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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT REPORT ON THE PROPOSED REVISION OF THE CONSTITUTION OF THE REPUBLIC OF ARMENIA

1. Following the fourth meeting of the Venice Commission Working Group on the Revision of the Constitution with the Armenian authorities (Strasbourg, 5-6 June 2001) [and the discussion held at the 47th Plenary Meeting of the Venice Commission (Venice, 6-7 July 2001)] on the basis of the drafts and explanatory notes submitted by the Armenian authorities and the opinions presented by the Rapporteurs, the Venice Commission made the following observations on the proposed revision of the Constitution of the Republic of Armenia.

General comments

2. The Venice Commission has co-operated with the Armenian authorities, at the request of the latter, for the revision of the Constitution of the Republic of Armenia. The co-operation has taken the form of several meetings between a delegation of the Armenian Constitutional Commission headed by Messrs G.Haroutyunian, President of the Constitutional Court, and T. Torossian, Vice-Chairman of the Armenian National Assembly, and Venice Commission Rapporteurs, Messrs G. Batliner, A. Endzins, K. Tuori and V. Moreira. Several meeting were held between February 2000 and July 2001 at which numerous proposals were examined and discussed on the basis of an agreed clear conceptual framework
3. The participants in these meetings have tried to consider the proposals made taking into account the legal, political and social traditions of Armenia but also the European constitutional heritage, the tendencies of modern constitutional law and, naturally, the standards of the Council of Europe and, above all, the requirements of the European Convention on Human Rights.
4. As reargds human rights, the amendments to the Constitution strengthen the constitutional guarantees thereof in a significant manner. The direct effect of fundamental human rights and, consequently, their justiciability are guaranteed.
5. The amendments further seek to strengthen the separation of powers and to achieve a better equilibrium in the distribution of competencies on the basis of the principle of co-operation of branches of Government.
6. In addition, the constitutional provisions on the judiciary are amended with a view to safeguarding the effective independence of the judicial authorities.
7. The development of the competencies of the Constitutional Court is particularily welcome as it meets the tendencies in most members of the Council of Europe and will contribute towards making the highest judicial authority of Armenia a powerful tool for the effective respect of the Rule of law and human rights.
8. The amendments to the chapter on Local self-government are a significant improvement and lay down the framework for developping a system of local self-government fully compatible with the European Charter of Local Self-Government.
9. Finally, the Commission notes that it has neither considered the transitional provisions of the Constitution, as they were not drafted when the present report was adopted, nor the Preamble of the Constitution, as no proposal for its amendment was made by the Armenian authorities.
10. In general, the propsed amendments are the result of a serious analysis, political maturity and and deep wish to follow the standards of the Council of Europe. The Venice Commission wishes to thank the Armenian authorities for their openness and the spirit of genuine co-operation during this process.

On Chapter 1: Foundations of the Constitutional Order

11. The Commission welcomes the fact that the draft constitution no longer contains a natural law terminology, which may give rise to confusion in implying the existence of supra constitutional principles and create thus legal insecurity in the control of constitutionality.
12. The Venice Commission further welcomes the new formulation of Article 4 ("*The Republic of Armenia recognises 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*"). This wording admittedly makes human rights directly applicable and places them at the very to of the hierarchy of norms in the Armenian legal order. The Commission would have wished to see human rights placed, together with the rule of law, in the very first Article of the Constitution ("*The Republic of Armenia is a sovereign, democratic state, based on social justice and rule of law*"). It understands however that Article 1 is a fundamental provision that cannot be subject to amendments. It further notes that, by virtue of the new wording of Article 4, the notion of "rule of law" in Article 1 encompasses respect for human rights.
13. Article 6, in its proposed new wording, provides correctly that *"Laws and other normative legal acts that contain universally mandatory rules of conduct shall take effect only after official publication"*. This wording, introduced in the draft in June 2001, follows the Rapporteurs' proposal and no longer gives the impression that the Armenian legal order allows for « unpublished legal acts ».
14. The Commission further welcomes the formula used for setting out the rule on the hierarchy of norms: *"Laws of the Republic of Armenia shall comply with the Constitution. Other normative and individual legal acts shall be consistent with the Constitution, the laws and international treaties ratified by the Republic of Armenia*". The ambiguity that could be created as to the place of international law in the hierarchy of norms in the Republic of Armenia is avoided, as the same Article clearly provides in its penultimate paragraph that in case the norms of international treaties differ from those of national laws, the norms provided in the treaty shall prevail.
15. The Commission welcomes the new provision in Article 7.1 that « The Church in the Republic of Armenia shall be separate from the State ». The same provision further recognises the *« historically exceptional role of the Armenian Apostolic Church* ». Having regard to Article 26 (previously 23) of the Constitution, guaranteeing freedom of thought, conscience and belief, as well as freedom of worship, the Commission understands that no negative consequences whatsoever nor any discrimination can be drawn from the provision recognising the exceptional role of the Armenian Church for persons who do not belong to this Church. A discrimination of that type would infringe Articles 9 and 14 (and possibly Protocol 12) to the European Convention on Human Rights. This position is now reflected more clearly in the wording of Article 7.1 in fine, which reads*: "The freedom of activities of all religious organisations operating in the manner defined by law shall be guaranteed in the Republic of Armenia"*.
16. The Commission had initially suggested that constitutional guarantees for private property in Article 8 *(« The right to property is recognized and protected in the Republic of Armenia* ») be moved to Chapter 2 on Fundamental Rights. It understands however the importance, for a post-communist society, of placing the constitutional guarantee for property in the Chapter on the foundations of the Constitutional order. Moreover, it notes that as a result of the its new wording, Article 8 can be seen as a provision determining the State's position towards property and market economy *("Economic freedom, free*

