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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT FINAL OPINION

**ON THE CONSTITUTIONAL REFORM
IN THE REPUBLIC OF ARMENIA**

On the basis of comments by

Mr Vlad CONSTANTINESCO (Expert, France)
Mr Aivars ENDZINS (Member, Latvia)
Mr Kaarlo TUORI (Member, Finland)

I. Introduction

- 1. In June 2005, the Commission adopted its second interim opinion on constitutional reforms in Armenia (CDL-AD(2005)016). It concluded that the proposed constitutional amendments, as adopted in their first reading, required important amendments in the areas of the separation of powers, the independence of the judiciary and the manner of appointment of the Mayor of Yerevan.*
- 2. As previously agreed, on 17 June 2005 the Armenian authorities submitted revised constitutional amendments to the Commission's working group.*
- 3. On 23-24 June 2005, a meeting was held in Strasbourg, at which representatives of the Armenian authorities and of the civil society and the Commission working group, composed of Messers Endzins, Tuori and Vlad Constantinesco, discussed these revised amendments with a view to improving them. As a result of this meeting, certain principles which were to guide the further constitutional works were agreed upon (CDL(2005)052).*
- 4. On 7 July 2005, the Armenian authorities submitted a further revised version of the constitutional amendments (CDL(2005)058).*
- 5. The Commission's working group prepared an assessment of this version of the constitutional amendments and sent it to the Armenian authorities on 21 July 2005.*
- 6. On 1 September 2005, these amendments passed their second reading in the National Assembly. They were submitted to the Commission in their final version on 9 September 2005.*
- 7. The present opinion relating to the constitutional amendments as adopted in second reading was prepared by the working group and submitted to the Armenian authorities on 19 September 2005. It was subsequently endorsed by the Commission at its ... plenary Session (...).*

II. Analysis of the revised draft constitutional amendments adopted in the first reading

A. Preliminary remarks

8. The present comments only relate to the aspects which were specifically discussed at the meeting of 23-24 June 2005, and which were summarised in document CDL(2005)052. In elaborating them, the working group has aimed at achieving solutions allowing for the workability of the democratic institutions of Armenia.
9. Other aspects of the Constitution, which have not been addressed by the Commission in this opinion but in previous ones,¹ may well deserve discussion among the Armenian authorities, the opposition forces and the civil society.

¹ CDL(2000)102rev., CDL-INF(2001)017, CDL-AD(2004)044 and CDL-AD(2005)016).

B. Human Rights

Ombudsperson

10. The constitutional foundation of the institution of the Ombudsperson represents an important step towards ensuring an effective protection of human rights and freedoms in Armenia.

11. It is now expressly foreseen in Article 83.1 § 1 that the ombudsperson shall be elected by a majority of 3/5 of the deputies, as currently provided in the Law of the Republic of Armenia on the Human Rights Defender. The principle of irrevocability of the Ombudsperson has also been explicitly stated in paragraph 3 of the same Article.

Freedom, independence and plurality of the media

12. Article 83.2 of the proposed Constitution now sets out the manner of appointment of the members of National Commission on Radio and TV.

13. The members of the National Commission on Radio and TV are no more appointed by the President under the general clause of Article 55.5, but are appointed, for 6 years, as follows:

- ½ by the National Assembly, and
- ½ by the President.

14. The Commission welcomes this solution, which constitutes an undoubted step forward towards the independence of the NCRT. The Commission recalls the need, for both the National Assembly and the President, to follow a transparent and merit-based procedure of selection of candidates. It points out in particular that members of the NCRT should not be active members of political parties.

15. The Commission also wishes to refer to the need for the members of the boards of management of public service broadcasting organisations to be appointed so as to avoid the risk of “any political or other interference”.² In this respect, the appointment by the President of the Republic of all the members of the Council of the Public TV and Radio has been seen as problematic, and the need for the appointment process, if this power of the President is to be retained, to be open and transparent and not open to political abuse, has been underlined³. The Commission notes in this respect that the CPTR is, according to the information submitted by the Armenian authorities, a joint stock company. It follows that the members of its managing board are not “state officers” and need not be appointed by the President of the Republic under Article 55 § 5 of the Constitution. Other options could indeed be preferable, such as, for instance, the appointment by civil society and professional bodies.

