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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

**ON THREE SETS OF PROPOSALS
FOR CONSTITUTIONAL AMENDMENTS
IN ARMENIA**

by
Mr Bruno NASCIMBENE
(Expert, Italy)

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

1. *Foreword. Protection of human rights and institutional context*

1.1. The deep connection between the section of a Constitution related to the protection of human rights, on one hand and the section concerning the separation of powers, on the other hand is an axiom of modern constitutionalism.

An effective guarantee of the fundamental rights and freedoms is made sure not only by defining and listing-as much, as far as possible, a catalogue of all individual, social and political rights, but above all by an institutional system that allows the balance and the mutual control of the political powers.

Therefore, it is essential that the existence of a powerful and independent Constitutional Court of the judiciary is not subjected to the executive power of a Parliament able to bar the President's way, in case he had hegemonic aims.

These checks and balances are even more decisive in the "young democracies", where customs, constitutional conventions and procedures are not deeply rooted.

Moreover, the institutional framework has a particular evidence as regards the freedom of speech and the pluralism of media.

1.2. It is well-known that freedom and pluralism of media are pre-conditions of the democracy: by the words of the [Recommendation 1506](#) (2001) of the Council of Europe on freedom of expression and information in the media in Europe, «the media is vital for the creation and the development of a democratic culture in any country and a free and independent media is an essential indicator of the democratic maturity of a society».

The right to freedom of expression and information is intrinsically linked to the citizens' right to know, which is a prerequisite for making well-informed decisions. The possibility to express freely ideas and opinions enhances public dialogue and therefore stimulates the development of the democratic process.

The right to freedom of expression and information is therefore a "delicate" or "particular" right: *a)* the absence of independent and autonomous media in the broadcasting sector; *b)* the merger between the political and the communication powers; *c)* the use by the executive of the public broadcasting service; *d)* the lack of a real pluralism in the press and in the broadcasting sector; *e)* the lack of impartiality of media during electoral campaigns could be conducive to an "apparent democracy".

1.3. The value of a provision in the constitution that fully protect either the right to freely express an opinion, or the freedom to hold opinions and to receive and impart information and ideas or the freedom of the mass media, is very important and relevant.

In the same direction and perspective are the need of constitutional rules to guarantee the establishment of independent regulatory authorities with powerful tools for the broadcasting sector; the need of a reference to safeguard the impartiality of public services; the existence of a wide range of independent and autonomous media in the broadcasting sector for the effective respect of the information rights.

2. The freedom and the pluralism of the media in Draft Law on Amendments to the Armenian Constitution

2.1. The Armenian legislator is partially facing these problems in the Constitutional amendments proposed by the three-party pro-government coalition.

Article 24 of the Armenian 1995 Constitution provides that:

«Everyone is entitled to assert his or her opinion. No one shall be forced to retract or change his or her opinion.

Everyone is entitled to freedom of speech, including the freedom to seek, receive and disseminate information and ideas through any medium of information, regardless of state borders.»

2.2. As we noted in a former opinion, «no irreconcilable contradictions seem to exist with the requirements of the Convention and therefore not an absolute need of introducing modifications on the Constitution on this point».

2.3. In the aforesaid text we note that «In this framework the opportunity to make some amendments to the Armenian Constitution could be seriously pursued, by following the direction indicated by the European Charter of Fundamental Rights and generally the tendencies that have arisen at a European level during the last 10 years:

- a) plurality and freedom of media;
- b) impartiality of public services;
- c) establishment of independent regulatory authorities for the broadcasting sector».

As regards freedom of the media, the draft law under examination **strengthens** the constitutional guarantees in a significant manner.

Article 27 of the Draft provides that:

“Everyone shall have the right to freely express his/her opinion. No one shall be forced to recede or change his/her opinion.

Everyone shall have the right to freedom of expression including freedom to search for, receive and impart information and ideas by any means of information regardless of frontiers.

Freedom of press and other mass media shall be guaranteed. The activities and liabilities for mass media shall be defined by law.” (emphasis added)

The last paragraph, by guaranteeing media freedom and the rule of law principle, provides added value to the principle of free speech and increases the awareness of the importance of issues essential for a new democracy like media and political pluralism.

Nevertheless, relevant issues are still open: the text does not provide a reference to the right for all individuals to equal access to impartial news and information and a reference to the principle of pluralism of the media.

Moreover, it is lacking in facing up to the challenges to safeguard effective independence, powers and transparency of the regulatory Authorities and to turn the national television channel from a governmental body to a public service channel managed by an independent

administrative board and able to play a central role within the information system, and to protect democratic, social and cultural needs.

