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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW ON AMENDMENTS AND ADDITIONS TO THE LAW ON ALTERNATIVE SERVICE

OF ARMENIA

on the basis of comments by

Mr Richard CLAYTON (Member, United Kingdom)
Mr Nicolae ESANU (Member, Moldova)
Mr Hubert HAENEL (Substitute Member, France)
Ms Hanna SUCHOCKA (Member, Poland)

I. INTRODUCTION

1. By a letter of 29 September 2011, Mr. H. Karapetyan, Chairman of the Standing Committee on Defense, National Security and Internal Affairs of the National Assembly sought the Venice Commission's opinion on a draft Law on Amendments and Additions to the Law on Alternative Service of the Republic of Armenia (CDL-REF(2011)050).

2. The following rapporteurs were invited by the Venice Commission to provide their comments on this draft Law: Mr Richard Clayton, Mr Nicolae Esanu, Mr Hubert Haenel, Ms Hanna Suchocka .

3. On 15-16 November, the Venice Commission organised meetings in Yerevan on the draft Law in which Messrs Clayton and Esanu participated. The results of these meetings are reflected in the present opinion.

4. The present opinion, based on the Rapporteurs' comments, was adopted by the Commission at its … Plenary Session (Venice, ...).

II. SCOPE OF THE OPINION AND GENERAL REMARKS ON THE LAW ON ALTERNATIVE SERVICE

5. In his letter the Chairman of the Standing Committee on Defense, National Security and Internal Affairs states that the request for a Venice Commission's opinion on the draft Law on Amendments and Additions to the Law on Alternative Service (hereinafter "the draft Law") is motivated by the willingness of the Armenian authorities of "ensuring the maximum compliance with international standards of the legislation of Armenia".

6. The comments and recommendations below are based on international standards and good practices, as found in international acts ratified or entered into by Republic of Armenia, which developed the right to conscientious objection to military service as a part of the freedom of thought, conscience and religion[1].

7. When joining the Council of Europe, Armenia had pledged to introduce a law recognising the right to conscientious objection. On 17 December 2003 the Law of the Republic of Armenia on alternative service was adopted (hereinafter the Law).

8. The amendments and additions to the Law, if adopted, will be a step in the right direction and can, to some extent, enhance the Law's conformity with international standards relating to conscientious objection to military service. However, the Venice Commission deemed it necessary to draw the attention of the authorities to the fact that further clarifications and modifications of the other provisions of the Law in force (hereinafter "the Law") will still be needed before the Law on Alternative Service can be said to be fully in line with international standards.

9. It became apparent during the meetings held on 15 - 16 November in Yerevan that the amendments were drafted long before the Grand Chamber Judgment in the case of Bayatyan v. Armenia of 7 July 2011, and that further amendments must be made to address specifically the implications of the judgment. As a result of this judgment, Article 9 of the ECHR now

[1] Resolution 337(1967) and Recommendation 478(1967) on the right of conscientious objection adopted by the the Parliamentary Assembly of the Council of Europe; Recommendation No. R(87)8 of the Committee of Ministers to member states regarding conscientious objection to compulsory military service adopted on 9 April 1987 and Recommendation 1518 (2001) adopted by the Standing Committee, acting on behalf of the Parliamentary Assembly of the Council of Europe, on 23 May 2001; CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces; International Covenant on Civil and Political Rights and General Comment No. 22(48), adopted by the UN Human Rights Committee on 20 July 1993. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), reprinted in U.N. Doc. HRI/GEN/1/ Rev.1 at 35 (1994).

applies to conscientious objection which has important consequences both for the individuals and the States concerned.

10. The Venice Commission delegation was also informed during these meetings that no one had applied for alternative labour service since 2005. In the Venice Commission's view, while this situation is meant to reflect the Armenian citizens' individual choice in this matter, it also indicates that the present system does not work effectively.

11. The areas of concern regarding the Law in force are listed below. It should be underlined that this brief enumeration does not constitute an opinion on the Law itself and that the Venice Commission stands ready to provide a detailed opinion on the entire text of the Law, should the Armenian authorities request it.

Scope of the right to alternative service

12. Article 3 of the Law states that alternative service is available to a citizen when military service is "contrary to his religious belief or convictions" (and not "religious belief and conviction" as had been translated by mistake). This wording appears to be restrictive as compared to the wording of Article 9[2] of the European Convention on Human Rights, which now applies to alternative service. Article 3 should therefore be amended in order to match more closely the wording of Article 9.

