



Strasbourg, 26 September 2014

**CDL(2014)040**  
Engl. only

**Opinion no. 757/2014**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON THE DRAFT CONCEPT PAPER  
ON THE CONSTITUTIONAL REFORMS**

**OF THE REPUBLIC OF ARMENIA**

**on the basis of comments by**

**Mr Sergio BARTOLE (Substitute Member, Italy)**  
**Mr Aivars ENDZINS (Member, Latvia)**  
**Mr Christoph GRABENWARTER (Member, Austria)**  
**Ms Taliya KHABRIEVA (Member, Russian Federation)**  
**Mr Evgeni TANCHEV (Member, Bulgaria)**  
**Mr Kaarlo TUORI (Member, Finland)**

## Table of Contents

|      |  |    |
|------|--|----|
| I.   | Introduction .....   | 3  |
| II.  | Amendment process and scope of the opinion .....   | 3  |
| III. | Introduction of the Draft Concept Paper and Part I on The Main principles underlying constitutional reform.....  | 4  |
| IV.  | Part II of the Draft Concept Paper on conceptual approaches to constitutional reforms .....  | 4  |
|      | A. Fundamental rights and guarantees for the implementation of the constitutional principle of the social state (Parts 2.2 and 2.3 of the Draft) ..... | 4  |
|      | Ensuring the direct effect of fundamental rights and freedoms .....  | 4  |
|      | Constitutional solutions for the limitations of rights .....   | 5  |
|      | B. Separation and balancing of powers: opportunities availed by a parliamentary system of Government .....   | 6  |
|      | Function and election of the President of the Republic .....   | 6  |
|      | Legal disputes between state organs .....  | 7  |
|      | Ensuring the Government stability .....  | 7  |
|      | Oversight powers of Parliament and strengthening the role of the opposition.....   | 7  |
|      | C. Suffrage and the Electoral System .....   | 8  |
|      | Scope of possible restrictions on suffrage .....   | 8  |
|      | Main characteristics of the electoral system of the National Assembly; .....   | 9  |
|      | Definition of the status of the Central Electoral Commission.....  | 10 |
|      | D. Judiciary .....   | 10 |
|      | Increasing the role and efficiency of activities of the Council of Justice .....   | 10 |
|      | Structure of the judicial system.....  | 11 |
|      | Constitutional justice .....   | 11 |
|      | E. Constitutional safeguards for a referendum .....  | 11 |
|      | F. Conceptual fundamentals for constitutional and legal reforms of local self-government.....  | 12 |
| V.   | Conclusion .....   | 12 |

## **I. Introduction**

1. On 1<sup>st</sup> November 2013, the President of the Constitutional Court of Armenia, Mr Gagik Harutyunyan, in his quality of coordinator of the Professional Commission for Constitutional Reforms (hereinafter “the Commission”), and on behalf of the President of the Republic of Armenia, requested the assistance of the Venice Commission in the process of revision of the Constitution of Armenia.
2. A working group of Rapporteurs was set up, composed of Mr Bartole, Mr Endzins, Mr Grabenwarter, Ms Khabrieva, Mr Tanchev, and Mr Tuori.
3. The Professional Commission for Constitutional Reforms (hereinafter “the Commission”) and the rapporteurs met three times in 2014 in order to discuss the Draft Concept Paper on the constitutional reforms. Meetings were held in February in Yerevan (Armenia), in March in Venice (Italy) and in September in Paris (France).
4. On 4 September 2014, the Draft Concept Paper - as at 2 September 2014 - on the Constitutional Reforms of the Republic of Armenia elaborated by the Commission (see CDL-REF(2014)033) was submitted to the Venice Commission for its comments. This paper was discussed at the meeting in Paris on 19 September. Mr Lafitsky provided comments after the meeting in Paris.
5. *The present opinion was adopted by the Commission at its ... Plenary Session (Venice, ...)*

