<sup>294</sup> *Op. cit.* footnote 1, par 28 (2008 ODIHR Opinion).

<sup>295</sup> *Op. cit.* footnote 198, par 30 (2011 CESCR's Concluding Observations on Turkmenistan).

<sup>296</sup> See par 21 of the OSCE/ODIHR-Venice Commission, *Guidelines on the Legal Personality of Religious or Belief Communities* (2014), available at <http://www.osce.org/odihr/139046?download=true>.

<sup>297</sup> Article 18 par 1 of the ICCPR.

association.<sup>298</sup> As political parties are integral vehicles for political activity and expression, their formation and functioning should not be limited. It is questionable whether, in this light, a blanket ban on the establishment of political parties with religious attributes would be permissible.

168. Universal and regional human rights instruments recognize that freedom of association may be limited for reasons of public order, public safety, protection of health and morals of the society, national security (including measures intended to counter terrorism and extremism), and the protection of the rights and freedoms of others.<sup>299</sup> In order for a restriction on freedom of association to be accepted as reasonable, the activities or aims of a political party would need to constitute a real threat to the state and its institutions or/and involve the use of violence.<sup>300</sup> It is difficult to accept that this would automatically apply to all political parties affiliated with or carrying the name of a certain religious denomination, without exception. Rather, such limitations would only be permissible with regard to political parties whose militant religious character poses a serious and immediate danger to the constitutional order, and which seek to pursue their aims in an illegal or possibly even violent manner. It is worth noting that it is normal practice in many OSCE participating States for political parties to operate on the basis of or inspired by religious beliefs, or with the participation and support of religious communities.<sup>301</sup> Hence, **the blanket prohibition of political parties with religious attributes in Article 44 appears to be disproportionate and should be reconsidered.**
169. Article 44 par 2 also **prohibits political parties with ethnic attributes.** In principle, persons belonging to minorities have the right to form political parties that represent the interests of that ethnic minority, and ethnic parties should not be prohibited *per se*.<sup>302</sup> Moreover, State regulations of political parties may not discriminate against any individual or group on any ground, including ethnic origin.<sup>303</sup> It is therefore recommended **to delete this prohibition from Article 44, which was also considered to be problematic** in 2013 OSCE/ODIHR Parliamentary Election Assessment Mission Final Report on Turkmenistan.<sup>304</sup>
170. It is noted that Article 44 par 2 still prohibits the establishment and activity of political parties or other public associations if they are “opposing the constitutional rights and freedoms of citizens”. In the 2008 ODIHR Opinion, such terminology was considered too vague to enable political parties or public associations, or their leadership to predict the consequences of their actions based on this provision.<sup>305</sup> Moreover, the term “opposing” is also quite general and could be seen to simply constitute an expression of opinion. Overall, political parties or public associations should not be prevented from advocating for changes in the constitutional order of the state, so long as the party/association does not employ violence and does not threaten civil peace or the

<sup>298</sup> These values are reflected in key OSCE commitments, including par 7.6 of the OSCE Copenhagen Document (1990), and in Articles 22 of the ICCPR (right to freedom of association) and 25 of the ICCPR which recognize citizens’ right to vote and be elected by universal and equal suffrage.

<sup>299</sup> See *op. cit.* footnote 237, pars 89-90 (2011 ODIHR-Venice Commission Guidelines on Political Party Regulation). See also *op. cit.* footnote 237, Principle 9 and pars 108-111 (2015 ODIHR-Venice Commission Guidelines on Freedom of Association).

<sup>300</sup> See e.g., pars 13-14 of the OSCE/ODIHR-Venice Commission, *Joint Opinion on the Draft Law on Political Parties of the Kyrgyz Republic* (2009), available at <http://www.legislationline.org/topics/country/20/topic/16>.

<sup>301</sup> See e.g., par 42 of the OSCE/ODIHR, *Comments on the Concept Paper on State Policy in the Sphere of Religion of the Kyrgyz Republic* (2014), available at <http://www.osce.org/odihr/118672?download=true>.

<sup>302</sup> See the OSCE HCNM, *Ljubljana Guidelines on Integration of Diverse Societies* (2012), Principle 23 and page 35, available at <http://www.osce.org/hcnm/96883?download=true>. See also *op. cit.* footnote 220, par 22 (2002 Venice Commission’s Code of Good Practice in Electoral Matters).

<sup>303</sup> See Article 5 of the ICERD. See also *op. cit.* footnote 237, par 18 (2011 ODIHR-Venice Commission Guidelines on Political Party Regulation).