² See, in particular, Recommendation No. R(96)10 of the Committee of Ministers to Member States on the Guarantee of Independence of the Public Service Broadcasting, adopted by the CoM on 11 September 1996. See also Recommendation Rec(2000)23 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the CoM on 20 December 2000.

³ “Analysis and comments on the Law of the Republic of Armenia on TV and Radio broadcasting, adopted in October 2000 and amended in 2001, and the regulations of the National Committee on TV and Radio adopted by law on 11 January 2002 (ATCM (2002)016rev, 26 June 2002) carried out by the Council of Europe’s Division on the Media, Directorate General of Human Rights.

16. The Commission underlines the importance of regulating this matter in accordance with the applicable European standards. It recommends therefore that the relevant legislation be brought in compliance thereof with the assistance of the Council of Europe.

C. Separation of powers

Presidential immunity

17. With respect to the presidential immunity, the Commission notes with approval that the revised Article 56.1 § 2 fully reflects both the principle of the President's non-liability in respect of the acts arising from his or her presidential duties during and after the mandate, and the immunity from prosecution, during the mandate, for acts not arising from his or her presidential duties.

Extraordinary sittings and sessions of the NA

18. The Commission notes with approval that the revised Article 70 on extraordinary sessions and sittings now clearly stipulates that it is the Chairman of the National Assembly who will convene a parliamentary session or sitting upon the initiative of the President of the Republic, or of at least 1/3 of the deputies or of the Government.

Formation of government.

19. The Commission welcomes the revised provisions on the formation of government, which now provide guarantees for the indispensable balance in the relations between the main constitutional organs in Armenia.

20. Pursuant to the new Article 55 § 4, the President of the Republic will appoint as Prime Minister the person who enjoys the confidence of the majority of the deputies. The meaning of the following expression in the second part of the first sentence "*if it is not possible*, the person who enjoys the confidence of *relative majority*" is unclear and the exact procedure to be followed should be spelled out.

21. The Prime Ministers can now only be dismissed by the National Assembly through a vote of non-confidence. On the other hand, as a compromise solution, the President has the right to present to the National Assembly a motion of non-confidence in the Government (new Article 84 §2).

22. At the meeting of 23-24 June, the possibility of introducing a constructive vote of non-confidence was discussed. The members of the Commission's working group considered that such mechanism generally contributes to the stability of the government and that, as such, it might be useful.

23. With regard to the President's power to dissolve the National Assembly for "technical" reasons, the revised Article 74.1 § 2 now rightly provides for the involvement of the Chairman of the National Assembly or the Prime Minister.

24. As regards the composition of the government, the Commission notes with approval that it is now to be fixed by law.

Foreign policy

25. The new Article 85 now correctly stipulates that the Government shall “determine and implement” the foreign policy of Armenia jointly with the President of the Republic. In fact, Article 55 on the competences of the President of the Republic should more accurately provide that the President “determines and implements the foreign policy jointly with the Government” rather than “executes the general guidance” of it.

Sittings of the government

26. The Commission notes with satisfaction that the new Article 86 § 2 expressly states that the President may convene and chair sittings of the government *in connection with foreign policy, defence and state security issues* only.

D. Independence of the Judiciary

Prosecutor General

27. In accordance with the revised Article 55 § 9, the appointment and dismissal of the deputies of the Prosecutor General will be done upon the recommendation by the Prosecutor General.

Appointment and dismissal of judges/ Composition of the Justice Council

28. Recommendation No. R (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges provides as follows:

“The authority taking the decision on selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules. However, where the constitutional or legal provisions and traditions allows judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above”.

29. The European Charter on the Statute for judges provides as follows:

“In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”.

30. According to the Explanatory Memorandum of the European Charter, the term “intervention” of an independent authority means an opinion, recommendation or proposal as well as an actual decision⁴.

⁴ See Consultative Council of European Judges (CCJE), Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, § 39.

