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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION
ON THE DRAFT LAW
ON THE HUMAN RIGHTS DEFENDER
OF ARMENIA

Adopted by the Venice Commission
at its 54th Plenary Session
(Venice 14-15 March 2003)
on the basis of comments by:

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Introduction

On 17 January 2003 the Vice President of the National Assembly of Armenia, Mr Torossian, asked the Venice Commission for its opinion on the Draft Law on the Human Rights Defender of Armenia (CDL (2003) 17). Following this request, the Venice Commission appointed Ms Serra Lopes as rapporteur on this issue. The Commission adopted her comments (CDL (2003) 23) set out below at its 54th Plenary session (Venice, 14-15 March 2003.

I- General remark

The new Draft on the Human Rights Defender (hereinafter "the draft Law") is, in many respects, similar to previous one (hereinafter "the previous draft"), about which I submitted my comments in March 2001 (see CDL (2001) 26, annexed hereto), but contains significant improvements, such as the Defender's appointment by Parliament. In the present opinion, I will confine myself to examining in detail the provisions which have been modified; for the rest, I refer to my previous comments.

II- Comments on the draft Law

Article 2. Human Rights Defender

The previous version of article 2, first paragraph, stated "The Defender is a *state official*."

The new one omits the word "state". The new formulation seems to be more appropriate.

Article 2 of the draft Law set out the general mandate of the Human Rights Defender.

The same article of the former draft law listed, in its paragraph 2, the Defender's concrete fields of action (restitution of violated rights of physical and legal persons; improvement of human rights legislation and compatibility thereof with international standards; development of international cooperation in the domain of human rights; public awareness of human rights and their methods of protection) and underlined, in its paragraph 3, that the Defender's activities would supplement the existing instruments of human rights protection without exempting the Court and central and local government agencies from their respective responsibilities.

It is regrettable that these paragraphs have not been reproduced in the new draft law. There is no similar provision in the current draft law, clarifying the scope of action of the Defender. Moreover, a comparison between the this draft and the previous one might lead to argue that the Defender's mandate has been reduced.

Article 3. Appointment of the Defender

This Article corresponds to Article 4 of the former draft.

The new formulation of paragraph 1, setting out the requisites for being eligible to the position of defender, serves better the institution and is in accordance with my previous suggestion. I agree with the suppression of the second part of this paragraph in its former version.

Paragraph 2 sets out the appointment procedure. It introduces appointment of the Defender by the Parliamentary Assembly, which is an undoubted step forward in respect of the previous draft in terms of independence of this institution from the Executive, which it is mandated to control. It is in accordance with paragraph 4 of the Principles Relating to the Status of National Institutions for the promotion and protection of human rights (the United Nations' so-called "Paris Principles"). In particular, the appointment of the Defender *"by a vote of more than half of the general number of deputies"* is in accordance with my previous suggestion to provide for the election of the Defender by a qualified majority of the members of parliament. Actually, the larger the majority of the deputies involved in the appointment of the Human Rights Defender, the greater his independence and public authority. I assume that the appointment is made *"from candidates nominated by the President of the Republic* ***and*** *1/5 of the National Assembly deputies"* (otherwise the sense of this last phrase would be unclear).

Paragraph 4 is new and perfectly acceptable.

[Former Article 3 — *Regulations Governing the Activities of the Defender* —disappeared with no visible advantage to the institution]

Article 4. Restriction on Other Activities of the Defender

This Article corresponds to Article 5 of the previous Draft, with minor and irrelevant alterations.

Article 5. Independence of the Defender

This article corresponds in substance to former Article 6 and is better formulated.

Article 6. Termination of the Defender's Powers

This article corresponds to former Article 7 of the former Draft with generally positive alterations. In particular, the new time-limit of one month (as opposed to the previous fifteen days) for appointing a new Defender, in paragraph 6, seems to be more realistic and adequate. In paragraph 2.1, reference should be made to Article 4 and not 5.

Article 7. Complaints that are subject to the Defender's Consideration

This Article corresponds to Article 8 of the previous Draft, with minor phrasal alterations.
The new Draft limits the right of the Defender to speak at Cabinet meetings and in the National Assembly to the *"issues related to civic rights and freedoms"*. This formula should not be used to restrict this important prerogative of the Defender.

Article 8. The Right to Appeal to the Defender

This article reproduces Article 9 of the previous Draft, with certain minor alterations in paragraphs 2, 4 and 5. In paragraph 3, the restriction of the possibility of appealing on behalf of deceased persons to family members and representatives only has been maintained, despite my suggestion to adopt a broader formulation such as "claims addressed to the defender are not subject to any requirements concerning a direct, personal and legitimate interest on the part of the claimant".

Article 9. Appealing to the Defender

This provision reproduces in substance Article 10 of the previous Draft. In paragraph 2, however, it introduces the possibility of submitting, during the first year of application of the law, to the Defender's consideration complaints relating to situation occurred in the previous five years. This is a positive innovation.

Article 10. Complaints that are not subject to the Defender's Consideration

This provision has a better formulation than its previous corresponding article, particularly its paragraph 3. Paragraph 4 introduces the need to seek the complainant's consent prior to submitting the claim to another official for consideration. This provision is to be evaluated positively.