<sup>304</sup> *Op. cit.* footnote 72, page 6 (2013 ODIHR Parliamentary Election Assessment Mission Final Report - Turkmenistan).

<sup>305</sup> *Op. cit.* footnote 1, par 34 (2008 ODIHR Opinion).

democratic constitutional order of the country as such.<sup>306</sup> It is **recommended to delete the reference to “opposing the constitutional rights and freedoms of citizens” from Article 44 par 2.**

171. Similarly, restricting associations, including political parties if they ‘[encroach] on the health *and morals* of the people’ (Article 44 par 2) appears to set equally vague limitations, due to the potentially wide interpretation of the term “morals”.<sup>307</sup> It is therefore recommended **to exclude “morals” as a limitation ground in Article 44 par 2.**
172. Finally, the **right to form and join trade unions**<sup>308</sup> is not explicitly mentioned in the Draft Constitution. Although this may fall under the term ‘association’, it would be preferable to **explicitly include such right in the Draft Constitution.**

#### 5.2.4. Freedom of Opinion and Expression

173. Article 74 par 1 provides that the President’s “honour and dignity shall be protected by law”; Article 85 states that “[t]he state shall guarantee to each deputy of the Mejlis the creation of enabling environment for [...] protection of their [...] honour and dignity”. It is important that such protection of honour and dignity not be used as a tool to limit the freedom of expression. This may hinder the creation of a healthy and diverse political climate, marked by political diversity and a multiparty system (Article 17 of the Draft Constitution), as well as the exercise of freedom of opinion in political matters (Article 42 of the Draft Constitution). Public figures should generally be prepared to tolerate criticism and the limits of acceptable criticism should be wider compared to those of private individuals.<sup>309</sup> There is also an increasing international consensus that criminal liability for such offences should be abolished in view of their chilling effect on free expression.<sup>310</sup> The UN Human Rights Committee has also stressed that Article 19 of the ICCPR on freedom of expression also protects “deeply offensive” speech.<sup>311</sup> As such, public expression that is said to humiliate “national honor and dignity” may nevertheless be protected by the right to freedom of expression.<sup>312</sup> Hence, **the above-mentioned provisions should not serve as grounds for imposing criminal sanctions on individuals criticising political figures, even if this is done in a manner that may be considered offensive.** To avoid this, the wording could be changed by deleting the references to “honour and dignity” in Articles 74 and 85.
174. Finally, the Draft Constitution does not set out **the freedom of the press and media**, whereas these constitute basic elements and prerequisites for truly democratic and civil societies.<sup>313</sup> It is recommended to supplement the Draft Constitution in that respect;

<sup>306</sup> See *op. cit.* footnote 237, pars 43 and 92-93 (2011 ODIHR-Venice Commission Guidelines on Political Party Regulation). See also *op. cit.* footnote 237, pars 89-90 (2015 ODIHR-Venice Commission Guidelines on Freedom of Association).

<sup>307</sup> See e.g., *ibid.* footnote 43 (2011 ODIHR-Venice Commission Guidelines on Political Party Regulation). See also Venice Commission, *Opinion on the issue of the prohibition of so-called “Propaganda of homosexuality in the light of recent legislation in some Council of Europe Member States*, CDL-AD(2013)022, 18 June 2013, pages 14-15, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)022-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)022-e).

<sup>308</sup> Article 22 par 1 of the ICCPR.

<sup>309</sup> See e.g., *op. cit.* footnote 191, par 37 (2016 ODIHR Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland). See also e.g., Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased*, CDL-AD(2014)040, 15 December 2014, par 23, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)040-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)040-e). See also e.g., in the case of *Eon v. France*, ECtHR judgment of 14 March 2013 (Application no. 26118/10), par 59, available at <http://hudoc.echr.coe.int/eng/?i=001-117742>.

<sup>310</sup> See UN HRC, *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, 12 September 2011, par 37, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>; and par 2 (2010 Joint Declaration on Ten Key Threats to Freedom of Expression). See also Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly “Towards decriminalisation of defamation”, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>.

<sup>311</sup> See *ibid.* par 11 (UN HRC General Comment No. 34 (2011)).

<sup>312</sup> *ibid.* par 38 (UN HRC General Comment No. 34 (2011)).