## **II. Amendment process and scope of the opinion**

6. The Letter of 1<sup>st</sup> November 2013 sets out the development foreseen for the amendment process. In a first phase, the Commission should prepare a draft concept paper on the reforms of the Constitution to be presented to the President of the Republic. In a second phase, the draft of the concrete reforms should be prepared and presented.
7. The assistance of the Venice Commission has been requested for the two phases of the amendment process.
8. The calendar for the submission of the Draft Concept Paper (herein after “the Draft”) to the President of the Republic has been modified twice, from April 2014 to 1 July 2014 and then to 15 October, so that public discussions could be held in Yerevan and outside Yerevan. Moreover, political parties were invited and participated in a Conference organised in Yerevan on 5-6 June 2014 by the European Union Delegation in Armenia, the OSCE Office in Yerevan, and GIZ. This consultation process is to be acknowledged.
9. The present opinion is based on the English translation of the Draft - as at 2 September 2014 –transmitted by the Armenian authorities. Since the translation may not accurately reflect the original version, certain comments and omissions might be affected by problems of the translation.
10. The Draft Concept on the Constitutional Reforms of the Republic of Armenia consists of the introduction, which outlines the existing deficiencies of the constitutional regulation, and two major sections, the first of which sets forth the purposes of the reform, and the second contains the methodological approaches to their realization. Each of the sections consists of parts which reflect new vision of regulation of human rights, the role of the Parliament, form of government, guaranteeing provisions of the Constitution on the social and legal State (the rule of law), strengthening of independence of the judicial power, improvement of local self-government, etc.

11. The Draft does not suggest any detailed wording of Articles of the Constitution, but rather sets out general ideas, sometimes quite abstract, on how to improve the respect for human rights, the rule of law and the functioning of the institutions. It is therefore sometimes difficult to take a stand. Moreover, all the provisions would have to be read together in order to establish an overall balance in the drafting of the Constitution.

12. The Venice Commission recognises the important work done by the Professional Commission since the beginning of its works and welcomes the fact that several experts' ideas and opinions expressed during the meetings have been taken into account.

### **III. Introduction of the Draft Concept Paper and Part I on the Main principles underlying constitutional reform**

13. The Introduction and Part I of the Draft on the main principles underlying the constitutional reforms describe the constitutional history of the Republic of Armenia and analyse the present situation, identifying in particular the deficiencies of the current system. Practical implementation of the constitutional reform of 2005 shows that there is a need for further amendments. This Part of the Draft defines the areas where reform is most needed and sets out the objectives of the constitutional reforms.

14. The purpose of this opinion is to assist the Commission in designing the outline of the future reform and therefore, the first part of the Draft will not be commented on in detail. However, the Venice Commission notes that the objectives of the reform, as set out in the Draft, deserve full support. The reform aims at recognising human dignity as a central value, clearly defining the guarantees for the exercise of fundamental rights and the permissible limitations, creating the preconditions for a state governed by the rule of law (*Rechtsstaat*) and establishing a balanced and stable system of democratic government. These aims are also spelt out in Part II.1 of the Draft.

15. The reform thus aims at bringing the country closer to the full realisation of the values of the Council of Europe. The Venice Commission can only welcome a reform pursuing these aims.

16. The Venice Commission notes that the concept paper will be an important instrument for the future interpretation of the amended Constitution.

### **IV. Part II of the Draft Concept Paper on conceptual approaches to constitutional reforms**

#### **A. Fundamental rights and guarantees for the implementation of the constitutional principle of the social state (Parts 2.2 and 2.3 of the Draft)**

17. The solutions proposed as "new conceptual approaches" on page 10 ("clarify the rights and freedom and their limitations, enshrining the principle of proportionality etc.) are in general in line with the well-established practice of constitutional legislation in other European States as well as at the European level. In addition, the issue of the protection of rights of national minorities would merit reflection in the framework of the reform.

#### **Ensuring the direct effect of fundamental rights and freedoms**

18. The Draft makes several references to the need for necessary and sufficient constitutional guarantees for ensuring the direct effect of constitutional rights. This objective, strengthening the constitutional guarantees for the direct effect of constitutional right, is to be supported. However, implementing this objective requires analytical precision.

19. “Direct effect” could mean that provisions on constitutional rights are immediately effective even if no complementary legislative measures have been taken.