31. Article 94.1 of the proposed Constitution sets out the composition of the Justice Council as follows: nine judges (it should not say “up to” nine judges, but according to the Armenian authorities this is a translation inaccuracy) elected by secret ballot for a period of five years by the General Assembly of Judges of the Republic of Armenia, two legal scholars appointed by the President of the Republic and two legal scholars appointed by the National Assembly.

32. Under new Article 94.1 § 3, the sittings of the Judicial Council will be chaired by the Chairman of the Cassation Court *without a right to vote*.

33. In the Commission’s view, the composition of the Judicial Council conforms to European standards as highlighted above.

34. At the meeting of 23-24 June, it had been agreed that the President of the Republic can only appoint or dismiss someone upon a recommendation or conclusion of the Judicial Council to this effect. This important principle needs to be more clearly reflected in Article 55 § 11.

35. The expression “upon the recommendation or conclusion of the Council of Justice” must unequivocally refer to any decision concerning the appointment, career progress or termination of office of a judge. The expression “*may* terminate their powers” should be replaced by “shall terminate their powers”. It should be clearly stipulated, in an additional point of paragraph 11, that the President shall, upon the recommendation or conclusion of the Council of Justice, “promote judges who are candidates for professional advancement”.

36. The Commission underlines the importance of regulating this matter in accordance with the applicable European standards. It recommends therefore that, in addition to rephrasing paragraph 11 of Article 55, the Armenian authorities prepare or revise the relevant law with the assistance of the Council of Europe.

E. Local self-government

37. The changes made in Chapter 7 on Local self-government meet the recommendations made by the Commission in its previous opinions. Thus, the principle that Yerevan is a community, hence a local self-government unit, is expressly stated. The new Article 108 affirms the principle that the Yerevan Mayor must be elected, though the law may provide for an *indirect election*, which is legitimate under the European Charter on Local Self-Government. Detailed provisions on the formation of the local self-government bodies and their functioning in the City of Yerevan will be specified by law. Should an indirect election of the Mayor *by the Council of Aldermen* be already envisaged as the solution, it would be appropriate to state it in Article 108.

F. Amendments to the Constitution

38. Pursuant to the revised Article 113, in order for the referendum on the constitutional reform to be considered valid, $\frac{1}{4}$ (instead of previously $\frac{1}{3}$) of registered voters must effectively express their vote. In the Commission’s view, this simplification is to be welcomed.

G. Transitional provisions

39. The Commission considers that the new constitutional provisions should enter into force as soon as practicable. The provisions concerning the mandates of the elected bodies (Article 63 § 2 and Article 107 § 1) obviously need to await the expiry of the mandate of the current ones.

III. Conclusions

40. The revised draft constitutional amendments represent an undoubted improvement as compared to earlier drafts commented upon by the Venice Commission. In the opinion of the Commission, a successful constitutional referendum on the basis of this text would constitute a good basis for ensuring the compliance of the Armenian Constitution with the European standards in the fields of respect for human rights, democracy and the rule of law, and would pave the way to further European integration. The Commission acknowledges the efforts and the good will of the Armenian authorities.

41. It is certainly important that the discussions of the final text be pursued in an open and transparent manner with the opposition forces and the civil society in Armenia. The broadest political consensus must be found.

42. The next main challenge will be to organise an appropriate referendum campaign leading to the adoption of the new Constitution for Armenia. The Commission encourages the Armenian authorities to do their utmost to ensure the success of the constitutional reform in November 2005. The reform must be presented in due time and form to the Armenian people. To this end, it is crucial that the referendum campaign be fairly, adequately and extensively broadcast by the media.

43. The Commission wishes to underline that the success of this process of constitutional reforms depends on and is the mirror of the maturity of the Armenian political class. Not only the majority, but also the opposition must prove their capability of compromising in order to achieve a workable political environment, which only can lead to democracy in Armenia.

44. Indeed, a good Constitution is certainly the first crucial step towards democracy. It is not sufficient though. The Armenian authorities will have to build a political and social context allowing for an effective realisation of the newly established system of government. The Commission stands ready to assist them in this crucial task.