<sup>313</sup> *Op. cit.* footnote 11, par 11 (OSCE Moscow Document (1991)).

consideration may also be given to **including an express prohibition of censorship. The promotion of the development of free, independent and pluralistic media, that would ensure people’s right to receive information from diverse sources, could also be mentioned in that respect.**<sup>314</sup>

5.2.5. *The Right to Vote and to Stand for Elections*

175. As mentioned above, it is positive that Article 17 of the Draft Constitution expressly mentions the principle of political diversity and multi-party system, which is in line with OSCE commitments<sup>315</sup> and other international obligations and standards.
176. While some of the basic principles of elections and the right to vote (universality, equality, secrecy, and direct suffrage)<sup>316</sup> are mentioned in Section V, there is no reference to the principle of a “vote free from intimidation and pressure”. **Section V should be expanded in this respect. It may also be advisable to add a reference to the objective of achieving a balanced representation of men and women in political and public life.**<sup>317</sup> This would provide a constitutional basis for the adoption of electoral legislation requiring for instance, a minimum percentage of persons of each sex among candidates<sup>318</sup> or for other special temporary measures.<sup>319</sup>
177. Article 120 par 2 of the Draft Constitution grants the right to vote to citizens who have reached the age of 18 on election day, except those “recognized by the court as legally incapable”, as well as those serving a prison sentence, regardless of the length of sentence, the gravity of the offence or any individual circumstances. This blanket denial of voting rights of all imprisoned persons is not proportional and is thus at odds with OSCE commitments and other international obligations.<sup>320</sup> As recommended by the OSCE/ODIHR in the past, **the restriction on voting rights due to a criminal conviction should be reconsidered in line with the principle of proportionality, and should thus only apply to prisoners serving sentences for serious crimes.**<sup>321</sup>

<sup>314</sup> See OSCE Copenhagen 1997 (Annex 1: Permanent Council Decision No. 193, Mandate of the OSCE Representative on Freedom of the Media).

<sup>315</sup> See e.g., OSCE Document of the Bonn Conference on Economic Co-operation in Europe (1990) where the OSCE participating States expressly committed to multiparty democracy based on free, periodic and genuine elections; and *op. cit.* footnote 11, Preamble (OSCE Copenhagen Document (1990)).

<sup>316</sup> See e.g., *op. cit.* footnote 220, page 5 (2002 Venice Commission’s Code of Good Practice in Electoral Matters). The five principles underlying Europe’s electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals.

<sup>317</sup> Article 7 of the CEDAW.

<sup>318</sup> See e.g., *op. cit.* footnote 220, par 2.5 (2002 Venice Commission’s Code of Good Practice in Electoral Matters).

<sup>319</sup> See OSCE Ministerial Council Decision No. 07/09 on Women’s Participation in Political and Public Life that specifically calls on OSCE participating States to consider “providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies” and “possible legislative measures, which would facilitate a more balanced participation of women and men in political and public life and especially in decision-making” (Articles 1 and 2). Further commitments guaranteeing effective equal opportunities for women in political and public life are found in par 40 of the OSCE Moscow Document (1991) and in par 23 of the OSCE Istanbul Document (1999). See also *op. cit.* footnote 135, pages 58-59 (2016 ODIHR Compendium of Good Practices for Advancing Women’s Political Participation in the OSCE Region).

<sup>320</sup> *Op. cit.* footnote 11, par 7.3 (OSCE Copenhagen Document (1990)), which states that the participating States will “guarantee universal and equal suffrage to adult citizens,” while paragraph 24 provides that restrictions on rights and freedoms must be “strictly proportionate to the aim of the law.”; see also *op. cit.* footnote 219, pars 10 and 14 (UN HRC General Comment No. 25 (1996)), which state that grounds for deprivation of voting rights should be “objective and reasonable”, such as minimum age limit, whereas, physical disability, literacy, educational or property requirements are not valid reasons for restrictions. See also OSCE/ODIHR, *Guidelines for Reviewing a Legal Framework for Elections (2013)*, par 6.4, available at <http://www.osce.org/odihr/elections/104573?download=true>, which also provide that “[t]he right of suffrage is a fundamental civil and political right, and any limitation of that right must be designed to achieve a legitimate aim and be demonstrated as strictly necessary in a democratic society”. In addition, while Turkmenistan is not a member of the Council of Europe, judgements by the ECtHR may also serve as good practice examples. They provide that limitations on prisoner voting rights can be imposed only where the prisoner has been convicted of a crime of such a serious nature that forfeiture of the right to vote is a proportionate punishment; see e.g., the case of *Hirst v. United Kingdom (No. 2)*, ECtHR judgment of 6 October 2005 (Application no. 74025/01), available at <http://hudoc.echr.coe.int/eng/?i=001-70442>.

