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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PRELIMINARY OPINION
ON THE DRAFT AMENDMENTS
TO CHAPTERS 1 TO 7 AND 10
OF THE CONSTITUTION
OF THE REPUBLIC OF ARMENIA

on the basis of comments by

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I. Introduction

1. On 1 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 Constitutional 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. The Letter of the President of the Constitutional Court of Armenia set out the plan for the amendment process. In a first phase, the Constitutional Commission would 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 would be prepared and presented. The assistance of the Venice Commission was requested for both phases of the amendment process.
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 Constitutional Commission and the rapporteurs met three times in 2014 in order to discuss the Draft Concept Paper on the constitutional reforms (CDL-REF(2014)033) and the Venice Commission adopted an opinion on it at its 100th Plenary Session (Roma, 10-11 October 2014) (CDL-AD(2014)027).
4. The draft concept paper was subsequently submitted to the President of the Republic, who accepted it.
5. The Constitutional Commission proceeded with the drafting of the amendments to Constitution. An initial version of the draft amendments to the first two chapters of the current Constitution (CDL-REF(2015)014) was submitted to the Venice Commission and was discussed by the rapporteurs and the Constitutional Commission at a meeting held in Paris on 18-19 May 2015. This text was subsequently revised by the Constitutional Commission in the light of the recommendations made by the rapporteurs (see CDL-REF(2015)023).
6. An initial version of the draft amendments to Chapter 4 –The National Assembly, Chapter 5 – The President of the Republic, Chapter 6 – The Government; Chapter 7 – Courts and the Supreme Judicial Council and Chapter 10 – the Human Rights Defender was submitted to the rapporteurs and discussed at a meeting held in Vienna on 1-2 July 2015. This text was subsequently revised by the Constitutional Commission in the light of the recommendations made by the rapporteurs (see CDL-REF(2015)023).
7. The present opinion is based on the English translation of the Draft amendments provided by the Armenian authorities. The translation may not accurately reflect the original version and certain comments and omissions might be the results of these problems of translation.
8. The present opinion was prepared on the basis of the contributions of the rapporteurs; it was sent to the Armenian authorities as a preliminary opinion and made public on 30 July 2015.

A. Scope of the opinion

9. The present opinion covers amendments to the following chapters of the Constitution of Armenia in force: Chapter 1 - Foundations of Constitutional Order; Chapter 2 - Fundamental Rights and Freedoms of the Human Being and the Citizen; Chapter 3 - The President of the Republic; Chapter 4 – The National Assembly, Chapter 5 – The Government and Chapter 6 – The Judicial Power. Draft amendments to the remaining chapters of the Armenian Constitution are being prepared by the Constitutional Commission and will be the object of another opinion.

10. Many of the comments and recommendations which the rapporteurs formulated during the exchanges of views with the Constitutional Commission have been taken into account by the latter and have resulted in the revision of the draft amendments. Such comments and recommendations will therefore not be repeated in this opinion.

B. Preliminary remarks

11. At the outset, the Venice Commission wishes to acknowledge the importance and the high quality of the work achieved by the Constitutional Commission. It highly praises, also, the quality of the exchanges and the open and constructive attitude held during the working meetings. It stresses and welcomes that most of the suggestions and proposals made by the rapporteurs during these meetings have been given serious consideration and have often been taken on board.

12. The Venice Commission collaborated with the Armenian authorities on two preceding constitutional reforms: in 2001-2003 (when the constitutional referendum failed) and again in 2004/2005, when constitutional amendments were approved by the referendum held on 27 November 2005. Several recommendations which the Venice Commission formulated but were not accepted at that moment are now reflected in the text under consideration. This is a clear sign, in the Commission's opinion, that the Armenian political and legal culture has continued to develop during these years and has now achieved a remarkable level of maturity which is certainly to be welcomed.

II. Analysis of the draft amendments to the chapters related to the Foundations of constitutional order and Fundamental Human and Civil Rights and Freedoms (chapter 1 and 2 of the current Constitution)

A. General remarks

13. Article 1 and 2 of the Constitution are unamendable pursuant to Article 114 of the Constitution. Most of the other articles in this part of the Constitution have been widely amended.

14. The catalogue of constitutionalised fundamental rights has been substantially enriched by the inclusion of some of the newest rights and by including for the first time in the constitutional draft other rights thus elevating them at constitutional level. For instance, Articles 40 to 52 constitutionalise some of the most important criminal law human rights which are universally recognised.

15. The draft introduces a new structure and this modification has to be approved. After Chapter one which deals with the Foundations of Constitutional Order, a new distinction has been made between rights which are directly applicable (Fundamental Rights and Freedoms) and social rights which are spelled out as objectives of the state policy on the one hand and rights to be defined by law, on the other hand (Chapter 3. Legislative Guarantees and Main Objectives of State Policy in the Social, Economic and Cultural Spheres).

16. The provisions of the first three draft chapters comply with the international law treaties on human rights, especially the European Convention on Human Rights (hereinafter "ECHR") and soft law instruments of the Council of Europe, Venice Commission and OSCE commitments in the area of human rights.

17. Chapter 1 contains many of the fundamental principles which can be found in the other modern constitutions in Europe.

18. Chapter 2 establishes an elaborate and modern catalogue of fundamental rights. It takes up many guarantees from the ECHR (e.g. Articles 2, 5, 13, 19, 20, 22, 23, 38 and seq.) and/or the Charter of Fundamental Rights of the European Union (e.g. Articles 1-4, 15, 19, 20, 22, 23, 38 et seq.) as well as some guarantees (e.g. Article 21 of the Armenian Constitution), which can be found in other national constitutions but not at the European level.

19. In Chapter 2, the wording of several provisions is often, but not always, very close to the wording of the ECHR. Questions of interpretation may arise when this is not the case.

20. Deviations from the Convention are sometimes due to a more detailed regulation which also includes positions developed in the jurisprudence of the European Court of Human Rights (hereinafter “the European Court”). For instance, this applies to the elements of the right to a fair trial. This approach is interesting and, at first sight, could be useful; it might however raise difficulties in the long run, as the European Court case law is constantly developing, making it impossible to reflect it in its entirety in national constitutional provisions.

21. Some provisions are quite detailed. This is the case, for example, of provisions on judicial rights. It might be doubted whether all of them should be adopted at constitutional level. This applies e.g. to “the right to be exempted from the duty to testify” (Art. 42).

22. In two respects, the draft amendments show particular openness towards international/European standards of human rights protection: explicit reference to the possibility to apply to international bodies is made in Article 59 paragraph 3; moreover, Article 81 para. 2 ensures that where international standards are higher than national standards, international standards apply. This is to be welcomed.

B. Specific remarks

Chapter 1. The foundations of constitutional order

Article 5. The Hierarchy of Legal Norms

23. This article provides for a system of hierarchy of legal norms. However, it does not mention constitutional laws implied by Article 103. The institution of constitutional laws implies two normative consequences: first, ordinary laws may not contradict constitutional laws; and, secondly, constitutional laws may not exceed their sphere of competence, as defined in Article 103. It would be recommendable to enshrine both principles in the Constitution

24. The Article duly provides that the peremptory norms of international law and the ratified international treaties shall have priority over the laws¹. This is a very welcome provision.

25. Article 7 and Article 60 paragraph 2, which provides that “restrictions of fundamental rights and freedoms may not exceed the restrictions defined by the international treaties of the republic of Armenia”, need to be interpreted systematically. The case-law of the European Court of Human Rights is binding on the domestic courts, at least as concerns Armenia, including in relation to Chapter 2 of the Constitution (this is explicitly provided in the Judicial Code of Armenia).

Article 6. The Principle of Legality

¹ On the importance of the implementation international law by national courts, see CDL-AD(2014)036, in particular §113.

26. The practical significance of the last sentence of Article 8 paragraph 2 “Authorisation norms shall comply with the principle of legal certainty” is unclear. In any event, should the reference to the principle of legal certainty remain in this paragraph – which refers specifically to sub-legislative normative acts adopted by bodies foreseen by the Constitution – it should not be limited to “authorising norms”.

Article 7. Suffrage Principles

27. Article 7 lists the five principles of the European electoral heritage², which are thus now protected at the constitutional level. This is to be welcomed. It would seem also important to add the principle of “parity of sexes”, so that the electoral legislation may provide for legal rules requiring a minimum percentage of persons of each gender among candidates.³

Article 8. Ideological pluralism and multipartisanship

28. Paragraph 4 of Article 8, which requires congruence of the objectives of political parties with the fundamental principles of the Constitution, is problematic. According to the Venice Commission, it should not be unconstitutional to pursue constitutional reform through constitutional means. The wording in Article 45 paragraph 4 has been changed from the previous draft to be in conformity with the position of the Venice Commission. Now a tension exists between Article 8 paragraph 4 and Article 45 paragraph 4.