economic competition based on the principles of market economic relationships are guaranteed in the Republic of Armenia. Abuse of monopoly status, illegal restriction of competition and bad faith competition in the market are prohibited. In the interests of the state and society, the possible forms of monopoly and their permissible limits may be defined by law »), whereas Article 31 guarantees an individual right to respect for his possessions.

17. The provision providing that the State shall contribute to free access to national and world cultural heritage is welcome.
18. The Commission welcomes the new drafting of Article 11.2 : « *The Republic of Armenia shall recognize and guarantee the local self-governance as an independent democratic system of public self-governance*", a principle enshrined in the European Charter of Local Self-Government.

On Chapter 2: Fundamental Human and Civil Rights and Freedoms

19. The Venice Commission insisted upon the necessity to enshrine **clearly all fundamental values** and more specifically **all fundamental human rights** in the Constitution. The Constitution should also define and list as much as far as possible a catalogue of all constitutional fundamental rights and social and cultural rights. In this respect, the provision of new Article 42, which, in its initial wording reads "*The rights and freedoms set forth in the Constitution <u>are not exhaustive</u>*" seemed problematic. The Commission was of the opinion that the purpose of this provision was to prevent that fundamental rights and freedoms guaranteed by international treaties be unduly restricted or ruled out by virtue of constitutional human rights guarantees. It welcomes therefore the new wording that reads as follows: "*The rights and freedoms set forth in the Constitution do not exclude other fundamental or civil rights and freedoms stipulated in the law or the international treaties of the Republic of Armenia"*.
20. The Venice Commission **strongly supports** the proposed provision of Article 15 **abolishing death penalty.** It recalls that abolition of death penalty is one of the commitments subscribed by Armenia when it became member State of the Council of Europe. It further notes that references to death penalty "*in times of war or in the event of an unavoidable threat of war*" are in substance taken from Protocol No 6 to the ECHR. It understands therefore that the implementation of this provision shall strictly respect standards applicable in other Council of Europe member States.
21. The Venice Commission has considered whether it would be advisable to include in the Constitution provisions concerning prohibition of experiments on human foetus. Relevant provisions in the Human Rights Charter of the European Union and the European Convention on Bioethics could be used as models. It finds however that it may be counterproductive to initiate a discussion on this topic at this stage of the constitutional revision process. Moreover, the Commission is confident that provisions guaranteeing respect for <u>human dignity</u> may well be construed in such a way so as to prevent abuses in the field of bioethics.
22. The Commission welcomes the inclusion in (new) Article 16 of an exhaustive list of cases where deprivation of liberty may be permitted. It notes that the list follows closely the wording of Article 5 par 1 of ECHR.
23. The new structure of Article18 (previously 38) is to be welcome, as it gives a constitutional basis for judicial and non-judicial human rights protection mechanisms both in domestic and international law. As it stands in the draft, this provision guarantees to persons that claim to be victims of violations of their constitutional rights, the right to an effective remedy before State authorities, the right of access to court, the right to

address the Defender of Human Rights and the right to appeal to international bodies of human rights protection.