<sup>321</sup> *Op. cit.* footnote 72, Section A on the Right to Vote, page 7 (2013 ODIHR Parliamentary Election Assessment Mission Final Report - Turkmenistan).

178. As regards persons “recognized by the court as legally incapable”, it is noted that under Article 29 of the CRPD, State Parties shall ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including the right and opportunity for persons with disabilities to vote.<sup>322</sup> Generally, no complete restrictions on the right to vote should be imposed on the basis of physical or sensory disability, or intellectual disability or psychiatric illness, unless the latter amounts to a specific mental incapacity that justifies the withdrawal of suffrage rights.<sup>323</sup> In this regard, it should be borne in mind that the Committee on the Rights of Persons with Disabilities specifically recommended to Turkmenistan to make sure that all restrictions on the right to vote of persons with disabilities are removed, by immediately restoring the right to vote for persons deprived of legal capacity and by providing full accessibility and information in relation to this right.<sup>324</sup> It is thus recommended **to delete the restriction on the right to vote of persons “recognized by the court as legally incapable” from Article 120 of the Draft Constitution.**
179. The Draft Constitution also somewhat limits the right to stand as candidate in elections. As regards the eligibility requirements for presidential candidates, Article 69 of the Draft Constitution provides that “[a] citizen of Turkmenistan, born in Turkmenistan, not younger than 40 years old, who speaks the national language, has been living and working constantly in Turkmenistan for the past 15 years, can be elected as President of Turkmenistan”. It is noted that, compared to the current Constitution, the 70-year limit for candidates has been deleted, as has the obligation to have served on a state body, public association, state enterprise, institution or state organization in order to stand as a candidate. This latter deletion is welcome, and addresses one of the concerns noted in ODIHR’s 2012 Presidential Election Needs Assessment Mission Report, which considered such requirements to constitute an undue restriction on the right to stand for office.<sup>325</sup> At the same time, as noted in the same report, the requirement to have lived and worked constantly in Turkmenistan for the last 15 years remains at odds with Turkmenistan’s international obligations; indeed, residency requirements can be considered excessive and disproportionate with regards to the principle of equality, thus challenging paragraph 24 of the 1990 OSCE Copenhagen Document and other international obligations.<sup>326</sup>
180. As in the case of presidential elections, residency restrictions are also imposed in parliamentary elections. Article 121 requires that, in order to be elected as a deputy of the Mejlis, a person must have permanently resided in Turkmenistan for ten years prior to parliamentary elections. As recommended by the OSCE/ODIHR in its 2013

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<sup>322</sup> Including *inter alia*, by: (i) ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (ii) protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, while facilitating the use of assistive and new technologies where appropriate; and (iii) guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.

<sup>323</sup> *Op. cit.* footnote 320, page 22 (2013 ODIHR Guidelines for Reviewing a Legal Framework for Elections). See also e.g., the case of *Alajos Kiss v. Hungary*, ECtHR judgment of 20 May 2010 (Application no. 38832/06), par 44, available at <http://hudoc.echr.coe.int/eng?i=001-98800>, where the ECtHR held that “an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote”.

<sup>324</sup> UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on Turkmenistan*, 13 May 2015, pars 45-46, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTKM%2fCO%2fi&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTKM%2fCO%2fi&Lang=en).

<sup>325</sup> OSCE/ODIHR, *Presidential Election Needs Assessment Mission Report*, 12 February 2012, page 1, available at <http://www.osce.org/odihr/elections/86861?download=true>.

<sup>326</sup> See *op. cit.* footnote 219, par 15 (UN HRC General Comment No. 25 (1996)), which states that “any restrictions on the right to stand [...] must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as [...] residence [...]”. See also *op. cit.* footnote 11, par 24 (OSCE Copenhagen Document (1990)), which provides that restrictions on rights and freedoms must be “strictly proportionate to the aim of the law.” See also *ibid.* page 1 (2012 ODIHR Presidential Election Needs Assessment Mission Report).



