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(VENICE COMMISSION)

COMMENTS

ON THREE SETS OF PROPOSALS FOR CONSTITUTIONAL AMENDMENTS IN ARMENIA

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Comments on the 1st set of proposals (CDL(2004)100)

1. At its 47th Plenary Meeting, held in Venice 6-7 July 2001, the Venice Commission adopted a report on the revised constitution of the Republic of Armenia (CDL-INF (2001)17). A working-group of the Venice Commission had participated in the preparation of the revised constitution. A referendum on constitutional amendments was held in Armenia on 16 May 2003. The amendments did not, however, receive the required majority. For the most part, the amendments submitted to the referendum corresponded to the revised constitution drafted in co-operation with the Venice Commission. However, there were also significant changes, of which an opinion of the Commission was not requested. The Commission has not even received the text of the amendments submitted to referendum.

   In the following comments, the main point of reference will be, in addition to the constitution in force, the revised constitution from 2001, prepared in co-operation with the Venice Commission. If the proposed amendments correspond to the revised constitution, the comments included in the report CDL-INF (2001)14 will not, as a rule, be repeated. Thus, the following comments should be read in conjunction with those included in the report CDL-INF (2001)17

2. The amendments proposed to Chapter 1 (Foundations of the Constitutional Order) and Chapter 2 (Fundamental Human and Civil Rights) correspond, in most respects, to those included in the revised constitution from 2001. However, the proposed Art. 15 does not any longer include the explicit provision on the prohibition of the death penalty. This must be considered a fallback in relation to the previous proposal, although the remaining provision on the right to life, taken together with Art. 6(4) and Art. 14 of the amended constitution, as well as Protocol No 6 to the ECHR, signed by Armenia, can be interpreted as including the prohibition of the death penalty.

3. Art. 16 does no longer include para 2 with the list of situations where a person can be deprived of her/his freedom. However, the provisions of Art. 5(2) receive their constitutional relevance and legal relevance through Art. 42(5) ("Any restrictions on human and citizen rights and freedoms shall not exceed the scope set by the international commitments of the Republic of Armenia.")

4. In Art. 24(2), the possibility of searching for a place of residence without a prior court order has been removed. This is to be regarded as a positive change.

5. In its report CDL-INF (2001)17 (para 26), the Venice commission welcomed the provision in Art. 27(3) on the freedom of press and other media. The new amendments, however, include an additional provision according to which "the activities and liabilities for mass media shall be defined by law". This provision may be interpreted as allowing for regulations which, in fact, restrict the freedom guaranteed in the first sentence of Art. 27(3), although Art. 42(5) sets constitutional limits to such regulations, the removal of the new provision is to be recommended.

6. The proposed provisions on martial law and the state of emergency deviate in some crucial aspects from those of the revised constitution prepared in co-operation with the

Venice Commission. The new provisions in para 13-14, of Art. 55 leave unclear the distinctions between a) martial law, b) a state of emergency and c) the measures taken in the event of an imminent danger to the constitutional order. Para 13 seems to imply that concepts of martial and state of emergency are used as synonyms. However, other provisions where both martial law and a state of emergency are mentioned presuppose a distinction between the two (Art. 44, 60.1(4-5).) The provisions in Art. 55 should make clear the distinction between martial law and a state of emergency (if a distinction between the two is intended), and para 13 should lay down that the legal regime of a state of emergency should also be defined through a law.

7. According to para 14 of Art. 55, the appropriate measures that the President may take in the event of an imminent danger to the constitutional order are not preceded by a declaration of a state of emergency, nor is the scope of the measures defined anywhere in the amended constitution. Art. 44 on the derogation from human rights concerns only martial law and a state of emergency. Both the ECHR and the UN Covenant require that a state of emergency, allowing for derogations from human rights, is expressly declared and that a notification is sent to the respective Secretary General. The revised constitution prepared in co-operation with the Venice Commission required the declaration of an extraordinary situation, before the President could exercise its powers. In its proposed form, para 14 creates legal and constitutional uncertainty.

8. According to the revised constitution prepared in co-operation with the Venice Commission, a special session of the National Assembly was to be convened immediately after the declaration of both martial law and an extraordinary situation, in order to examine the "correspondence of the measures undertaken with the situation". In the present draft amendments, this provision is included in neither para 13 nor para 14 of Art. 55. The only provision on a parliamentary control of the exceptional measures is in Art. 81(2): "The National Assembly can stop the progress of measures prescribed by Clause 13 of Article 55 of the Constitution." This provision does not cover measures undertaken under para 14, nor does it include the requirement of convening the National Assembly immediately after the President has started exercising his/her powers.

9. All in all, the proposed amendments concerning martial law, states of emergency and measures referred to in para 14 of Art. 55 represent a fallback in relation to the revised constitution prepared in co-operation with the Venice Commission. It is to be strongly recommended that the provisions be changed back into the form they had in the revised constitution from 2001.

