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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AMENDMENTS TO THE LAW ON THE HUMAN RIGHTS DEFENDER OF ARMENIA

Comments by

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I. Introduction

The following comments are submitted to the European Commission on Democracy through Law (the Venice Commission) in response to a request to the Commission for providing an opinion, jointly with the General Directorate for Human Rights and the Human Rights Commissioner of the Council of Europe, on a Law of the Republic of Armenia making amendments and additions to the Law on the Human Rights Defender of Armenia. The request was submitted on the part of the Republic by the Speaker of the Armenian National Assembly (the Azgayin Zhoghov), Mr. Tigran Torosyan.

The Law presented for consideration (referred to herein as the "Amending Law") was adopted by the National Assembly on 1 June 2006 and entered into force upon its public promulgation. The Law refers to the basic Law of the Republic of Armenia on the Human Rights Defender, which was adopted by the National Assembly on 21 October 2003 and entered into force on 1 January 2004. The comments set forth below chiefly relate to the provisions of the Amending Law itself, but also include certain general remarks with respect to the comprehensive Law as now amended.

II. Background of the Amending Law

1. Briefly, the institution of Human Rights Defender or Ombudsman was first established within the Armenian legal system by the above Law entering into force on 1 January 2004. At the time of its preparation, the Armenian people were engaged in a revision of the Constitution of the Republic adopted in 1995 (cf. the Venice Commission's CDL (1995) 62). During this process of constitutional reform, the introduction of the Human Rights Defender or Ombudsman in Armenia was also being independently considered, and a draft Law on this institution was referred to the Venice Commission for review in 2001 (CDL (2001) 22) and was commented on by Mrs. Maria de Jesus Serra Lopez (CDL (2001) 26) on its behalf.

2. At the time, the question whether the institution would be sufficiently introduced by means of parliamentary legislation or whether its establishment should wait until it could be squarely embedded on the constitutional level within a revised Constitution was being discussed as a major issue, as reflected in the said comments. One reason for concern in this regard was that under the Constitution of 1995, the appointment of high public officials such as an Ombudsman was to be made by the President of the Republic, whereas the dominant view among European countries has been that the Ombudsman should be selected by the legislative power on the basis of a consensus sufficiently broad to ensure his or her independence and impartiality and the credibility of the institution towards the general public.

3. When it became apparent that the constitutional revision would take a longer time than initially anticipated, it was resolved to look into pragmatic ways of overcoming the difficulties which might ensue for the progress of other legislative reform. The Venice Commission participated in the discussion of this matter through a Working Group which subsequently reported on conclusions arrived at in its meeting with the Armenian Authorities in July 2002 (CDL (2002) 109). As there related, it was thought preferable to proceed with the adoption of a Law on the Human Rights Defender prior to the anticipated reform of the Constitution, on the understanding "*that this Law should provide that the appointment of the Defender is done by the President in consultation with the political forces represented in parliament*". In other words, the conclusion was that a compromise might be sought between the existing constitutional rule and the above general view in favour of selection by the National Assembly.

4. In the result, a new draft Law was prepared and also referred for review to the Venice Commission (CDL (2003) 62), which rendered its opinion on the basis of new comments by Mrs. Serra Lopez (CDL-AD (2003) 6). Among other changes, it included a provision whereby

the appointment of the Defender was to be effected "*by the National Assembly by a vote of more than 3/5 of the general number of deputies from candidates nominated by both the President of the Republic and at least 1/5 of the National Assembly deputies*". This text accorded with the above conclusion and also with suggestions included within CDL (2001) 26, and became a part of the Law as adopted (Article 3, para. 2). By a transitional provision, however, it was decided that the paragraph would not become effective until the entry into force of constitutional amendments relating to the Defender, and that for the intervening period, a first Defender would be appointed by the President of the Republic under observation of the principle reflected in the report above quoted. This procedure was then followed in due course.