Parliamentary Election Assessment Mission Final Report,<sup>327</sup> **this provision appears to be unnecessarily limiting for certain parts of the population, and should thus also be removed, as should the residency requirements applying to presidential elections.**

181. Finally, Article 124 of the Draft Constitution states that “[t]he right to nominate candidates shall belong to political parties and citizens’ groups, and shall be exercised in accordance with laws of Turkmenistan”. This may imply that self-nominated independent candidates are excluded from standing for elections. While electoral legislation may legitimately include certain requirements for ballot access (e.g., the demonstration of a minimum level of support), such requirements should not be so restrictive as to prevent non-partisan (independent) candidates from running for office.<sup>328</sup> In any case, Article 124 should not be interpreted as banning independent candidates from standing in elections, which would be contrary to the 1990 OSCE Copenhagen Document (par 7.5), other international standards and good practice.<sup>329</sup> To avoid such interpretation, it may be advisable to specifically mention **in Article 124 of the Draft Constitution the right for independent candidates to run for elections, regardless of their political affiliation or lack thereof.**<sup>330</sup>

#### 5.2.6. Equality, Non-Discrimination and Minority Rights

182. First, it is welcome that the provision on equality between men and women (Article 29) is wider than the current one, which is limited to “equal civil rights”, and now covers all rights and freedoms. Indeed, the existing Article has been largely criticized by international human rights monitoring bodies.<sup>331</sup>
183. Article 28 of the Draft Constitution lists a number of discriminatory grounds and should be supplemented in order to render it fully in line with international human rights standards. It is thus recommended to expressly include **“other opinion”, “national or social origin” (instead of “origin”), “birth”,<sup>332</sup> “descent” and “ethnic origin”,<sup>333</sup> “age”, “nationality”, “health status”, “marital and family status”, and “beliefs” (since the provision currently only refers to religion),<sup>334</sup> disability,<sup>335</sup> “gender”,<sup>336</sup> “sexual orientation”,<sup>337</sup> and “gender identity”.**<sup>338</sup> With regard to discrimination based

<sup>327</sup> *Op. cit.* footnote 72, page 7 (2013 ODIHR Parliamentary Election Assessment Mission Final Report - Turkmenistan).

<sup>328</sup> See e.g., *op. cit.* footnote 237, pars 130 and 142-146 (2011 ODIHR-Venice Commission Guidelines on Political Party Regulation).

<sup>329</sup> *Op. cit.* footnote 11, par 7.5 (OSCE Copenhagen Document (1990)), which provides that participating States will “respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination”. See also *op. cit.* footnote 220, par I.1.1.1.d.iii (2002 Venice Commission’s Code of Good Practice in Electoral Matters), which states that the proportionality principle must be observed when depriving an individual of the right to be elected. See also *op. cit.* footnote 219, pars 15 and 17 (UN HRC General Comment No. 25 (1996)), which state that “any restrictions on the right to stand for election [...] must be justifiable on objective and reasonable criteria” and that “the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties.”

<sup>330</sup> *Op. cit.* footnote 237, par 130 (2011 ODIHR-Venice Commission Guidelines on Political Party Regulation).

<sup>331</sup> *Op. cit.* footnote 21, pars 12-13 (2012 CEDAW Committee’s Concluding Observations on Turkmenistan), where it is recommended to “include in the Constitution or in the Law on State Guarantees on Gender Equality the principle of equality with respect to all rights, including civil, political, economic, social and cultural rights, and a definition of discrimination against women in line with article 1 of the Convention”.

<sup>332</sup> In line with Article 2 par 1 of the ICCPR.

<sup>333</sup> In line with Article 1 par 1 of the ICERD.

<sup>334</sup> See UN CESCR, General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights (Article 2 par 2 of the ICESCR), 2 July 2009, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en).

<sup>335</sup> Article 4 par 1 (b) of the CRPD states that States Parties undertake “b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.

<sup>336</sup> Article 1 of the CEDAW. “Sex” refers to physiological characteristics while “gender” refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women. See also the definition of “gender” by the UN World Health Organization, available at <http://www.who.int/gender/whatisgender/en/>.