Article 10. Economic Order

29. The wording of the new Article 10 – which states that a “social market economy shall be the basis for the economic order in the Republic of Armenia” – has been improved after the discussions held in Paris; there is now a reference to the “state policy” as an element of the “social market economy”. This reference makes the choice of the economic order clearer, namely a “social” market economy, and will give a basis to the necessary corrective interventions of the public authorities for the sake of the social objectives enshrined in Chapter 3.

Article 16. The State and Religious Organisations

30. Article 16 paragraph 1 guarantees the freedom of activity for religious organisations and paragraph 2 affirms the principle of separation of the State and religious organisations. The provisions of this Article – which have been redrafted after the discussions held in Paris – are in harmony with the provisions in Article 40, in particular with paragraph 4 addressing the collective aspect of freedom of religion.

Article 17. The Armenian Apostolic Holy Church

31. Article 17 states, in its paragraph 1, that “the Republic of Armenia shall recognize the exclusive mission of the Armenian Apostolic Holy Church in the spiritual life of the Armenian people, in the development of its national culture, and in the preservation of its national identity”

32. The Venice Commission is aware of the importance of the Armenian Apostolic Holy Church in all the aspects described in this paragraph (spiritual life, national culture and identity of Armenia). However, the words “exclusive mission” may give rise to misinterpretations of the position of the Apostolic Holy Church. Recognising an “exclusive mission” to the Apostolic Holy

² Code of good practice in electoral matters, Guidelines and Explanatory report adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002).

³ Code of good practice in electoral matters, 2.5, op. cit.

Church in the spiritual life of Armenians seems to be contradicting Article 16 paragraph 1 in its current wording “The freedom of activity shall be guaranteed in the Republic of Armenia for the religious organizations”. It also seems to be contradicting Article 40 which deals with the freedom of thoughts, conscience and religion: “Everyone shall have the right to freedom of thought, conscience, and religion”. Finally, recognising an “exclusive mission” in the development of the national culture of Armenia does not seem to leave room for the actions of the State in the field of culture and preservation of the national identity.

33. Article 16 recognises the Apostolic Holy Church as the national church. This is in conformity with the ECHR and the case law of the European Court: nothing in them calls for a strict equality between all churches and religious groups. Therefore the Apostolic Holy Church can have a particular place in Armenia, but entrusting it with an exclusive mission, as explained above, could lead to misunderstandings. This may be an issue of translation.

34. Finally it should be noted that usually provisions on citizenship appears in the General or fundamental provisions of Constitutions. In this draft, they appear in Article 46 under the title Right of citizenship of the Republic of Armenia. This Article could be moved to Chapter 1.

Chapter 2. Fundamental rights and freedoms of the human being and the citizens

Article 23. Right to Life; the Prohibition of the Death Penalty

35. Article 23 on the Right to life is an example of provisions that has been drafted after the ECHR and in this particular case updated to include the prohibition of death penalty. This is to be welcomed, as it constitutes a good basis for taking into account the case-law of the European Court.

Article 24. Right to Physical and Mental Integrity

36. The provisions of this Article on the Right to Physical and Mental Integrity are in line with the Charter of Fundamental rights, the case-law of the ECHR and the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the “Oviedo Convention”⁴.

Article 26. Right to Personal Liberty

37. Article 26 which deals with the right to personal liberty is very detailed. It is an example of Article whose wording is very close to the ECHR and also incorporates certain case-law of the European Court.

38. Paragraph 3 reads “If an arrested person is not detained by court decision within 72 hours of the moment of arrest, then he shall be released immediately”. This paragraph settles a time-limit for a detention without a court order which is in conformity with the case law of the Strasbourg Court. However this wording does not allow for flexibility and a possible more favourable time-limit.

Article 28. Equality of rights between women and men

⁴ See respectively Article 5 and Article 16v of Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine CETS No.: 164 (the “Oviedo Convention”) <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>

39. Article 28 proclaims the principle of equality of rights between women and men. The second paragraph of the Article – which deals with equality in “marrying, during marriage and in divorce” – somehow weakens the general principle, as equality between men and women goes far beyond the specific situation of marriage. This paragraph would find its natural place in Article 34 which concerns with freedom of marriage and equality of rights of spouses.

Articles 30, 31, 32, 39, 40, 41, 43, 44 (Qualified Rights)) and the principle of necessity in a democratic society (Article 78, Article 80)

40. Article 30 (Inviolability of Private and Family Life and of Honor and Reputation), Article 31 (Inviolability of the Home), Article 32 (Freedom and Confidentiality of Communications), Article 39 (freedom of movement), Article 40 (Freedom of thought, conscience and religion), Article 41 (Freedom of opinion and freedom of information) Article 43 (freedom of assembly) Article 44 (freedom of association) are drafted following the same structure: paragraph 1 sets out the right and paragraph 2 the legitimate aims for its restrictions.

41. None of these provisions provides for the principle of proportionality and necessity in a democratic society, which is required under the ECHR for restricting the exercise of these fundamental rights. In fact, the Armenian drafters have chosen to include a general provision on the application of the principle of proportionality to all restrictions to fundamental rights and freedoms⁵ as well as a provision on the “inviolability of the essence of provisions on Fundamental Rights and Freedoms” (Article 80). It is regrettable that the central requirement of necessity is now “hidden” in the Article on the principle of proportionality, and is not included in the provisions on particular fundamental rights.

42. The “horizontal” Articles 78-80 do not include a list of rights which may not be limited, the obvious implication being that rights may only be limited if such a possibility is laid down in the respective articles. However, a list of “absolute” rights would have at least an informative value.

43. In the Articles where it is not mentioned, the requirement that limitations are only possible on the basis of the law should be added; this would make clear that limitations may not be based directly on the Constitution. Stating that procedural issues are regulated by law is not sufficient (see for example Article 32).

44. Article 78 sets out the principle of proportionality in this manner: “the means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution. The aim of the restriction and the means chosen for such restriction have to be proportionate to the role and significance of the fundamental right that is restricted”. The wording of this Article is quite convoluted. Furthermore the meaning of the second sentence is unclear and seems to imply a ranking of fundamental rights (“the aim of the restriction and the means chosen for restriction has to be *proportionate to the role and significance of the fundamental right* that is restricted”). It is suggested to revise the wording.

Article 33. Protection of Personal Data

45. The rights provided for in Article 33 (Protection of personal data) to have access to the information about oneself, request correction or deletion of the information, are welcome. They should however not be limited to databases established by public authorities.

Article 34. Freedom of Marriage; Equality of Rights of Spouses

⁵ A similar choice was made in the new Constitution of Tunisia: see CDL-AD(2013)032.

46. Article 34 read together with Article 15 (protection of the family) should not be interpreted as preventing introduction of legal recognition of same sex unions⁶.

47. The current paragraph 2 of Article 49 could be moved to this Article (see under Article 28).

Article 36. Rights of a Child

48. Paragraph 3 of Article 36 entrusts a “competent authority” to decide whether it would be contrary to the interests of a child to maintain, on a regular basis, a personal relationship and direct contact with his parents. Such a decision should be taken by a court. This might be a problem of translation since in Article 35 paragraph 2 on the Rights and Obligations of Parents, which mirrors Article 36 Paragraph 3, it is provided that “Deprivation or limitation of parental rights may be performed *by court* (...)”.

Article 37. Right to Education

49. This Article is more detailed and further reaching than European Conventions (compulsory school for 10 years, free of charge, self-government for institutions of higher education). This is noteworthy.

Article 40. Freedom of Thought, Conscience, and Religion

50. Paragraph 3 of Article 40 provides a constitutional guarantee to the right to alternative service. This is an outstanding way of securing the implementation of the case of *Bayatyan v. Armenia*⁷ and has to be praised.

Article 45. Right to create a Party and Right to Join a Party.

51. This important provision correctly reflects the European standards. The right to create and to join a party has been duly coupled with the right not to be compelled to join any party. The criterion for the prohibition of a political party duly refers to “the violent overthrow of the constitutional order and the use of violence for overthrowing the constitutional order”, and a decision of the Constitutional Court is required for the suspension of the activities of the party. This provision, however, is silent about the possible termination of the activities of the party; this should be added.

Article 46. Right of Citizenship of the Republic of Armenia

52. Under this provision, a parental link to an Armenian citizen is indispensable to obtain the citizenship. This limitation might seem excessive.