5. The process of constitutional reform has since been completed by the adoption of a new Constitution in 2005, on the basis of national referenda held on 5 July and 5 December that year. In its Article 83.1, the Constitution explicitly provides for the presence of a Human Rights Defender as a basic part of the Armenian legal system, and lays down the principles governing his or her election/appointment (para. 1), qualifications for office (para. 2), security of tenure (para. 3) and general status and scope of activity (para. 4). In Article 18, para. 3 the Constitution also provides a guarantee of access to the Defender ("*Everyone shall be entitled to have the support of the Human Rights Defender for the protection of his/her rights and freedoms on the grounds and in conformity with the procedure described by law*").

6. Further, in Article 101 concerning access to the Constitutional Court of Armenia, the Defender (in subpara. 8) is endowed with standing to apply to the Constitutional Court on the issue of compliance of normative acts as listed in Article 100 (i.e. laws and resolutions of the National Assembly, orders and decrees of the President of the Republic, and resolutions/regulations of Government) with the provisions of Chapter 2 of the Constitution, which deals with fundamental human and civil rights and freedoms.

7. In accordance with the above transitional provision, a new Defender was duly appointed for a full term following the entry into force of the Constitution. However, the governing principles declared therein resulted in certain inconsistencies between the Constitution and the Law on the Human Rights Defender, primarily with respect to the procedure for the election/appointment of the Defender, the qualifications required for the office, and the scope of the powers vested in the institution. The Amending Law clearly has been prepared and adopted for the purpose of eliminating these inconsistencies in favour of the Constitution, and the scope of the actual amendments appears to have been limited accordingly. This clearly is to be commended as a laudable action. It is proper to note that the initiative for the amendments was made by the Defender's office as now constituted, and there is no indication that views expressed on his part were disputed by the National Assembly members in processing the actual Law.

8. The further issue whether the opportunity might have been used to adopt more extensive changes in the rules applicable to the Human Rights Defender of Armenia, or whether a future effort towards such changes might be desirable, will be touched upon briefly in relation to some of the amendments, but otherwise referred to within the General Remarks below.

III. Provisions of the Amending Law

9. The several Articles of the Amending Law will now be commented on in order. According to the text in English translation presented to the Commission (CDL (2006) xx), they are numbered not in continuous sequence, but by the number of those Articles of the Law to which the respective amendments relate.

Article 1 – General Provisions

10. This Article as now amended states that the Law "*defines the procedure of election and dismissal of the Human Rights Defender, as well as the powers, the terms and the guarantees of his/her activity*". The sole change is the replacement of the prior word "*appointment*" by the word "*election*", which is logical in view of the terms of Article 83.1(1), of the Constitution (cf. item 18 below). Although the change was perhaps not unavoidably necessary, it serves to underline the fact that the Defender appropriately is an elected official.

11. The use of the broad term "*dismissal*" to denote a termination of the tenure of the Defender is not objectionable in this context and has not been criticised in prior comments by the Venice Commission on the Law. By contrast, a word equivalent to "revocation" would seem inappropriate.

Article 2 – Human Rights Defender

12. This Article now states (in the translation) that the Human Rights Defender is "*an independent and unchangeable official, who implements the protection of human rights and fundamental freedoms violated by the state and local self-governing bodies or their officials*", and thus has been brought exactly into line with Article 83.1(4) of the Constitution. This general description of the Defender's mandate represents a simplification from the prior text, which also referred to the Defender as acting "*pursuant to the Constitution and Laws of the Republic*" as well as "*recognised principles and norms of International Law*". The deletion of these references clearly involves no change in substance, especially since similar references are contained within Article 7. In fact, the simplification should serve to widen rather than narrow the general concept of the scope of the Defender's powers, since a plain statement such as now set forth in the Constitution and this Article obviously invites a broad interpretation.

13. There are, of course, other ways of describing in general terms the mandate of the Human Rights Defender which may perhaps lend greater support to the broad interpretation here assumed. In particular, it may be asked whether a use not only of the word "protection", but also of such words as "monitoring" and/or "promotion" would constitute an improvement in this direction. However, the term "protection" does not stand alone in the text, but is preceded by the verb "implement", which has a wide connotation. At the same time, the function of monitoring the administration by way of being able to issue recommendations is so basic to the role of the Ombudsman institution as generally perceived among nations that it clearly must be seen to belong to the mandate of the Defender as now declared in the Armenian Constitution.

