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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT CIVIL SERVICE LAW
OF THE REPUBLIC OF ARMENIA**

by

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Comments on the Draft Civil Service Law of the Republic of Armenia

1. The translation of the draft is not particularly good, which makes some provisions almost unintelligible. Another general problem consists of the fact that I have not had any information of the larger normative context in which the draft would be inserted, except for the Draft Constitution. What other general statutes on the administration are in force or under preparation is unknown to me.
2. A (draft) law on civil servants can be assessed from different perspectives, roughly corresponding to the different objectives such a law should accomplish. In the following, I shall concentrate on issues concerning constitutionality, the rule of law and democracy. Thus, questions of more technical nature, pertaining to, for example, the choice between a statutory and career system and the training of civil servants are not of central interest here. In this respect, I can refer to the comments of professors Cebisovà, Flogaitis and Kitschenberg (ADACS DAJ EXP (2000) 26).
3. According to art. 27.1 of the Draft Constitution (CDL (2000) 88) “citizens have the right to be accepted into civil service on general terms stipulated by law”. The article also lays down that “the principles and procedure for organization of civil service shall be defined by law.” The draft law under consideration now aims at fulfilling this constitutional obligation. Otherwise the provisions of the draft constitution (CDL (2000) 88) on public administration are very scarce, maybe even too scarce. So the issue of outright contradictions with the constitution cannot really arise, provided that in the Civil Service Law are not included provisions of a more general nature. This is, to a certain extent, the case in the present draft. Thus, Art. 5(2) contains a provision on the precedence of international treaties in case of a conflict with the Civil Service Law. The provision is in line with Art. 6(5) of the Draft Constitution. It is, of course, juridically possible to repeat constitutional provisions on the level of ordinary laws, although not necessary. One should, however, be very careful that even the wording of the provisions is identical so that no possibility for conflicting interpretations arises.
4. Another provision, which is closely related to the Constitution, is Art. 4, concerning Fundamentals of the Civil Service. The provision is a very important one, because it is supposed to contain a list of the basic principles to be observed by civil servants. The draft list is very heterogeneous and includes principles of varying weight. The principles should be grouped and perhaps located in different provisions according to their significance and specific focus. Thus, principles pertaining to the civil service’s general position and aiming at securing the demands of a democratic *Rechtsstaat* should be grouped together. These principles include a, d and e. A second group concerns the oversight of civil service and the responsibility of civil servants (j, k and l), Finally, a third group consists of principles relating to access to civil service and the legal protection of civil servants.
5. The principle listed in Art. 4 a) (“supremacy of the Constitution and the laws of the Republic of Armenia, priority of human and citizen’s rights and liberties”) is the most fundamental one, and it should be very carefully worded. The wording should be in harmony with the Constitution, especially with articles 4-6. “Human and citizen’s rights and liberties” should be explicitly linked to the relevant normative sources, that is, the Constitution and international human rights

treaties. The text of the oath required by civil servants (Art. 15), as well as the provisions on their principal obligations (Art. 22), should also conform to that of the provision on fundamental principles. Now both the text of the oath and Art. 22 e) refer, in addition to human and civil rights and liberties, to “lawful interests”. What this expression denotes and how it is related to rights and liberties is unclear to me.

6. One of the fundamentals listed in Art. 4 is “transparency of the civil service” (d). This is a very important principle but requires more detailed, complementary provisions in order to be realised in practice. An explicit reference to a separate Access to Information Act could be recommended. The provisions on civil servants’ obligations should also here correspond to the provisions on fundamental principles. Now Art. 22 only includes a provision on the obligation “to maintain state, official and other secrets protected by the law” but nothing on the obligations pertaining to the transparency of administration.
7. “Political restraint of the civil service” also belongs to principles, which have particular importance from the point of view of the democratic *Rechtsstaat*. “Political restraint” is a very vague concept, which is in need of specification through complementary provisions concerning, for example, the possibility of the civil servants to hold leading positions in parties and the required neutrality in the performance of their duties. In the latter respect, reference can, however, be made to Art. 22 d).
8. General and non-discriminatory access to civil service is important even from a human rights perspective. Reference must also be to Art. 27.1 of the Draft Constitution. This provision restricts the right to be accepted into civil service only to citizens. The same restriction is included in Art. 10 of the Draft Civil Service Law. The justifiability of such a general restriction, extending even to the lowest levels of the civil service which do not have any juridically relevant competence, can be questioned. The provision on non-discrimination in Art. 10 is appropriate. Art. 11 contains a list of factors entailing a disqualification for civil service. As professor Cebisova has noted, nobody should be deprived of eligibility for civil service but through a decision by a competent court (Art. 11 d). The requirement of an explicit decision by a court should also be extended to crimes; not all sentences for any crime whatsoever should entail such a consequence. What is meant by “refrain from the term military service” (11 e) is unclear to me. If the purpose is to exclude from civil service those who have exerted their right to alternative service, the provision should be deleted.
9. The legal protection of civil servants themselves belongs to the juridical guarantees of a democratic *Rechtsstaat*. Thus, it is important that they have the right to appeal their dismissal from civil service to a court as is provided for in Art 34(1). However, the right to appeal to a court or some other controlling body should also cover other disciplinary penalties mentioned in Art. 31.
10. An important and often enough also difficult issue in a democratic *Rechtsstaat* concerns the constitutional rights of the civil servants, especially the so-called political basic rights, such as freedoms of assembly, association and press. Art. 21 on the principal rights of civil servants does not make any explicit mention of these rights. This can be interpreted so that the civil servants enjoy the same constitutional rights as everybody else in Armenia, if not expressly otherwise laid down through law. If it is considered necessary to restrict the civil servants’ constitutional rights – as concerns, for example, their right to hold positions in political parties –

this should be done through explicit statutory provisions and paying due attention to both constitutional provisions and international human rights treaties.

11. The right to form and join trade unions belongs to the rights that are not explicitly mentioned in the draft. Nor is any reference made to tariff agreements' role in specifying the civil servants' economic and social rights. Because of the importance of the issue for the institution of civil service and the legal status of the civil servants I would strongly recommend that the draft be complemented in these respects.
12. According to Art. 3 e) the Civil Service Law would be applied even in local self-government. However, the question can be raised whether local self-government, which has its constitutional basis in Chapter 7 of the (Draft Constitution), should include at least a certain degree of autonomy even in the regulation of the position of their administrative staff.