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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

INTERIM OPINION

ON CONSTITUTIONAL REFORMS IN THE REPUBLIC OF ARMENIA

Adopted by the Venice Commission
at its 61st Plenary Session,
Venice, (3-4 December 2004)

On the basis of comments by:

Mr Aivars ENDZIŅŠ (Member, Latvia)
Mr Kaarlo TUORI (Member, Finland)
Mr Owen MASTERS (Expert, United Kingdom)
Mr Bruno NASCIMBENE (Expert, Italy)

Introduction

1. By a letter of 26 August 2004, Mr. Tigran Torossyan, Vice-Speaker of the Armenian National Assembly, requested the Venice Commission to carry out an expert assessment of three draft proposals of amendments to the Constitution of Armenia (CDL (2004) 100, CDL (2004) 101, and CDL (2004)107).

2. Messrs. Aivars Endzins, Kaarlo Tuori, Owen Masters and Bruno Nascimbene were appointed to act as rapporteurs.

3. The present opinion, which was prepared on the basis of their comments, was discussed within the Sub-Commission on Constitutional Reforms on 2 December 2004, and was subsequently adopted by the Commission at its 61st Plenary Session (Venice, 3-4 December 2004). It's an interim opinion to the extent that the Commission will also assess the next steps of the process of constitutional reform in Armenia.

I. Background

4. The Constitution that is currently in force in Armenia was adopted by popular referendum on 5 July 1995. It established a presidential regime.

5. After the resignation of the first elected president Levon Ter-Petrosyan in 1998, his successor Robert Kocharyan (then Prime Minister of the Republic) made the issue of constitutional reform one of the cornerstones of his electoral platform. The major points in the reform were human rights, the interrelation between the president and other branches of government, the independence of the judiciary, and local self-government. Upon his election as president, the Constitutional Reform Preparation Committee was established to prepare draft constitutional amendments. The Venice Commission was actively engaged during the whole process of drafting constitutional amendments, and adopted its report on the proposed draft text in July 2001 (CDL-INF (2001) 017).

6. The draft constitutional amendments (which did not entirely correspond to the text prepared in co-operation with the Commission) were submitted to popular referendum on 25 May 2003.

7. The May referendum failed. Only 46 percent of the 1.2 million voters who participated in the referendum approved the proposed changes

8. In January 2004, the process of constitutional reform was resumed. A conference launching this process was organised by the Committee on Questions of European Integration of the National Assembly in co-operation with the Venice Commission. It was held in Yerevan on 20-21 January 2004. In summer/autumn 2004, three draft proposals of amendments were submitted to Parliament: the first set of proposals, prepared and adopted by the ruling coalition (a three-party pro-government coalition) ; the second set of proposals, prepared by Mr Arshak Sadoyan, leader of the National Democratic Alliance of Armenia, and submitted in his personal capacity; and the third set of proposals, prepared, *inter alia,* by Mr Gurgen Arsenyan, of the United Labour Party.

9. Since its accession to the Council of Europe in 2001, the Armenian authorities have repeatedly expressed their willingness and determination to fulfil the commitments accepted[1], and meet European standards and criteria that underpin true democracy. The present opinion will examine whether the proposed amendments to the 1995 Constitution represent a step forward in this direction.

II. The First Set of Proposals for Constitutional Amendments (CDL (2004) 100)

A. General Remarks

10. In the following comments, the main point of reference will be, in addition to the Constitution in force (CDL(1995)62), the revised Constitution of 2001 (in the Appendix to CDL-INF(2001)17, hereinafter "the 2001 draft Constitution"), prepared in co-operation with the Venice Commission. The amendments proposed by the first set of proposals for constitutional amendments (hereinafter: "1st set of proposals") correspond, in many respects, to those contained in the 2001 draft Constitution. To the extent that the amendments proposed in the 1st set of proposals correspond to the latter, the comments included in the report CDL-INF (2001) 17 will not, as a rule, be repeated. Thus, the following comments should be read in conjunction with those included in the report CDL-INF (2001) 17. In the preparation of this opinion, the Commission has only examined the proposals for changes, and has not addressed other parts of the Constitution which have not been the object of proposed amendment.

B. Analysis of the Proposed Amendments

a. Protection of Human Rights and Freedoms

11. The new formulation of Article 4[2] making human rights directly applicable and placing them at the very top of the hierarchy of norms in Armenian legal order is to be welcomed. The same holds true for the new Article 6.4[3] which removes any ambiguity as to the place of international treaties, including the European Convention on Human Rights (hereinafter: "the ECHR") in the hierarchy of norms.

12. With regard to the exercise of the constitutionally guaranteed rights and freedoms, the Commission recalls the importance of a clear provision on domestic remedies for an effective implementation. In this respect, the Commission regrets that a proposal has been made to remove the second sentence of the current Article 18 § 1, which guarantees persons claiming to be victims of violations of their constitutionally guaranteed rights, the right to an effective remedy before State authorities. The Commission strongly recommends that the said sentence be reinserted in the final text[4].

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[1] *Particularly those listed in Opinion no. 221 (2000) of the Parliamentary Assembly of the Council of Europe, and acknowledged by the PACE Resolution no. 1304 (2002).*

[2] "*The Republic of Armenia recognizes the fundamental human rights and freedoms as an inalienable and ultimate value. In the exercise of power the people and the state shall be limited by those rights stipulated by the Constitution, as a directly functioning right*".

[3] « *If a ratified international agreement stipulates norms other than those stipulated in the laws, the norms of the agreement shall prevail ».*

[4] *See CDL-INF (2001) 017 , § 23.*

Death Penalty

13. The Commission notes with regret that the proposed Article 15 of the Constitution would not contain an explicit prohibition of the death penalty. This is to be considered a fallback in relation to the draft proposal of 2001.

14. The Commission recalls that on 29 September 2003, Armenia ratified Protocol No 6 to the ECHR. Although Article 15, taken together with Articles 6.4 and 14 of the 1st set of proposals, as well as Protocol No 6 to the ECHR can be interpreted as including the prohibition of the death penalty, the Commission would favour including an explicit provision in the revised Constitution.

