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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW SUPPLEMENTING THE PENITENTIARY CODE OF ARMENIA

on the basis of comments by:

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I. Introduction

1. By letter dated 21 April 2011, the Armenian authorities asked the Venice Commission to give an opinion on the Draft Law of the Republic of Armenia making a supplement to the Penitentiary Code of the Republic of Armenia (CDL-REF(2011)020, hereinafter: "the Draft law").

2. According to the Armenian authorities, this legislative initiative is aimed to fill a legislative gap as, apart from guarantees in the Armenian Constitution linked to the secrecy of correspondence, there is no law or other provision in Armenia regulating the possibility to control the correspondence of detainees.

3. The Venice Commission invited Mr Pieter van Dijk and Ms Katerina Simackova to act as rapporteurs.

4. The present Opinion, based on the rapporteurs' comments, was adopted by the Venice Commission at its …. Plenary Session (Venice, May 2011).

II. Preliminary remarks

5. The comments contained in the present document are based upon the English translation of the proposed legal provisions, as provided to the Venice Commission. This may have created misunderstandings of the Draft law at certain points. Moreover, the "rationale" attached to the Draft law is of a rather general nature and does not entirely explain the wording of the provisions.

6. The comments are mainly related to Article 8 of the European Convention on Human Rights (ECHR) which guarantees the right to respect of one's correspondence. The proposed legal provisions may also raise issues under Article 10 ECHR concerning the right to freedom of expression. However, Article 8 may be considered a *lex specialis* in this context.

III. Scope of the right to respect of one's correspondence

7. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[1], in its first paragraph, guaranties, *inter alia*, the right to respect for one's correspondence. This guarantee offers mainly protection against the interception, opening and censoring of letters and other means of communication by public authorities.

8. Such interferences of correspondence may be justified under the second paragraph[2] if they are in accordance with the law and are necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

9. At first, the European Commission of Human Rights adopted the view that the restriction or censorship of correspondence sent or received by detainees constitutes a limitation of the detainees' right to respect of one's correspondence which forms an inherent feature of detention. Therefore, it does not constitute an infringement of the first paragraph that needs a

[1] "1. Everyone has the right to respect for his private and family life, his home and his correspondence."
[2] "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

justification under the second paragraph, not even if the interception concerns correspondence with defence counsel.[3]

10. However, in the ´Vagrancy´ cases, the European Court of Human Rights (ECtHR) rejected this ´inherent features´ theory for provisions of the ECHR like Article 8, which contain an express provision for limitations. According to the ECtHR, every restriction has to be reviewed for its justification on one of the grounds mentioned explicitly in the second paragraph of Article 8.[4] In reviewing the necessity and proportionality of the restriction, the special position of the prisoner may be taken into account.[5] The Strasbourg case law indicates, however, that the Court is not prepared to leave the national authorities an especiallybroad margin of discretion in the case of detainees.

11. Thus, in *Silver v. United Kingdom*, the ECtHR reached the conclusion that the practice of control of prisoners´ correspondence prevailing in England and Wales at the time to which the application related, was in violation of Article 8 where it concerned the holding back of letters of the detained applicant, with the exception of letters in which violence was threatened or crimes were discussed.[6] And in *Boyle and Rice v. United Kingdom* the stopping of a letter of a detainee was found in breach of Article 8 since it was acknowledged to be a purely personal one.[7]

12. According to the Strasbourg case law, certain categories of correspondence require special protection:

- the correspondence between the detainee and his or her lawyer, in view of the rights of defence laid down in Article 6 ECHR; and

- the correspondence between the detainee and his or her close relatives and friends, in view of the right to respect of family life and private life under Article 8.