24. The Commission further welcomes the establishment of the Office of the Human Rights Defender (Ombudsman) by this provision. Although a clearer wording (such as " *The office of the Human Rights Defender is hereby established*") could have been chosen, the Commission is satisfied that this provision, together with Articles 83 par. 4 (appointment of the Human Rights Defender by the National Assembly) and 101 par 8 (allowing the Human Rights Defender to bring case before the Constitutional Court) provide a sufficient constitutional basis for the operation of this institution.
25. The Commission welcomes the new formulation of the right to respect for private and family life in Article 23 (former Article 20), which follows the suggestion of the Rapporteurs. Furthermore, the new draft correctly provides that several interferences by State authorities within the exercise of the right to respect for private and family life, correspondence (Article 23) and home (Article 24), can only take place when they are permitted by law.

    The lacuna identified by the Commission's Rapporteurs, that there was no constitutional requirement that these interferences need also to pursue aims recognised as legitimate under the Constitution, is now dealt with in a satisfactory manner in the new wording of Article 43 *in fine.* It should be noted that Article 43 does now cover rights guaranteed under Articles 23 and 24.

    [As regards the right of individuals to have access to information on their person held by state authorities and to seek that this information be corrected or eliminated, the Commission observes that this right is restricted to *citizens.* This seems to conflict with the right granted to "*everyone*" in Article 8 of the ECHR to respect for private and family life. Since the judgment in the case Z v. Finland, in February 1997, the European Court of human rights has repeatedly held that data protection is a fundamental element of effective protection of the right to private life. Article 8 of the Charter of Human Rights of the European Union also refers to data protection as a fundamental right. It is further stressed that European constitutions generally grant the right to everyone and not only to citizens (see e.g. Article 10 of the Grundgesetz; Article 22 of the Constitution of Lithuania, Article 31 of the Constitution of Ukraine, Article 20 of the Constitution of Georgia. It is further underlined that Article 51 of the Polish Constitution prohibits the collection of information on *citizens* (and thus, *a contrario*, permits the collection of information on foreigners) but allows *everyone* access to official documents and information concerning him/her.]
26. Article 27 guarantees freedom of opinion and freedom of speech. A new provision is added to this Article guaranteeing media freedom as follows: "*The freedom of the media and other means of information is guaranteed*".

    The Commission welcomes this addition, which goes beyond the classical safeguard for individual freedom of expression. The "*freedom of the media*" must be construed as a fundamental guarantee for pluralist democracy.

    In this respect, the Commission understands that the freedom of media comprises a requirement for independence of media and in particular that media in the public sector are so structured and operated as to be independent of the Government and of any public service and to guarantee opportunities for the expression of different lines of opinion. It further implies the existence of an independent authority, entrusted with the task of guaranteeing the independence of mass media from political and economic powers. The Commission refers to Articles 38 and 39 of the Constitution of Portugal which refer to Freedom of press and freedom of the mass media and to relevant Recommendations of the Committee of Ministers of the Council of Europe, in particular Recommendations R

(96) 10 on the independence of public service broadcasting and R (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector. If the constitutional provision is construed as suggested above, there is no need for an explicit constitutional provision on independent media authority.