Right to Liberty and Security

15. The proposed new wording of Article 16 of the Constitution, while including the need to respect the principle of legality, does not provide for an exhaustive list of situations where a person can be deprived of her or his freedom. In this respect, the Commission assumes that the provisions of Article 5.1 a) to f) of the ECHR shall become legally relevant through the proposed Article 42 § 5 of the Constitution[5].

Right to request pardon or mitigation of the punishment

16. Article 19 of the 1st set of proposals currently provides for a right of every convicted person to pardon or mitigation of the sentence. It should rather provide for the right to *request* such pardon or mitigation of the sentence.

Freedom of Movement

17. Under the proposed Article 24, freedom of movement and residence guaranteed by Article 25 of the current Constitution would no longer be granted only to citizens, but also to "anyone legally in Armenia". This is a positive change and merits welcome.

Freedom, Independence and Plurality of the Media

18. Freedom and plurality of the media are pre-conditions of democracy[6]. The possibility to freely express ideas and opinions enhances public dialogue and therefore stimulates the development of the democratic process. Equally important are the existence of a wide range of independent and autonomous media and the establishment of independent and powerful regulatory authorities for the broadcasting sector. Freedom of expression is also intrinsically linked to the citizens' right to access to information, which is a prerequisite for making well-informed decisions.

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[5] "*Any restrictions on human and citizens rights and freedoms shall not exceed the scope set by the international commitments of the Republic of Armenia". In paragraph 2 of the same provision, there is a clear misprint or inaccuracy in the translation : Everyone shall have the right to act in a way* not *prohibited by law … "* .

[6] *In its Recommendation No 1506 (2001) on freedom of expression and information in the media in Europe, the Parliamentary Assembly of the Council of Europe stressed that* «*the media are vital for the creation and the development of a democratic culture in any country and free and independent media are an essential indicator of the democratic maturity of a society*».

19. In this respect, the current situation in Armenia still gives cause for concern[7].

20. The Commission thus welcomes that Article 26 of the 1st set of proposals suggests that "the freedom of the press and other mass-media" be explicitly guaranteed.

21. However, the same provision further reads "the activities and liabilities for mass media shall be defined by law". In the Commission's view, this provision may be problematic. While introducing a clause of legality, it may in fact open the door to not clearly defined restrictions on the freedom of the media. The essence of freedom of the media is that media enterprises and media professionals decide themselves what they do within the framework of the general law.

22. Thus, although the Commission is aware that constitutional limits to such restrictions are set out in Article 45 of the 1st set of proposals (Article 42 § 5 of the proposed Constitution would in fact read: "Any restrictions to human and citizens' rights and freedoms shall not exceed the scope set by the international commitments of the Republic of Armenia"), it would nevertheless support removing the last sentence of paragraph 3 of Article 27 of the proposed Constitution.

23. As underlined above, the Commission understands that the freedom of the media comprises a requirement for independence of the media and in particular that media in the public sector be set up and operated in such a way as to be independent of the Government and of any public service as well as to guarantee opportunities for the expression of different lines of opinion[8].

24. In this respect, the Commission notes that the 1st set of proposals fails to provide guarantees of pluralism of the media and of independence and transparency of the regulatory authorities.

25. The Commission would therefore suggest that Article 27 § 3 of the proposed Constitution be phrased as follows:

> "The freedom of the media and other means of information is guaranteed.
>
> The State shall ensure the existence and operation of an independent, nationwide public service of radio and television offering a diversity of programmes in the field of information, education, culture and entertainment.
>
> To further the goals of freedom, independence and plurality of the media, the broadcasting media shall be regulated by an independent authority, established by law, whose members shall be appointed in a democratic and transparent manner and whose decisions are subject to judicial review".

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[7] *Newspapers are regularly found guilty in court and ordered to pay heavy fines for publishing defamatory articles about prominent figures in or close to the government. The National Broadcasting Commission, which controls radio and television frequencies, consists of six members, all appointed by the President. In many cases, the Commission, which according to the law should open regional competitions for new frequencies every year, simply avoids this by not convening for several years (see the International Crisis Group Europe Report n°158, 18 October 2004 and PACE Report on "Implementation of Resolutions 1361 (2004) and 1374 (2004) on the honoring of obligations and commitments by Armenia").*

[8] *See CDL-INF(2001)17, § 26.*

26. Such modification would also respond to the concerns expressed by the Parliamentary Assembly of the Council of Europe, which recently requested that "the composition of the National Broadcasting Commission be renewed as soon as possible and that fair conditions for awarding broadcasting licenses to televisions /…/ be created"[9].

Freedom of Assembly

27. Freedom of assembly is a fundamental right in a democracy. It covers all types of gatherings including assemblies and meetings, demonstrations, marches and processions, whether public or private, provided they are "peaceful".

28. The Commission takes note, with approval, of the proposal to grant the right to peaceful assembly to "everyone" (Article 29 of the proposed Constitution). The Commission notes however that the same proposed provision maintains the distinction between three categories of assemblies : "assembly, rallies and demonstrations". This categorisation seems unnecessary and at any rate incomplete, thus dangerous as it may lead to the conclusion that those types of assemblies which do not clearly belong to one of the three (pickets or sit-ins, for example) are not guaranteed under the Constitution. The Commission suggests deleting the three categories and leaving only the general term "assembly".

29. In respect of the second paragraph of the proposed Article 29 of the Constitution, the Commission notes that it contains a limitation on the possibility for "the military and public servants" to restrict the exercise of the right of freedom of peaceful assembly only in a manner "prescribed by the law".

30. The Commission points out that, as it stands (unless the English translation of the Armenian text is inaccurate), this provision allows for unlawful restrictions to be imposed by, for example, the President of the Government, who do not fall within the two categories mentioned, which would be contrary to Article 11 of the European Convention. The Commission recalls that Article 11 § 2 of the European Convention allows for special restriction on the possibility for "members of the armed forces, the police or of the administration of the State" to exercise the right to freedom of assembly. If this is what was meant by the authors of the 1st set of proposals, the provision should then be modified accordingly.

31. The Commission recalls that Article 11 § 2 of the European Convention contains an extremely important proportionality clause, as it provides that "No restriction shall be placed on the exercise of [the right to freedom of assembly"] other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". The requirement of proportionality should therefore be added in the proposed Article 29 of the Constitution in the same terms as in Article 11 § 2 of the European Convention. This would be useful even in the presence of the general clause of the proposed Article 42 § 5 of the Constitution.