13. In *Campbell v. United Kingdom,* the Court stressed that correspondence with a lawyer[8] is privileged and, therefore, its control requires solid justification. Prison authorities may open such correspondence when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. For that purpose, however, the letter may only be opened but not read and, therefore, should be opened in the presence of the prisoner and after inspection be given to him or her. Reading is allowed only in exceptional circumstances, when the authorities have reasonable cause to believe that the privileged position is being abused in that the contents of the letter endangers prison security or the safety of others or are otherwise of a criminal nature. However, the confidential character of the correspondence excludes automatic control.[9]

14. In *Foxley v. United Kingdom* the ECtHR stressed again "the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client" and that only exceptional circumstances could justify any interference.[10] A case in which such special circumstances were accepted by the ECtHR was *Erdem v. Germany*, where the prisoner was a PKK terrorist, the power to monitor correspondence was vested in an independent judge and oral communication between the prisoner and his lawyer remained possible.[11]

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[3] Appl. 2375-64, *X. v. Federal Republic of Germany*, Collections 2 (1967), p. 45 at 47.
[4] Judgment of 18 June 1971, § 93; judgment of 21 February 1975, *Golder v. United Kingdom*, § 45.
[5] *Golder* (note 4), § 45.
[6] Judgment of 25 March 1983, § 105.
[7] Judgment of 27 April 1988, § 50.
[8] The same holds good for a representative who is not a practising lawyer: *A.B. v. the Netherlands*, Judgment of 29 January 2002, § 86.
[9] Judgment of 25 March 1992, §§ 48-52.
[10] Judgment of 20 June 2000, § 44.
[11] Judgment of 5 July 2001, § 69.

15. The same privileged status is recognised for correspondence with the ECtHR itself and its Registry, as well as with the former European Commission of Human Rights and its Secretariat[12], while a similar status applies to correspondence with other public authorities,[13] and with medical persons or institutions.[14]

16. Stopping or censuring letters with family members and close friends constitutes interference not only with the right to the respect of one's correspondence, but also with the right to respect for family and private life.[15]

IV. Grounds of limitations

A. In accordance with the law

17. According to the second paragraph of Article 8 ECHR, in order for a restriction of the right to respect of correspondence, it must be "in accordance with the law". The Strasbourg case law has specified this requirement:

18. This expression requires firstly that the impugned measure should have some basis in domestic law and, in addition, is in conformity with the (other) provisions of the ECHR.

19. It also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law".[16]

20. The ECtHR has held that, while a law which confers discretion must indicate the scope of that discretion, it is impossible to attain absolute certainty in the framing of the law, while the likely outcome of any search for certainty would be excessive rigidity. However, if the law concerned leaves the authorities too much latitude and does not go further than identifying the category of persons whose correspondence may be censored and the competent court, without saying anything about the reasons that may warrant it, the law is not specific enough on this point.[17] The procedures to be followed must also be regulated.

21. Moreover, the duration of the measures to be taken must be specified in the law concerned.[18]

B. In the interest of …

22. Measures of interference may be justified only if they are taken in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

C. Necessary in a democratic society

23. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether interference measures are "necessary in a democratic society", regard may be had to the State's margin of appreciation. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the

[12] *Campbell v. United Kingdom*, judgment of 25 March 1992, § 53; *A.B. v. the Netherlands*, judgment of 29 January 2002, §§ 81-84.
[13] *A.B. v. the Netherlands*, judgment of 29 January 2002, § 89.
[14] *Szuluk v. United Kingdom*, judgment of 2 June 2009, §§ 47-54.
[15] *Poltoratskiy v. Ukraine*, judgment of 29 April 2003, § 153.
[16] *Poltoratskiy v. Ukraine*, judgment of 29 April 2003, § 155.
[17] *Calogero Diana v. Italy,* judgment of 21 October 1996, § 32.
[18] *Enea v. Italy,* judgment of 17 September 2009, § 143.

interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention.

24. In assessing whether a measure of interference with the exercise of the right of a convicted prisoner to respect for his correspondence was “necessary” for one of the aims set out in Article 8 § 2, regard has to be paid to the ordinary and reasonable requirements of imprisonment. Some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention.