27. The Commission welcomes the proposal in the draft to grant the right to peaceful assembly not only to citizens but to everyone (Article 29).
28. Article 30.1 is a new provision setting out the constitutional foundation of civil service. The Commission recalls the need to secure compatibility of the Civil Service Act (which is being currently drafted) with this constitutional provision. Reference is made here to the opinion by Mr Tuori (CDL (2001) 25) on constitutional aspects of the Civil Service Act.
29. The Commission takes note, with approval, of the amendment to Article 31 par 2 that forbids foreigners and persons without citizenship to possess land in Armenia, "*except in cases provided by law*". The Commission's Rapporteurs were of the opinion that such a strict limitation of the right to property might raise serious problems in respect of the requirement of proportionality of restrictions of fundamental rights. The new wording no longer contains such a categorical prohibition but allows for restrictions by law to the property rights of foreigners and stateless persons on land: *"The law may impose restrictions to the right of aliens and stateless persons to own land"*.
30. As regards social rights guaranteed in Articles 32 (except 32 par 4 (right to strike)) to 34, the Commission recalls that it advisable to make a clear distinction between classical human rights and other rights. In particular, it is necessary to make a clear distinction between individual and enforceable rights and state obligations or non enforceable rights (for example the right to an adequate standard of living, Article 34; see also CDL (2000) 105) [Article 34 in fine should read *"The State shall take the necessary measures to enable the exercise of these rights."* The words *"of citizens"* should be deleted, as the rights guaranteed do no longer belong to citizens only but to anyone.]
31. Article 36 in fine provides for an obligation of individuals "*to take care of their needy and incapable parents*". The Commission, although it fully subscribes to this principle, stresses the fact that this obligation should not diminish in any way whatsoever the social obligations of the State towards needy and incapable individuals, as set forth in other provisions of the Constitution.
32. The Commission notes with approval that the right to social security in Article 37 should be granted to everyone and not only to citizens.
33. Furthermore, Article 39 provides that "*everyone has the right to education*" and that basic general education is obligatory for *everyone*. The Commission welcomes these amendments that bring in line the Constitution of Armenia with Article 2 of Protocol No 1 to the ECHR.
34. The Commission welcomes the new wording in Article 41 (former 37) guaranteeing to <u>*persons*</u> belonging to minorities the right "*to freely express, preserve and develop their ethnic, linguistic, cultural and religious identity*".
35. As regards **restrictions to fundamental rights and freedoms (Article 44.1),** the Commission notes that a general clause according to which "*the limitations of human rights and freedoms may not exceed the limitations defined in effective norms of international law and shall not violate the essence of rights and freedoms instruments"* is now included in the draft. The Commission strongly supports the inclusion of this provision that is likely to remove any possible inconsistencies with ECHR.
36. The Commission further notes in this respect that the rules as to the restrictions to fundamental rights in the Constitution of Armenia are quite dispersed as they can result from a) the absolute character of some rights (e.g. the prohibition of torture); b) the

restrictions that follow the affirmation of the right concerned (e.g. the restriction to the right to liberty (see Article 16); c) the inherent restrictions to social rights; d) the clause on restrictions to Articles 23 to 30 and 32 par 4 in Article 43 and the general clause on restrictions in Article 44.1. Although this may seem *prima faciae* confusing, the combined effect of these provisions offers a sufficient protection against arbitrary restrictions to fundamental human rights and freedoms. In any case, the revision process cannot entirely reform the actual structure of Chapter 2.

37. The Commission welcomes the reference to the principle of proportionality and international obligations in Article 44 (emergency situations). It assumes that reference to international obligations covers also the procedural aspects thereof (e.g. the declaration foreseen in Article 15 ECHR).
38. [Article 47 par 2 (abuse of rights) should not be construed as an additional restriction to human rights. It might be advisable to follow in this respect the wording of Article 18 of the German Basic Law.]
39. The Commission welcome the provision on fundamental rights of legal person (Article 48).

On Chapters 3, 4 and 5 concerning the State Organs and Separation of powers

40. The Commission has carefully considered the balance of powers in the above-mentioned Chapters of the new draft and it is convinced that the draft offers a coherent distribution of power and competences between the President, the Parliament and the Government. In particular, the Commission observes the following:
41. The new provision of Article 55 should be welcome as it clarifies the process of preventive constitutional control by the **President** with the final involvement of the Constitutional court as follows: "*The President of the Republic 2) shall sign and promulgate, within twenty one days of receipt, laws passed by the National Assembly. During this period, the President may remand a law to the National Assembly with objections and recommendations requesting new deliberations The President of the Republic shall sign and promulgate within a period of five days a law that has again been adopted by the National Assembly or shall apply to the Constitutional Court with a request to obtain a conclusion as to its compliance with the Constitution. If the Constitutional Court issues a conclusion on the provisions of the law being in contradiction with the Constitution, the President of the Republic shall not sign the law ».*
42. The President's right to *dissolve* the National Assembly (the new draft uses the term "*reduce the term of the authorities of the National Assembly*") is now rightly framed as this power can only be exercised in those cases expressly provided for in the Constitution (in Article 74.1, in the Chapter on the National Assembly), in accordance with a procedure described in the Constitution and after consultations with the President of the National Assembly and the Prime Minister.
43. The Commission welcomes the fact that the option whereby the National Assembly could dismiss the President of the Republic has been excluded from the draft. Of course, the National Assembly still is the only body that has the power to remove the President from office but this is now clearly limited to cases of treason or other high crimes. Moreover, the Constitutional Court has a very important role in the process of the removal as it has to issue a conclusion as to the reasons for the removal (Article 57). These are thus sufficient guarantees against political dismissal of the President of the Republic.