<sup>337</sup> Discrimination on the basis of sexual orientation has also been found to be contrary to the ICCPR (see UN HRC, *Toonen v. Australia*, (Communication no. 488/1992, 31 March 1994), par 8.7, available at <http://www.ohchr.org/documents/publications/sdecisionsvol5en.pdf>, where the Committee stated that “[t]he State party has sought the Committee’s guidance as to whether sexual orientation may be considered an ‘other status’ for the purposes of article 26. The same issue

- on “marital and family status”, including this specifically would provide a constitutional basis to not discriminate against couples living in *de facto* unions, which was raised as a concern by the UN Committee on the Elimination of Discrimination against Women.<sup>339</sup>
184. More specifically, Article 40 of the Draft Constitution refers to the protection by the state of “motherhood and fatherhood, and childhood”. Such a **reference should be reconsidered, and ideally even removed, to avoid the perpetuation of possible gender stereotypes** (including limiting women’s roles to being wives and mothers).<sup>340</sup>
185. **Article 40** also refers to the right to marry; the wording of this Article could be improved by replacing the requirement that **marriages are effected** “by mutual consent” with the term “**by free and full mutual consent**”, so as to be fully compliant with Article 23 of the ICCPR.
186. On a more general note, Article 29 provides that “violating equality on the basis of sex is punishable by law”. It is recommended to expand this provision by ensuring that all violations of the principle of equality, also on the basis of other grounds, are punishable by law.
187. **The rights of children, and the fact that their best interests should always be a primary consideration in all decisions that concern them, should also be mentioned in the Draft Constitution.**<sup>341</sup>
188. As it stands, the protection of the rights of minorities is not addressed in the Draft Constitution. Pursuant to Article 27 of the ICCPR, “persons belonging to [ethnic, religious or linguistic] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. Consequently, there should be **specific reference to the right of persons belonging to national minorities to enjoy and develop their cultural, linguistic or religious identity.**<sup>342</sup> While Article 21 commendably provides that “[t]he use of native language shall be guaranteed to all citizens of Turkmenistan” and Article 104 does mention the use of a person’s native language during court proceedings, consideration could be given to extending **this right also to relations with the public administration, especially in those areas which are traditionally inhabited by persons belonging to national minorities or where such persons live in substantial numbers.**<sup>343</sup>

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could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”

<sup>338</sup> See *op. cit.* footnote 334 (CESCR’s General Comment No. 20 (2009)). See also UN HRC, *Resolution 17/19 on human rights, sexual orientation and gender identity*, A/HRC/RES/17/19, 14 July 2011; and UN High Commissioner on Human Rights, *Report to the Human Rights Council on violence and discrimination based on sexual orientation and gender identity*, A/HRC/19/41, 17 November 2011. See also the Yogyakarta Principles, “Principles on the application of international human rights law in relation to sexual orientation and gender identity”, 26 March 2007, Principle 20, <[http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)>, which defines “gender identity” as “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.

<sup>339</sup> *Op. cit.* footnote 21, pars 38-39 (2012 CEDAW Committee’s Concluding Observations on Turkmenistan).

<sup>340</sup> UNDP, *Drafting Gender-Aware Legislation: How to Promote and Protect Gender Equality in Central and Eastern Europe and in the Commonwealth of Independent States*, page 8, available at <http://iknowpolitics.org/sites/default/files/drafting20gender-aware20legislation.pdf>.

<sup>341</sup> See Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3 par 1)*, par 54, available at [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

<sup>342</sup> *Op. cit.* footnote 142, par 86 (2005 ODIHR-Venice Commission-OSCE Mission to Georgia-HCNM Joint Opinion on the Draft Amendments to the Constitution of the Republic of Georgia).

<sup>343</sup> See, for instance, the OSCE HCNM, *Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998)*, pars 13-15, available at <http://www.osce.org/hcnm/67531>.

189. Members of minorities shall further be able to exercise their **right to disseminate, have access to, and exchange information and ideas in their native language;**<sup>344</sup> the **Draft Constitution could be supplemented accordingly.**
190. The Draft Constitution should also ensure that **minorities are represented in advisory and decision making bodies,**<sup>345</sup> in **public affairs and in affairs relating to the protections and promotion of the identity of such minorities.**<sup>346</sup> The OSCE Lund Recommendations on the Effective Participation of National Minorities in Public Life<sup>347</sup> can serve as a useful reference document in that respect.
191. The state is under the duty to facilitate a culture of tolerance in education, culture, media and other spheres and to encourage mutual respect without any distinction based on ethnic, religious and linguistic identity. However, other than the general provisions of Article 55, there is no reference in the Draft Constitution to **educational rights, including the right to learn and to be instructed in a minority language, and the right of minorities to set up and to manage their own private educational and training establishments, which constitute a key element of minority rights protection.**<sup>348</sup> **The drafters should consider supplementing the Draft Constitution accordingly.** This would be in line with the practice of most OSCE participating States which have incorporated these principles and standards in their constitutions.<sup>349</sup>

