Strasbourg, 11 December 2001
<cdl\doc\2001\cdl\133-e>

Restricted
CDL (2001) 133
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE RATIFICATION OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF THE REPUBLIC OF ARMENIA OF 1995

I . Introduction

1. Following the discussions held at the 47th and 48th Plenary Meetings of the Venice Commission (Venice, 6-7 July 2001 and 19-20 October 2001), the Armenian authorities have asked the Venice Commission to examine the question of the possible ratification of the European Convention for the Protection Human Rights and Fundamental Freedoms (further on "the European Convention") and its Protocols under the Constitution of the Republic of Armenia of 1995 (hereinafter "the Constitution" or the "Armenian Constitution").

2. The purpose of this opinion is thus to establish whether there are any non reconcilable contradictions between the European Convention and its Protocols on the one side, and the Armenian Constitution on the other side, which would prevent Armenia from ratifying the said international instruments without awaiting the constitutional reform scheduled for 2002. However, a possible conclusion that the European Convention can be incorporated in the current Armenian legal system without any prior constitutional reform, does not amount to saying that it can be effectively and successfully applied in Armenia without changing the Constitution in due time.

II Application of international treaties according to the 1995 Constitution.

3. Article 6 of the Armenian Constitution establishes in Para 1 that "*The supremacy of law shall be guaranteed in the Republic of Armenia*". The Constitution "*has supreme judicial force, and its norms are applicable directly*' (Para 2). In Para 4 the same article provides that "*International treaties that contradict the Constitution may be ratified after making a corresponding amendment to the Constitution*". This means that before ratifying any international treaty, the Parliament must compare its provisions with the norms of the Constitution. If any "contradictions" are found, a constitutional amendment will be required prior to the ratification concerned.

4. In this context, the question of the sense of the word "contradiction" can be raised. A strict interpretation of this term would require that the text of the Constitution should be modified whenever its wording does not coincide with or correspond to that of the relevant treaty provision. Such interpretation, however, seems to be far too restrictive. It seems more reasonable to consider that a "contradiction" is an absolute incompatibility between the two provisions: in practice, this would only occur in cases where the Constitution explicitly excludes a right that is instead explicitly provided for by a treaty, or when the Constitution imposes a conduct that is explicitly forbidden by the treaty.

5. A constitutional amendment will thus be needed prior to ratification of a treaty, when the latter contradicts the Constitution. Amendments to the Constitution cannot be done by any State power, not even by the Parliament, but only, pursuant to Article 111 § 1 of the Constitution, " (…) *by referendum, which may be initiated by the President of the Republic or the National Assembly*".

III. The Constitution and the European Convention.

6. The European Convention provides in its Article 1 that "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*". The rights protected under the European Convention, listed in this Section I, mostly correspond to those guaranteed by the current Constitution of the Republic of Armenia.

7. The Constitution of Armenia in fact provides a satisfactory guarantee for the protection of fundamental rights and freedoms. Article 4 provides that "*The State guarantees the protection of human rights and freedoms based on the Constitution and the laws, in accordance with the principles and norms of international law*." Its Chapter II (Articles 14 – 48) establishes a list of rights protected. Moreover, its Article 43 establishes that "*The rights and freedoms set forth in the Constitution are not exhaustive and shall not be construed to exclude other universally accepted human and civil rights and freedoms*".

8. An in-depth analysis of the Constitution reveals nevertheless certain apparent "contradictions" between it and the European Convention and its Protocols that deserve a detailed examination. They concern essentially the restriction of certain rights to citizens only and the provision on the death penalty.

a) Restriction of certain rights to citizens only

9. As underlined in the *Study on the compatibility of the legal system of the Republic of Armenia with the requirements of the European Convention,* carried out by the Directorate General of Human Rights in 2000[1], certain rights set forth in the Armenian Constitution are granted to citizens only, despite the wording of Article 16 of the Constitution according to which "*All are equal before the law and shall be given equal protection of the law without discrimination*".

10. These rights are: the right not to be discriminated against (Article 14); the right to freedom of movement (Article 22); the right to found political parties and become members thereof (Article 25 § 2); the right to peaceful assembly (Article 26); the right to elect and to be elected (Article 27); the right of property on land (Article 28); the right of freedom of choice in employment (Article 29); the right to an adequate standard of living and to adequate housing (Article 31); the right to social security (Article 33); the right to education (Article 35); and the right to preservation of one's traditions (Article 37).