    Both the political "dismissal" of the directly elected President by the National Assembly and the President's unrestricted power to dissolve the National Assembly were regarded by the Commission as options that might create a confrontational political climate that

could prejudice the effective and smooth functioning of democratic institutions. The options taken in the new draft show a strict adherence to the principles of European democratic heritage.

44. The Commission's Rapporteurs had expressed some concern about the rule empowering the National Assembly not to accept the resignation of the President of the Republic (Article 58) as this is quite exceptional in comparative constitutional law and there is an obvious risk that refusal of a resignation can cause difficulties in the functioning of democratic State organs. The Commission welcomes therefore the new provision, according to which the President can submit his resignation for a second time and this resignation is then considered as accepted without a vote.
45. The Commission understands that Article 55 par 4 provides that the President shall appoint a new Prime Minister in case of resignation and in case of vote of no confidence. This provision should be read in conjunction with the proposed new Article 85.1, which clearly and expressly requires that the President appoint a new Prime Minister also after election of a new National Assembly. The Commission finds that this is a key element in the Constitution and welcomes this new provision.
46. Article 55 § 13 - 15 provide for the procedure for declaring martial law and state of emergency. These provisions should be read in conjunction with Articles 44 (in the Human Rights Chapter) and Articles 81 and 100 par 6 providing for the involvement of the National Assembly and the Constitutional Court in the determination of the reasons and the proportionality of the emergency measures and the persistence of the danger requiring the use of emergency powers:
Article 55 *« The President, …*

l3) shall decide on the use of the armed forces. In the event of an armed attack against or of an immediate danger to the Republic, or a declaration of war the President shall declare a state of martial law and may call for a general or partial mobilization. In such a situation the armed forces and other troops of the Republic of Armenia are placed under the subordination of the operative management of the chief headquarters of the Ministry of Defense. In time of war the President of the Republic may appoint and dismiss the Commander in Chief of the armed forces.

14) In the cases of using the armed forces or declaring martial law, a special sitting of the National Assembly shall be immediately convened by force of law, which shall examine the issue of the correspondence of the measures taken with the situation. The legal regime of martial law shall be defined by law.

15) in the event of an imminent danger to the constitutional order, and consulting with the President of the National Assembly and the Prime Minister, shall declare an extraordinary situation, take measures appropriate to the situation. In this case, a special sitting of the National Assembly shall be immediately convened by force of law, which shall hear the issue of the correspondence of the measures taken with the situation. The regime of the extraordinary situation shall be defined by law.

Article 81: *"Upon recommendation of the President of the Republic, the National Assembly shall make a decision on the declaration of war and establishment of peace. In the event of impossibility to convene a sitting of the National Assembly the issue of declaring war shall be resolved by the President of the Republic.*

The National Assembly, on the basis of the conclusion of the Constitutional Court, may terminate the implementation of measures prescribed in sections 13 and 14 of Article 55».

Article 83.1 requires that the legal regime of military and emergency situation be regulated by law (83.1 point 22).

Article 100 par 6: *The Constitutional Court "6) shall issue a conclusion on the constitutionality of the measures prescribed by Sections 13 and 14 (probably 14 and 15?) of Article 55 of the Constitution ».*

The Commission understands that the National Assembly has a general supervision of all measures taken with regard to emergency situations and martial law: First, the National Assembly may assess the necessity of measures taken in the context of a declaration of martial law or state of emergency. It may also, after having taken into account the relevant conclusion of the Constitutional Court, decide to revoke the declaration of martial law or of state of emergency. Although much will depend in practice on the ability of the Constitutional Court and the National Assembly to assess rapidly the situation, the Commission finds that the above provisions contain sufficient guarantees to avoid abusive declaration of emergency and use of emergency powers.