20. The next step in clarifying the implications of the concept would be to identify at whom this directly binding effect is aimed; that is, the obligated party. Several categories can be distinguished: public authorities (the legislature, the executive and the – central and local – administration, as well as the judiciary) and private parties (the reach of the horizontal effect or *Drittwirkung*).

21. After analysing the diverse relations in which the direct effect of constitutional rights could be effective, the final step is to design the constitutional guarantees, which might be different in different relations (for example *vis-à-vis* the legislature and administrative authorities or *vis-à-vis* public authorities and private parties).

22. The distinction between social rights that require positive action by the state or other public authorities and liberty rights the effect of which are negative, is not sufficient in order to structure the Chapter on Human Rights. This is due to the fact that the distinction is not watertight: social rights may include elements of liberty rights and the constitutional safeguards for realising liberty rights may include positive measures too.

23. What is important is to make a clear distinction between directly justiciable rights and other rights. This distinction does not necessarily coincide with that between social and liberty rights, since it may be warranted to guarantee some social rights as justiciable individual rights. This goes for, above all, the right to basic subsistence and care.

24. Finally, establishing a justiciable individual right is only one of the possible legal effects of fundamental rights. Provisions on social rights can also be formulated as obligations for the legislature, and here again several alternatives exist. Constitutional provisions can, for instance, presuppose that through ordinary law an individual and justiciable right to specific social benefits is created and leave the manner in which the constitutional obligation is realised to the discretion of the ordinary legislature.

25. The aim of promoting a social State and to draw a clear line between basic social rights and objectives of the State, have to be supported without reservation.

26. As concerns, in general, the realisation of the constitutional principle of a social state, normal democratic procedures should be given sufficient leeway. One possibility of facilitating parliamentary oversight and public debate could be the Government’s obligation to report regularly to the National Assembly on the progress achieved in the realisation of the social state and plans for the future.

27. Finally, as set out in the Draft, in order to ensure the effectiveness of fundamental rights, the right to individual petition to the Constitutional Court should be extended to include the right to challenge the constitutionality of administrative acts.

### **Constitutional solutions for the limitations of rights**

28. With regard to limitations on fundamental rights, it is important that both general and specific limitation clauses are in harmony with the ECHR and the European Court of Human Rights’ case law and other applicable international instruments. The ECHR should be considered as minimum content of fundamental rights while the limitations admitted by the Court’s case law should be considered as maximal to the national legislator.

29. Several references are made in the Draft to the necessity for limitations of rights to be provided by law and to the principle of proportionality. It is also important to reiterate that the

aim of the restriction of rights has to be legitimate within the meaning of the European Court of Human Rights.

### **B. Separation and balancing of powers: opportunities availed by a parliamentary system of Government**

30. The Draft opts for a parliamentary system described as follows: “The National Assembly, as the legislative power, would oversee the highest body of the executive branch — the Government, while the President of the Republic would guard the compliance of the legislature and the executive with the rules prescribed by the Constitution”.

31. This option is based on a thorough assessment of the current situation: “the absence of a majority in the Parliament in support of the President of the Republic and the current context of the legal thinking significantly increase the danger of political crisis and confrontation” and “increases the danger of political autocracy; Necessary proportionality is not provided between the functions and powers of the President of the Republic. In particular, sufficient clarity is not afforded to the powers of the President in administering executive power and performing the functions of observing the Constitution; Proper guarantees are not yet ensured at the constitutional level for the full implementation of the legislative and supervisory activities of the National Assembly *as well as for the effective performance of its balancing role by the parliamentary minority*”

32. The Draft attaches particular importance to the function and election of the President of the Republic, to the oversight power of the Parliament including its minority and to ensuring the stability of the Government.

#### **Function and election of the President of the Republic**

33. The president “would be elected by the National Assembly or a wider electoral college for a term exceeding the term in office of the parliament. He would not have the right to be re-elected, so that during his term, he can be utmost independent from the political forces. (...) He would first of all assume the role of a mediator and reconciliator, in view of his core mission of ensuring dynamic balance in the country’s development.”