53. This Article could be moved to Chapter 1.

⁶ See the stocktaking of legislation and case-law on legal recognition of same sex couple in the judgment of the ECHR of 25 July 2015 Case of *Oliari and Others v. Italy* (§ 134 to 139)

⁷ CEDH 7 July 2011, *Bayatayn v. Armenia*, CM/ ResDH(2014)225

See also CDL-AD(2011)051-e Opinion on the draft law on amendments and additions to the law on alternative service of Armenia adopted by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011)

Article 47. Right to Vote and Right to Participate in Referenda

54. Article 47 paragraph 2 provides that in order to be a candidate for the National Assembly, in addition to being 25 and having a command of the state language, one has to a) not have had dual citizenship during the preceding five years; b) have permanently resided in Armenia for the last five years. The Venice Commission and the OSCE/ODIHR have already criticised these requirements⁸, which already exist in Armenia. The exclusion of double nationals from eligibility to be elected is contrary to Article 3 of the First Protocol to the European Convention on Human Rights (ECHR).⁹ The residency requirement is contrary to international standards. The Code of Good Practice in Electoral Matters states that “a length of residence requirement may be imposed on nationals solely for local or regional elections.”¹⁰ Further, the UN Human Rights Committee has stated: “Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as (...) residence or descent.”¹¹ These two requirements should be removed from Article 47 paragraph 2.

55. Paragraph 4 of Article 47 provides for a ban on the right to vote, to be elected and to participate in referendums for “persons convicted of grave crime”. The European Court of Human Rights has held that “Article 3 of Protocol No. 1, which enshrines the individual’s capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations (...) The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.”¹² The Venice Commission has recently examined in particular the issue of the exclusion of offenders from parliament and has reached the conclusion that “ineligibility to be elected is a restriction of the right to free elections: it must therefore be based on clear norms of law, pursue a legitimate aim and observe the principle of proportionality. It is in the general public interest to avoid an active role of offenders in the political decision-making. Proportionality limits not only the cases in which a restriction is admissible, but also the length of the restriction; it requires that such elements as the nature and severity of the offence and/or the length of the sentence be taken into account.”¹³ Article 47 paragraph 4 of the Armenian Constitution should therefore contain an explicit reference to limitations to this electoral ban in pursuance to the principle of proportionality.

Article 49. Right to Proper Administration

Article 50. Right of Access to Information

Article 51. Right to Apply to the Human Rights Defender

56. Articles 49 Right to Proper Administration, Article 50 Right of Access to Information and Article 51 Right to Apply to the Human Rights Defender are indispensable components of good governance and should therefore be welcomed.

⁸ CDL-AD(2011)032, §§ 37 to 39.

⁹ ECtHR, *Tanase v. Moldova*, 27 April 2010, Application No. 7/08; CDL-AD(2011)021, § 35.

¹⁰ Code of Good Practice in Electoral Matters, CDL-AD(2002)03rev, 1.1.1c.

¹¹ UN Human Rights Committee General Comment 25, para. 15.

¹² CEDH GC 6 October 2005 *Hirst v. the United-Kingdom* No. 2

¹³ CDL-AD(2015)019, § 150.

Article 54. Protection of the Right to a National and Ethnic Identity

57. Article 54 is to be welcomed especially inasmuch it takes into account in its paragraph 2 the right of national minorities. However the wording of the paragraph does not make clear whether the implementation of these rights are left to private initiative or if it intends to guarantee a positive intervention of the State.

Article 68. Right to Appeal in Criminal Cases

58. The second sentence of this Article reads “The exercise of this right, including the grounds of such exercise, shall be regulated by law”. It should be noted that the legislator’s discretion here will be limited by the case-law relating to Article 2 of Protocol 7 to the ECHR.

Article 73. Retrospective Effect of Laws

59. The formulation in Article 73 paragraph 1 is quite convoluted. It would be clearer to start with the main principle and then allow for exceptions. It should be made clear that permissible exceptions do not cover criminal law. Obviously, “right to confidence” refers to protection of legitimate expectations. It can be questioned whether retrospective effects of other than criminal legislation should at all be addressed in the text of the Constitution; it could also be left to constitutional doctrine.

Article 75. Organizational structures and procedures required in respect of legal persons

60. This provision adds to the positive obligations which are incumbent on the State pursuant to Article 3 paragraph 2 in Chapter 1 the duty to define “the organisational structures and the procedures” necessary for the effective exercise of fundamental rights and freedoms. This is to be welcomed.

Article 76. Limitations of Fundamental Rights and Freedoms in Emergency situations or during Martial Law

61. This provision refers to derogation in time of emergency or Martial Law. The list of non-derogable rights in this provision is considerably broader than Article 15 ECHR.

Chapter 3. Legislative guarantee and main objectives of the State Policy in the Social, Economic and Cultural Spheres

62. The idea of including non-directly justiciable rights in a separate Chapter is to be welcomed.

63. The same goes for the distinction between rights which ordinary laws should define as justiciable subjective rights (Articles 82 to 85), and policy objectives whose promotion is an obligation for public authorities (Article 86) and whose realisation is monitored by the National Assembly through an annual report of the Government (Article 87).

64. The explicit entrustment to the legislator of the task of defining the rights provided under Articles 82 to 85 raises the issue of the content of these rights pending the adoption of the implementing legislation. It might be argued that upon its adoption the Constitution will immediately guarantee at least the right to the legislative implementation of these provisions; will there be the possibility of judicial protection of these virtual guarantees? Will it be possible to apply to the Constitutional Court if the legislator fails to adopt the implementing legislation?

III. Analysis of chapters 4 to 6: The National Assembly, the President of the Republic and the Government

A. General Preliminary Remarks

65. New Chapters 4, 5 and 6 reflect a clear move towards a rationalised parliamentary regime.

66. 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.¹⁴

67. What is crucial is, first, that the independence of the judiciary is guaranteed under all regimes and, secondly, that the choice opted for is followed consequently. As a third consideration one could add that regime changes should be introduced to remedy problems in the balance of democracy and governability, but they should not aim to advance the positions of incumbent or future power holders. Furthermore, regime changes should meet broad social and political consensus.

68. The Venice Commission is aware of the fact that several meetings have already been held with political parties and that discussions should continue with political parties and with the public. The Venice Commission welcomes this approach and encourages the Armenian authorities to continue on this path in order to clarify any possible misunderstanding on the aim of the reform and give it a better chance to succeed.

B. General remarks

69 Drawing inspiration from comparative constitutional law in Europe, the draft amendments introduce instruments and techniques of rationalised parliamentarianism. Mechanisms for stimulating co-operation between the legislative and the executive branches have been introduced in order to avoid institutional conflict. The procedures and timing in powers enforcement have been carefully worked out.

70. The order of presentation of the three chapters has been modified. The provisions concerning the National Assembly occupy the first place, while those concerning the President of the Republic and the Government, whose election or appointment depend on the parliamentary decision, follow. This structure is consistent with a parliamentary regime.

71. The draft amendments entrust very broad powers to the National Assembly and, therefore, to the majority of the total number of the parliamentarians, whose vote is in principle required in view of the approval of decisions and legislative acts which fall in the competence of the Assembly. See, for example, Articles 104, 109, 115, 116, 118, 119, 120, 122.

72. The draft, however, preserves in many provisions the rights of the minority. See, for example, Articles 100, 104 and 114.

73. The text is quite detailed, containing provisions which do not usually appear in a Constitution. For instance, Chapter 4 on the National Assembly contains a number of articles concerning issues of internal organisation and aiming at ensuring the functioning of the National Assembly (Articles 99 Regular Sessions of the National Assembly, 100 Extraordinary

¹⁴ CDL-AD(2004)044, Interim opinion on constitutional reforms in Armenia § 42.

Sessions and Sittings of the National Assembly, 101 Publicity of Sittings of the National Assembly, 102 Temporary Committees of the National Assembly, 106 Standing Committees of the National Assembly, 107 Temporary Committees of the National Assembly, 112 Oral and Written Questions of Parliamentarians and 114 Deliberations on Urgent Topics). In other European countries, these provisions are normally to the Rules of Procedure. It was explained to the rapporteurs that constitutional safeguards were needed in this field, especially after the change of regime that the draft operates, mainly in order to protect the rights of the minority. However, such significant provisions could perhaps be compiled in one provision, in order to make the text simpler and easier to read, while the other provisions may be left to the Rules of Procedure.

74. The President is no more elected by the people; He/she “shall observe the compliance with the Constitution” (Article 123 paragraph 2); He/she “shall be impartial and shall be guided exclusively by state and national interests” (Article 123 paragraph 3). He/she is clearly separated from the executive and has very limited autonomous powers. His/her main functions which are exercised without a proposal from the Government or from a member of the Government, regard: the annual address to the Assembly (Article 128), the signature and publication of laws (Article 129), appointments to State position, resolution of issues related to citizenship (Article 134), granting pardon (Article 135), decoration with awards and granting of honorary titles (Article 136), awarding the highest grades (Article 137). In all this cases he/she has to proceed according to the provisions of the law (which could require the intervention of other organs of the State, although, in principle, the law could leave the final decision in these matters to the President only).