Article 3 – Election of the Defender

14. In this Article (previously entitled "Appointment"), **para. 1** describes the qualifications of eligibility of the Defender. The text has been changed so as to bring the Law into line with Article 83.1(2) of the Constitution, which states plainly that "*[a]ny person held in high esteem by the public and corresponding to the requirements envisaged for a Deputy of the National Assembly may be elected as a Human Rights Defender*." From the qualifications required of a Deputy according to the Constitution (Art. 64), it follows that the Defender must be a citizen of the Armenian Republic having had residence in Armenia for the preceding five years and having electoral rights, and must have attained the age of 25 years. The originally stipulated age limit of 35 has thus been removed in deference to the limit for Deputies, and the former requirements for the person having a university degree and having knowledge and experience in the field of human rights and fundamental freedoms have also been deleted.

15. The reduction in the age limit does appear correct in consequence of the impact of the Constitution and accordingly is acceptable. The same applies to the requirement for a university degree, which similarly has a formal connotation. There is perhaps some question whether it also was necessary to remove the reference to knowledge and experience in the field of human rights, seeing that such requirement allows for flexibility and lies very close to the

core of the Defender's mission. In general terms, however, it may be said that the main significance of having references such as those here deleted is to lend support to the essential requirement of the person of the Defender enjoying high respect and trust in the community, which is of extreme importance and is of course proclaimed in the Constitution as a primary condition for eligibility.

16. In recent opinions of the Venice Commission on the Ombudsman institution (such as CDL-AD (2004) 41 concerning Serbia), the view has been expressed that the criteria for his/her eligibility should not be too restrictive, and that e.g. a university degree in law is not a necessary prerequisite (although that criterion is widely relied on, e.g. among the Nordic countries). At the same time, it may be noted that the conditions of eligibility as stated in the original Article 3(1) of the Law were favourably commented on in the above opinion CDL-AD (2003) 6.

17. The key matter here is that the qualifications of the Defender as now declared in the Constitution and affirmed in the Law are acceptable as long as it may be assumed that the primary condition of the person being held in high respect/esteem by the public at large is given a strong interpretation, consistent with the general purpose of the Law. On such interpretation, this declared condition does indicate respect not only based on renown for achievement, but also on a reputation for sagacity and integrity (which similarly is indicated by the degree of consensus envisaged for his/her election to the office). Such qualities are of immense value as a pillar of the effectiveness and authority of the Defender both towards the administration being monitored and the members of the public plying for his/her assistance (especially during a period of consolidation of the position of the Defender within the democratic system), as well as for his/her independence.

18. **Para. 2** of this Article lays down the principles for the election/appointment of the Human Rights Defender and now provides, in conformity with Article 83.1(1) of the Constitution, that the Defender shall be elected by the National Assembly by at least 3/5 ths of the total number of Deputies, for a term of 6 years. The Law further provides that the election shall take place among candidates proposed by at least 1/5 th of the total Deputies in the Assembly. The change thus affirmed, necessitated by the impact of the Constitution, is that the President of the Republic is no longer expected to participate in the nomination of candidates, while the minimum number of Deputies required to support a nomination remains the same.

19. The amended version of this Article is to be welcomed, and the principle of having the ultimate selection of the person of the Human Rights Defender supported by such qualified majority as required by the Constitution and the Law is highly acceptable and in accord with views expressed in general and specific relations within opinions of the Venice Commission and statements of the governing organs of the Council of Europe, as well as the OSCE/ODHIR.

The question mainly remaining with respect to the Law is whether it might be necessary or desirable to state specifically that the election of the Defender should be based on a nomination of not less than two or three candidates, and whether considerations of gender equality should be expressly provided for in the process of nomination.