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[9] *See PACE Report on "Implementation of Resolutions 1361 (2004) and 1374 (2004) on the honouring of obligations and commitments by Armenia".*

32. The Commission further recalls and refers to its recently adopted opinion on the law "on the procedure of conducting gatherings, meetings, rallies and demonstrations in the Republic of Armenia"[10], in which it has recalled the essence of the right to freedom of assembly and the limits within which the authorities may legitimately regulate and restrict the exercise of this right.

Citizens' Rights

33. In a number of provisions, the term "citizens' rights" is used, while the Commission suggests the use of the term "civil rights". Furthermore, limiting rights to citizens only (in the proposed Articles 23 § 3 and 34 of the Constitution) does not seem justified.

b. The Powers and Immunity of the President

Martial law and state of emergency

34. The Commission notes at the outset that the proposed provisions on the procedure for declaring martial law and the state of emergency depart in some crucial aspects from those of the revised constitution prepared in co-operation with the Venice Commission[11].

35. Paragraphs 13 and 14 of the proposed Article 55 of the Constitution seem to imply that the concepts of martial law and state of emergency are used as synonyms. Those paragraphs do not allow to clearly distinguish between a) martial law, b) a state of emergency and c) the measures taken in the event of an imminent danger to the constitutional order. On the one hand, paragraph 13 seems to imply that the concepts of martial law and state of emergency are used as synonyms. On the other hand, a number of other Constitutional provisions where both martial law and a state of emergency are mentioned presuppose a distinction between the two (e.g. Article 44 or Article 60 § 1 of the proposed Constitution). If a distinction between "martial law" and "state of emergency" is indeed intended by the authors, the relevant provision should be revised to make this distinction clear. In addition, paragraph 13 should lay down that the legal regime of a state of emergency should also be defined through a law.

36. According to the proposed Article 55 § 14 of the Constitution, "the appropriate measures" that the President may take in the event of an imminent danger to the constitutional order are not preceded by a declaration of a state of emergency, nor is the scope of the measures defined anywhere in the proposed new Constitution. The proposed Article 44 of the Constitution on restrictions to fundamental rights and freedoms refers only to martial law and a state of emergency. Both the ECHR and the UN Covenant on Civil and Political Rights instead require that a state of emergency, allowing for derogations from human rights, be expressly declared and that a notification be sent to the respective Secretary General. The 2001 draft constitution (Article 55 § 15) indeed required the declaration of an "extraordinary situation", before the President could use the armed forces or declare martial law.

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[10] *Opinion on the law "on the procedure of conducting gatherings, meetings, rallies and demonstrations in the Republic of Armenia", adopted on 8-9 October 2004, CDL-AD(2004)39.*

[11] *See doc. CDL-INF (2001) 017, § 45.*

37. The active involvement of the National Assembly in the determination of the reasons and proportionality of the emergency measures as well as the persistence of the danger requiring the use of emergency powers is necessary. According to the 2001 draft Constitution, a special session of the National Assembly was to be convened immediately after the declaration of both martial law and an "extraordinary situation", in order to examine the "correspondence of the measures undertaken with the situation". In the present draft amendments, this provision is included in neither para. 13 nor para. 14 of Art. 55. The only provision on parliamentary control of the exceptional measures is in the proposed Art. 81 § 2 of the Constitution: "The National Assembly can stop the progress of measures prescribed by Paragraph 13 of Article 55 of the Constitution." This provision however does not cover measures undertaken under paragraph 14, nor does it include the requirement of convening the National Assembly immediately after the President has started exercising his/her powers. The proposed paragraph 14 of Article 55 of the Constitution merely requires the President to consult with the Chairman of the National Assembly and the Prime Minister prior to taking appropriate measures.

38. In conclusion, the proposed amendments concerning martial law, state of emergency and measures referred to in para 14 of the proposed Art. 55 of the Constitution represent a fallback in relation to the 2001 draft Constitution; in its proposed form, this provision creates legal and constitutional uncertainty. The Commission therefore strongly recommends that the provisions on the procedure for declaring martial law and the state of emergency be changed back into the form they had in the 2001 draft Constitution.

Signature and Promulgation of Laws

39. The Commission underlines that the 2001 draft Constitution provided, in Article 55 § 2, that in case the National Assembly once again adopts a law which the President of the Republic has sent back to it, the President has the possibility to apply to the Constitutional Court to seek a decision on the compliance of the law in question with the Constitution. The Commission would favour the introduction of this possibility in the proposed Constitution.

Presidential Immunity

40. The proposed new Article 56 § 1 of the Constitution stipulates that "The President of the Republic shall be immune". Such a general clause on immunity does not conform to European standards. It should be clearly specified that the immunity only covers the acts of the President which are the expression of his or her functions. The clarification of this clause is also relevant for a correct interpretation of article 57 of the present Constitution (which would be maintained), which provides for the removal of the President from his office in case of "State treason or other high crimes".

c. The Relations between the President, the Cabinet and the National Assembly

General Remarks

41. With respect to the relations between the main constitutional organs, the 1st set of proposals, when compared to the 2001 draft Constitution, expresses a shift in favour of the President. Thus, the President would retain the power to appoint and dismiss the Prime Minister and, on the latter's recommendation, the members of the Government. The main provisions of the Action

Plan of the Government would, however, require the approval of the National Assembly. If the Assembly adopts for the third time a vote of no confidence when deliberating the Action Plan of a newly-appointed Government, the

President shall dissolve the Assembly (proposed Art. 55 § 4, Art. 74 § 1 and Art. 85 § 1 of the Constitution). Even the other situations where the President would be entitled to dissolve the National Assembly would be explicitly regulated in the Constitution (Art. 74.1(2)).

42. The Venice Commission has repeatedly emphasised that the fundamental choice between a presidential, a semi-presidential and a parliamentary regime is a political choice to be made by the country in question and that all these regimes can be brought into harmony with democratic standards. In any case, however, the Parliament should have sufficient controlling powers with regard to the executive branch. In Armenia where the President, directly elected, is the real "engine" of the political system, it would be rather dangerous for the democratic life of the state to further increase his powers while at the same time not providing for the necessary strengthening of the role of the National Assembly.

Appointment of the Prime Minister

43. The Commission notes with regret that the National Assembly does not have any role in the procedure of nomination and dismissal of the Prime Minister.