34. The election of the president by parliament or a broader representation or an electoral college is in line with the option for a parliamentary system. However, taking the decision to change the electoral system should receive careful consideration as the people, used to directly electing the President up to now, may feel deprived of a right. If such a change was undertaken, the electorate and civil society should be properly informed of the reasons. Finally, setting up an electoral college for the Presidential election could be an appropriate solution, depending on the specific arrangements which will be chosen.

35. Implementing the reform envisaged by the Commission will require a revision of the presidential powers. The aim of such a revision would be to bring the powers of the President into harmony with the option for a parliamentary system. It should also be to prevent conflicts of competence or authority within the executive between the President and Government. The President’s powers would have to be reduced, in particular those listed in Article 55 of the Constitution and any parallelism in the powers of the President and Government would have to be avoided.

36. For instance, the Constitution presently in force does not clearly define in the foreign relations field the division of powers between the President of the Republic and the Government: according to Article 55.7 the President “represent the Republic in international relations, supervise the foreign policy, conclude international agreements, forward them to the National Assembly for ratification“, while the Government “shall determine and

implement the foreign policy of the Republic but “jointly with the President of the Republic “ (Article 85).

37. Moreover, the scope of the competence of the president’s power to issue orders and decrees is not clear even if they “shall not contradict the Constitution and laws of the Republic “(Article 56). If a decisive step is taken in the parliamentary direction, it may be doubtful whether the President should be granted norm-making powers at all.

38. These are only some examples of the risk of political conflicts between the President and Government which should be avoided.

39. As concerns the relation of the President with the Parliament, the right of the President to return a law to the Parliament for a new deliberation (current Articles 55.2 and 72 of the Constitution should be limited, for instance to constitutional issues.

40. Finally, a device for preventing frictions between the President and Government and also to guarantee parliamentary control over presidential action would be a constitutional requirement that the President take his/her decisions in the presence of Government and that the decisions are countersigned by a minister.

#### **Legal disputes between state organs**

41. As pointed out in the Draft, an effective system for the legal resolution of disputes between state organs should be established. This will imply granting additional powers to the Constitutional Court.

42. However, it should be emphasized that what is most important is a political culture of mutual respect and loyal cooperation

#### **Ensuring the Government stability**

43. The Draft states that “To ensure government stability, it will be necessary to take into account the modern experience of developing parliamentarism and the means supporting stability, which have proven to be effective in the international practice (as, e.g., in the Federal Republic of Germany). Examples of the means supporting stability can be a constructive vote of no confidence and the strong role of a prime minister in the system of state government. Dissolution of the parliament can take place only when the National Assembly cannot elect a new prime minister in a crisis situation.”

44. The German system of a constructive vote of no-confidence is being considered by the Commission and this is to be welcomed.

#### **Oversight powers of Parliament and strengthening the role of the opposition**

45. The Draft sets out that “Considering that, in a parliamentary system, the main dividing line is between the political majority and the parliamentary minority, rather than between the government and the parliament, the parliamentary minority would need to be given rights to match its role”.

46. First, the Draft considers introducing the concept of organic (constitutional) laws, which would need to be adopted by a qualified majority vote in order to enhance the role of the opposition. The Draft further states that “An exhaustive list of such laws would need to be prescribed by the Constitution”.

47. The Venice Commission underlines that such a legal instrument is appropriate for constitution-related issues, i.e. matters which directly affect human rights and fundamental freedoms and the organisation of the power of the State, where greater stability and larger consensus is to be required than is the case for ordinary laws. However, the Venice Commission emphasises that the scope of constitutional laws should be defined rather narrowly so that they do not become obstacles to normal democratic (and majoritarian) politics.

48. The Draft also considers giving the minority:

- a right to create investigative commissions;
- the right of chairing an investigative commission;
- an important role in the election of the Chairman of the Chamber of Control and the Chairman of the Central Electoral Commission by prescribing the election of these officials by a three-fifths vote of the total number of members of parliament (similar to the current practice for the election of the Ombudsman);

and require representation of the opposition in various bodies of the National Assembly (for instance, by reserving the post of deputy speaker of the National Assembly or of chairs of certain standing committees for the opposition). These ideas are welcome. Additional clarity would be recommended concerning the envisaged arrangements having regard to the existence, within the National Assembly, of different parliamentary factions as well as independent deputies.