11. To the extent that the European Convention enshrines fundamental rights which belong to "everyone" and are not restricted to citizens, and in the light of its

[1] Doc. H (2000) 12
[2] A reform of the Armenian criminal code is under way. Under the new code, the death penalty would not be foreseen.

Article 14 that prohibits unjustified differences in treatment – in respect of the rights laid down in the European Convention - of individuals in analogous situations, notably on the ground of their national origin, a contradiction may seem to exist with the Armenian Constitution.

12. However, a real contradiction may only be found where the constitutional provisions expressly prevent non-citizens from enjoying the rights enshrined in the European Convention.

13. In all other cases, the wording of the Constitution does not prevent non-citizens from being granted the same rights at a lower level of the hierarchy of norms.

14. In this respect, it must be recalled that the Armenian Constitution provides for the direct applicability of international treaties and for their supremacy over ordinary laws (Article 6 § 5). Accordingly, once ratified, the European Convention will be incorporated into the Armenian legal system and prevail over domestic laws.

15. Accordingly, after ratification non-citizens will be granted the rights in question by direct operation of the European Convention that – it must be underlined - does not require that the rights guaranteed therein be given constitutional protection.

16. Of the provisions listed in paragraph 10 above, only one sets out an explicit difference in treatment in relation to non-citizens: Article 28 § 2, providing that "*Foreign citizens and persons without citizenship shall not have the right to own land, except in cases prescribed by law*".

17. Article 1 of Protocol No. 1 to the European Convention provides that *"Every natural and legal person is entitled to the peaceful enjoyment of its possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

18. The latter provision only applies to "existing possessions" and thus does not recognise any right to become the owner of property (see No. 23131/93, dec. 4 March 1996, unreported, and No. 25497/94, D.R. 85, p. 126). Further, no potential right to inherit is guaranteed under Article 1 (see European Court HR, Marckx v. Belgium judgment of 1979, § 50). Only once acquired, can the right to inherit constitute a "possession" within the meaning of the said provision (see No. 8695/79, D.R. 39, p. 26).

19. Insofar as foreigners have not, to date, been in a position to acquire property, either directly or through succession, over Armenian land on the ground of the existing provisions forbidding them to do so, they cannot invoke the protection of Article 1 of Protocol No. 1, either alone or in conjunction with Article 14.

20. Instead, to the extent that Article 28 § 2 of the Armenian Constitution places a restriction on the possibility for Armenian citizens to dispose of their property (should

they wish to sell or leave a portion of their land to a foreigner), it could amount to an interference with these citizens' right to the peaceful enjoyment of their possessions within the meaning of the first paragraph of Article 1 (see, for example, No. 21632/93, dec. 30 November 1994, unreported). However, in the light of the legitimate aim pursued by this provision (the need to preserve the (limited) Armenian land as a national richness) and of the wide margin of appreciation of which States dispose in this field, the Commission finds that there is no *prima facie* contradiction between the Armenian Constitution and Article 1 of Protocol No. 1, either alone or taken in conjunction with Article 14 of the European Convention, that could *a priori* prevent Armenia from ratifying the international instruments in question.

b) *Death penalty*

21. Article 17 of the Constitution provides, in its second paragraph, that "*Until such time as it is abolished, the death penalty may be prescribed by law for particular capital crimes, as an exceptional punishment*".

22. Article 1 of Protocol 6 provides that: "*The death penalty shall be abolished. No-one shall be condemned to such penalty or executed"***.**

23. In the Venice Commission's opinion, the two provisions do not conflict. Article 1 requires the abolition of the death penalty; Article 17 itself anticipates such abolition and constitutes a sort of interim provision aiming at limiting the cases in which that sanction, as long as it is in force, can be imposed.

24. The Constitution being silent about the form in which the said abolition must be done, it can be achieved through the ratification of Protocol 6^2: ratification that, in the light of the Armenian system of hierarchy of norms (see paras 14 e 15 above), would prevent the legislator from reintroducing the death penalty. For these reasons, it would not even be necessary, from a formal point of view, to modify the wording of Article 17 of the Constitution, once the death penalty abolished.

IV. Conclusion

25. Nothing in the European Convention on Human Rights and its Protocols can be said to "contradict" the current Constitution of the Republic of Armenia. Accordingly, the latter can, and indeed should, ratify those international instruments without awaiting the Constitutional reform scheduled for 2002.

26. However, in order to allow that the European Convention be applied effectively, it is imperative that the said reform be effected without any undue delays.