75. Many powers of the President have to be exercised on the basis of a proposal of the Government or of a member of the Government. They regard the conclusion of international treaties, appointment and recall of diplomatic representatives of Armenia (Article 132), approval and suspension or renouncing of international treaties not requiring ratification (Article 132), appointment and dismissal of the supreme command of the armed forces (Article 133), awarding of the highest military ranks (Article 133).

76. If we compare these powers with the presidential powers which may be exercised without the proposal of another organ of the State (see under Article 138. Orders and decrees of the President of the Republic), it is evident that the central body in the working of the new constitutional system of the Republic of Armenia will be the Government.

77. An important change of the Armenian constitutional system regards the relations between the Executive and the Armed Forces (Article 154), which shall be subordinated to the Government under the direct command by the Minister of Defence within the general guidelines defined by the Security Council led by the Prime Minister. This solution gives new emphasis to the general role of the Prime Minister, while it reduces the position and the powers of the President of the Republic.

C. Specific Remarks

Chapter 4. The National Assembly

Article 89. National Assembly Composition and Election Procedure

78. Article 89 provides that the National Assembly will be composed of at least 101 parliamentarians, elected through a proportional contest which “shall secure the formation of a stable parliamentary majority in the National Assembly” (paragraph 3). A second round of the vote “with the participation of the two parties or pre-electoral alliances that received the largest number of votes” is envisaged “if a stable parliamentary majority is not formed as a result of the first round of the National Assembly election” (paragraph 4). The main features of the chosen

electoral system are therefore the proportional allocation of seats, the constitutional goal of stability and the second round between the two most voted parties or alliances. Moreover, in this system, the total number of Parliamentarians is not fixed in the Constitution: it will depend on the number of additional seats possibly allocated as majority bonus.

79. The electoral system from which the Armenian Constitutional Commission has drawn inspiration is the recently adopted Italian system. This system provides that if a party passes a threshold of 40% of the votes, it is attributed a minimum of seats which would bring the party to 54% of the seats. If no party has been able to pass the 40% threshold, a second round takes place between the two parties that received most votes in the first round. The party winning the second round is attributed 54% of the seats. The remaining seats are allocated to the other parties in a proportional manner, according to the results of the first round. This system has been adopted after a rather long period of instability and with the aim of finding a better balance between governability and representation. This system is the fruit of a long experience. It is not necessarily transferrable to a country which is making the choice of a parliamentary system and will experiment it for the first time.

80. This is why the Venice Commission rapporteurs had recommended enshrining in the Constitution only the main principles of the electoral system, in order to ensure the necessary flexibility in the future development of that system. Many details have thus been removed from Article 89. Yet, the possibility of a second round between the two most voted parties or alliances is mentioned, which gives a binding framework for the adoption of a certain type of proportional electoral system. In reality, the electoral system is thus enshrined to a large extent in the Constitution. Paragraph 4 of Article 89 should be removed; the possibility of a second round should be regulated in the Electoral Code.

81. While any electoral system is in principle acceptable as long as it respects the international standards in the field of elections¹⁵, it has to be reminded that “[t]he choice of an electoral system as well as a method of seat allocation remain both a sensitive constitutional issue and have to be carefully considered, including their adoption by a large consensus among political parties. While it is a sovereign choice of any democracy to determine its appropriate electoral system, there is the assumption that this latter has to reflect the will of the people. In other words, people have to trust the chosen system and its implementation”.¹⁶

Article 93. Setting Elections of the National Assembly

82. It was confirmed during the meeting with the Constitutional Commission that the role of the President in this respect is purely formal.

Article 94. Representation Mandate

83. This article is in line with the democratic standards.

Article 95. Incompatibility of the Parliamentarian Mandate

84. Although quite strict, since it excludes people exercising liberal professions such as advocates or doctors from being Parliamentarians, this Article is in conformity with European standards.

¹⁵ CDL-AD(2002)023rev, II.4

¹⁶ CDL-AD(2015)001, par. 9

Article 96. Immunity of a Parliamentarian

85. Article 96 paragraph 1 provides that “During and after the term of his parliamentary powers, a parliamentarian may not be prosecuted or held liable for actions arising from his status of a parliamentarian, including opinions expressed in the National Assembly, unless they contain defamation or insult”

86. The expression “actions arising from his status of a parliamentarian” is quite vague and could be interpreted to cover also activities outside the functioning of the Assembly. This might not be the intention of the authors.

87. It is doubtful whether defamation and insult should be an exception to the principle of immunity as provided in this paragraph. In its report on the scope and lifting of parliamentary immunities, immunities against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary office are referred to “special freedom of speech”¹⁷. Parliamentarians should have a wider freedom of speech than ordinary citizens. Many different models exist in Europe and there are no European standards in this field. However, opting for the possibility to prosecute a parliamentarian for defamation and insults, especially when this prosecution could take place after the term of the parliamentarian’s mandate (“During and after the term of his parliamentary powers...”) could lead to serious violation of freedom of expression. In its report on the scope and lifting of parliamentary immunities, the Venice Commission “considers that rules on parliamentary non-liability should by their nature not be limited in time (as long as the statement in question is made during the mandate). If non-liability is granted, it would be undermined if it were possible to bring legal charges against the parliamentarian once he or she has left office”¹⁸. Internal disciplinary sanctions by the Parliament itself would be more adapted¹⁹.

88. Paragraph 2 provides that the consent of the National Assembly is requested before prosecuting a parliamentarian and the Chairman of the National Assembly has to be notified immediately when a parliamentarian is caught at the time of or immediately after committing a crime. These provisions correspond to the recommendations which conclude the Report on the scope and lifting of parliamentary immunities and are welcome.

Article 98. Termination of Powers of a Parliamentarian

89. The “acquisition of the citizenship of a different state” is one of the grounds of termination of powers of parliamentarians. This is the logical consequence of Article 47 paragraph 2 which requires that a candidate be “a citizen of the Republic of Armenia only”. This requirement is not in conformity with the European Convention on Human Rights (see under Article 47. Right to Vote and Right to Participate in Referenda) and should be removed, together with the provision of the loss of mandate in case of acquisition of a second citizenship.

90. Other grounds of termination of mandate of parliamentarians are listed in Article 98. Paragraph 2 provides that two of the grounds for termination (“inexcusable absence from at least half of the votes during the term of a single regular session or a violation of any term of Article 95 of the Constitution” which concerns incompatibilities) shall be found (declared?) by

¹⁷ CDL-AD(2014)11, Report on the scope and lifting of parliamentary immunities, adopted by the Venice Commission at its 98th plenary session, (Venice, 21-22 March 2014) §12. Rules on *non-liability* (special freedom of speech) for members of parliament are to be found in almost all democratic countries, although the details differ quite a bit. Non-liability is closely linked to the parliamentary mandate, and protects the representatives when acting in their official capacity – discussing and deciding on political issues. It is often absolute and cannot be lifted, although there are some parliaments that can do this.

¹⁸ Report on the scope and lifting of parliamentary immunities, paragraph 98

¹⁹ Report on the scope and lifting of parliamentary immunities, paragraph 100

the Council of the National Assembly. These issues could be left to the rules of procedure of the Parliament. Should they stay in the Constitution itself, the drafters should ensure that all cases leading to the termination of mandate are mentioned in this Article.

Article 100. Extraordinary Sessions and Sittings of the National Assembly

91. According to the first paragraph of this Article, one quarter of the total number of Parliamentarians and the Government can call for an extraordinary session. This is a welcome possibility for the parliamentary minority.

92. The same possibility should be given to the President, too.

Article 103. Adoption of Laws, National Assembly Decisions, Statements, and Addresses

93. Paragraph 2 of Article 103 lists the Laws that have to be adopted at “at least three fifths of the total number of Parliamentarians”. Laws on the legal regime of martial law and state of emergency should be added to this list, especially if these laws are supposed to be of a general character. Moreover, the Law on the mass media, the Law on Political Parties, the Law on Normative Acts and laws on the administrative territorial division of the State could be added to this list, as well.

Article 104. The National Assembly Chairman, Deputy Chairmen, and the National Assembly Council

94. Paragraph 1 of Article 104 ensures that the opposition will have one deputy chairperson elected. This is in principle welcome. However, the number of deputy chairperson is not determined and it seems, according to the wording of paragraph 1, that one and only one deputy from the minority will be chairperson. According to the number of chairpersons and to the breadth of the minority, this provision dedicated to protect the minority may turn out to be restrictive.