44. According to the proposed Article 85 § 2 of the Constitution, the Government "brings to life" domestic and foreign policy. The precise legal significance of this provision seems unclear[12]. It seems to imply that the government only implements the domestic and foreign policy adopted by another organ, possibly the President. Such limitation of the governmental powers does not conform to European standards.

45. The Commission also notes that although the right of the President to chair the meetings of the Government has been removed from the text, he or she has the right to convene and chair a sitting of the Government (proposed Article 86 § 3 of the Constitution). In the light of these considerations as well as of a number of other provisions (see *infra*), the Chapter on the executive power does not seem to guarantee the effective independence of the Government vis-à-vis the President.

Vote of Confidence in the Government in respect of Draft laws proposed by Individual Deputies

46. Under the proposed § 4 of Article 75 of the Constitution, the Government may put forward a motion on confidence not only with regard to a draft law proposed by the Government itself, but also with regard to a draft law proposed by a Deputy. This provision weakens the power of the National Assembly and particularly the legislative initiative of the opposition : it should accordingly be removed.

[12] *In the original text, the term employed ("kensagortsel") literally means "implements".*

Dissolution of the National Assembly

47. The President has the power to dissolve the Parliament only in the cases expressly provided for by the Constitution (proposed Article 74 § 1), which are:

- when Parliament refuses - three times - to give a vote of confidence to the main provisions of the Action Plan of the Government formed by the President;
- when Parliament fails within two working months to decide on a draft law deemed urgent by decision of the Government;
- if, in the course of a regular session, no sittings of the Assembly are convened for more than two months;
- if, in the course of a regular session, the Assembly fails for more than two months to adopt decision on issues under debate.

48. While the National Assembly has no word in the formation of the executive, the main provisions of the Action Plan of the Government do require its approval. However, in practice, the Assembly is subordinated to the President as the latter is empowered, in case of conflict with the parliament, to call new elections and ask the people to choose between his own political line and the policy supported by the Parliament or its majority.

49. A period of two months may be objectively too short for the Parliament, possibly in three readings, to examine complex and/or voluminous draft laws.

Parliamentary Control of the Government

50. The Commission regrets that the right of Deputies to address written questions to the Government or administrative bodies has been removed from the draft. The possibility for groups of Deputies to submit written queries has also been removed.

d. Attributions of the National Assembly

51. The Commission notes that the list of the issues which fall within the exclusive legislative competence of the National Assembly is shorter than the one included in the draft revised constitution of 2001, prepared in co-operation with the Venice Commission (Article 83.3). Nevertheless, the explicit definition of the National Assembly's exclusive competence is to be considered a progress with respect to the present constitutional situation.

52. The Commission also notes that the number of deputies has been reduced. It recalls that the number of members of parliament is a matter for each Constitution to determine with regard to specific national factors such as the size of the population and the structure of parliament. The concern of ensuring parliament's effectiveness may also legitimately prompt a change in the number of MPs, in accordance with the applicable procedures of constitutional revision[13]. In the present case, no explanation is given for this amendment.

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[13] *See the Commission's opinion on the referendum on decreasing the number of members of Parliament in Georgia (CDL (2003) 78).*

e. The Control Chamber and the Central Bank

53. Under the 1st set of proposals (proposed new Article 83. 2 of the Constitution), the National Assembly's Oversight Office is to be replaced by an institution called the Control Chamber, which is defined as an independent body even though the power of appointing the Chairperson and other officials of the Chamber seems to fall to the President (or the Government). There are no objections to the establishment of such an independent body charged with overseeing the implementation of the budget and the use of state property. However, even the National Assembly should have financial controlling powers. It is to be regretted that the present amendments do not include any compensation for the replacement of the National Assembly's Oversight Office by the Control Chamber. The possibility for the Control Chamber to oversee the budget and use of property of the Local Self-Government units might be addressed.

54. The Commission welcomes the proposed new Article 83 § 1 of the Constitution, which aims at strengthening the independence of the Central Bank. However, the main aim of this Bank should be to ensure the stability of the national currency rather than of prices.

f. The Human Rights Defender

55. The Commission warmly welcomes the proposed paragraph 4 of Article 83 of the Constitution, empowering the National Assembly to appoint the Human Rights Defender, which is an important step forward in terms of the independence of this institution from the executive that it is mandated to control[14]. The Commission further welcomes the need for the grounds for termination of the Defender's mandate and the status of the Defender to be regulated by law (proposed Article 83 § 4 and proposed new Article 83.3, point 14 of the Constitution respectively) and the possibility for the Human Rights Defender to apply to the Constitutional Court (proposed Article 101 § 1 point 8 of the Constitution).

g. The Judiciary

56. The stipulation of constitutional guarantees for the establishment and functioning of an independent and impartial judicial power has been identified as one of the fundamental issues of the constitutional reform in Armenia.

57. The Commission welcomes the proposal (proposed new Article 94.1 of the Constitution) to have the Judicial Council composed of nine judges out of twelve members, elected by their peers (the General Assembly of Judges of the Republic of Armenia). It considers however that the non-judge members should rather be elected by Parliament than by the President of the Republic.

58. In addition, the Commission considers that sub-section 3 of the proposed new Article 94.1, providing that the President chairs the Council of Justice, could prove rather problematic. Having the President as the Chair is not necessarily the best solution (although provided for in a

[14] *See the Commission's opinion on the draft Law on the Human Rights Defender of Armenia (CDL-AD (2003) 6).*

number of European Constitutions) and his or her role as the Chair should be purely formal. In this regard, the Commission wishes to recall the European Charter on the Statute for Judges, which stresses the importance of the absolute independence of this body from both the executive and the legislative powers[15].

59. The Council of Justice should be the final authority for all aspects of the professional life of judges in particular matters pertaining to their selection, appointment, career (including promotion and transfer), training, dismissal and discipline, and should be responsible for overseeing the training of judges.

60. In this respect, the power of the President to appoint the chairmen of all courts without any involvement of the Council of Justice (Article 55.11) appears to be problematic.