Proportionality of the term for alternative service

13. Military service in Armenia lasts for 2 years. Article 2 of the Law on alternative service provides for two different alternative services: alternative military service and alternative labour service. Article 5 of the Law states that the term for alternative military service is 36 months and the term for alternative labour service is 42 months.

14. The term for alternative service appears to be too long.

15. As early as in 1987, the Committee of Ministers stated, in principle 10 of the Recommendation R(87)8 regarding conscientious objection to compulsory military service, that "alternative service shall not be of a punitive nature. Its duration shall, in comparison with military service, remain within reasonable limits".

16. In 2000, the European Committee of Social Rights stated in a decision on the complaint brought by the Quaker Council for European Affairs against Greece[3] (complaint No. 8/2000) that 18 additional months for alternative service amounted to a disproportionate restriction on the right of the worker to earn his living in an occupation freely entered upon and was contrary to Article 1(2) of the Social Charter.

17. In 2008, the European Committee of Social Rights clearly stated that "Under Article 1§2 of the Charter, alternative service may not exceed one and a half times the length of armed military service" (European Committee of Social Rights, Conclusions 2008, Estonia, Article 1.2).

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[2] Article 9 Freedom of thought, conscience and religion
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[3] European Committe of Social Rights, Decision on the merits, complaint No. 8/2000 by the Quaker Council for European Affairs (QCEA) against Greece

18. The existence of two different terms for alternative military service and for alternative labour service does not seem to be justified and might raise issues of discrimination.

19. It is therefore recommended that the Armenian authorities reconsider the duration of alternative service.

Procedure for determining applications

20. Article 6 of the Law entrusts the "Republican Commission" with considering applications for undergoing alternative services. This Republican Commission is not otherwise defined.

21. The failure to define Republican Commission might breach the obligation under Article 9 ECHR for any interference with freedom of thought or religion to be "prescribed by law".

22. The principle of 'prescribed by law' involves an obligation for a legal requirement to have some basis in domestic law: either in to national law[4] (which includes statute law,[5] other non-statutory regulations,[6] common law[7] and even the rules of a national body).[8] However, non statutory guidance is unlikely to be sufficient to satisfy the requirement to be 'in accordance with law' because it does not usually have the force of law.[9] An interference which has no basis in domestic law therefore breaches the principle, as in the case of *Halford v United Kingdom* where unlawful interception of telephone calls at work had no basis in domestic law.[10]

23. Any decision of the Republican Commission may therefore be successfully challenged as being not 'prescribed by law'.

24. As concerns the composition of the Republican Commission, the Venice Commission is of the view that the assessment of applications for alternative service based on conscientious objection should be under the control of civilian authorities, not under the control of the military.

25. Finally, performing an alternative service must be a personal and individual choice and all the conditions needed to allow free expression of this choice by the individuals concerned should be in place.

26. During the visit, the Venice Commission was told that although conscious objectors overwhelmingly comprise Jehovah Witnesses, the issue of conscientious objections covers much wider issues/aspects than those which concern that particular group. It was apparent from discussions with the NGOs that there were many other citizens of Armenia who are taking a variety of steps to avoid military service.

27. Given its sensitive role, it appears important and advisable to ensure a multi-disciplinary composition of the Republican Commission.

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4 *Campbell v United Kingdom* (1992) 15 EHRR 137 para 37

5 See *Norris v Ireland* (1988) 13 EHRR 186 para 40: the interference was plainly 'in accordance with the law' since it arose from the very existence of the impugned legislation.

6 *De Wilde, Ooms and Versyp v Belgium* (1971) 1 EHRR 373 para 93; *Golder v United Kingdom* (1975) 1 EHRR 524 para 45 (involving Prison Rules 1964)

7 See*: Dudgeon v United Kingdom* (1981) 4 EHRR 149 para 44; *Kruslin v France* (1990) 12 EHRR 547 para 29; *Huvig v France* (1990) 12 EHRR 528 para 28; *Herczegfalvy v Austria* (1992) 15 EHRR 437 para 91

8 *Barthold v Germany* (1985) 7 EHRR 383 para 46

9 See eg *Govell v United Kingdom* [1999] EHLR 121; *Khan v United Kingdom* (2000) 31 EHRR 1016.

10 (1997) 24 EHRR 523.