95. Moreover, it could be wise, for the sake of inclusion, to consider entitling every parliamentary faction to such a position and, for instance provide for a rotation where necessary.

Article 105. Factions of the National Assembly

96. Paragraph 1 of Article 105 defines the role of factions: “The factions shall facilitate the formation of the political will of the National Assembly”. Paragraph 2 provides that “(...) New factions may not be formed in the National Assembly” during the whole term of a legislature.

97. The Venice Commission understands the willingness of the Constitutional Commission to ensure stability in the future regime, but is nevertheless of the opinion that Paragraph 2 is too rigid. First of all, the prohibition to form new factions may be problematic from the point of view of the prohibition of imperative mandate. Factions have the power to address written interpellations which may lead to a decision expressing non confidence in the Prime Minister or in a minister. Above all, it could be an obstacle to the good functioning of Article 115 (see below). The prohibition to form new factions should therefore be removed.

Article 106. Standing Committees of the National Assembly

98. Paragraph 2 of Article 106 ensures the participation of the minority in standing committees and this is welcome.

Article 107. Temporary Committees of the National Assembly

99. This Article could be left to the rules of procedure.

Article 108. The Inquiry Committees of the National Assembly

100. The wording of this Article has been clarified and makes clear now that no less than one quarter of the total number of parliamentarians has the right to demand the creation of an inquiry committee but the final decision on the merit is left to the majority of the Assembly

Article 109. Legislative Initiative

101. The power of legislative initiative is granted to “a parliamentarian, a faction and the Government”. It is unclear why a faction should have this power, when a single parliamentarian has the right to introduce a bill before the National Assembly. Is it that certain privileges for an initiative by a faction, over that of a Member of Parliament, could be foreseen in the Rules of Procedures?

102. Paragraph 2 provides that if a draft law significantly reduces state revenues or increases state expenditures, the Government may demand that the National Assembly adopt it by majority vote of the total number of parliamentarians. A higher, qualified majority should be required, as a safeguard from financially unrealistic proposals.

103. Paragraph 3 provides for an urgent legislative procedure “The National Assembly shall adopt or reject a draft law deemed as urgent by decision of the Government within a two-month period“. This is a welcome provision.

Article 111. Oversight of the Execution of the State Budget

104. This Article provides that the “National Assembly shall exercise oversight of the execution of the state budget, including the use of loans and debt received from foreign states and international organizations”. However it leaves open the forms in which the National Assembly can exercise such oversight (except for deliberating the annual government report which is provided in paragraph 2).

Article 113. Interpellations

105. Article 113 gives to factions of the National Assembly the right to address written interpellations to the Government members. Time limits for responding to an interpellation are clearly defined in paragraph 1. However, the interpellation right of the factions is an amputated one, insofar as it is necessary for one fifth of the parliamentarians to request that the interpellation be deliberated. This deliberation can lead to a vote of non-confidence in the Prime-Minister and in this case the rules of Article 115 apply (see below). When the deliberations lead to “evaluate the performance of an individual member of the government and express (ion) of non-confidence in him” this shall “result in his resignation”. The appropriate character of an incidental vote of non-confidence may be questioned.

Article 114. Deliberations on Urgent Topics

106. Article 114 – according to which one quarter of the total number of parliamentarians can ask for “deliberations on urgent topics of public interest” once in a week during the regular session – is an example of those which have been deliberately left into the Constitution, rather than left to the rules of procedure, in order to protect the Parliament minority’s rights.

Article 115. Expressing Non-Confidence in the Prime Minister

107. The constructive vote of non-confidence has been taken from comparative constitutional law, notably from the 1949 German Grundgesetz. This is certainly the strongest weapon of the rationalised parliamentarianism. However, in the Armenian context, coupled with the prohibition under Article 18 paragraph 2 to form new parliamentary factions during the whole term of the legislature, it becomes a formidable, unbeatable obstacle to bringing down a cabinet by a non-confidence vote. If an additional prohibition on “floor-crossing” of MPs is introduced, it will become impossible to bring the cabinet down by a vote of censure.

108. The Prime Minister has a special position within the Government, as far as the determination of the general guidelines of the Government’ policy and the direction and co-ordination of the activities of the Government and of its members fall in his competence. A vote expressing non confidence in the Prime Minister should accordingly entail the fall of the Government. Article 115 is not very clear on this point, but a correct reading of the text excludes that the contemporary election of a new Prime Minister implies the latter’s mere substitution for the previous Prime Minister within a surviving Government. The text of the mentioned Article 115 should be co-ordinated with the rules concerning the election and appointment of the Prime Minister and the formation of the Government (see below).

109. A limitation of six months on the possibility to repeat the expression of a vote of non-confidence in case a decision is not adopted has been introduced in paragraph 3 of Article 115. This constitutes an exception to the required legitimacy of the government. The final solution should be to organise new elections.²⁰

Article 116. Ratification, Suspension, or Renunciation of International Treaties

110. Article 116, which deals with the National Assembly powers as regards Treaties and therefore foreign policy, raises several issues.

111. In this new draft text of the Constitution, the balance of powers has been modified; the Parliament is not controlled by the President, as is the case in the current Constitution. Therefore the powers of the National Assembly as regards treaties should be defined precisely and exhaustively in the Constitution. Some expressions used in paragraph 1 (“Treaty that have a political (...) nature” (sub-paragraph 3)) or that “directly contemplates ratification” (sub-paragraph 7)) are too vague.

112. It should also be noted that sub-paragraph 6 (Treaties that imply a change of law or the adoption of a new law in order to be applied, or stipulate norms that contradict a law) and sub-paragraph 8 (Treaties that contain matters that are subject to regulation by law) seem to overlap.

113. The National Assembly should not have the possibility to extend its foreign policy power through an ordinary law, i.e. by simple majority as provided for in paragraph 2 (“The National Assembly shall, by proposal of the Government, ratify, suspend, and renounce international treaties by means of adopting a law by majority vote of the total number of parliamentarians”)

Article 119. Martial Law and Use of the Armed Forces

114. Article 119 provides for the grounds and the procedure for declaring Martial Law and resorting to the use of the Armed Forces. The procedure is described in details, making possible expedient decisions by the Government or the Prime Minister and including the necessary consecutive approval of measures by the Parliament. However, it does not provide

²⁰ CDL-AD(2013)032, Opinion on the final draft Constitution of the Republic of Tunisia, § 135.

for any ex post control by the National Assembly of the measures taken under martial law or a state of emergency. This shortfall should be remedied.

115. It could be wise to explicitly entrust the President to refer to the Constitutional court Laws adopted under Martial Law.

Article 120. State of Emergency

116. Article 120 on State of Emergency seems to present the same shortfall as the previous Article. Paragraph 2 reads “In case of declaration of a state of emergency, a special sitting of the National Assembly shall be immediately convened by virtue of law. The National Assembly may terminate the state of emergency or cancel the implementation of measures by majority vote of the total number of parliamentarians”. This immediate consultation of the National Assembly is welcome, but the powers of the Assembly to control measures taken during the State of Emergency should be possible at a later stage.

117. Moreover, a reference to other grounds for declaration of the State of Emergency – such as natural, technological disaster – could be added in paragraph 1, which foresees only the event of an imminent threat to the constitutional order.

118. Finally, it could be wise to explicitly entrust the President to refer to the Constitutional court Laws adopted under the State of Emergency.

Article 122. Regulatory Commissions

119. Article 122 provides for the creation – by Law – of regulatory commissions “to safeguard the exercise of fundamental rights and freedoms of the human being and citizen, as well as to protect fundamental public interests enshrined in the Constitution”. These regulatory commissions seem to be similar to the independent authorities which can be found in other legal orders. If this is the case, their independent character (notably from the Executive) should be explicitly guaranteed in paragraph one.

120. Requiring a qualified majority for their creation should be considered as this would, on the one hand, give more legitimacy to them and, on the other hand, involve the minority in the decision of creating them and prevent the majority from possibly abusing of the creation of such commissions.

121. In any event, both the position of these commissions in the state organisation and the legal force/nature of the sub-legislative legal acts which they may be authorised to issue should be clarified.

Chapter 5. The President of the Republic

Article 125. Election Procedure of the President of the Republic

122. The President is elected by a College of Electors. The mode of election of the President is a political issue to be decided at national level. The most that can be said is that election by an electoral college might open the way to such behind-the-scenes manipulations which could endanger the authority and legitimacy of the institution.