25. The ECtHR has developed quite stringent standards, depending, inter alia, on the character of the correspondence and/or the addressees.[19] Thus, in *Schönenberger and Durmaz v. Switzerland* the Government had justified the stopping of a letter from a lawyer on the ground that its contents jeopardised the proper conduct of the proceedings. The Court held that the measure was not necessary in a democratic society since the advice contained in the letter concerned a tactic that was lawful in itself.[20]

V. Assessment of the proposed legal provisions

26. Regulation of restriction by public authorities of the right to respect the correspondence guaranteed under the first paragraph of Article 8 ECHR is permissible and even to be welcomed, since, according to the second paragraph, any such restriction has to be "in accordance with the law". It is especially to be welcomed that a court decision is needed to grant permission to restrict the right of a detainee to correspondence. It is particularly important that the measures at issue are submitted to the court before they have been taken, since otherwise this would most probably merely amount to a limited review of administrative discretion.

27. On the whole, the proposed legal provisions, which will have the legal status of a statute, are sufficiently accessible to enable the person concerned to judge under what circumstances and according to which procedure his or her correspondence may be interfered with.

28. However, the purposes listed in the first paragraph of proposed Article 92.1 for which the court may grant permission to restrict the right of a detainee to respect of his or her correspondence are not identical to the exhaustive list of the second paragraph of Article 8 ECHR. Their formulation and scope make the proposed provision less transparent and accessible as to the guarantees it contains. While the Contracting States, under Article 53 ECHR, may provide wider protection of the right to respect of correspondence, they are not allowed to expand the limitations. It is, therefore, recommended to strictly follow the wording of the second paragraph of Article 8 ECHR.

29. In any case, the prevention of the disclosure of crimes, the prevention of the dissemination of information that does not correspond to reality, as well as upholding the reputation of justice constitute limitation grounds which, in the opinion of the Venice Commission, are not covered by the second paragraph of Article 8 ECHR as interpreted by the ECtHR. Also, the Venice Commission is of the view that “preventing a direct threat to social rehabilitation of other convicts” would seem to be only partly covered by "protection of the rights and freedoms of others".

30. As concerns restriction on correspondence which contains critique of the court trial concerned, the reputation of justice is protected by way of restriction of the freedom of expression. Whether the correspondence concerned constitutes public expression depends on its distribution. In case of critical remarks about the treatment of the detainee in the penitentiary institution, the exercise of the right of free correspondence constitutes precisely one of the safeguards against bullying and violence. Restriction of correspondence should not amount to a disciplinary measure or additional punishment.

[19] *Szuluk v. United Kingdom*, judgment of 2 June 2009, §§ 45-46.
[20] Judgment of 20 June 1988, § 28.

31. The requirements of necessity and proportionality have to be taken into account by the court when deciding on the motion filed by the head of the penitentiary institution. It is recommended that these requirements are referred to in either paragraph 3 or paragraph 4 of the proposed Article 92.1. The notion of necessity and proportionality of the interference with the privacy of the detainee must be assessed in each case individually, and the requirement of minimisation of interference must be respected[21].

32. Any interference in a human right may not last any longer than is prescribed by law and is necessary. In that respect, paragraph 5 of the proposed Article 92.1, which refers to the "effective period of the court's decision" with a maximum of six months, which may be extended, it not specific enough. Moreover, it is not clear under what conditions and for what reasons the period may be extended. Furthermore it should be specified in the fifth paragraph of Article 92.1 that the "effective period of the court's decision (…) shall be calculated from the day of its delivery to the detainee".

33. The proposed Article 92.1 guarantees that the interference with the right of respect for correspondence is based upon a court decision, with the possibility of appeal to the Court of Appeal within ten days. However, in respect of the way in which the court decision is applied, there must also be access to a court under Article 6 ECHR, or at least an effective remedy under Article 13 ECHR. The detainee is entitled to a periodical review of the procedures followed and of the question whether the necessity still exists. Moreover, the detainee should have a remedy against any interference with his or her correspondence for which no court authorisation has been given. These remedies should be provided for or, if they exist in virtue of other legal provisions, the Draft law should include a reference to these provisions.

34. In that context, the Venice Commission makes the observation that the proposed provisions might be evaded by the mere refusal of the employees of the prison to accept incoming letters for distribution and outgoing letters for mailing. It is therefore recommended to complete Article 92.2 by laying down an explicit obligation of the penitentiary institution and its employees to accept letters addressed to or mailed by detainees before a decision about justification of any restriction under the proposed provisions be taken - as a precondition for any potential restriction of the detainee's right to correspondence, according to a prescribed procedure (article 92.2).