2.4. A relevant issue which deserves a reference inside the Constitution is the one regarding the competencies to strengthen the separation of powers and to achieve a better equilibrium in the distribution of competencies in the media sector.

In this respect, the introduction of an explicit constitutional provision on independence of media authority and public service broadcasting could be suggested in a wider context that provides:

a) a different distribution of powers between the President and the Parliament, increasing the role of the legislative in general and particularly in the process of appointing the members of the Authorities;

b) stronger guarantees for the opposition, especially during electoral campaigns;

c) the development of the competencies of the Constitutional Court and the strengthening of the effective independence of the judicial authorities.

Nevertheless, the amendments related to the Armenian institutional architecture seems to take an opposite direction.

3. The amendments to the Armenian institutional system

3.1. The draft amendments to the Constitution proposed by the pro-government coalition, in the sections concerning the constitutional bodies and their relationship, are characterized by a deep extension of the attributions of the President of the Republic.

It is useful to point out that the Armenian Constitution of 1995 conferred a quite large number of powers to the President of the Republic like, for example, the appointment and dismissal of the Prime Minister and of the other members of the Government (Art. 55, p. 4), the dissolution of the National Assembly (Art. 55, p.3), or the appointment of the members and the President of the Constitutional Court (Art. 55, p.10). These attributions (and many others granted to him) haven't the same meaning that they usually have in a parliamentary government system, where a lot of them are characterized only by a formal decision of the Chief of the State. In the Armenian government system the President of the Republic, elected by the citizens, is the real "engine" of the all-political system. So, if this is the starting situation, it seems quite dangerous for the democratic life of the State to increase further his powers.

Particularly, the new Article 74.1, allowing the President to dissolve the Parliament if it rejects for three times a Government proposed by the President, sets out an intolerable subordination of the legislative power to the President. This situation is **not compatible** with the principles of a correct democratic relationship between the powers of the State, because it is against the principle of the separation of the powers.

In France, where the President is elected by the citizens, and his role is very strong, if the political address of the National Assembly, determined by the vote of the people, clashes with the one of the President, the Chief of the State must appoint a Prime Minister and a Government expression of the Parliament.

3.2. A good solution could be that if the Parliament votes a motion of no-confidence against the first Prime Minister proposed by the President of the Republic, the Parliament then elects a Premier among its members (the norm on the incompatibility between member of the Government and member of the National Assembly would need to be changed), who is subsequently appointed by the President. The new Article 85.1, would also need to be changed, because it is strictly linked to the new Article 74.1.

3.3. The subordination of the National Assembly is confirmed by the second part of the new Article 74.1. It appears to consider the works of the parliament as an obstacle to the political will of the President and the Government. The only requirements for the life of the State is to “cut short” the discussions inside the Parliament. Therefore, if a constitutional system gives a lot of power to a political body like the President, it is important that the political and legislative dialectic can develop freely. That is obvious and clear, if we point out that the amendment of the Article 75 gives the President the right of legislative initiative.

3.4. As regards the Chief of the State, the new Article 56.1 says: “The President of the Republic shall be immune”. What does it mean? Does the immunity cover all the acts of the President, or just the acts expressly related to his function? The interpretation of this clause is also relevant for a correct interpretation of Article 57, concerning the removal of the President from his office in case of “State treason or other high crimes”. This rule should be even better explained, because the nature and importance of these crimes are too vague to allow a clear interpretation.

3.5. On the Judicial Power the draft must be regarded as an improvement in respect of the current Constitution, especially for the modifications introduced to Article 94: in the new text, the Council of justice’s independence is guaranteed by the Constitution and by the law, not by the President of the Republic. But the role of the President seems **still too strong** in some respects, particularly in relation with the Council of Justice and the Constitutional Court. A constitutional body with its own political address should not chair an independent organ like the Council, and should not appoint almost half of the members of the Constitutional Court.

3.6. The modification introduced by the new Article 101 is therefore appreciable. It meets a desirable enlargement of access opportunities (see especially points 6 and 7).

4. In conclusion, the draft shows remarkable lacunas in order to tackle some classical issues of the modern constitutionalism. The balancing of powers is not sufficiently respected. The Armenian constitutional system needs to transfer powers and functions from the President of the Republic to the National Assembly and to other institutions able to guarantee impartial decisions.

The questions connected with the freedom of speech and the pluralism of the media are not fully solved, even in the presence of a provision (Article 27) that certainly protects better than before the right to freely express an opinion and above all the freedom of the mass media.