47. The legislative powers of the President are provided for in Article 56. The Commission's Rapporteurs insisted that these powers should be based on and be compatible with the Constitution and the law. Article 56 in the new draft reads as follows: *The President of the Republic may issue orders and decrees which shall correspond to the Constitution and the laws of the Republic of Armenia.*
    The Commission welcomes this provision. It further notes that the provision according to which the President of the Republic was given general legislative powers in matters not only expressly assigned to him/her by the Constitution and by delegation (devolution) through law, but also in all areas until the National Assembly takes legislative action is now deleted from Chapter 3 of the Constitution. In the Commission's view, this general legislative power was problematic as it definitely extended the President's legislative competencies in an unlimited way. The Commission understands that it may be justified in societies in transition, where there is an urgent need to legislate on many issues at the same time, to make use, for a transitional period, of exceptional legislative powers of the President of the Republic. Such powers should however remain exceptional and transitional and should be regulated in the transitional provisions rather than in the corpus of the Constitution.
48. As regards the Chapter concerning the **legislative power**, the Commission observes the following:
    The incompatibility of the status of member of the National Assembly with any entrepreneurial activity or any other remunerated work, (except from scientific, pedagogical or creative work) can be regarded as too strict; it is not however incompatible with European standards and can be justified by the need to have a "professional" Parliament.
49. The role of the National Assembly in the nomination of the Prime Minister is defined in Articles 74 and 74.1. These provision should be read in conjunction with the new provision of Article 85.1 and Article 55 par. 4 (see also above point 34)
    Although the provisions on the nomination of the Prime Minister and the Government and the question of confidence are dispersed, the system taken as a whole manages to combine a balanced power sharing and an effective exercise of Parliamentary control over

the executive. This delicate legal and political exercise will still needs to be tested in real life.

50. The Commission notes, with approval, that the draft provides for a list of areas where the National Assembly has exclusive power to legislate (Article 83.1).
51. It further notes that both the President of the Republic and the Government have a right to legislative initiative (Article 75). As observed by the Rapporteurs, a parallel legislative initiative of the President and the Government can lead to confusions and to a situation where executive organs submit contradictory bills to the National Assembly.
52. With regard to Article 80, the Commission finds that there is in the new wording a clear distinction between the right to obtain information and the right to pose questions implying political responsibility. Questions implying political responsibility are to be addressed exclusively to the Government, as provided for in Article 80, par. 3, in accordance with the principles of parliamentary democracy.

    Although the issue of parliamentary inquiries is not clearly addressed in the proposed draft, such inquiries can be curried out by the Committees as foreseen under Article 73.3

53. The Commission warmly supports the new provision in Article 83.1 that the National Assembly appoints the Human Rights Defender. Although a qualified majority for such an appointment might have secured a large consensus for the person of the Human Rights defender and might have thus increased the prestige and credibility of this important new institution (see in this respect the opinion of Mrs Serra Lopes on the legislation concerning the Ombudsman of Armenia (CDL (2001) 26)). The Commission understands that qualified majority requirements are rare in the Armenian constitutional order and praxis. The issue as to who is entitled to submit proposals for candidates can be dealt with in the Law on the Human Rights Defender.
54. As regards the Chapter on **Executive power**, the Commission finds that the amendments proposed are coherent with the general logic of the constitutional reform aiming at re-balancing power distribution by strengthening the Government and the Prime Minister's position as head of the executive. In particular, the following comments can be made:
55. The Government powers are defined in the Constitution and the law and the operation of the Government is now to be determined by law and no longer by Presidential decree (Article 85). This re-enforces also the role of the National Assembly.
56. As regards Article 85.1 (formation of Government after the first sitting of a new National Assembly) see above points 34 and 38
57. In accordance with Article 86, although the President may still convene and chair a Government sitting, the (regular) sessions of the Government are no longer chaired by the President but by the Prime Minister.

    In accordance with new provisions in Article 86, the President has a function of preventive constitutional control as he/she can suspend the effect of a governmental decision for one month and request the Constitutional Court to determine the suspended decision's compatibility with the Constitution and the law. The Commission understands that this function only concerns normative (regulatory) acts of the administration and not individual acts.
58. Article 85 par 2 contains a new provision according to which "*all issues of State governance which are not reserved by law to other State or local self-government bodies" are subject to the jurisdiction of the Government*". Admittedly, this provision introduces the possibility to establish by law independent regulatory bodies (such as Independent authorities on Broadcasting, Energy Commissions and others) that are not subordinate to Government.

The Commission welcomes the general rule that State bodies should operate under the authority and control of the Governmental and would favour an explicit provision on the possibility to set up independent bodies, possibly delimiting the areas in which this could be done. In any case it is to keep in mind that independent bodies' acts and decisions should also be subject to judicial review.