61. As regards the power to appoint almost half of the members of the Constitutional Court, the Commission does not find it, in itself, problematic. The Commission recalls nevertheless the need for appropriate checks and balances: the additional powers of the President under this set of proposals, coupled with his already existing power to appoint some members of the Constitutional Court, shift the balance of powers too much in the President's favour. If the necessary balance is reached on another basis, the President's power to appoint a certain number of members of the Constitutional Court may well be acceptable.

h. Local Self-Government

62. The Commission considers that, generally speaking, the 1st set of proposals strives to conform to the European Charter of Local Self-Government. Yet, a number of amendments proposed strongly deviate from the spirit and the objectives of the Charter and raise concerns.

63. The last sentence of paragraph 3 of the proposed Article 30 of the Constitution, providing that "the law may prescribe other restrictions to the right to vote in the elections for the bodies of local self-government" is vague and should be deleted.

64. With regard to the appointment and dismissal of the Mayor of Yerevan (proposed Article 88.1, § 2), the Commission recalls its report of 2001[16], stating that the power of the President to appoint and dismiss the Mayor of Yerevan is not only in breach of essential principles of local democracy and the European Charter of Local Self-Government[17], but also contradicts with Article 3 of the Armenian Constitution currently in force, which provides for direct suffrage for the election of local self-administration structures. The strong recommendation, expressed in the report, to delete this provision is therefore to be repeated.

65. The Commission further suggest to delete the part of the proposed paragraph 3 of Article 88.1 of the Constitution which reads that the Mayor of Yerevan "shall pursue the territorial policy of the Government". The Mayor of Yerevan should undertake only those responsibilities which are attributed to him/her in accordance with a new Law on the City of Yerevan. He or she must therefore not be responsible for the territorial policy of the Government, unless some functions are delegated to the City of Yerevan in accordance with a law on the City of Yerevan.

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[15] *DAJ/DOC (98) 23, § 1.3.*
[16] *CDL-INF(2001) 17, § 58.*
[17] *According to Article 3. 2 of the European Charter on Local Self-Government, the Mayor must be elected by the citizens of the City.*

Nothing should be incorporated in the amendments to the Constitution which would diminish the independence of local self-government.

66. The proposed Article 109.1 of the Constitution gives the Government the power to dismiss, in cases prescribed by law, the Head of Community and to dissolve the Council of Aldermen. The Commission underlines that the use of this power may endanger the principle of local self-government, especially as the provision no longer requires the Government to consult the Constitutional Court before taking the decision.

67. In respect of the power of the Government to discharge the Head of community (proposed Article 109 of the Constitution), the Commission considers that in addition to the cases provided for by law, this should be possible "on the basis of a conclusion of the Constitutional Court".

68. The 2001 draft Constitution (Article 110) provided that "changes in the territorial organisation require a consultative referendum in the communities concerned." This requirement does not appear in the 1st set of proposals. The Commission strongly recommends, in the interests of the local self-government, to include in the proposed Article 110 of the Constitution, the explicit requirement of local referenda and consultation in conformity with Article 5 of the European Charter of Local Self-Government.

i. Constitutional Amendments

69. According to the Constitution currently in force, constitutional amendments introduced by the *qualified majority* of National Assembly shall be submitted to a popular referendum (Article 111 § 4, emphasis added). The proposed new paragraph of Article 111 of the Constitution allows for constitutional amendments to be adopted *by the majority* of the National Assembly, if the initiative originates from the President of the Republic. This difference, which strengthens the role of the President with regard to the National Assembly, does not seem to be justified.

70. According to the proposed new Article 111.1, constitutional amendments may also be adopted through a qualified majority of the National Assembly (on the initiative by the President or by one-third of Deputies), without submitting them to a referendum. This proposal would make constitutional amendments more flexible, while at the same time maintaining the requirement of a referendum in issues of a fundamental nature, and is thus supported by the Commission.

j. The Transitional Provisions

71. The Commission notes that the 1st set of proposals leaves the transitional provisions to be decided and formulated "after the review of the package of reforms". This does not seem acceptable. Transitional provisions form part and parcel of the proposed reform of the Constitution and may in fact address important and delicate issues which should not be shielded from parliamentary debate.

III. 2nd Set of Proposals for Constitutional Amendments in Armenia (CDL (2004) 101)

A. General Comments

72. The 2nd set of proposals for constitutional amendments (hereinafter: "2nd set of proposals") mainly focuses on the issue of formation and functioning of the Government, and the election of deputies to the National Assembly. Thus, it lacks most of the amendments to Chapter 2 (Fundamental Human and Civil Rights and Freedoms) and to Chapter 6 (The Judicial Power) which the Venice Commission in its report CDL-INF (2001) 17 had welcomed as strengthening the protection of human rights and the rule of law in Armenia.

73. In addition, the 2nd set of proposals does not include a provision on the exclusive legislative competence of the National Assembly[18], while the provisions on martial law and states of emergency (proposed Article 55 §§ 12 to 14 of the Constitution) do not meet the requirements of democracy and the rule of law (see previous comments in respect of the 1st set of amendments). This is an important drawback with respect to the 2001 draft Constitution and should be remedied in the final text.

B. Analysis of the Proposed Amendments

a. The Role of Pre-Election Programmes in the Functioning of State Institutions

74. The 2nd set of proposals seems to aim principally at binding the political parties, the Government and even individual deputies to the pre-election programmes presented during the electoral campaign.

75. The proposed Chapter 1 of the Constitution (The Foundations of Constitutional Order) would thus include a general provision according to which "selecting long-term state programs, goals and objectives in the RA shall be set forth and modified through national referenda as well as on the basis of the program provisions approved by the voters during elections" (Article 2.1). According to the proposed Article 7 of the Constitution, "the political parties and the pre-election unions thereof running for election to the National Assembly shall impart their pre-election programs and approaches to the voters, and these programs shall act as a basis for developing state four-year and annual programs, and defining the course of action of the executive power in the event that they, in compliance with the Constitution, are granted the right to form the Government on the basis of the election outcomes". More detailed provisions on the content of the programmes would be included in Chapter 4 on the National Assembly.

