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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON AMENDMENTS TO THE LAW ON THE CONSTITUTIONAL COURT

OF ARMENIA

on the basis of comments by

Mr. J. CARDOSO DA COSTA (Member, Portugal)
Mr. P. PACZOLAY (Member, Hungary)

1. During the 65th Plenary Session of the Venice Commission (17-18 March 2006), the President of the Constitutional Court of Armenia and member of the Commission, Mr. G. Harutyunian, requested an opinion on draft amendments to the Law on the Constitutional Court of Armenia (CDL(2006)045).

2. The Commission appointed Messrs Cardoso da Costa and Paczolay as rapporteurs on this issue. Their comments figure in documents CDL(2006)047 and 046.

3. On 26 April 2006, the Head of the Constitutional Justice Division of the Secretariat of the Venice Commission, Mr. Dürr, participated in a meeting on the draft law in Yerevan in which the following persons participated: Mr. G. Harutyunian, Mr. Rafik Petrosyan, Member of Parliament, Chair of the Standing Committee on Legal and State Issues of the National Assembly, Mr. Hovhannes Margaryan, Member of Parliament, Vice-Chair of the Standing Committee on Legal and State Issues of the National Assembly, Mr. Anatoly Matevosyan, Deputy Minister of Justice, Ms. Liana Hakobyan, the Head of Legal Division of the Constitutional Court and Mr. Karen Andreasyan, Adviser to the Constitutional Court. During this meeting the comments made by the rapporteurs were discussed.

4. On 19 May 2006, the Court transmitted a revised version of the draft amendments (CDL(2006)045rev.). This text, which then had passed the first reading in Parliament is the subject of the present [draft] opinion.

5. The present [draft] opinion has been adopted by the Venice Commission at its ... Plenary Session on ...

General remarks

6. The amendments are required in order to adapt the law to changes of status and jurisdiction brought about by the recent constitutional amendments. The draft amendments are to enter into force on 1 July 2006 in order to allow the Court to assume its new competence of the individual complaint.

7. The revised version of the draft law represents a clear improvement as compared to the first version. Many issues (some of which were also due to problems of translation) have been settled. In particular, the Commission welcomes that:

1. In case of the finding of unconstitutionality of a law on the basis of an individual appeal, the review of the court decision against the individual is explicitly provided for in Article 69.12.
2. An exception can be made from the payment of a court fee in case of low income of an applicant (Article 27.3).
3. Some complicated rules on evidence and on the reversal of the burden of proof have been removed from the draft amendments. The remaining rules seem acceptable.
4. The requirement to have the diploma of a legal representative certified by a notary has been deleted (Article 46.3)
5. Chapter 9 on the Acts of the Constitutional Court is set out in a much clearer way.
6. Article 77 on the decision of the Court on the incapacity of the President of the Republic to perform his or her office now gives – to the extent possible – the President the right to present his or her standpoint on this incapacity.
7. Article 80 no longer provides that in case of doubt a political party should be represented by previous leaders rather than the current *de facto* leadership.

8. Nevertheless some issues remain open two of which relate to the separation of powers:

A. Participation of the President and Parliament in the lifting of immunity and dismissal of Constitutional Court judges

9. Both the Constitution and the draft amendments provide for a decision by the Constitutional Court on lifting of immunity and dismissal of its judges. However, on the basis of such a decision by the Court, the respective appointing authority of the judge concerned (President or Parliament) can – but is not obliged to – lift the immunity or dismiss the judge. If these authorities were to refuse the lifting of immunity or the dismissal of a judge for political reasons, the Court would be forced to continue to work with a judge which it had found unfit for this position. This could create a situation of serious tension within the Court which be detrimental to its smooth functioning.

10. This problem is however not rooted in the draft amendments but originates in the Constitution itself (Articles 55.10 and 83.3). Consequently, only a constitutional amendment would allow a full solution to this problem.

11. The Armenian Constitution is quite rigid and cannot be easily amended. During the meeting in Yerevan, agreement was reached that at least the explanatory memorandum to the draft amendments should set out that the appointing authorities are expected to exercise their discretion bearing in mind the need to guarantee the smooth functioning of the Court.

B. Special investigation committees:

12. The draft amendments provide for the establishment of committees entrusted with the collection of evidence in the case of disputes related to the results of referenda (Article 73.2) and by reference also for electoral disputes (Article 74.8). These investigation committees are composed "one of the Members of the Constitutional Court (as a leader of the Committee(s)) and the employees of the same or different bodies as well as the Deputies of the Parliament, local and international observers upon their agreement".

13. The establishment of such committees can create a problem of separation of powers. On the one hand, Members of Parliament who may have a political interest in the issue participate in the committee. On the other hand, the presence of a judge of the Court gives such a committee an increased credibility, which may make it difficult for the Court to overrule the committee's findings.

14. During the discussion of the draft amendment, the Court insisted that such committees already existed in the current practice. Candidates, political parties etc. had a legitimate interest to see how facts were collected. The Court as a whole was not in a position to do this 'data collection' itself.

15. If indeed such committees were deemed indispensable, at least they should not as such report to the Court but the report should be drawn up only by the participating Constitutional Court judge. The other participants could then present to the Court their opinion individually but separately from the report by the Judge. The current draft does not yet contain such a provision.

16. Another, different type of investigation committee is established in the impeachment procedure of Article 76.9 (and by reference in Article 80 on the prohibition of political parties). The Court can "form a body of preliminary investigation, a special committee with powers

determined by Law, which includes two Members of the Court of Cassation and the President of one of the Chambers of it as the leader of the committee."