49. Finally, to safeguard the legislative power of Parliament, the possibility for the executive to adopt normative acts should be made subject to an authorisation by Parliament.

### **C. Suffrage and the Electoral System**

50. Under the heading “Suffrage and the Electoral System”, the Draft deals with three main topics: the scope of possible restrictions on suffrage; the main characteristics of the electoral system of the National Assembly, and the definition of the status of the Central Electoral Commission.

#### **Scope of possible restrictions on suffrage**

51. Currently, Article 30<sup>1</sup> of the Constitution states that “*Citizens found to be incompetent by a court decision, duly sentenced to prison or serving the sentence, shall not be entitled to vote or to be elected*”. The Draft observes that “convicts may only be deprived of the right to vote in case of grave crimes. Specifying such a restriction in the Constitution is more appropriate than completely depriving the convicts of the right to vote”.

52. According to the case law of the European Court of Human Rights, a provision which imposes a blanket restriction on all convicted prisoners is not compatible with Article 3 of Protocol No.1<sup>2</sup>. Considering modifying the wording of Article 30 is therefore welcome.

---

<sup>1</sup> Article 30 of the Constitution of the RA: Eighteen-year old citizens of the Republic of Armenia have the right to take part in the elections and referenda as well as the right to take part in the public administration and local self-governance through their representatives chosen directly through the expression of free will. The law may define the right of suffrage for the elections of the bodies of local self-government and for the local referenda for persons who are not citizens of the Republic of Armenia. Citizens found to be incompetent by a court decision, duly sentenced to prison or serving the sentence, shall not be entitled to vote or to be elected.

<sup>2</sup> Case of HIRST v. the United Kingdom No. 2, GC 6 October 2005 “The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.”



53. The European Court of Human Rights also added that it should be left “to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1”

**Main characteristics of the electoral system of the National Assembly;**

54. The Draft states “For ensuring sustainable electoral system during elections to the National Assembly its main characteristics must be enshrined in the Constitution” and quote *Constitutional provisions concerning the system of election to the parliament are widely accepted in old member states (Belgium, the Netherlands, Luxembourg, Denmark, Sweden, Norway, Iceland, Ireland, Austria, Spain, Portugal), as well as new member states (Estonia, Latvia, Czech Republic) of the European Union.*

55. It should be added that all these countries have adopted a parliamentary system and have chosen a proportional electoral system.

56. The electoral system is such an important issue for defining the political system that basic principles should be enshrined in the Constitution. The intention of including such a provision in the Constitution for the election to the National Assembly is therefore welcomed. Moreover it would ensure stability of the electoral system.

57. Seeking stability should however not lead to a system that is too rigid. For instance, it is desirable that such a constitutional provision does not include a fixed threshold. Details of the electoral system (threshold, system of close or open lists) should be left to an organic law, not requiring a too high majority.

58. Finally, the Code of good practice in electoral matters<sup>3</sup> states “Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy”. “Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections”.

59. The Code of good practice further underline that changing electoral system “frequently or just before (within one year of) elections” is a bad thing because “Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests”. It therefore recommends “stipulating in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that”.

60. Several European constitutions have such provisions<sup>4</sup>.

---

<sup>3</sup> CDL-AD(2002)23rev § 66. One way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution would be to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that.

<sup>4</sup> See for instance Article 54.1of the Constitution of Greece “The electoral system and electoral districts shall be specified by law which applies as of the elections immediately after the following ones, unless an explicit provision adopted by a majority of two thirds of the total number of Members of Parliament, provides its immediate application as of the elections immediately following” ; Article 67.6 of the Constitution of Turkey “The amendments made in the electoral laws shall not be applied to the elections to be held within the year from when the amendments go into force”.

### **Definition of the status of the Central Electoral Commission**

61. The Venice Commission supports the idea that the constitutional status of the Central Electoral Commission needs to be clarified.

62. The Central Electoral Commission and its independent and permanent character could be enshrined in the Constitution. Details on its composition and functioning should be left to an organic law.