Responsibility of Political Parties

76. The proposed new Article 63.2 of the Constitution would require *inter alia* that "A pre-election four-year programme and approach include annual sub-programmes for all the main sectors as well as the *quantitative and qualitative evaluation indicators*, the extent of permitted deviations and the description of insurmountable obstacles for the implementation of the program" (emphasis added). Such programmes would imply not only a political but also a legal

[18] *CDL-INF (2001) 017, § 49.*

responsibility on the political party concerned. Thus, "in the event that the party denies the main programme provisions or has terminated its activities in conformity with the procedure established by law, it shall, upon the conclusion of the Constitutional Court and the resolution of the National Assembly, be deprived of its parliamentary seats" (proposed Article 63.3, § 2).

77. The Commission considers that whilst there is no objection to the principle that a political party or coalition elected to Parliament respect and implement its pre-election programmes, it is not appropriate to determine in detail, through the Constitution, the structure and the manner in which the electoral programme should be prepared.

78. Furthermore, the evaluation of whether the pre-election programmes have been respected and implemented would undoubtedly be a very delicate and complex task. The requirement that the deprivation of a political party/coalition's parliamentary seats be decided by the Constitutional Court does not remove the problematic character of the provision. The Constitutional Court should not be entrusted with the power of adopting decisions of a political nature which imply the use of political criteria of judgment.

Role and Responsibility of the National Assembly

79. The National Assembly should "upon the submission of the Government, adopt laws on the long-term, four-year, annual and special programmes and the budget, make amendments and oversee the progress thereof" (proposed Article 62 § 2 of the Constitution). It would be up to the President of the State to oversee the National Assembly with regard to the implementation of the four-year state programme. In case of the failure by the National Assembly to annually implement the four-year state programme, "the President of the Republic shall at the end of the first year of the National Assembly term of office deliver a warning address to both the National Assembly and the Government". In the event the failure to implement the programme continues, the President "*may* reduce the term of office of the National Assembly at the end of the first half of either the second or the third year of the National Assembly office and declare special elections to the National Assembly" (proposed Article 55 § 3, emphasis added).

80. These provisions raise two main concerns. First, the proposal that the Government's programmes should be adopted by the National Assembly in the form of laws is highly questionable. Such a situation might lead to a confusion of political and legal obligations and responsibilities. In addition, the exact legal significance of the laws confirming the Government's programmes is unclear.

81. Second, it does not seem advisable to grant to the Head of State a discretionary power to decide whether or not to dissolve the Assembly in case he or she considers that the National Assembly has failed to implement the four-year programme. Giving such power to the President would result in placing him or her above the National Assembly in the hierarchy of constitutional organs, which is contrary to the principle of the separation of powers as well as to the general strive of the draft law to strengthen the position of the National Assembly and the Government. In addition, the President of the Republic has also a role in ensuring progress in the implementation of the programmes by the National Assembly (he must issue a warning "in case of failure by the National Assembly to annually implement the programmes" – proposed Article 55 § 3, first sentence of the Constitution).

Responsibilities of Individual Deputies

82. The 2nd set of proposals also provides for a kind of imperative mandate, which is highly questionable in a modern parliamentary democracy[19]. According to a new Article 63.4, "a deputy elected from the party list either publicly denying the four-year pre-election program provisions, or expelled from the party or resigning on his/her own accord shall be deprived of the deputy's mandate and the next person in the party list shall substitute him/her in the National Assembly". Candidates for deputies to be elected to the National Assembly by single-mandate would, in turn, be obliged to present to the voters of their respective electoral districts their action plans for the electoral districts and the National Assembly. Such a deputy would be "recalled from office by local constituents for the failure to meet his/her election commitments through a process of local referendum"(Article 63.4).

Formation of the Government and Vote of Confidence

83. The pre-electoral programmes would play an important role even in the formation of the Government. According to the proposed Article 74, "the party or the pre-election union having obtained most of the seats at the National Assembly shall submit the main provisions of its pre-election four-year programme, its approaches on the composition of the Government and the main directions of its action plan and its candidate for the post of the Prime Minister to the National Assembly". The candidate for Prime Minister, in turn, should "submit to the National Assembly the draft of the state four-year programme based on the pre-election programme as well as the issue of the Government composition, thus putting forward the motion on expressing confidence in the Government". If "no draft resolution on expressing no-confidence in the Government is put forward or no such resolution is adopted, the state four-year programme, the Government composition and the candidate for the post of the Prime Minister shall be deemed approved".

84. In case the Parliament adopts a resolution of no-confidence, "recurrent elections shall be declared for the seats under the proportional representation system in which only parties and pre-election unions having received seats at the regular elections shall take part" (Article 74.1).

85. The Commission warmly supports the proposal to strengthen the role of the National Assembly in the nomination of the Prime Minister and the formation of the Government. A procedure for resolving deadlocks in the formation of the Government and involving, as the ultimate means, the dissolution of the Parliament is in itself wholly justifiable in a constitutional democracy. The same holds true for a vote of confidence on the basis of the programme, which can be considered as a mechanism for ensuring the political presuppositions for a successful Government work.

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[19] The Commission has already had the opportunity to underline the importance of the free and independent mandate of the deputies (see for example, its opinion on the Ukraine constitutional reform project of 2001, doc. CDL-INF (2001) 11, pp. 2, 3).

86. On the other hand, the governmental programme as well as the control of and consequences for failures of its implementation should remain of a mainly *political* nature. The procedure laid down in the proposed Article 74.1 including the so-called "recurrent elections", in which only those parties and "pre-election unions" which have received seats at the previous, ordinary elections could take part, is not appropriate.

87. The Commission is aware of the lack of tradition of a multiparty system and of the difficulties which Armenia has experienced in the past in the formation of workable political coalitions. Wishing to make the political parties and the Government accountable is a legitimate objective. However, the proposed amendment tends to an excessive juridification or constitutionalisation of the political processes. Thus, the proposed Articles 63.2 to 63.5 of the Constitution, obliging political parties and individual candidates to present specific and detailed programmes to the electorate and setting out the legal consequences of not respecting such programmes, concern issues which should be left to political processes and political responsibility. Indeed, only the citizens should be empowered to judge - at the following elections – what the (political) consequences for not meeting electoral promises will be for a party or an individual deputy. It would contradict the very idea of an election-based parliamentary system if a political party could be deprived of its parliamentary seats or an individual deputy of her/his mandate for reasons of a mainly political nature through a procedure other than the following elections.

b. Role and Powers of the President of the Republic

88. Under the proposed Article 49 of the Constitution, the President of the Republic would be the guarantor of, besides the independence, territorial integrity, security and continuity of state power, also *transparency and accuracy of the official information and statistical data in the Republic of Armenia"*. The Commission finds it unusual to mention this particular area of responsibility of the President and put it on the same level of importance as territorial integrity or security. At any rate, if it is to be kept, all the other areas of responsibility should be mentioned, or the sentence should be left open-ended.