#### *5.2.7. Economic, Social and Cultural Rights*

192. Article 51 par 1 of the Draft Constitution states that “[e]very citizen shall have the right to living accommodation and support of the state in obtaining or acquiring a comfortable living accommodation, and construction of individual housing”. As mentioned in par 132 *supra*, such a provision which directly relates to the right to adequate housing<sup>350</sup> should be guaranteed to everyone and not only to citizens. While the right to adequate housing habitually does not require the State to build housing for the entire population,<sup>351</sup> it obliges governments to put in place an enabling legal and regulatory framework, supported by sufficient budget allocation, with a view to also addressing the problems and concerns of vulnerable and marginalized groups.<sup>352</sup>
193. In terms of general principles, “adequate housing” means more than just shelter alone, as defined by four walls and a roof. For housing to be considered “adequate”, it must, at a minimum, meet a number of key criteria,<sup>353</sup> including in particular security of tenure,

<sup>344</sup> See par 45 of the OSCE Vienna Document (1989).

<sup>345</sup> See Part IV of the Report of the CSE Meeting of Experts on National Minorities, Geneva (1991), available at <http://www.osce.org/hcnm/14588>.

<sup>346</sup> *Op. cit.* footnote 11, par 35 (OSCE Copenhagen Document (1990)).

<sup>347</sup> OSCE HCNM, *Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999)*, available at <http://www.osce.org/hcnm/32240>.

<sup>348</sup> *Op. cit.* footnote 142, pars 87-93 (2005 ODIHR-Venice Commission-OSCE Mission to Georgia-HCNM Joint Opinion on the Draft Amendments to the Constitution of the Republic of Georgia).

<sup>349</sup> See *op. cit.* footnote 302, page 14 (OSCE HCNM’s Ljubljana Guidelines on Integration of Diverse Societies (2012)).

<sup>350</sup> Article 11 par 1 of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>351</sup> See, with respect to the progressive realisation of housing rights, par 9 of General Comment No. 3 (1990) of the CESCR. See also page 6 of the Factsheet No. 21 on the Right to adequate housing of the Office of the United Nations High Commissioner for Human Rights and the United Nations Human Settlement Programme (UN-Habitat), November 2009, available at [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf).

<sup>352</sup> *ibid.*

<sup>353</sup> See CESCR, General Comment No. 4 on Adequate Housing (1991), par 8, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en). The seven key criteria can be further detailed as follows: (1) security of tenure: a degree of tenure security that guarantees legal protection against forced evictions, harassment and other threats, with; (2) availability of services, materials, facilities and infrastructure: the housing occupants have safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal; (3) affordability: housing costs do not threaten or compromise the occupants’ enjoyment of other human rights; (4) habitability: housing guarantees physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards; (5) accessibility: the specific needs of disadvantaged and marginalized groups are taken into account; (6) location: housing is not cut off from employment opportunities, health-care services, schools, childcare centres and other social facilities,

to guarantee legal protection against forced evictions. In that respect, *forced* evictions need to be carried out in accordance with the law, and should be accompanied by adequate safeguards and protection measures to prevent homelessness.<sup>354</sup> It is recommended **to supplement the Draft Constitution to reflect this principle**. This would help bring the Draft Constitution in line with international standards in this field, and respond to the concerns of UN treaty bodies, which have in the past urged Turkmenistan to refrain from forcibly evicting and relocating a large number of people in the context of urban renewal projects.<sup>355</sup>

194. Article 12 provides for a right to property and its paragraph 3 specifies that “[f]orced confiscation of property shall be permissible only in cases stipulated by law”. Pursuant to Article 17 of the Universal Declaration of Human Rights, “[e]veryone has the right to own property alone as well as in association with others” and “[n]o one shall be arbitrarily deprived of his property”. It is recommended to supplement Article 12 to include a **protection against unlawful expropriation. As such, expropriation should only be possible if prescribed by law, and if it pursues of a legitimate public interest, which should be balanced with the private interest at stake, and, as feasible, with a guarantee of prompt and adequate compensation.**<sup>356</sup> Article 12 should be supplemented accordingly.

#### 5.2.8. *Other Rights*

195. **Article 37** seems to narrowly define the right to respect for private and family life as it appears to be limited to “secrets” and also does not refer to “home”. It is recommended **to remove the reference to “secrets” and to instead refer to “private and family life”, while also clarifying that this protection shall apply to a person’s “home”**.
196. **Article 39** refers to the right to freedom of movement and residence within Turkmenistan. However, the Draft Constitution does not mention **the freedom of everyone to leave any country, including his/her own**, nor the principle that no one shall be arbitrarily deprived of **the right to enter his/her own country**, recognized by Article 12 pars 2 and 4 of the ICCPR.<sup>357</sup> OSCE participating States have also expressly committed to fully respect such freedom of movement rights (1989 OSCE Vienna Document, par 20). It is thus **recommended to supplement Article 39 of the Draft Constitution accordingly**.