10. With respect to the relations between the main constitutional organs, the present amendments express a shift in favour of the President, when compared to the revised constitution prepared in co-operation with the Venice Commission. Thus, the President would retain the power to appoint and dismiss the Prime Minister and, on the latter's recommendation, the members of the Government. The main provisions of the Action Plan of the Government would, however, require the approval of the National Assembly. If the Assembly adopts for the third time a vote of non-confidence when deliberating the Action Plan of a newly appointed Government, the President shall dissolve the Assembly. (Art. 55, para 4; Art. 74.1; Art. 85.1) Even the other situations where the President would be entitled to dissolve the National Assembly would be explicitly regulated in the Constitution (Art. 74.1(2)).

The Venice Commission has repeatedly emphasised that the fundamental choice between a presidential, a semi-presidential and a parliamentary regime is a political choice to be made by the country in question and that all these regimes can be brought into harmony with democratic standards. In any case, the Parliament should have sufficient controlling powers with regard to the executive branch. According to the proposed amendments, the National Assembly would retain the power of adopting a vote of no-confidence (Art. 84). In addition, the revised constitution prepared in co-operation with the Venice Commission included specific provisions on the right of the deputies to address written questions to the Government (Art. 80). It is to be regretted that these provisions have not been included in the present amendments.

11. The new provisions in Art. 83.1, which aim at strengthening the independence of the Central Bank, are to be welcomed.

12. In the present amendments, the National Assembly's Oversight Office has been replaced by an institution called the Control Chamber (Art. 83.2). This Chamber is defined as an independent body. The power of appointing the Chairperson and other officials of the Chamber seems to fall to the President (or the Government).

    There can be no objections to an independent body like the proposed Control Chamber, overseeing the implementation of the budget and the use of state property. However, even the National Assembly should have financial controlling powers. It is to be regretted that the present amendments do not include any compensation for the replacement of the National Assembly's Oversight Office by the Control Chamber.

13. The list of the issues which fall to the exclusive legislative competence of the National Assembly has been reduced from the one included in the revised constitution prepared in co-operation with the Venice Commission (Art. 83.3). Nevertheless, the explicit definition of the National Assembly's exclusive competence is to be considered a progress with respect to the present constitutional situation.

14. In its report CDL-INF (2001)17, the Venice Commission stated (para 58) that the provision in Art. 88.1(1), according to which the Mayor of Yerevan is appointed and dismissed by the President, is in breach of essential principles of local democracy and in obvious contradiction with the European Charter of Local Self-Government. The strong recommendation, expressed in the report, to delete this provision is to be repeated. The same holds for the observation concerning the provision in Art 88.1(2). According to this provision, the Mayor of Yerevan "shall pursue the territorial policy of the Government". This provision is difficult to reconcile with the Mayor's position as the Head of Community in accordance with the provisions of Chapter 7.

15. The proposed Art. 109(1) gives the Government the power to dismiss, in cases prescribed by law, the Head of Community and to dissolve the Council of Aldermen. The use of this power may endanger the principle of local self-government, especially as the provision no longer requires the Government to consult the Constitutional Court before taking the decision.

16. According to Art. 110 of the revised constitution prepared in co-operation with the Venice Commission, changes in the territorial organization require a consultative referendum in the communities concerned. This requirement has been deleted from the

present draft. In the interests of local self-government, the explicit requirement of local referenda should be restored.

17. The proposed Art. 111.1 allows for constitutional amendments through a qualified majority of the National Assembly, without submitting the amendments to a referendum. This proposal would make constitutional amendments more flexible, while at the same time maintaining the requirement of a referendum in issues of a principal nature. The proposal is to be welcomed.

18. All in all, the proposed amendments can be regarded as a step forward with regard to the Constitution in force and as facilitating Armenia's compliance with the commitments it adopted on its accession to the Council of Europe, although in certain respects the present draft falls behind the revised constitution prepared in co-operation with the Venice Commission.

Comments on the 2nd Set of Proposals (CDL(2004)101)

The draft law under examination mainly focuses on the provisions concerning the formation and functioning of the Government, as well as the election of the National Assembly. Thus, it lacks most of the amendments to Chapter 2 (Fundamental Human and Civil Rights and Freedoms) and to Chapter 6 (The Judicial Power) which the Venice Commission in its report CDL-INF (2001)14) welcomed as strengthening the protection of human rights and the rule of law in Armenia; nor does the draft law include a provision on the exclusive legislative competence of the National Assembly (cf. para 49 of the Venice Commission's report). In addition, the provisions on martial law and states of emergency (55 para 12-14) do not meet the requirements of democracy and rule of law, emphasised in the Venice Commission's report (para 45).