### **D. Judiciary**

63. As concerns the Judiciary, the Draft provides that “The main issue is the ineffectiveness of the judicial branch, which is due to functional uncertainties, structural instability and insufficient independence of the judicial branch, deficiencies in court procedures, as well as a number of negative aspects conditioned by subjective factors. As a result, there is also low public confidence in courts.”

64. It should be noted from the outset that the proclamation of the independence of both the Judiciary and each individual judge in the exercise of adjudicating functions is missing in the text of the Constitution presently in force.

65. The Draft identifies several domains that need improvement in the Judiciary: increasing the role and efficiency of the Council of Justice’s activities; modifying the structure of the judicial system and enhancing the role of the Constitutional Court. They are commented below.

66. The Draft is silent on the regulations concerning the prosecution service. It will be important to ensure that these provisions comply with Council of Europe standards.

### **Increasing the role and efficiency of activities of the Council of Justice**

67. As concerns the Council of Justice, it is stated in the Draft that “this constitutional body must have sufficient structural independence for its protection from illegitimate or discretionary influences”, “It shall be endowed with constitutional functions that will enable it to play an active role in ensuring the independence and autonomy of the judicial branch. In this sense, issues relating to the formation of the Council of Justice and its relations with other government bodies (including the National Assembly of the Republic of Armenia, the President of the Republic of Armenia and the Government of the Republic of Armenia), as well as issues relating to the composition and the scope of powers of this body, *inter alia*, need to be legally regulated anew.”

68. However, the Draft does not develop the concrete changes which are envisaged in the Constitution itself.

69. In its Report on Judicial Appointments,<sup>5</sup> the Venice Commission states: “An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy.”

70. It also recommended that “a balanced representation of judges from different levels and courts” be ensured and that the principle be expressly added in the Constitution<sup>6</sup>.

---

<sup>5</sup> CDL-AD(2007)028 Report on Judicial Appointments, §48.

<sup>6</sup> CDL-AD(2011)010 Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor’s Office and the Law on the Judicial Council of Montenegro. Para 21. (...)Moreover, a new paragraph could be included in Article 127 of the Constitution to provide that the composition of the Judicial Council must secure a balanced representation of judges of all Courts. See also

## Structure of the judicial system

71. Discussion on the structure of the judiciary is still underway within the Commission and the Draft does not take a definite stance on this issue.

72. Whether a system of two or three levels of instance should be introduced is still being debated. The basic choice of a system with two or three instances does not preclude the possibility of having a different number of instances for different types of disputes.

73. Finally, it should be recalled that in a recent opinion concerning the terms of office of court presidents in Armenia, the Venice Commission suggested that “In order to contribute to legal and constitutional clarity, an amendment to the Constitution on fixed terms of office of court presidents could be considered. Such an amendment could be included in the pending constitutional reform”<sup>7</sup>.

## Constitutional justice

74. It is envisaged to widen the competence of the Constitutional Court to “solving the dispute between constitutional bodies regarding their constitutional powers” and this is welcome<sup>8</sup> (see under paragraph “Legal disputes between state organs”).

75. As mentioned above under the paragraph “Ensuring the direct effect of fundamental rights and freedom,” the right to individual petition to the Constitutional Court should be extended, in particular to include the right to challenge the constitutionality of administrative acts (current Article 101 of the Constitution).

76. On a more formal level, having a section / a chapter in the Constitution dedicated to the Constitutional Court would clarify the specific nature of the Constitutional Court, and in particular that it is not a court of appeal for possible supreme courts.

### E. Constitutional safeguards for a referendum

77. The Draft suggests to “further enhancing the role of a referendum as an effective means of direct democracy” “The ultimate objective is to benefit to the maximum from the balancing impact of direct democracy on the exercise of state powers”. It further states:

“The main conceptual approaches for the development of the institute of referendum include the following:

- giving priority to such an option of clarifying the scopes of referendums according to which issues regarding accession to international organizations resulting in partial restriction of state sovereignty are subject to referendum;
- specifying in the Constitution the scope of issues which may not be put on a referendum;

---

CDL-AD(2012)024 Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012) Para. 20 and 23.