17. It was pointed out that Cassation Court judges had special expertise in criminal cases and that some involvement of the Court of Cassation in the impeachment procedure was useful in order to link up to a possible separate criminal trial against the President (e.g. on high treason). In any case, the final decision on impeachment would be taken by the Constitutional Court and not the committee. Clearly, the judges concerned also must not sit on any case related to criminal charges against the President.

18. Following the discussions in Yerevan, the sentence "The submitted evidence has to be examined by the Constitutional Court by the general procedure prescribed by this Law" was added to make it clear that the evidence provided by the Committee has again to be examined by the Constitutional Court. Given that in this investigation committee only the judiciary is represented, this solution may be acceptable as long as the Constitutional Court remains the only body authorised to decide on impeachment or the suppression of a political party.

C. Further Remarks Article by Article

19. Some articles (e.g. Article 13 on the uniforms of the judges or Article 50 on the requirement to stand up when the members of the Court enter the room) are very detailed and should be moved to the rules of procedure. The possibility for the Court to adapt its procedure without the necessity of an intervention by from Parliament is important even from a point of view of the independence of the Court.

20. The **decision on a violation of the procedure of appointing a judge to the Constitutional Court** (Article 14.7.7) **should to be taken by the Court itself and not an ordinary court** (without the participation of the judge concerned)**.** In general, all grounds for termination of membership in Article 14.1 should be subject to at least a **formal decision or declaration of the Constitutional Court** itself.

21. Should any sentence even for a minor offence automatically lead to the termination of the membership of a judge (Article 14.1.6)?

22. Article 14.2: In some countries, vacant seats at the Constitutional Court were not filled within time for political reasons. In one case this led to the Court being unable sit due to the lack of a quorum. In order to **guarantee the uninterrupted functioning of the Constitutional Court** the members of the court should continue in their functions until their successor is appointed. Together with the present opinion the Venice Commission adopts an opinion on possible ways to ensure the uninterrupted functioning of the Constitutional Court of Ukraine (CDL-AD (2006) *), which provides more information on a possible solution.

23. A number of **deadlines in the draft are very tight**. Especially, in case of an inflow of individual complaints it may be very difficult to remain within these deadlines (e.g. Articles 29.3, 29.4, 29.5, 31.6, 65.1 and others).

24. The revised Article 29 provides that the Court's personnel can 'return' a case to the applicant if it does not find it admissible (similar to German practice). Article 29.5 gives a right to appeal against such a 'return' to the President of the Court. Such an **appeal should lie to a committee of three judges** (like in Article 69.6) **rather than to the Court's President only**.

25. The new Article 32.4 obliges the court to reject a claim if there is already another claim with the same subject. This makes Article 39 on the combining of cases useless. Indeed, such cases the **Court should not be obliged to reject a claim on the same subject as a pending case but be allowed to combine it with the first claim**.

26. The various procedures in Chapter 10 do not mention who is authorised to file an application in each case. This information is available only in Article 101 of the Constitution. The draft would become far more readable if this information were indicated (repeated) for each procedure also in the law on the Court.

27. The limitation of dissenting opinions to cases of constitutional review of laws and of treaties seems to be an acceptable middle way excluding more politicised powers like electoral disputes or impeachment (Article 62.7).

28. Article 68.7 provides that the **Court proceeds from a limitative number of factors**:

> "1) the type and the form of the legal act;
> 2) the time when the act was adopted, as well as whether it got into force in compliance with established procedures;
> 3) the necessity of protection and free exercise of human rights and freedoms enshrined in the Constitution, the grounds and frames of their permissible restriction;
> 4) the principle of separation of powers as enshrined in the Constitution;
> 5) the permissible limits of powers of state and local self-government bodies and their officials,
> 6) the necessity of ensuring direct application of the Constitution."

Such a limitation of the approach by the Court is unusual. While especially item 6 seems capable to cover any principle not expressly mentioned, it will be up to the Court itself to avoid giving any restrictive meaning to this list of factors.

29. The general effects of a decision on unconstitutionality are set out more clearly in Article 68.10, 68.12 and 68.13. Article 68.12 provides that the Constitutional Court can exceptionally invalidate an act *ex tunc* if otherwise 'irretrievable consequences' would be caused. In such a case, individual acts dating back three years, which were based on the unconstitutional act can be revisited by the courts and the administration. Instead of the fixed three year rule, the Court could be given the powers to determine this period. (In the same paragraph it should probably read "found unconstitutional and annulled").

30. Article 71.1 provides that ordinary courts and the Chief Prosecutor appeal to the Constitutional Court if they 'find' that the a legal act they have to apply is unconstitutional. It would be sufficient that they have a 'doubt' about the constitutionality. The Constitution (Article 101.7) does not require a 'finding' of unconstitutionality.

Conclusions

31. The amendments are coherently drafted and should allow the Court to assume its widened jurisdiction. The revised draft, which remains very detailed, settles a number of issues brought up by the rapporteurs. Apart from problems related to the link between a constitutional court judge and the appointing authority after his or her appointment and special investigation committees, some specific issues remain:

1. The decision on a violation of the procedure of appointing a judge to the Constitutional Court (Article 14.7.7) should to be taken by the Court itself and not an ordinary court. In general, all grounds for termination of membership should be subject to at least a formal decision or declaration of the Constitutional Court itself.
2. In order to guarantee the uninterrupted functioning of the Constitutional Court, judges should continue in their functions until their successor is appointed.
3. Some deadlines in the draft seem very tight.
4. An appeal against the 'return' of application decided by the staff of the court should be available to a committee of three judges rather than to the Court's President only.
5. the Court should not be obliged to reject a claim on the same subject as a pending case but be allowed to join it with the first claim.