123. The College of Electors is composed of one half of parliamentarians of the National Assembly and the other half of representatives of local self-government bodies elected from among them (paragraph 1). At least one fifth of the members of the Electoral College shall have the right to nominate candidates for the President of the Republic (paragraph 4). The candidate

who receives at least three fifths of the votes of the Electoral College members shall be elected as President of the Republic (paragraph 5).

124. Article 125 provides in its paragraph 5 for diminishing majorities in consecutive rounds, if the three-fifths majority cannot be reached in the first round. It is wise and welcome to have provided for an anti-deadlock mechanism.

Article 128. Address of the President of the Republic

125. The President of the Republic may deliver an address to the National Assembly on matters pertaining to his authority.

Article 129. Signature and Publication of Laws

126. Paragraph 1 of this Article makes clear that the role of the President in the legislative process is purely formal and that, as the guardian of the Constitution, he/she can only decide to send the Law to the Constitutional Court to decide on its constitutionality.

127. Paragraph 2 gives an explicit time-limit to the President for signing and publishing a Law which has been declared constitutional by the Constitutional Court. This is to be welcomed.

128. The President is not given the power to request that a Law be reconsidered by the National Assembly. The President will therefore not be in a position to raise political arguments against the adoption of a law. It could be envisaged that the President be competent to raise procedural irregularities. This would not be incompatible with his/her impartiality, nor with the fact that he or she should be guided exclusively by state and national interests, as requested in Article 123 paragraph 3.

Article 132. Powers of the President of the Republic in Foreign Policy

129. According to this Article, the powers of the President in treaty related issues are shared with the Government and the Prime Minister. Paragraph 1 a (The President shall "In the cases and procedure defined by law, conclude international treaties of the Republic of Armenia by proposal of the Government") and Paragraph 2 ("In the cases and procedure defined by law, the President of the Republic shall, by proposal of the Prime Minister, approve, suspend, or renounce international treaties not requiring ratification") define in general terms the powers of the President and refer to the Law for the details.

130. The division of Treaty-related powers between constitutional bodies should be defined at the level of the Constitution.

Article 138. Orders and Decrees of the President of the Republic

131. This Article provides that orders and decrees of the President require the co-signature of the Prime Minister and the Minister who made a proposal, with the exception of the cases in which the exercise of the President's powers does not require an initiative by other State bodies (President's address to the National Assembly, Signature and Publication of Laws, Acceptance of the Government's resignation, President's resignation, appointments to offices in the staff of the President, Appointment of the Prime Minister). The preponderance of powers which may be exercised by the President only upon the initiative of the government expresses very clearly the central role of the government in the future power structure of Armenia (see also under paragraph 77).

132. The provisions on the President's role in the resignation and in the reshuffling of the Government will be examined below.

Chapter 6. The Government

Article 145. Status and functions of the Government

133. Pursuant to Article 145 paragraph 2, “based on its programme, the Government develops and implements the domestic and foreign policy of the State”. This provision does not appear to be fully consistent with paragraph 4 of Article 145, which provides that the competence of the Government includes issues related to the executive power which are not reserved for other state administrative bodies or local self-government bodies. It is obvious that the development and implementation of internal and foreign policy of the Republic of Armenia can not be determined by only one branch of state power.

Article 148. Election and appointment of the Prime Minister; Article 149. Formation of the Government; Article 151. Programme of the Government.

134. The Prime Minister clearly enjoys a position of pre-eminence in respect of the deputy prime ministers and the ministers, who are appointed by the President of the Republic upon the proposal of the Prime Minister himself, after his/her election by parliament and his appointment by the President. The Constitution does not explicitly provide for the majority which is necessary for the election of the Prime Minister, but it seems logical to deduce that the absolute majority of the MPs is needed. At any rate, the absolute majority is necessary for the approval by the National Assembly of the programme of the Government. Should the election of the Prime Minister not require the absolute majority, he or she would have some margin of manoeuvre in negotiating the formation of a majority to support his or her programme. In any case, the President must appoint as Prime Minister the candidate elected by the National Assembly.

135. The distinction between the moment of the appointment (more correctly: the nomination) and the moment of the election of the Prime Minister implies that the choice in view of this nomination has to be made – after the election of the new Assembly – by the President, who is bound to nominate and present to the Assembly the Prime Minister candidate of the party or party alliance which has won the election of the National Assembly. In case of resignation of the Prime Minister or vacancy of the office, the President has to open consultations with the parliamentary factions and must nominate the candidate who enjoys the confidence of the majority: this gives the President some discretion. In case that a second round is necessary and the Prime Minister is not elected by the majority of the votes of the total number of parliamentarians, “the National Assembly shall be dissolved by virtue of law”. This wording suggests that the President does not have any margin for taking initiatives before the dissolution of the Assembly. The same rule should be applied in the case of a decision expressing non-confidence in the Prime Minister (Article 115).

136. In all these cases, and also in the case of question of confidence put forward by the Government pursuant to Article 156, the continuity of the Government depends on the vote of the majority of the total number of the parliamentarians. This rigidity seems not to reconcile well with Article 103 paragraph 1, which sets out as a general rule that “decisions [...] are adopted by the majority vote of the parliamentarians present at the sitting”. In fact, the Government could survive also without the support of the absolute majority of the Assembly if it refrains from putting the question of confidence and if the parliamentary factions do not present a draft decision on expressing non confidence in the Government. According to Articles 115 paragraph 4 and 156 paragraph 4, the Government may also survive during martial law or a state of emergency. It would seem advisable to entrust the President new powers under his role of guarantor of the compliance with the Constitution (Article 123 paragraph 2) in relation to the choice of a candidate Prime Minister, prior to the dissolution of the National Assembly.

137. The dissolution of the National Assembly ‘by virtue of law’ applies also in the case of non approval of the Government’s programme by the Prime Minister (Article 151 paragraph 4).

Article 152. Powers of the Prime Minister and Other Members of the Government; Article 153. Sittings and Decisions of the Government.

138. Article 152 paragraph 3 grants members of the Government the power to adopt sub-legislative normative acts. The same power is given to the Government (Article 153). The Constitution should provide the ratio for the exercise of this parallel power.

139. Article 153 paragraph 2 provides that “decisions by the Government will be adopted by majority vote of the members” and paragraph 3 that they “shall be signed by the Prime Minister”. These provisions do not deserve constitutional entrenchment.

Article 154. Command and Administration of the Armed Forces

140. As already mentioned, this provision introduces an important change in the relations between the Executive and the Armed Forces, which shall be subordinated to the Government under the direct command by the Minister of Defence, within the general guidelines defined by the Security Council led by the Prime Minister.

141. Paragraph 2 provides that “During war, the Prime Minister shall be the Supreme General Commander of the armed forces”. But the draft does not explicitly mention who is the Supreme General Commander of the armed forces in peacetime (even if the President’s power under Article 133 to appoint and dismiss the Supreme Command and to award the highest ranks upon proposal of the Prime Minister suggests that the President is the Supreme General Commander during peacetime). This should be clarified.

Article 157. Resignation of the Government

142. The Government has the general direction of the state administration (Article 145 paragraph 3) and “power over those matters pertaining to the executive power, which are not reserved for other administrative bodies of the State and local self-government bodies”. The Prime Minister, however, has a special position inside the Government as far as the determination of the general guidelines of the Government’s policy and the direction and co-ordination of the activities of the Government fall under his competence (Article 152 paragraph 1). It follows that expressing no confidence in the Prime Minister should entail the fall of the whole Government (see Article 115 paragraph 44). This should be reflected in Article 157.

Article 155. Annual Report of the Government to the National Assembly

143. The follow-up to be given by the National Assembly to the Annual Report of the Government is obviously more stringent than that given to the President’s report.

IV. Analysis of the draft amendments to the chapter on the Courts and the supreme Judicial Council (chapter 7)

A. General remarks

144. The chapter on the Courts and the Supreme Judicial Council includes Articles on the Administration of Justice, the Courts, the Status of a Judge, the Constitutional Court, the Cassation Court and The Supreme Judicial Council.

145. Article 162 on “The Courts” lists the courts of the Republic of Armenia and mentions among them the Constitutional Court. However, in view of the competence of the Constitutional Court to “resolve constitutional disputes arising between constitutional bodies with respect to their powers” (Article 167 paragraph 1.3), the Constitutional Court should be kept separated from the other Courts: the Constitutional Court cannot be a party of these disputes as a component part of the judiciary.

146. The Venice Commission is of the opinion, as already mentioned in the Opinion on the Draft concept paper that having a section / a chapter in the Constitution dedicated to the Constitutional Court would further clarify the specific nature of the Constitutional Court.

B. Specific remarks

Article 161. The Administration of Justice

147. Paragraph 3 which states that “Final acts of court(s) shall be adopted in the name of the Republic of Armenia” is ambiguous. What is meant by “final acts of courts”? Any court decision should be adopted in the name of the Republic.