<sup>7</sup> CDL-AD (2014)006 opinion on the draft law on Introducing amendments and addenda to the Judicial Code of the Republic of Armenia.

<sup>8</sup> See for example [CDL\(1997\)018rev](#) Opinion on the law on the Constitutional Court of Ukraine, paragraph 4. “The Commission noted already in its opinion on the Constitution of Ukraine [...] that several procedures which could play an important role for the consolidation of constitutionalism in Ukraine were not specifically mentioned in the text of the Constitution:... - a provision on conflicts of competence between State organs.

In its opinion, the Commission noted that the Law on the Constitutional Court seeks to remedy these gaps by using the procedures mentioned in the Constitution in a way producing effects similar to the missing procedures.”

- establishing the practice of organizing referendums by civil initiative;
- establishing constitutional and legal basis for presentation of a prior opinion by the National Assembly concerning the issue or draft law put on a referendum by civil initiative.”

78. From a theoretical point of view, the major directions enumerated above seem to be in conformity with the standards developed in the field<sup>9</sup> and which should be applied, among others, should the choice to enhance referendum be confirmed.

79. However, the Venice Commission wishes to highlight that practical experience of referendums has not always been positive (in particular in post-Soviet countries but also in some Western countries). Moreover, for countries whose citizens live abroad, determining a right quorum (number of registered voters who must effectively express their vote) can become problematic.

80. In any event, the Venice Commission recommends keeping referendums and popular initiatives separate. Where a democracy is functioning, political parties are supposed to aggregate popular initiative and compose political programmes so that important political and social issues reach Parliament.

81. However, referendums could be kept and developed at the local level (on issues that are close to the people).

#### **F. Conceptual fundamentals for constitutional and legal reforms of local self-government**

82. The commitment to ensure compliance with the European Charter of Local Self-Government is welcome.

#### **V. Conclusion**

83. The Draft concept paper is a good and valuable basis for the preparation of a concrete package of proposals for the reform of the Constitution of the Republic of Armenia, which would strengthen democratic principles and establish the necessary conditions for ensuring the rule of law and respect for human rights within the country. It is based on a comprehensive and consistent analysis of the situation in the country.

84. The aim of the Draft is to bring the country closer to fully implementing the basic values of the Council of Europe. While it would bring substantial change, it does not constitute a break with the current constitutional system. It will build on the constitutional reform that was adopted in 2005, correcting some of the deficiencies which have appeared in its implementation.

85. The aims and the overall approach of the reform therefore deserve strong support. The legal positions expressed in the Draft are in line with the Venice Commission's traditional positions and the Venice Commission notes that the views expressed by its rapporteurs during the various exchanges of views were taken into account.

---

<sup>9</sup> CDL-AD(2007)008rev Code of good practice on Referendums adopted by the Council for Democratic elections. See in particular III. 6. Opinion of Parliament “When a text is put to the vote at the request of a section of the electorate or an authority other than Parliament, Parliament must be able to give a non-binding opinion on the text put to the vote. In the case of the popular initiatives, it may be entitled to put forward a counter-proposal to the proposed text, which will be put to the popular vote at the same time. A deadline must be set for Parliament to give its opinion: if this deadline is not met, the text will be put to the popular vote without Parliament's opinion”.

86. While the paper is based on a comprehensive legal analysis of the situation, some of the choices made, such as the option in favour of a parliamentary system of government, also contain a political element and will have to be debated extensively in the country. In any case, a comprehensive constitutional reform can be carried out only on the basis of broad consensus within society.

87. The Venice Commission notes that, on the basis of its opinion, the Draft concept paper will be revised and submitted to the President of the Republic of Armenia. Thereafter, the Draft will have to be transformed into a concrete set of constitutional amendments. The Venice Commission encourages the Armenian authorities and the constitutional reform commission to pursue their efforts to involve the public and all stakeholders, in particular political parties. In its opinion, the Draft concept paper provides an opportunity for reform that should not be missed.

88. The Venice Commission will be pleased to continue its cooperation with the Armenian authorities for this important reform.