89. The proposed Article 55 § 2 of the Constitution would reduce – from the current twenty-one days to two weeks - the time-limit within which the President must either sign and promulgate a law or return it to the National Assembly. This proposed amendment does not seem appropriate.

90. The Commission also considers that this provision should introduce the possibility for the President of the Republic to apply to the Constitutional Court should he or she think that the law which he or she refuses to sign and promulgate is in conflict with the Constitution.

c. Election of Deputies to the National Assembly

91. The 2nd set of proposals introduces a mixed electoral system, where 100 deputies of the National Assembly would be elected according to the system of proportional representation and 31 deputies would be elected from single-mandate constituencies (proposed Article 63 of the Constitution). The manner in which these single-mandate constituencies would be formed is unclear. In certain respects, these two groups of deputies would be subject to divergent constitutional provisions (e.g. Article 63.5 and Article 74.1). Both electoral systems have their own justifications. There are countries which have adopted a combination of the two systems, but, as a rule, the experiences gathered cannot be deemed very positive.

d. Local Self-Government

92. The Commission welcomes the proposed amendments to Articles 104 to 108 of the Constitution. It would recommend adding the following in Article 107: "The population of the administrative territorial units may be directly involved in the administration of local affairs by resolving the problems through consultation and/or a referendum".

93. The Commission also supports the proposal to remove the current Article 109 (about the power of the Government to remove the Administrator of a district) from the text of the Constitution.

IV. 3rd Set of Proposals for Constitutional Amendments (CDL (2004)107)

A. General comments

94. In the following comments, the main point of reference will be, in addition to the Constitution in force (CDL(1995)62), the 2001 draft Constitution The amendments set out in the third set of proposals for constitutional amendments (hereinafter: "3rd set of proposals") correspond, in many respects, to those contained in the 2001 draft Constitution. To the extent that they do correspond, the comments included in the report CDL-INF (2001) 17 will not, as a rule, be repeated. Thus, the following comments should be read in conjunction with those included in the report CDL-INF (2001) 17.

B. Analysis of the Proposed Amendments

a. Protection of Human Rights and Freedoms

95. Most of the proposed provisions in Chapter 1 (Foundations of the Constitutional Order) and Chapter 2 (Fundamental Human and Civil Rights and Freedoms) correspond to those included in the 2001 draft Constitution and are therefore supported by the Commission.

96. The Commission notes with satisfaction that the proposed amendments also contain a number of provisions which can contribute even further to the strengthening of the protection of human rights. This holds true, for example, for the proposed provision in the proposed Article 17 § 3 of the Constitution, according to which "children under the age of 16 shall not be subjected to scientific, medical and other experiments", as well as for the new provision on consumers' protection (proposed new Article 31.1 of the Constitution).

97. The Commission also welcomes the explicit prohibition of the death penalty in the proposed Article 15 of the Constitution.

98. It also supports the provision in the proposed Article 16 of the Constitution of an exhaustive list of situations where a person can be deprived of his or her freedom; these situations correspond to those listed in Article 5.1 a) to f) of the ECHR.

99. On the other hand, paragraph 6 of the proposed new Article 11.3, granting the right to political asylum to "*citizens* persecuted for their political convictions" (emphasis added) seems problematic : as it presently stands, it may lead to the *a contrario* conclusion that non-citizens do not have the corresponding right. Yet, citizens do not need the right to political asylum, as they have the right to return to the Republic of Armenia (proposed Article 25 § 3 of the Constitution) and may not be extradited to a foreign country (proposed new Article 11.3 § 3).

100. With regard to the right to freedom of assembly, the 3rd set of proposals also provides for different categories of public events. The comments previously made in relation to 1st set of proposals also apply here (see paragraphs 27-32 above).

101. Pursuant to the proposed § 2 of Article 30 of the Constitution, the Armenian citizens with double citizenship would have neither active nor passive right to vote. Such difference in treatment of Armenian citizens does not appear to have a legitimate justification and thus appears, in the Commission's opinion, to be discriminatory and in breach of Article 14 of the European Convention in conjunction with Article 3 of Protocol 1. The Commission also wishes to recall the European Convention on Nationality[20], which requires that nationals of a State with double citizenship shall have, in the territory of that State in which they reside, the same rights and duties as other nationals of that State.

102. The proposed Article 47 § 2 of the Constitution provides for the right of "every citizen of the Republic of Armenia to protect the Constitution, the principles of the constitutional order stipulated therein and the laws". The legal significance of this provision remains unclear, unless what is meant is that every citizen is entitled to receive the protection of the Constitution etc.

b. The Relations between the President, the Government and the National Assembly

103. The proposed principles governing the mutual relations between the President, the National Assembly and the Government are similar to those adopted in the draft 2001 Constitution, and are generally coherent with the overall logic of the 3rd set of proposals aiming at ensuring a better balance of powers by strengthening the Government and the National Assembly's position. The differences concern mainly procedural issues.

104. The appointment of the Prime Minister, as a rule, falls within the prerogatives of the National Assembly, and only in case the National Assembly fails to appoint the Prime Minister or to approve the Government's Concept of Action shall the President appoint the Prime Minister and form the Government (proposed new Article 85.3 § 3). The National Assembly is also empowered to express no-confidence in the Prime Minister, at the request of at least one-third of the total number of Deputies (proposed Art. 84 of the Constitution).

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[20] *To date, Armenia has not signed this Convention.*

105. The Prime Minister is empowered to put forward a motion on confidence in connection not only with the budget and the five-year plan of action (Article 90), but also with the adoption of a draft law proposed by the Government or by a Deputy (Article 75.1, §§ 2 and 4).

Dissolution of the National Assembly

106. The President would have the power to dissolve the National Assembly only in the cases enumerated in the proposed new Article 74.1. With regard to the sub-sections a) and c), the Commission refers to its comments made with regard to the same provision included in the 1st set of proposals (see paras 47 to 49 above).