Article 11. Receiving of Complaints

This article corresponds to Article 12 of the previous draft. Paragraph 1.3 now requires the complainant's consent prior to referring a claim to the competent authorities, which is a positive innovation. Paragraph 8 maintains the possibility for the Defender to take up certain issues upon its own initiative – though unfortunately only in limited cases – but, and this is positive, does not require any longer that the relevant decision be made public.

Article 14. Publication of Complaints or their Content

These articles reproduce in substance Articles 13, 14 and 15 respectively of the previous Draft.

Article 15. The Defender's Decisions

This article reproduces previous Article 16.
Provision is made in paragraph 1 for the possibility for the Defender (after modification of the Constitution on this point: see Article 27) to apply to the Constitutional Court in respect of violations of human rights and freedoms. This new prerogative of the Defender is in line with the recommendation of the Commission and the European standards. Paragraph 5 provides for the possibility for the Defender to submit special reports to the President of the Republic and the National Assembly, which is a certainly positive innovation. The expression *"upon necessity"* is however very vague and should be clarified.

Article 16. Clarifications Given by the Defender

This provision corresponds in substance to former Article 17.

Article 17. The Defender's Report

This provision corresponds to former Article 18. The adjective *"public"* for the Defender's report has disappeared.

Article 18. Liability for Non Compliance With the Requirements of the Law

This provision reproduces in substance former Article 20.

Article 19. The Defender's Immunity

This provision corresponds to previous Article 20. It is now foreseen, consistently with the new appointment procedure and with the exception of the initial transitory period, that, in case the Defender is caught in the act of crime, the official person executing the arrest shall immediately inform the National Assembly, and not the President of the Republic as before.

Article 20. Social Guarantees for the Defender

This provision regulates in particular the level of salary of the defender, which in former Article 22 had been left for legislation to determine. This constitutes a positive innovation.

Article 21. Security of the Defender

In respect of previous Article 23, the right of the Defender to carry a registered weapon has been suppressed.

Article 22. The Deputy Defender

This provision corresponds to Article 24 of the previous version with a better formulation. Under the new draft, the deputy defender is going to be elected by Parliament. The draft law fails to provide for a transitional provision concerning the appointment of the deputy Defender pending the reform of the Constitution.

Article 23. The Status of the Defender's Staff

This article corresponds to Article 25 of the former draft with a new paragraph 6 to cover situations that were not previously envisaged. The reference in paragraph 5 should go to Article 12 rather than Article 13.

Article 24. Financing of the Defender's Activities

This provision corresponds to Article 26 of the former draft. In paragraph 3, reference should be made to Article 17 and not 18.

Article 27 - Transitional Provisions

Under the current Constitution of Armenia, state officials are appointed by the President; so long as the Constitution is not amended, this provision applies also to the Human Rights Defender. The question which arises is whether the establishment of this institution should be made dependent upon the reform of the Constitution. For quite a long time, when this reform was presented as imminent, the Commission and the Council of Europe were convinced that is was worth waiting for it. Time has passed: the reform has not made it through the procedural labyrinth. A working group established by the Venice Commission concluded, in July 2002 (see CDL (2002) 109), that it was preferable, in the light of the continued postponement of the constitutional reform, to proceed with the adoption of the law, making provision for an initial, transitory appointment by the President "after consulting with the groups and factions of the National Assembly".

In its Resolution 1304(2002) on "Honouring of obligations and commitments by Armenia" adopted on 26 September 2002, the Parliamentary Assembly of the Council of Europe has subsequently invited Armenia "to defer the adoption of the law on the ombudsman no longer".

Such solution is clearly one of compromise, a presidential appointment presenting the actual risk of casting doubts as to the defender's independence, which would be of great prejudice to the newly created institution. In accordance with the conclusions of the working group, however, provision is made for prior consultation with the parliamentary forces, which would add to the institution's pluralism and independence. Furthermore, this solution would, indeed, present the advantage of allowing for the preparatory steps for establishing the institution to be carried out with no further delay.

In order for this compromise to be acceptable, however, it is essential that it be explicitly stated, in Article 27, that the mandate of the president-appointed defender should be a transitory and "technical" one, designed to set up the structures of the office rather than to start dealing with complaints. In addition, the duration of this mandate needs to be made dependent on the actual possibility for the National Assembly to elect the new defender: in other words, as soon as the Constitution gets changed, Parliament should proceed with filling the post of defender, and the previously appointed one should leave office (unless, of course, elected by parliament). Similarly, should the Deputy Defender be initially president-appointed (a transitional provision in this respect is lacking), the duration of his mandate should cease upon election of his successor by Parliament.

With these guarantees, and in a spirit of compromise, it is possible to support the proposed establishment of the institution of human rights defender prior to providing a constitutional basis for its election by parliament.

It is to be noted that the constitutional reform is again presented as imminent, and the relevant referendum is now planned for late May 2003 (its feasibility, however, depends on the follow up to the recent presidential elections. Clearly, should it indeed prove possible to hold the referendum in May (or shortly afterwards), there would be no reason to push for the adoption of the law prior to it.