20. The paragraph spells out the oath to be sworn by the Defender upon his/her appointment or taking of office pursuant to the election result. The text of the oath appears not to have been amended and is altogether appropriate. However, the reference at the end of its former sentence to both "*individuals and citizens*" for purposes of protection of rights perhaps raises a question, since a differentiation between citizens and others presumably is not intended. Under the Constitution, as by accepted standards, "*everyone*" whose rights and freedoms are under threat is entitled to seek the assistance of the Defender, i.e. all individuals finding themselves within the territory of Armenia. The reason for the twofold reference would seem to be that the protection of the Defender is expected to extend to citizens who may be staying or residing

outside of Armenia, which clearly is appropriate. The twofold reference similarly appears in para. 1 of Article 7 of the Law.

21. The term of six years of tenure for the Human Rights Defender seems reasonably chosen. It was so determined in the Law and is now declared in the Constitution as above noted. In **para. 3** of this Article in the original Law, the possibility of re-election/appointment for a second term (but no more) was allowed for, but that provision has now been deleted, presumably in view of the fact that the possibility is not referred to in the Constitution. There may be reason to question whether the Constitution is to be interpreted so as to exclude a further term, but the principle of a single term does in any case provide a safeguard contributing to the Defender's independence and precluding the risk of accusations to the effect that his activities or recommendations might be influenced by an interest for gaining re-election. On the other hand, since the Defender is neither a member of the judiciary nor an official of the executive power, there may be technical problems with offering him security of employment on an objective basis after the end of this term, and this is not dealt with in the Law.

22. The new **paras. 3 and 4** inserted into Article 3 by the Amending Law provide useful instructions relating to the timing of the regular election of the Defender and of the assumption of office by the Defender following his/her election.

Article 5 – Independence of the Defender

23. To this Article of two numbered paragraphs, the Amending Law adds a new **para. 3**, stating that the Defender's decisions do not constitute administrative acts and are not subject to appeal. This may be seen as a useful clarification for the sake of good order.

24. The unamended **para. 1** of this Article appropriately provides that "*the Defender shall be independent in executing his/her power and shall be guided only by the Constitution and the Laws of the Republic of Armenia, as well as recognised norms and principles of International Law*". – The paragraph further contains a second sentence stating that the Defender "*shall not be subordinated to any state or local self-governing official*". This may perhaps be useful as a clarification for the sake of good order in a first Law on the Defender, but should in fact not be necessary.

25. The unamended **para. 2** appropriately provides that the Defender shall not be obligated to clarify/disclose the nature of a complaint or document in his possession. A second sentence addresses the question of to what extent he/she may approve of making them accessible for examination, but the text as presented in English version is unclear.

Article 6 – Termination of the Defender's Powers

26. This Article deals with the highly important issue of termination of the mandate of the Human Rights Defender, and proceeds from the principle of his/her irremovability as declared in Article 83.1(3) of the Constitution and Article 2 of the Law. It also connects with the Defender's immunity under the Constitution, which is dealt within Article 19.

27. **Para. 1** makes a slight adjustment in the prior rule concerning the expiry of the regular term of tenure, stating that it will terminate on the same calendar day of the 6th year following the Defender's taking of his/her oath of office.

28. **Para. 2** provides for those specific events or instances by or upon which the Defender's mandate may be terminated prior to the expiry of its term, by listing them in an exhaustive manner. In the original Law, the list provided for seven grounds, of which two have been deleted by the Amending Law. The former of these related to a breach by the Defender of Article 4 of the Law (providing restrictions against his/her engaging in other activities and

forbidding membership of a political party and engagement in elections), while the latter referred to prolonged absence from duty for reasons of health. Both deletions are to positive effect as regards security of tenure, although the removal of the grounds without other adjustment may perhaps result in a certain lack of clarity or remedy, such as in the case of failing health, where the remedy of having a Deputy Defender is now not provided for (cf. Article 22).