35. The seventh paragraph of the proposed Article 92.1 expressly provides that the Court of Appeal shall convene a hearing with the participation of the detainee, while the third paragraph provides for the first instance only the participation of the head of the penitentiary institution. This suggests that the court of first instance decides on the order filed by the head of the penitentiary institution without hearing the detainee, whose fundamental right is at stake. This would conflict with the right to a fair procedure.

36. The first paragraph of Article 92.2 contains an obligation for the head of the penitentiary institution to draw up a protocol when seizing the correspondence, while the second paragraph prescribes that the detainee must be present when his or her correspondence is opened. It is not clear what steps to be taken and procedures to be followed the protocol must include. In the opinion of the Venice Commission it should be specified what the term "seize" in the proposed Article 92.2 corresponds to in case of incoming and outgoing correspondence. As to the incoming correspondence it is not clear whether the detainee has only the right to be present while the head of the penitentiary institution opens his or her letter, or whether he or she has, according to the proposed provisions, also the right to read its contents or part of it. As to the outgoing correspondence, it should be specified whether the detainee will be allowed to modify his or her letter in order to delete the parts which meet with objections, or to send the letter to someone else, if the original addressee is problematic; this in order to minimise the interferences with his or her right to respect of correspondence.

[21] ECtHR judgment of 25 March 1983, *Silver and Others v. The United Kingdom,* § 97.

37. The third paragraph of the proposed Article 92.2 contains a prohibition of seizing and opening letters of the detainee addressed to the Minister of Justice, a court, the Prosecutor General, the Human Rights Defender, an ordained clergyman-confessor and the defence counsel. It does not provide the same exception for letters received by the detainee from these persons and authorities. The provision should be supplemented to that effect. This way, the provision covers most of the correspondence with a privileged status. It is recommended, however, to include other legal assistance in addition to practising lawyers, as well as persons and institutions in the medical field. In addition, it should be prescribed that letters to and from close relatives and friends which are of an evidently private nature, may only be seized and opened if there are very strong reasons to believe that this is necessary in view of one or more of the limitation grounds.

38. The fourth paragraph provides that the seized letters shall be attached to the personal file of the detainee. This provision does not sufficiently guarantee that each letter that is seized is registered. The detainee concerned and his or her lawyer can control which letters have been seized on which ground or grounds, and whether the prescribed procedures have been followed, only if he or she has access to such registration.

39. The fourth paragraph also provides that the seized letters shall be returned to the detainee after serving the sentence. However, if in the meantime the necessity of withholding the letters has ceased to exist, there is no justification for not returning what is to be considered the legal possession of the person concerned.

VI. Conclusions

40. The Venice Commission welcomes the Armenian authorities' initiative, in the absence, at present, of specific domestic legislation in this field and drawing on the applicable international standards, to regulate restriction by public authorities of the right to the respect of the correspondence of detainees through a supplement to the Penitentiary Code.

41. It is commendable that, as clearly stated by the authors of the Draft Law, the principles underlying this legislative proposal are those enshrined in Article 8 of the ECHR. It is also positive that the proposed legal provisions, if enacted, will have the legal status of a statute. This should enable all those concerned to assess under which circumstances and according to which procedures their correspondence may be monitored and/or interfered with.

42. The Venice Commission however notes that, in order for the Draft law to be entirely in line with the ECHR requirements and the relevant case law of the ECtHR, further improvements of its detailed provisions are needed. This concerns in particular the grounds acceptable for introducing limitations to the right to the respect of one's correspondence, which should be in conformity with those listed under the second paragraph of Article 8 ECHR. More detailed provisions and increased clarity are also recommended with regard to the detainee's possibility to appeal to the competent court at regular intervals after the restriction measure(s) has/have been taken, and with regard to the remedies available in case of infringement of the court decision, or for any interference in his/her correspondence which would not be based on a court decision. Finally, more specificity is recommendable concerning procedural matters, such as the obligation for the head of the penitentiary institution to draw up a protocol when seizing the detainee's correspondence.

43. The Venice Commission stands ready to further co-operate with the Armenian authorities with regard to this legislative proposal.