59. The provision of Article 88.1 seems to aim at making a clear distinction between territorial administration and local self-government. The Commission welcomes this approach.
However, the proposal to re-introduce the provision according to which the Mayor of Yerevan is appointed and dismissed by the President of the Republic (which was deleted in a previous draft) is in breach of essential principles of local democracy and in obvious contradiction with the European Charter of Local Self-Government. The Commission strongly recommends that this provision be deleted.
The Commission further notes that according to the proposed provision the Mayor of Yerevan "*shall conduct the territorial policy of the Government*". The Commission recalls that the Mayor should be the elected head of local self-government unit of Yerevan. Performing at the same time the duties of an elected head of a local self-government and of a representative of the central authority may prove quite delicate. This cannot however justify a loss of the necessary independence of the local self government (see also below, point 69).
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Chapter 6: The judiciary

60. The Commission welcomes the provision according to which "*justice shall be administered through constitutional, criminal, civil and administrative proceedings*" (Article 91). The reference to administrative proceedings is understood as establishing a specific category of administrative law disputes. The need to subject administrative acts to judicial review is one of the fundamental elements of the rule of law. However, as regards the establishment of administrative courts (Article 92), the Commission notes that this is not a necessary element of judicial review of acts of the administration. It may well be envisaged that control over normative acts is carried out by the Constitutional Court (as it is the case under the actual Constitution), whereas judicial review of individual administrative acts is performed by specialised sections or chambers of ordinary courts (usually courts of appeal and courts of cassation), as it is the case in Croatia and Latvia, for example. The Commission refers to the comments by Mr Torfasson on the constitutional requirement of judicial review of administrative acts (CDL (2001) 39). There are of course arguments in favour of establishing separate administrative courts and the Commission does not wish to take a definite position on this point. It emphasises however that the court system should not be too complicated. If separate administrative courts are established, this will affect the need for economic and other specialised courts.
Moreover, in the Commission's opinion, the establishment or non-establishment of an administrative judiciary is a solution of such importance that it should be made at constitutional level.
61. The Commission's Rapporteurs had expressed some worry about Article 93 allowing the Prosecutor to appeal to the Court of Cassation without any specific restriction, i.e. also in civil cases. This might infringe the principle of party initiative in civil proceedings and it was all the more so since this Article did not provide for a corresponding right of parties to appeal to the Court of cassation. The new wording, which the Commission welcomes, does no longer specifically refer to the Prosecutor's right to appeal to the Court of

cassation but states that judgments of other courts "*shall be reviewed by the Court of Cassation in the manner and within periods defined by law*".

62. The Commission supports the proposal to delete the provision according to which "*the President of the Republic shall be the guarantor of judicial independence*" and to replace it by "*The independence of the courts shall be guaranteed by the Constitution and laws*".
63. The fact that the Constitution retains a minimum of provisions on the Council of Justice is to be welcome, as this body, being competent for the appointment and career of judges has a particularly important role for safeguarding judicial independence.
64. The Commission observes however that decisions as to the removal of judges is left to the Constitutional Court (Article 100.8). Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court.
    The question was further considered whether it should be possible for the Constitutional Court to raise ex officio the question of removing a judge, when the Council of Justice does not take any action. The Commission's Rapporteurs expressed concern about this; it was more appropriate to let the President of the Republic (the ultimate appointing authority) or the Minister of Justice the right to appeal to the Constitutional Court. The Commission is now satisfied that the initiative for the dismissal of a judge belongs to the Minister of Justice (Article 101.11). Of course the question remains as to the role of the Judicial Council in this matter.
65. The Commission understands that the wording used in Article 100 par 3, according to which the Constitutional Court "*shall resolve disputes on the results of referenda*" does not only refer to the results as such but also to other questions determining the validity of the referendum (e.g. the constitutionality of the question posed, the conformity of the procedure followed etc).
66. The Commission welcomes the provision of 101 par 5 enabling the bodies of local self-government to challenge the constitutionality of norms concerning their constitutional rights and powers and to bring before the Constitutional Court disputes with central government authorities.
67. The Commission is, on the other hand concerned by the fact that the Constitution allows the Constitutional Court to decide on the "*termination of the authorities*" of the elected head of a commune and of the community council (see Article 100.8.2 and below comments on Chapter 7).
68. The Commission welcomes the new provisions on the Constitutional Court.
    It understands that the very first sentence in Article 100 ("*The Constitutional Court administers constitutional justice in the Republic of Armenia*") combined with Article 101 par 5 ("*In accordance with the procedure defined by the Constitution and the law on the Constitutional Court, may apply to the Constitutional Court … citizens, in specific cases, when there exists a court decision and the constitutionality of the provision of the law or of another normative act applied in this court decision*") is to be regarded as the provision founding the right of access individual to the Constitutional Court.
69. The Commission welcomes the fact that the right to apply to the Constitutional Court in Article 101 par 5 is not restricted to citizens (as in the original draft) but granted to "everyone".
70. As regards the mechanism of constitutional appeals and referrals to the Constitutional Court, the Commission understands that the jurisdiction dealing with a case (and possibly the Public Prosecutor) may refer the question of constitutionality of a provision to the Constitutional Court and suspend the proceedings until the decision is made. In addition,