29. The provisions in five subparagraphs on the remaining five grounds have been partially amended, and to positive effect. Thus a loss of citizenship (subpara. 2) does now not constitute a ground for removal of the Defender unless it is due to his/her resignation of citizenship or acquiring citizenship in another country. And in the event of the Defender tending a statement of resignation to the National Assembly (subpara. 3), he/she is required to resubmit the statement within 10 days if it is to become effective. In subpara. 4, the ground stated is the event of the Defender being "*declared incapable, missing or deceased by an effective decision of the Court*", with a reference to "partially disabled" being deleted. However, the description of the ground under subpara. 1 (i.e. that "*a verdict of the Court convicting the Defender enters into legal force*") remains the same, although it appears too open-ended, as it does not provide a clarification or qualification of the subject matter of the "conviction" of the Defender. – The ground under subpara. 5 is the event of death of the Defender.

30. With respect to the procedures to be followed upon an early termination of the Defender's mandate, **para. 3** now provides that the Chairman of the National Assembly shall inform the Deputies of the advent of the termination and the presence of the pertinent ground therefor under **para. 2**. This clearly means that it is for the National Assembly to check whether the grounds exist, which is appropriate. However, the recourse of putting the issue of termination to a vote in the Assembly (and then deciding upon it by a vote of more than one-half of the Deputies), which was provided for in the former **para. 3**, has now been deleted. Accordingly, the Law now appears to be based on the principle that since the grounds are being listed in a manner making them objectively ascertainable, a vote will not be necessary, and that the opinion of the Assembly (the Chairman) as to the presence of the pertinent ground will prevail, unless contested on the part of the Defender (presumably then by way of a court proceeding). This principle of an objective approach to the termination may be seen as a positive feature of the Law.

31. **Para. 4** provides as before that in the event of an early termination, a new Defender shall be elected within one month after the position becomes vacant. The former reference to a Deputy Defender assuming the position during the interval has been abandoned together with the previous Article 22. The time limit seems acceptable, though it is perhaps on the short side considering the weight of the institution. Although not expressly stated in **para. 4**, it seems to be clear that the new Defender is to be elected for a full 6-year term.

Article 7 – Complaints that are Subject to the Defender's Consideration

32. In this Article, the first of two paragraphs or parts within **para. 1** describes the scope of the powers of the Defender, in line with Article 83.1(4) of the Constitution, and has not been amended. It appropriately speaks of a duty to "*consider the complaints of individuals (including citizens) regarding violations of human rights and fundamental freedoms provided by the Constitution, laws and international treaties of the Republic of Armenia as well as by the principles and norms of International Law, caused by the state and local self-governing bodies and their officials*".

33. The second part or paragraph provides as before in its first sentence that the Defender "*cannot intervene in judicial processes*". The next (second) sentence, on the other hand, has been radically amended, in deference to a judgment of the Constitutional Court of Armenia on 6 May 2005 by which it was declared unconstitutional. The Judgment, which may be found in

CODICES (ARM-2005-2-001 06-05-2005 DCC-563), presumably is one of the major causes for the Amending Law.

33. In its former version, the sentence provided that the Defender should be able to ask for information on any case which is under trial and address recommendations/comments to the court, for the purpose of guarding the rights of citizens to a fair trial as guaranteed under the Constitution and norms of International Law. Briefly, the Constitutional Court decided that the right thus proclaimed for the Defender was too far-reaching to be found constitutional, that it created an inter-legislative contradiction, and that it was not in fact supported by the need to secure independent and impartial justice. In particular, the Court referred to those Articles of the Constitution of 1995 (39, 91 and 97(1)) which provided that everyone should be entitled to a fair trial by an independent and impartial court, that justice should be administered solely by the courts, and that when administering justice, judges should be independent and subject only to the Constitution and the Law. The Court felt that an unrestrained application of the disputed clause, referring to "information" in an apparently wide sense and permitting comments on cases in progress, might affect the independence of judges and the judicial process, as well as the equality between the parties before the court. The Court, referring to Articles 10(1), 12(1)(5) and 17(1) of the Law on the Human Rights Defender, concluded that his/her right to request information from the courts should be satisfied if the request did not interfere with judicial proceedings, did not concern the administration of justice in a concrete case, and did not concern the material and procedural issues for examination in the case under judicial consideration.