Article 162. The Courts

148. The Constitutional Court should not be part of the courts listed in paragraph 1 (see above)

149. A definition and the modalities of the institution of “specialised courts” provided for in paragraph 1 should be added.

150. The prohibition of extraordinary courts in Paragraph 2 is welcome

Article 163. The Status of a Judge

151. Article 163 affirms the principle of independence and impartiality of a judge and deals with incompatibilities, immunities, dismissals and remuneration of judges.

152. It provides for safeguards against arbitrary dismissal of judges. As concerns judges of Constitutional Court, Paragraph 7 sets a higher majority (three-fifths majority vote of the total number of the National Assembly parliamentarians) for dismissing a judge than for electing him (majority of the total number of votes of the parliamentarians – Article 166 paragraphs 1 and 2). The vote can take place only if the Constitutional Court has given an opinion on the case. However, once the Constitutional Court has given its opinion, the decision should not depend on the National Assembly which is already the organ authorised to apply to the Constitutional Court in this case (Article 168 paragraph 1.1). The President, who according to the amendments will be a neutral figure in charge of “observ(ing) the compliance with the Constitution”, might be entrusted with taking the decision.

153. The dismissal of a judge of the Court of cassation follows the same features (vote by three-fifths majority vote of the total number of the National Assembly parliamentarians based upon an opinion of the Supreme Judicial Council). However, there should be no decision of a political organ once the Supreme Judicial Council has decided on the ground for dismissal. There should be an appeal to a court against the Council’s decision but after such an appeal the dismissal should enter into force without any decision of Parliament. The argument, which is sometimes advanced, of a need for a *contrarius actus* for a dismissal by the appointing authority does not hold for dismissals of judges. The involvement of political organs in the appointment of judges is justified by the need to provide some democratic legitimacy also for the judicial power. However, once appointed, any link between the judge and the political organs should be severed. A judge can be dismissed only on the basis of objective grounds like

severe disciplinary violations. Whether such grounds exist should not be established by a political organ. Such decisions are a typical task of judicial organs including judicial council, which include a substantial part of judges. An appeal to a court should be available against dismissals by a judicial council.

154. Paragraphs 2 and 3 deal with immunities. They establish guarantees against arbitrary arrest and detention: a judge may be criminally prosecuted only with the consent of the Supreme Judicial Council /Constitutional Court respectively. With respect to performance of his duties a judge may not be deprived of liberty without the consent of the Supreme judicial Council/ Constitutional Court respectively, except if the judge is apprehended during or immediately after the commission of a crime. In that case, the Supreme judicial council/ Constitutional Court is immediately informed. These provisions provide for inviolability, as opposed to substantive immunity for decisions taken. Such provisions exist mostly in Eastern European countries.²¹ Where it exists, judicial inviolability should be lifted only by organs of the judicial system. Therefore the lifting of immunity by the Supreme Judicial Council or the Constitutional Court respectively is welcome.

155. Both paragraph 2 and 3 refer to the listing of immunity but they give no guidance on substance to the competent organs. A provision on immunity from civil suit for judges acting in good faith in the performance of his or her duty (substantial immunity) seems to be missing.

156. According to the English translation of paragraph 6, the grounds for dismissal of judges would be set out by law and the procedure for dismissal in the Constitution and in the law. In order to safeguard the independence of the judiciary, the grounds for dismissal of judges should be established in the Constitution (for instance “only for grave and repeated violations of disciplinary rules”).

157. Article 163 paragraph 9 provides that judges’ remuneration should be commensurate with the remuneration of other public officials. In principle, such a statement could give leverage to the Constitutional Court to annul legislation which does not provide for adequate remuneration but it is formulated too vaguely and should be made more concrete.

Article 164. Appointment (or Election) Procedure and Term in Office of Judges and Chairmen of Courts (Cassation Court Chambers)

158. Paragraph 3 deals with the nomination of judges and chamber Chairmen of the Court of Cassation. It opts for a mixed system: candidates are first selected by competition; then three candidates for each post of judges are presented by the Supreme Judicial Council to the National Assembly which should elect the judges and chamber Chairpersons by majority vote of the total number of parliamentarians. Parliament should not be involved in the appointment of judges and court chairpersons of the Court of Cassation. This should be a competence of the Judicial Council.

159. Paragraphs 2 and 4 provide for a fixed term of office for the chairpersons of courts: 3 years for Chairmen of general jurisdiction, first instance courts and specialised courts without the possibility of being reelected immediately after the end of their term in office; 6 years without the right of being reappointed for the Cassation Court Chairperson. These provisions are a welcome follow-up to the Opinion on the draft law on Introducing amendments and addenda to the Judicial Code of the Republic of Armenia which recommended that “In order to contribute to legal and constitutional clarity, an amendment to the Constitution on fixed terms of office of

²¹ CDL-AD(2014)039-e Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, adopted by the Venice Commission at its 101st plenary session (Venice, 12-13 December 2014)

court presidents could be considered. Such an amendment could be included in the pending constitutional reform.”²²

160. The expression “strong professional qualities” in Paragraph 5 appears quite vague but will probably be specified by the Law which “may prescribe additional requirements on judge candidates”. A requirement of probity could nevertheless be added in this paragraph.

Article 166. Composition and Formation Procedure of the Constitutional Court

161. The Constitutional Court shall consist of nine members: three shall be elected upon nomination by the President of the Republic, three upon nomination by the Government, and three upon nomination by the General Assembly of Judges. They shall be elected by the National Assembly, by decision made by the majority of the total number of votes of the parliamentarians (Article 166 paragraphs 1 and 2). This system provides necessary democratic legitimacy for the Constitutional Court.

162. However, it has to be ensured that the governmental majority cannot alone elect the judges. Various means are available in order to ensure this. The most frequent is a high qualified majority, e.g. two thirds. The idea is that both majority and opposition will propose highly qualified candidates which are acceptable for the other side. Admittedly, this can lead to a trade-off, both side accepting also less qualified candidates in exchange for acceptance of their own less qualified candidates. In some countries, the political culture is not developed enough to allow for compromise between majority and opposition and it is very hard to reach a two thirds majority. Anti-blocking measures can be introduced, like nominations of new candidates by neutral bodies, following several unsuccessful votes in Parliament.

163. The requirement of a majority of the total number of votes of the parliamentarians was not in the first draft and is therefore a positive step. This qualified majority should be further improved, so that the minority at the National Assembly have a say in this election.

164. According to paragraph 3 “Judges of the Constitutional Court shall be elected from among reputed lawyers that are citizens of only the Republic of Armenia and have voting rights of the Republic of Armenia, have reached the age of 40, and have strong professional qualities and professional work experience of at least 15 years”.

165. Paragraph 5 which states that “Judges of the Constitutional Court shall serve in office for 12 years until reaching the age of 70 and may not be re-elected to the office of a Constitutional Court judge” is in line with European practice.

166. The Constitutional Court chairperson and deputy chairperson shall be elected by the Court from its own members (paragraph 5) which is a good safeguard for the independence of the Court. The chairperson and deputy chairperson are elected for a six-year term and cannot be re-elected.

Article 167. Powers of the Constitutional Court

167. Sub paragraph 1 of paragraph 1 of Article 167 lists the acts whose constitutionality can be controlled by the Constitutional Court. It mentions the subordinate acts adopted by the members of the Government but not those of the Government. Given that with the introduction

²² CDL-AD (2014)006 opinion on the draft law on Introducing amendments and addenda to the Judicial Code of the Republic of Armenia. § 55

of the normative constitutional complaint the case-load of the Court will increase, the review of sub-statutory acts could be left with the ordinary judiciary.

168. Paragraph 4 establishes the competence of the Constitutional Court in electoral and referendum cases. To avoid any ambiguity, the Court should have also powers to cancel a parliamentary or the presidential mandate or general election if proven to be unconstitutional and done *extra* or *contra lege*.

Article 168. Right to Apply to the Constitutional Court

169. Paragraph 8 of Article 168 provides for a normative constitutional complaint: “Everyone (can apply to the Constitutional Court) – in a concrete case when there is a final act of court, all judicial remedies have been exhausted, and the person challenges the constitutionality of a provision of a normative act applied by such act of court in relation to him, which has led to a violation of his fundamental rights and freedoms enshrined in Chapter 2 of the Constitution, taking into account also the construal of such provision in its practical legal application”. This is a welcome improvement as compared to the Constitution in force.

170. The Preliminary Constitutional Review (or concrete review) provided for in Paragraph 9 (“Courts – concerning the constitutionality of provisions of normative acts related to a specific case pending in their jurisdiction”) is also a very positive element.