## 6. Final Comments

197. It is noted that the Draft Constitution does not include any transitory provisions concerning the mandates of state organs already elected or appointed, and other procedures. This may inhibit the smooth transition into new systems and processes once the new Constitution is adopted. It would be advisable to introduce such transitory provisions, while ensuring that the new Constitution does not terminate lawful mandates

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and is not located in polluted or dangerous areas; and (7) *cultural adequacy*: the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.

<sup>354</sup> See *ibid.* par 18 (CESCR’s General Comment No. 4 on Adequate Housing (1991)). See also pars 1 and 4 of the General Comment No. 7 on forced evictions of the CESCR (1997), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6430&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6430&Lang=en).

<sup>355</sup> See e.g., *op. cit.* footnote 198, par 21 (2011 CESCR’s Concluding Observations on Turkmenistan).

<sup>356</sup> See e.g., *op. cit.* footnote 22, par 15 (2010 Venice Commission Opinion on the Draft Constitution of the Kyrgyz Republic).

<sup>357</sup> See also UN HRC, *Svetlana Orazova v. Turkmenistan*, Communication No. 1883/2009, 4 June 2012, pars 7.3-7.4, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f104%2fd%2f1883%2f2009&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f104%2fd%2f1883%2f2009&Lang=en).

within the judiciary (e.g., judges) and other independent bodies.<sup>358</sup> This would also allow sufficient time to prepare and adopt the necessary underlying legislation, for instance laws to regulate the reform of the prosecution service (see Section 4.5. *supra*), the establishment of the new national human rights institution (see Section 4.6. *supra*), and, as applicable, the setting-up of an independent judicial council (see pars 95-96 *supra*).

198. It is noted positively that overall, the Draft Constitution uses gender neutral drafting. However, on some occurrences, certain provisions still use only the male gender. This is not in line with general international practice, which normally requires legislation to be drafted in a gender neutral manner, by referring to equality of both genders. It is recommended to review the respective provisions and replace “he” (он) when referring to the Chairperson of the Mejlis by “he or she” (он или она) and as appropriate “ero/emy” by the gender-neutral “своего/ своему” when referring to the President (Articles 70 par 2, 71 par 19, 74, 92 par 2 and 93 par 1), the Chairperson of the Mejlis and his/her deputies (Articles 80, 88 and 89) and the Prosecutor General (Articles 130 and 133), or to use some other gender neutral formulation.
199. Finally, constitutional amendments should only be made after extensive, open and free public discussions, following a timeline that allows for wide and substantive debate.<sup>359</sup> Transparency, openness and inclusiveness, adequate timeframes and conditions allowing for a variety of views and proper debates of controversial issues are key requirements of a democratic constitution-making process. Notably, these should involve political institutions, non-governmental organisations and citizens associations, the academia, the media and the wider public;<sup>360</sup> this includes proactively reaching out to groups that would otherwise be marginalized.<sup>361</sup> The transparency, openness and inclusiveness of the process are generally considered to be key for adopting a sustainable text widely accepted by society as a whole, and representative of the will of the people.<sup>362</sup>

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<sup>358</sup> See e.g., *op. cit.* footnote 32, pars 41-42 (2013 Venice Commission Opinion on the Draft Amendments to the Constitution of Ukraine).

<sup>359</sup> See, in relation to the adoption of legislation, *op. cit.* footnote 11, par 18.1 (OSCE Moscow Document (1991)), which provides that “legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives”.

<sup>360</sup> See e.g., Venice Commission, *Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary*, CDL-AD(2011)001, 28 March 2011, pars 18-19, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)001-e).

<sup>361</sup> See *op. cit.* footnote 302, Principle 2 on page 9 and Principle 23 on page 32 (OSCE HCNM’s Ljubljana Guidelines on Integration of Diverse Societies (2012)).

<sup>362</sup> See e.g., Venice Commission, *Compilation of Venice Commission Opinions concerning Constitutional Provisions for Amending the Constitution*, CDL-PI(2015)023, 22 December 2015, Section C on pages 5-7, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)023-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)023-e).