34. In line with the recommendation expressed by the Constitutional Court, the above second sentence of the second part of Article 7(1) has now been amended so as to state substantially that the Defender shall be entitled to request information from the courts in relation to and in observance of the applicability of the aforesaid Articles 10(1), 12(1)(5) and 17(1) of the Law. The indication thus is (a) that the Defender should act consistently with his duty to refrain from considering complaints which "*must be settled only by a court*" and to discontinue consideration if the subject matter of a complaint is brought before the courts, (b) that he/she can examine a potential violation of rights in matters which already have been decided by a court and matters on which no proceedings have been instituted, and (c) that he/she can request information for purposes of his annual report. In any case, although the formulation perhaps might have been made more clear, the amendment is easily understandable in the light of the above judgment.

35. It remains to be noted that the said second part of Article 7(1) also contained a third sentence, stating that the Defender should have the right to provide advice to those who wish to appeal court decisions or judgments. It does not seem clear whether this sentence now has been deleted in the course of the above amendment, but its contents were not directly in issue or passed upon in the case before the Constitutional Court.

36. In general terms, it may be said that the second part of **para. 2** of Article 7 (and also the first sentence of **para. 1** of Article 10 of the Law, which has not been amended) deal with issues which are very sensitive, in seeking to draw a proper line between the powers of the Human Rights Defender and the role and functions of the courts of law. Under the new Constitution, the people of Armenia have clearly opted for a Defender or Ombudsman whose mandate does not extend to supervision of the courts and whose activities should be carried out under due respect for the independence of the judiciary, as reflected in the judgement of the Armenian Constitutional Court. This structure of the Defender/Ombudsman institution is also the most widely accepted, and corresponds with the statement in Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe that "*the role of intermediary between individuals and the administration lies at the heart of the ombudsman's functions*", which again implies that the Defender/Ombudsman's capacity for neutrality will be his/her strongest asset.

37. Although the powers of the Armenian Defender vis-à-vis the courts accordingly should be strictly limited, it is also necessary not to use an excess of caution in drawing the line. Among other things, the existence of a legal remedy should not prevent a person from filing a complaint with the Defender, and the Defender should have the right and obligation to advise the complainant about legal remedies within bounds of neutrality, and to comment thereon in cases where the subject matter of complaint appears to require recourse to the courts and the complaint should be dismissed for that reason. Also, the Defender should be able to issue recommendations to the administration on such matters a s the granting of free process.

38. According to **para. 2** of Article 7, which has not been amended, the Defender shall not consider complaints concerning actions of non-governmental bodies and organisations or their officials. While this is appropriate as a general principle, it should not necessarily preclude having the mandate of the Defender extend to such parties in cases where they have been endowed by law with a public power to make decisions regarding the rights or obligations of person in similar manner as ordinary governmental authorities. Perhaps they may be regarded as included.

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

39. In this Article, **para. 2** has been amended so as to address in a more neutral manner the issue whether the Defender should consider complaints that are anonymous or complaints that do not relate to recent events (a limit of one year from the time at which the complainant became or should have become aware of the alleged violation/problem is here introduced as measure), or complaints that are not indicative of a violation or are otherwise lacking proper ground. The wording adopted is that the Defender "*may or may not consider*" such complaints.

Article 12 – Examination of Issues Raised in a Complaint

40. This Article deals with the important matter of the Defender's powers of examination, including power to require access to facilities and institutions and to obtain documentary or other information and statements of clarification of circumstances relating to a complaint. The description of the scope and conditions for these powers has not been altered, but the introduction in **para. 1** to the enumeration of the actions in issue has been simplified to the advantage of the Defender, i.e. by stating that he/she "*shall have the right*" to make these requirements, instead of relating them directly to the Defender's acceptance of a complaint for consideration. The amendment thus is to positive effect.