a party to the proceedings may, after the judgement is given, challenge the constitutionality *"of the provision of the law or of another normative act applied in this court decision"*. A decision by the Constitutional Court that the challenged provision is unconstitutional should logically lead to the annulment of the judgement (otherwise the Constitutional Court proceedings will not be regarded as effective remedies). The question is left to the legislator whether the appeal to the Constitutional Court shall be made only after the exhaustion of other available judicial remedies or whether it can be made after any judgement, even before the final one. The Commission understands that the latter option is more likely to be followed.

71. The Commission supports the provision of Article 101 par 7 enabling the Human Rights Defender to appeal to the Constitutional Court. This mechanism offers both the Human Rights Defender and the Constitutional Court the possibility to become important actors in the protection of human rights and constitutional order. The Human Rights defender should be able to request a decision by the Constitutional Court on the constitutionality of a provision at any time, irrespective of a specific pending or decided case.
72. The 30 days time limit set out in the Constitution in force (Article 102) for dealing and deciding any case brought before the Constitutional Court is rather unrealistic. Its abolition in the new text of Article 102 is to be welcome.
73. It is not yet clear whether the Procuracy and the Prosecutor General are to be regarded as parts of the judiciary or as an independent office attached to the executive. Much will depend on whether the Procuracy will also be entrusted with the task of defending the State interests in civil and administrative cases (American model). However, placing the Procuracy in Chapter 6 as part of the judiciary and the fact that Prosecutors are appointed by the President – and not by the Prime Minister (see Article 55 par 9) would rather indicate a preference for the continental approach. If the continental model is followed, Prosecutors should be included in the composition of the Judicial Council and the latter should be competent for their appointment, career and possible removal.

On Chapter 7: Local Self Government

74. The Commission welcomes the provisions in this Chapter. Article 104 gives a definition of communities and sets out the right to local self government and establishes the communities' legal personality, whereas Article 105 par 1 enshrines the communities' own powers and the principle that the communities may also exercise powers upon delegation by the State. The Rapporteurs also welcome the constitutional guarantee of communities' budgetary independence as enshrined in Article 106.

75. The Commission welcomes the fact that in Article 107 there is now an express constitutional guarantee for the election of the "council of elders" and the "leader of the community". This is in conformity with the requirements of the European Charter of Local Self Government.
76. The Commission understands that Article 108.1 distinguishes the scope of State supervision over the exercise of delegated powers (first sentence of Article 108.1) from the supervision over the exercise of own powers of the communities (second sentence of Article 108.1). It is recalled in this respect that in accordance with the European Charter of Local Self Government State supervision over the exercise of the communities' own powers should be confined to a review of legality.
77. In Article 108 concerning the city of Yerevan, the principle should be included that the Mayor and the council must be elected. The Rapporteurs are aware that the elected Council and elected Mayor may be entrusted with tasks concerning the execution of Governmental policy in the capital and this may place them in a difficult positions as

Governmental policy may not always be compatible with the elected council's or Mayor's policies. This is however not so unusual and the Rapporteurs note that several European capitals have found specific solutions to these problems. The Law on the city shall have to address this problem.

78. The Commission's Rapporteurs had expressed concern that Article 109, allowing the dismissal of elected mayors and the dissolution of the elected communities' councils, might lead to situations that could be incompatible with the very essence of democracy. The Commission now notes, with approval, that the new draft expressly provides that the dismissal may only take place for reasons "*stipulated by law*" and on the basis of a conclusion by the Constitutional Court.

79. The Commission finds the norms contained in Article 110 regulating merger and split of communities in general compatible with European standards. It welcomes the new wording that follows the Rapporteurs' suggestion.