The main idea of the present draft law seems to be the binding of the Government, the political parties and even individual deputies to programmes presented to the electorate in the electoral campaign. The following comments will concentrate on the proposed amendments expressing this idea.

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

A new Art. 63.2 would require that "the parties and the pre-election unions thereof taking part in the elections by proportional representation shall impart on the voters their pre-election four-year programmes and approaches, by which they shall be governed for the next four years in the event that the outcomes of elections entitle them to form the Government". The programme presented would not only have a politically but even legally binding effect on the party. Thus, "in the event that the party denies the main programme provisions or has terminated its activities in conformity with the procedure established by law, it shall upon the conclusion of the Constitutional Court and the resolution of the National Assembly be deprived of its parliamentary seats".

Individual deputies would also be bound by the electoral programme. According to a new Art. 63.4, "a deputy elected from the party list either publicly denying the four-year pre-election programme provisions, or expelled from the party or resigning on his/her own accord shall be deprived of the deputy's mandate and the next person in the party list shall substitute himself/herself in the NA". Candidates for deputies to be elected to the NA by single-mandate would, in turn, be obliged to present to the voters of their respective electoral districts their action plans for the electoral districts and the NA". Such a deputy could be

"recalled from office by local constituents for the failure to meet his/her election commitments through a process of local referendum". (Art 63.4).

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

According to Art. 85, the RA Government would "be responsible for the implementation of the RA long-term, four-year and annual programmes and the execution of the budget". It would be obliged to submit annually "to the NA the draft law on the RA state four-year programme with its sector-based sub-programmes, the evaluation criteria for the progress of implementation and potential deviations, as well as the description of the insurmountable obstacles, for approval". The procedure to be followed would be the same as in the formation of the Government. In addition, it should "submit to the NA the drafts of the annual state programmes and the budget for approval, ensure the progress of execution thereof and submit reports on the aforementioned to the National Assembly". (Art. 89, para 1-2). The National Assembly should, "upon the submission of the Government, adopt laws on the long-term, four-year, annual and special programmes and the budget, make amendments and oversee the progress thereof" (Art. 62). Finally, the President would oversee the National Assembly with regard to the implementation of the four-year state programme. Thus, "in case of failure by the National Assembly to annually implement the four-year state programmes the President of the Republic shall at the end of the first year of the NA term of office, deliver a warning address to both the National Assembly and the Government". The failure to implement the programme can lead to the dissolution of the National Assembly: the President could "reduce the term of office of the National Assembly at the end of the first half of either the second or the third year of the NA office and declare special elections to the NA in the event that the failure to implement the programme continues".

The main problem of the provisions cited above is a tendency of an excessive juridification or constitutionalisation of political processes. Thus, the provisions in Art. 63.2-63.5 on the obligation of political parties and individual candidates to present specific programme to the electorate, as well as on the consequences of not respecting them, concern issues which should be left to political processes, and lead to a confusion of political and legal responsibility. The provisions also express a kind of imperative mandate which is highly questionable in a modern parliamentary democracy. Thus, it should be left to the judgement of the electorate at the next election as to what the (political) consequences for not meeting electoral promises will be for a party or an individual deputy. It would contradict the very idea of an election-based parliamentary system if a political party could be deprived of its parliamentary seats or an individual deputy of her/his mandate for reasons of a mainly political nature through a procedure other than the next elections.

It is also questionable to adopt the Government's programmes in the National Assembly as laws (Art. 62 and 85), as this also easily leads to a confusion of political and legal obligations and responsibilities. In addition, the exact legal significance of the laws confirming the programme is unclear. Nor can the provisions on the President's duty to oversee the National Assembly's implementation of the four-year programmes and on her/his power to dissolve the assembly in case of a failure in this implementation be deemed advisable. The President's proposed competence would place her/him above the National Assembly in the hierarchy of constitutional organs and run counter to the general strive of the draft law to enhance the position of the National Assembly and the Government.

The respective powers of the President and the Parliament in the formation of the Government belongs to the political choices to be made by the country in question. The system adopted in the present draft is in conformity with democratic standards. In the process of forming the Government, even the programme presented by the coalition or its candidate for the post of the Prime Minister can play the role envisaged in the draft under examination. Thus, a vote of confidence on the basis of the programme can be regarded as a mechanism for ensuring the political presuppositions for a successful Government work. However. it has to emphasised that the programme should mainly be a political document and that the control of and consequences for failures of its implementation should also be of a mainly political nature.

A procedure for resolving deadlocks in the formation of the Government and involving, as the ultimate means, the dissolution of the Parliament is in itself wholly justifiable in a constitutional democracy. However, the procedure laid down in the proposed Art. 74.1 and including so-called recurrent elections in case the National Assembly adopts a resolution of no-confidence, cannot be deemed recommendable. In the recurrent elections, only parties and "pre-election unions" which have received seats at the regular elections could take part. The need for such a procedure seems to follow from the provisions on the binding pre-election programme.