41. As a general remark here, it may perhaps be seen as a weakness in the Law that it does not explicitly provide that the Defender should be able to address instances of maladministration or human rights violation on his/her own initiative, such as by stating that a decision by the Defender to dismiss a particular claim or not to consider an anonymous claim will <u>not</u> prevent the Defender from taking the matter up with the (pertinent) authorities on his own initiative. Also, it may be recalled that in the opinion CDL-AD(2003)6, it was stated that the limitation in Article 8(3) against complaints being made by persons other than family members or representatives of the chiefly interested person was overly restrictive and deserved a broader formulation. However, an overview of the Law and the straightforward phrasing of Article 83.1 of the Constitution points to the conclusion that the said power of initiative for the Defender is in fact included within the scope of the Law. The above changes by the Amending Law in Articles 10 and 12 of the Law are significant because they tend to strengthen that conclusion.

Article 15 – The Defender's Decisions

42. The Amending Law here introduces in **para. 1** a new **subpara. 3** according to which the Defender may decide to terminate the consideration of a complaint (by reasoned comment) in

cases where an examination of the matter reveals grounds indicating that the complaint should not be considered or its further handling not be continued. The addition of this clause to the enumeration of types of decision in **para. 1** has been made at the suggestion of the Defender, with reference to the frequency of instances in the daily practice of the institution where the grounds for declaring a complaint inadmissible are brought out in the process of its consideration. The clause does seem to fill a gap in the enumeration, and thus is to positive effect.

43. At the same time, the prior text of subpara. 3, which enabled the Defender to decide to apply to the Constitutional Court over issues of violations of human rights and freedoms, has been deleted. The reason for the deletion is that this highly important facility for the Defender is now directly dealt with in Article 101, subpara. 8 of the Constitution, as noted under item 6 above. The reason clearly is valid as such, but on the other hand, it might have been preferable to reiterate the constitutional declaration within the Law (in this Article or elsewhere) in order to render the Law a more complete source of information on the mandate of the Defender.

Article 19 – The Defender's Immunity

44. In the Amending Law, the first two paragraphs of this Article have been joined in a single paragraph with some changes in wording. A change which is clearly positive and important is that the immunity of the Human Rights Defender from prosecution or criminal proceedings is now expressed as persisting not only during his term of office, but also thereafter. This accords with the principle of the Constitution that the Defender shall be endowed with the immunity envisaged for a Deputy of the National Assembly (Article 83.1(6)), and the new phrasing of the Article appears to have been modelled in most part upon the constitutional provision regarding Deputies (Article 66). However, it may be questioned whether the extent of the immunity is sufficient. There is no reference here to the staff of the Defender, but under Article 23(5), they are endowed with immunity during their period of tenure in respect of their conduct while performing their responsibilities under the Defender's instructions. This immunity should be more extensive.

Article 22 – The Deputy Defender

45. This Article providing that the Defender should have a Deputy, appointed upon his proposal, in order to perform the responsibilities of the Defender during his absence and having the same rights as the Defender in that capacity, has now been deleted from the Law. The reason may be that a Deputy is not provided for in the Constitution, although the absence of his/her being mentioned should not necessarily be preclusive. In any case, the presence of a permanent Deputy Defender is not imperative, and the solution adopted involves more of a political decision than a question of solidity of the institution.

Article 24 – Financing the Defender's Activities

46. In the Amending Law, the contents of this Article have been rephrased and amplified in a manner which appears to clarify rather than weaken the position of the Defender's budgetary requirements and financial management, but the change in substance is limited.

Article 26 – The Expert Council

47. Under this Article, the Defender is authorised to establish an Expert Council composed of persons of his own choosing in order to benefit from advisory assistance. It is assumed that these persons will be engaged on a voluntary basis and perform their activities without compensation. The question of the role of these expert assistants is left quite open in the Law,

although it appears from the concluding paragraph of Article 12(1) that their activities are not entirely internal and directed towards the institution, seeing that the Defender can authorise them by instrument in writing to carry out examination assignments in the same manner as members of his staff proper. The change brought by the Amending Law appears to be solely to the effect of enabling the Defender to establish more than one Council, which presumably is oriented towards affording him/her greater flexibility. This feature of the Law appears to be positive, but it must remain clear that the Defender is in full control of the arrangement, and that no attempt at outside interference with the Defender's activity is implied.