171. The wording of Paragraph 2 “The Constitutional Court shall examine a case only when a respective application is present” is unclear. If it means that the Constitutional Court cannot act *proprio motu*, it is a wise and welcomed provision. Of course, this should not prevent the Court from giving a wide interpretation of the scope of an application.²³

Article 169. Acts of the Constitutional Court

172. According to Article 169, the Constitutional Court shall adopt decisions and opinions (paragraph 1) which shall be final and shall enter into force (paragraph 2) unless the Constitutional Court sets out, in its decision, a later date (paragraph 3). Paragraph 3 introduces thus a useful flexibility.

173. The Constitutional Court adopts its decisions by majority vote of the total number of the judges. Such majority ensures that the Court cannot adopt decision with a “weak” majority during the absence of some of the members.

174. A higher majority is required for the decision “on suspending or prohibiting the activities of a party” (Article 167 paragraph 9) for which a majority of at least a two-thirds of the total number of judges is required.

175. The same qualified majority is required for the adoption of opinions. The Constitutional Court adopts opinions on “the existence of a ground for impeaching the President of the Republic” (Article 167 paragraph 4) “on terminating the powers of a judge of the Constitutional Court, initiating criminal prosecution against him or depriving him of liberty with respect to performance of his duties” (Article 167 paragraph 7) and on the grounds for dismissing a community mayor; and (Article 167 paragraph 8). Such a higher majority is justified by the nature of the matters being decided.

²³ See CDL-AD(2015)016 Amicus Curiae Brief for the Constitutional Court of Georgia on the *non ultra petita* rule in criminal cases, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June)

176. Paragraph 3 wisely establishes flexibility about the effect in time of the decisions of the constitutional court “The Constitutional Court may set out, in its decision, a later date of invalidating a normative act contravening the Constitution or a part of such normative act.” . The Court can thus enable the legislator to fill legal gaps, which would be the result of an immediate annulment of the provision. A special regulation is needed for the individual applicants. The Court should specify the effects of its judgement in the individual case of the applicant. The applicant should immediately benefit from the annulment of the unconstitutional provision, even if it remains in force for a given period for all other persons. Otherwise, the individual application would not have any benefit for the applicant. His or her case would be decided again on the basis of the unconstitutional law. Such a provision for the benefit of the applicant is usually called the “premium for the catcher” (of the unconstitutional provision). A limitation in time for the entry into force of the decision could be established (e.g. no later than one year).

Article 170. The Cassation Court

177. The provision that constitutional justice is an exception to the supremacy of the Cassation Court is welcome and can avoid misunderstandings which have persisted in some countries.

178. It is also welcome that Article 170.2 gives the ordinary judiciary the task to eliminate “fundamental violations present in judicial acts“. This is important from a human rights perspective.

Article 172. Composition and Formation Procedure of the Supreme Judicial Council

179. Paragraph 1 of Article 172 provides that the Supreme Judicial Council shall be composed of five “legal scholars and other reputed lawyers” elected by the National Assembly and five judges elected by the General Assembly of Judges. This composition of an equal number of judges and lay members ensuring inclusiveness of the society should avoid both politicization and corporatism of the Judicial Council. It could be useful however to make possible the membership of individuals with other background than “legal scholars and other reputed lawyers”.

180. The minority of the National Assembly should have the possibility to have its say in the choice of the elected members of the Supreme Judicial Council. The choice of the qualified majority is therefore important. The majority vote of the total number of National Assembly parliamentarians might not be enough in the context created by the draft amendments to Constitution.

181. The following provisions should ensure the proper functioning and the independence of the Supreme Judicial Council: Paragraph 3 which provides that Judges elected should “proportionately represent the judges of all instances” and Paragraph 4 according to which members may not be re-elected.

182. According to Paragraph 7 the Council Chairperson shall be elected from among the judge and lawyer members of the Council in accordance with the procedure defined by law; the draft does not specify whether he/she will be elected by his/her peers.

Article 173. Powers of the Supreme Judicial Council

183. Article 173 lists the powers of the Supreme Judicial Council and provides that the rules for the implementation of these powers will be defined by law. The vast majority of these powers are classical powers linked to the procedure of appointment of judges and chairpersons, the management of their career and disciplinary issues.

184. Sub paragraph 10 of Paragraph 1 states: the Supreme Judicial Council “shall prepare the estimate of its costs and the cost estimates of courts, and present them to the Government of the Republic of Armenia for incorporation in the draft State Budget, and oversee the use of budgetary resources”. It is welcome that the Council is competent to prepare the budget of the judiciary. However, in order to strengthen the independence of the Judiciary, the Council should also be enabled to present this draft and to defend it directly to Parliament. Conversely, the term “oversee the use of budgetary resources” is ambiguous. If this means that the Council is in charge of judicial administration, including salaries, court buildings etc., this would clearly overburden the Council, which could not focus on its main tasks related to judges’ career and discipline. If “to oversee” means only following expenditure in order to be able to prepare the proposal for the budget, this would be useful.

V. The Human Rights Defender

A. General remarks

185. Until now, the institution of the Human Rights Defender was not guaranteed at Constitutional level. This new Chapter will guarantee the existence of the Human Rights Defender and the basic principles of its activity. This has to be welcomed.

B. Specific remarks

Article 1. Functions and Powers of the Human Rights Defender

186. Paragraph 1 seems to give a comprehensive picture of the functions of the Human rights Defender. His/her functions are threefold:

- follow the respect for human rights and freedoms by state and local self-government bodies and officials;
- facilitate the restoration of violated rights
- facilitate the improvement of the legislation related to human rights and freedoms.

187. However, it is unclear from this definition whether the Human Rights Defender will have powers in individual cases or whether his/her role is limited to a general overview of the situation of human rights in the country. The Defender should be able to work in individual cases and this should be set out explicitly.

188. Paragraph 3 which provides for a duty to cooperate with the Human rights Defender is to be welcomed.

189. Paragraph 4 sets out that the Defender shall present annual reports to the National Assembly. This is welcome. In addition, the Defender should have the power to send ad hoc reports but this also can be set out in the legislation.

Article 2. Independence of the Human Rights Defender

190. Paragraph 3 of Article 2 provides that the Human Rights Defender shall enjoy the immunity prescribed for a parliamentarian. It should be underlined that the Human Rights Defender should have immunity against judicial proceedings in respect of words spoken or written and acts performed by him/her in his/her official capacity and that such immunity should continue after the end of the Human Rights Defender’s mandate. For remarks relating to the immunity of Members of Parliament, see under Article 96.

191. In order to enhance the independence of the Human Rights Defender, guarantees as to the inviolability of the institution’s documents and premises, etc. are also very important.

These guarantees may however be provided for in the Law on the Human rights Defender referred to in Article 1 paragraph 5.

Article 3. Election of and Requirements on the Human Rights Defender

192. Paragraph 1 of Article 3 provides that the Human Rights Defender shall be elected by the Parliament by a qualified majority of “at least three fifths of the total number of votes of the parliamentarians”. The intention of this provision is probably to ensure that a compromise with the Parliamentary opposition is required for the election of the Human Rights Defender. Nevertheless, as the broadest possible consensus on the person elected should be ensured, the election by a two-third majority should be considered.

193. The Human Rights Defender is elected for a six-year term. The term of Parliament is five years. The fact that the Human Rights Defender has a longer mandate than Parliament provides an additional safeguard of independence from the organ which elected him or her. Parliament cannot elect “its” Human Rights Defender for the length of its own mandate.

194. The provision according to which the Human Rights Defender shall be irremovable is a very strong guarantee for the Human Rights Defender’s independence.

VI. Conclusion

195. The Venice Commission welcomes the work done by the Constitutional Commission of Armenia. Thanks to an open dialogue with the Venice Commission, important improvements have been made on a text which was already a very good basis for the constitutional reform.

196. Nonetheless, this opinion makes some recommendations for the further improvement of the draft. The Venice Commission would like to highlight notably the following points:

- limitations to the right to vote and the right to be a candidate for the National Assembly should be lifted (see paragraph 54);
- the electoral system should not be set out in detail in the Constitution: the possibility of a second round between the two most voted parties of alliances should be removed (see paragraph 80);
- the prohibition of forming new factions in the Assembly during the whole term of a legislature should be removed as it would limit the free mandate of Members of Parliament (see paragraph 97);
- as concerns the Judiciary, there should be no interference of a political organ in the procedure of dismissal of judges and in the appointment of judges and court chairpersons of the Court of Cassation (see paragraphs 153 and 158).

197. The Venice Commission encourages the Armenian authorities to continue the discussions with all political forces and civil society in order to clarify any misunderstandings and to ensure the widest possible support for the reform.

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