10. In the draft amendments, it is proposed that 100 deputies of the National Assemblies would be elected according to the system of proportional representation, whereas 31 deputies would be elected from single-mandate constituencies (Art. 63). In certain respects, these two groups of deputies would be subject to divergent constitutional provisions (e.g. Art 63.5 and Art. 74.1). Both electoral systems have their own justifications. There are countries which have adopted a combination of the two systems, but, as a rule, the experiences gathered cannot be deemed very positive.

Comments on the 3rd set of proposals (CDL(2004)107)

1. In the following comments, the main point of reference will be, in addition to the constitution in force, the revised constitution from 2001, prepared in co-operation with the Venice Commission. If the proposed amendments correspond to the revised constitution, the comments included in the report CDL-INF (2001)14 will not, as a rule, be repeated. Thus, the following comments should be read in conjunction with those included in the report CDL-INF (2001)17.

2. Most of the proposed provisions in Chapter 1 (Foundations of the Constitutional Order) and Chapter 2 (Fundamental Human and Civil Rights and Freedoms) correspond to those included in the revised constitution from 2001. In Chapter 2, there are some additions, which can be welcomed from the point of view of strengthening the protection

of human rights. This holds e.g., the proposed provision in Art. 17(3) according to which "children under the age of 16 shall not be subjected to scientific, medical and other experiments", as well as for the provision on consumer protection in Art. 31.1. However, the proposed provision in 11.3(6), granting the right to political asylum to "citizens persecuted for their political convictions shall have the right to political asylum", is problematic: it may lead to the e contrario conclusion that non-citizens do not have the corresponding right. On the other hand, citizens do not need the right to political asylum, because they have the right to return to the Republic of Armenia (Art. 25(3)) and may not be extradited to a foreign country (Art. 11.3(3)).

According to the proposed provision in Art. 47(2) "every citizen of the Republic of Armenia shall be entitled to protect the Constitution, the principles of the constitutional order stipulated therein and the laws". The legal significance of the provision remains unclear.

3. The principles on which the provisions determining the mutual relations between the President, the National Assembly and the Government are close to those adopted in the revised constitution from 2001. The differences concern mainly procedural issues. Thus, the appointment of the Prime Minister, as a rule, falls to the National Assembly, and only in case the National Assembly fails to appoint the Prime Minister or to approve the Government's Concept of Action shall the President appoint the Prime Minister and form the Government (85.3.). The National Assembly would have the right to express no-confidence in the Prime Minister (Art. 84), and the Prime Minister could put forward a motion on confidence in connection, not only with the budget and the five-year plan of action (Art. 90), but also with the adoption of a draft law (Art. 75.1.). The President would have the power to dissolve the National Assembly only in cases enumerated in Art. 74.1.

4. The respective powers of the main constitutional bodies are also close to those proposed in 2001 in the revised constitution. However, some of the amendments now proposed raise questions. According to Art. 55 para 9 the President would have the duty to "uphold the state interests through a unified system of the Prosecution Office". This provision would seem to subject the prosecutors to the President in a way the legal significance of which remains unclear and which may endanger the independence of the prosecutors.

5. The draft law contains a list of issues which fall to the exclusive legislative power of the National Assembly (83.1). The list corresponds to the one proposed in 2001 in the revised constitution. However, a new provision according to which the list may be extended by law has been added. This cannot be deemed appropriate: a constitutional division of powers should not be changed through a law. Another issue is that the National Assembly can have the power to issue laws even in areas not included in the list of its exclusive competences and that such laws can – and should – have a pre-emptive effect with regard to the norm-giving powers of other constitutional bodies.

6. The draft law includes provisions aimed at securing the autonomy of the National Assembly and its deputies (Art. 66 and 79.1). These new provisions seem appropriate.

7. According to the proposed Art. 75(4), the President and the Government "may determine the sequence of the debate for their proposed draft legislation and may demand that they

be voted only with amendments acceptable to them". The legal significance of this provision remains unclear. Taken according to its wording, it would imply that the President or the Government could in effect determine how the National Assembly exercises its legislative competence!

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

9. The draft law includes separate chapters on the Control Chamber (6.2) and the Central Bank (6.3.). The general aim of the proposed provisions is to strengthen the independence of these bodies. This aim is to be welcomed. However, it is important that the National Assembly also has certain controlling powers with regard to the management of public finances. According to Art. 103.1(3), the Control Chamber should at least once a year report to National Assembly on the outcomes of its oversight. The procedure to be followed after such a report should be regulated by the rules of procedure of the National Assembly.

10. Art. 109(1), concerning the dismissal of a Head of Community and the dissolution of the Council of Aldermen, should contain a similar requirement of a conclusion of the Constitutional Court as is included in the proposed 1 Art. 09.1(1).