IV. General Remarks and Conclusions

48. The Amending Law here under review has been adopted in order to effect certain changes in the first Law (adopted in October 2003) on the Human Rights Defender of the Republic of Armenia, in the wake of the entry into force on 8 December 2005 of the revised new Constitution of the Republic and of the subsequent election of the first Defender instated for a regular 6-year term. The amendments in issue appear to be made mainly in order to ensure an alignment between the text of the Law and the declarations of the Constitution, and also to adjust some of the provisions relating to the activities of the Defender, apparently towards reinforcing and clarifying his/her position. Further, a specific change in article 7(2) of the Law has been made in order to achieve conformity with a judgement of the Constitutional Court of Armenia pronounced on 6 May 2005.

49. The institutional structure for the Armenian Human Rights Defender is in conformity with accepted European standards and is based on the model most widely followed, namely a Defender/Ombudsman who is an independent official elected by the legislative power having the primary role of acting as intermediary between the people and the state and local administration and being able in that capacity to monitor the activities of the latter by issuing recommendations on the basis of equity to counter human rights violations and instances of maladministration. At the same time, the Defender's role does not include a power of supervision in relation to the courts of law.

50. The general mandate of the Defender is stated primarily in terms of implementing protection against violations of human rights and freedoms by the executive power. The question may be raised whether his/her authority to monitor the administration and promote the observance of human rights might be expressed in stronger terms, such as by using those exact words. As in the opinion CDL-AD(2003)6, it also may be asked whether the Defender's mandate could be strengthened by listing his/her fields of action in more specific terms than in the Law. However, the straightforward description of the Defender's general mandate and purpose embedded in the Constitution and now followed in the Law clearly invites a broad interpretation ensuring that the essential function of monitoring is in fact included. Under the assumption of such broad interpretation, the role envisaged for the Armenian Defender does appear fully acceptable.

51. The generally accepted principle of having the Defender elected by the National Assembly with a high qualified majority (3/5 ths) is now squarely in place. The stated conditions of eligibility for election are relatively liberal, and are quite acceptable by European standards as long as the primary condition of general respect or esteem in the society is regarded on a basis of strong interpretation.

52. The Defender is to be elected from among candidates proposed by at least 1/5 th of the Deputies of the Assembly. The Law does not otherwise indicate whether the nomination should include more than one candidate. It may be asked whether the nomination of 2-3 candidates should be a requirement, and whether they should include both men and women.

53. The amendments made in deference to the Constitution include the principle that the Defender will be elected for a single term of 6 years, and the possibility of re-election for a second term is not envisaged. Although the single term constitutes an advantage from the point of view of independence, it may perhaps be questioned whether the Constitution does in fact preclude a second term.

54. These amendments also include a revised description of the Defender's immunity (Article 19), which is basically made equal to the immunity of Deputies of the National Assembly. While it is now clearly stated that the immunity of the Defender in office will persist after the end of his/her term, this does not apply to the staff (Article 23). There remains perhaps some question whether the immunity needs to be strengthened, under the principle that the Defender and his staff should be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity and within the limit of their authority.

55. The concept of having a Deputy Defender (the former Article 22) has been abandoned, which is acceptable.

56. The provisions for early termination of the Defender's mandate (Article 6) have been tightened to positive effect. The Law now follows the principle that the issue of early termination will not need to be put to a vote in the National Assembly, which also is positive.

57. The amendments relating to the position of the Defender towards the courts of Law have mainly been made in deference to the above judgement of the Constitutional Court (Article 7), which has been appropriately accepted. There remains perhaps a question whether the limits between the mandate of the Defender and the judicial power may need further clarification, and an excess of caution should not be applied in drawing the line.

58. The amendments otherwise made to clarify and strengthen the Defender's position are mainly to positive effect (Articles 10, 12 and 15). A remaining question is whether it may be assumed that the power of the Defender to take actions of recommendation upon his/her own initiative is clearly enough provided for.

I remain at disposal for further comment as appropriate.

Reykjavík, 28th November 2006

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