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(VENICE COMMISSION)

AMENDMENTS TO THE LAW ON THE CONSTITUTIONAL COURT OF ARMENIA

Comments by

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The revision and amendment of the constitution of the Republic of Armenia was approved by popular referendum in 2005. The amendment affected the regulation of the Constitutional Court, too (Articles 93-102). The major constitutional amendments in this area are:

- Art. 94 of the constitution expressly declares that "the constitutional justice in the Republic of Armenia is administered by the Constitutional Court;

- the powers and the composition of the Constitutional Court shall be regulated by the constitution itself, and not by law;

- Art. 102 of the constitution introduces a procedural rule providing for the possibility of the *pro futuro* annulation of a law or a legal provision (the unconstitutional provision is not invalidated at the date of the publication of the Constitutional Court's decision, but at a later date);

- the independence of the members of the Constitutional Court is regulated by new provisions;

- besides the abstract control of norms, concrete norm control has been introduced where the necessity of the constitutional review is raised in a regular court proceedings (Art. 101.7);

- individual complaint has been introduced (Art. 101.6).

All these major changes in the constitution necessitated the amendment of the Law on the Constitutional Court. The remarks in the draft opinion sometimes refer to the "old provisions" of the law, though the main aim of this opinion to evaluate the newly amended provisions.

The amendments generally may be evaluated as widening the powers of the Constitutional Court, introducing new forms or constitutional review, and creating the possibility for individual citizens to seek protection by the Constitutional Court. These developments – stipulated primarily in the constitution – are to be welcomed. They are in conformity with European standards of rule of law, and adopt solutions already well-known in the constitutional justice system of several European countries.

However, the thorough examination of the provisions of the Law on the Constitutional Court raise quite a number of problems. The main concerns are the following:

1. The Law itself is quite long, and in some aspects too detailed. The complicated and lengthy way of regulating certain issues does not result always in a clear and precise formulation of the rules, on the contrary sometimes the language becomes rather vague. (Certainly, the not always appropriate French translation may contribute to the vagueness of the text, too.) Certain articles are repeated twice in the law. Sometimes the specially complicated and detailed regulation is closely connected to the very widely defined competences of the Constitutional Court, thus it follows from the constitutional amendment (see for example Chapter 9).
2. Some questions could be regulated in the internal rules of the Court without the danger of lowering the level of the necessary guarantees (Art. 44, 49.3, 49.5, 52)[1]. This would reasonably shorten the text of the law.

[1] The numbering of the articles is not consistent, the paragraphs are not divided clearly, e.g. 14.1.4, 21(2), 41.1, 57-1.9, etc.

On the other hand, the internal rules should be approved by the Constitutional Court and not the by its President (Art. 17.7).

3. The law does not cut off all the relations of the judges with their appointing authority. This is a mistaken concept. The appointment of a constitutional judge is the only area where politics directly interfere with constitutional courts. But after the election no links must exist. Thus the appointing authority should not have anything to do with the prosecution of the constitutional judge (Art. 12.2 and 14.1.4).

4. The principle of separation of powers is violated in some cases. The law introduces at least three peculiar and unusual institutions that are not known in the European practice of Constitutional Courts.

a) The interference of the President of the Republic as stipulated by Art. 14.5 is not simply unnecessary but violating the independence of the court. The President of the Republic should be left out from the exclusion of a constitutional judge. The exclusion should be issued by the decision of the Constitutional Court itself, and not by a presidential decree.

b) Similarly, the cautious procedure of annulling acts that could leave to the creation of legal *lacunae*, endangering legal certainty, mentioned in Art. 55.18 and 55.19, tries to avoid the hard consequences for the community and the State as a consequence of the annulment of a legal provision. However, the consultation with the 'competent organs' that issued the acts in question, seems exaggerated and should be avoided.

c) It is a strange and unusual solution in the law the establishment of special commissions led by a constitutional judge, and composed by government and local government agents. These commissions would address questions concerning the results of elections (57.5), the President of the Republic (59.9), and in other procedures (Art. 62 and 63). This kind of mixing of constitutional judges' responsibilities with other branches of power seem unacceptable.

5. The lengthy regulations of the law are partly the consequence of that basic philosophy that the procedural rules are shaped after the ordinary judiciary procedure. This solution is justified by the argument that it is a guarantee against the 'law-making activity of the Constitutional Court', and itself the self-limitation poses a legally binding limitation on the activities of the court. Procedural rules borrowed from ordinary court proceedings are regular in Constitutional Court procedures, however, it cannot be the proper way to restraint the activism of the court by imposing on it complicated and overregulated procedural rules.

6. The use of evidences in the Constitutional Court proceedings is rather alien in a procedure of norm control (constitutional review), the whole evidence system is very complicated, and seems useless. Moreover, the burden of proof is several times inversed without any justification (Art. 55, 57-1.9, 57-1.11).

7. The procedure is based on an adversary system (Art. 6). Nevertheless, in some cases the procedural rules put the obligation on the court to act following an inquisitorial logic (19.2, 21.2, 23). Both systems can be accepted, the problem is rather the inconsequent way of regulation of this issue.

Reviewing certain regulated topics – like that of the access to the court files, or the media information – one has again the feeling that less would be more. The rules of access to files are not

regulated properly. In the case of the information given to the media, issues like this could be decided on a case by case basis, and they do not require regulation in law.

Besides these groups of discussable provisions, other particular problems should be mentioned.

Art. 27.2. It is not clear which law regulates the court fees?

Art. 39.3. Interpreters, witnesses should be distinguished from the parties of the procedure.

Art. 52.5 Why is it necessary that the minutes should be signed by all members of the Court?

Art. 55 The numbering is strange, after para 6 comes 9.

Art. 55-1. In the case of the individual complaint it is very important to regulate how does the decision of the Constitutional Court effect the decision of the individual last instance.
The final and binding decision of an ordinary court is overruled by the Constitutional Court, and the modalities of this revision should be regulated by the law.

Art. 66.7. The possibility of making public dissenting opinions has been missing so far from the Armenian system of judicial review. The introduction of the possibility of dissenting opinions is to be welcomed but they should be allowed in all Constitutional Court cases and not restricted.

Finally, some reflections to the remarks of Schnutz. I agree with most of them, with the following few exceptions:

Art 3.1. The exclusion of double citizenship is a very complicated problem. I would leave to the discretion of the legislator to decide on it.

Art. 3.3 The sense of this provision is that teaching or other activities allowed for judges cannot be excuse for not taking part in the court's work.
Art. 7 in my view provides the necessary guarantees for the financial independence of the court. I can accept that the government might reject – in a justified way – certain financial demands of the court.
Art. 29.2. For me it is acceptable that questions of admissibility should be regulated by the internal rules and not by law.