107. The right of the President to dissolve the National Assembly in case of refusal by the latter to confirm the dismissal of the Prime Minister (sub-paragraph d of Article 74.1) seems questionable, as it would have the effect of weakening the role of the National Assembly.

The conduct of the debate

108. The Commission notes that, according to the proposed Article 75 § 4, the President and the Government "may determine the sequence of the debate for their proposed draft legislation and may demand that they be voted only with amendments acceptable to them". The legal significance of this provision remains unclear. As it presently stands, it would imply that the President or the Government could determine how the National Assembly exercises its legislative competence. The Commission thus strongly recommends to remove it from the final text.

c. Attributions of the National Assembly

109. The Commission warmly supports the new provisions aimed at securing the autonomy and independence of the National Assembly and its deputies (proposed Articles 66 and 79.1 of the Constitution).

110. As the Commission already pointed out in its Report of 2001, a provision containing a list of issues which fall into the exclusive legislative power of the National Assembly is very useful and is to be supported (proposed new Article 83.1 of the Constitution). However, the provision in the last paragraph of Article 83.1, according to which this list may be extended by law, cannot be deemed appropriate: it should not be possible to change a constitutional division of powers through a law.

d. The Judiciary

111. Pursuant to Article 55 § 9 of the Constitution, the President would have the duty to "uphold the state interests through a unified system of the Prosecution Office". This provision would seem to subject the prosecutors to the President in a way whose legal significance remains unclear, and which may endanger the independence of the prosecutors.

112. As it was previously underlined, the Council of Justice is a body which has a particularly important role for safeguarding judicial independence. According to the proposed new Article 94.1 of the Constitution, the Council of Justice would consist of "up to six judges elected /…/ by the General Assembly of Judges of Armenia, two defence attorneys and two scientists representing the legal profession, as well as *ex officio* the Minister of Justice and the General Prosecutor". These provisions need further elaboration: it is not clear how and who would nominate the "two defence attorneys and two scientists representing the legal profession". As to the membership of the Minister of Justice and the General Prosecutor, particularly having in mind the proposed new Article 55.9, it does not seem necessary.

e. Control Chamber and Central Bank

113. The Commission supports the inclusion of the new provisions on the Control Chamber (Chapter 6.2) and the Central Bank (Chapter 6.3) aiming at strengthening the independence of these bodies. However, it is important that the National Assembly also has certain overseeing powers with regard to the management of public finances (see para. 53 above).

114. Pursuant to paragraph 3 of the proposed new Article 103.1, the Control Chamber should report to National Assembly at least once a year on the outcome of its overseeing activities. The procedure to be followed after such a report should be regulated by the rules of procedure of the National Assembly.

f. Local Self-Government

115. The proposed Articles 88.1 § 3 and 108 of the Constitution would leave the status of Yerevan and its main organs to be regulated through an ordinary law. It seems unclear to what extent the legislator would be bound by the general provisions of local self-governance included in Chapter 7.

116. The proposed Article 109 of the Constitution, concerning the dismissal of a Head of Community and the dissolution of the Council of Aldermen, should contain a requirement of a conclusion of the Constitutional Court similar to that included in the proposed Art. 109.1.

V. Conclusions

117. Since the failure of the constitutional referendum in the spring of 2003, Armenia has been confronted with an unconstructive struggle between the majority and the opposition on the issue of an appropriate model to follow in the constitutional reform. All three sets of proposals for constitutional amendments submitted to the Venice Commission represent an attempt to find the best form of political system for Armenia.

118. The first and the third sets of proposals represent a step forward with respect to the Constitution currently in force and could contribute to Armenia's compliance with its commitments to the Council of Europe. Nevertheless, more significant amendments, especially with respect to the key issue of the balance of powers between the state organs, are necessary.

119. The second set of proposals fails to address a number of fundamental issues, such as the protection of human rights and freedoms, or the judiciary, and includes a number of provisions that cannot be realistically implemented in practice.

120. On the basis of the above considerations, and bearing in mind that the first and third sets of proposals are in many respects similar to the 2001 draft Constitution, the Commission considers that the latter 2001 draft constitution should be taken as a basis for the reform, with some further discussion and refinement of the amendments before their adoption.

121. The Commission wishes to draw the attention of the Armenian authorities in particular to the following points:

- provisions guaranteeing the fundamental rights and freedoms should be drafted on the model of the ECHR, without introducing unnecessary details opening the way for unclearly-defined restrictions ;
- principles governing the mutual relations between the President, the National Assembly and the Government should be fully consistent : no powers should be given to the President which might weaken the Government and the Assembly (e.g. the right to dissolve the Assembly in case of refusal by the latter to confirm the dismissal of the Prime Minister or the right of legislative initiative);
- the attributions of the National Assembly should be determined exclusively by the Constitution;
- the Prime Minister should not be allowed to put forward a motion on confidence in connection with the adoption of a draft law proposed by a Deputy;
- the independence of the Prosecutor from the executive should be constitutionally guaranteed;
- the composition and nomination of the members of the Council of Justice are essential for ensuring its independence and should be clearly determined by the Constitution;
- provisions on local self-government should also apply to the status of Yerevan and its main organs;
- the independence of the Central Bank and the Control Chamber is an important step forward; the National Assembly should nevertheless keep certain supervising powers with regard to the management of public finances; and

- the dismissal of elected heads of community and the dissolution of the Council of Aldermen might lead to situations which could be incompatible with the very essence of local self-governance; if this is kept in the final text, it should contain the requirement of a prior conclusion by the Constitutional Court.

122. The Commission welcomes the willingness and determination of the Armenian authorities to improve the state of democracy and the rule of law in the country. It considers that the 2001 draft Constitution with the additional amendments that are suggested in the present opinion would significantly contribute to this goal.

123. The Commission wishes to underline the importance for all Armenian political forces and civil society to be duly and timely involved in the process of constitutional reform. In this respect, the Commission considers that the 2001 draft Constitution, which set out a fairly balanced distribution of powers, constitutes a good basis for reaching consensus amongst political forces and thus for securing the success of the constitutional referendum. The Commission hopes that the process of constitutional reform will be conducted in accordance with the European standards and that the electoral campaign will be conducted in a fair and free manner.

124. The Commission remains at the disposal of the Armenian authorities for any further activity, particularly in connection with this constitutional reform.