Grounds for rejecting an application for alternative service

28. The grounds for rejecting an application for alternative service are prescribed by Article 9. This Article allows the Republican Commission to reject a claim where:

(a) a citizen fails to appear before the Commission without any valid excuse; and
(b) the application for alternative service contains false information.

29. While the first ground for rejecting an application appears to be justified, the second ground seems to be very broad and leaves a too wide margin of appreciation. It should be more strictly defined.

Conditions of alternative service

30. The conditions of alternative service are defined in Article 16 of the law as concerns alternative military service and Article 17 as concerns alternative labour service. These articles call for several remarks. For instance, the presence of the alternative labour servicemen "at his place of service on a 24 hours basis" (Article17.4) raises concern; the prohibition on someone being assigned to a managerial position whilst engaging in alternative service (Article 17.5) appears to be a too severe prohibition; that prohibition may have profound consequences on future career prospects and the detriment it may cause requires substantial justification, especially because Article 2.3 states that alternative service does not have the nature of punishment or humiliating a person's honour or dignity.

31. Further points could be elaborated on within the framework of an assessment of the entire Law.

III. COMMENTS OF THE DRAFT LAW ARTICLE BY ARTICLE

Article 1 of the draft Law amending Article 14 of the Law

32. The amendment proposes to replace the supervision by the "public administration body authorized by the Government" over the performance of the alternative labour service with a supervision by a "Commission composed of representatives of the state bodies authorized by the Republic of Armenia Government (hereinafter, authorised bodies) in the sphere of defense, health, labour and social services".

33. It should be noted that this amendment affects only the alternative labour service, while under the Law the "administration body authorized by the Government " presumably supervise the performance of both types of alternative service, alternative labour and alternative military service. Therefore, if the amendment is adopted as it is, the Law would become silent on the supervision of alternative military service.

34. These amendments are nevertheless welcome, in so far as they aim at lifting complete military control over the alternative labour service. However, the draft Law does not specify the composition of the Commission, which is left to be decided "by the joint order of the heads of authorised bodies". According to the amendment as it stands, it is not excluded that the representatives of the military will constitute a majority. That would allow them to maintain control over the alternative labour service. The amendment therefore does not achieve the purpose of removing military control. In order to do so, the amendment should ensure that the military never constitute the majority in the Commission.

35. The amendment also provides that "the Commission implements its study by visiting the alternative labour service sites no less than four times annually".

36. According to this amendment, the Commission is responsible for the overall control of alternative labour service. The overall control has to be distinguished from the day-to-day operational control, on which the Law remains silent.

37. During its visit to Armenia, the delegation of the Venice Commission was informed that formal supervision of the work was performed by the public body which ran the relevant institution where the work of alternative servicemen took place. According to non-governmental sources, the day-to-day supervision of the work of those who undertook alternative labour service used to be carried out by the military.

38. It has to be recalled that any form of control over alternative service should be of civil nature and in order to alleviate any ambiguity, the amendment should explicitly state that the military have no supervisory role in the day-to-day operational supervision of those who perform alternative service. Equally, the authorities should make sure that any byelaw, other regulation or practical application measure is fully in line with the principle of civil control over alternative service.

39. Finally, the Commission set up by this amendment would have a greater impact on the alternative labour service if the public bodies which ran the institutions where alternative labour service is carried out were responsible to it.

Article 2 of the draft Law amending Article 15 of the Law

40. Article 2 of the draft Law proposes an amendment to Article 15 of the Law on Alternative Service, which would enable alternative servicemen to apply, at any time of their alternative service, for a replacement of the alternative service with the compulsory military service. This amendment would remove the six month limitation, prescribed by the Law currently in force, for lodging such an application.

41. No similar option is offered to those conscripted servicemen who, while undergoing military service, realise that such service insurmountably conflicts with their religious or other conscientious beliefs. Article 3 of the Law states that "the citizen of the Republic of Armenia undergoing compulsory military service, may not refuse the service and choose alternative service". This prohibition conflicts with relevant international standards[11], which provide that the right to conscientious objection to military service should be possible at any time before, during or after conscription or performance of military service, given that persons performing military service, may also develop conscientious objections.

42. The failure to allow transfer both ways raises issues of compliance with Article 14 of the ECHR (now that conscientious objection is within the scope of Article 9, following the Grand Chamber decision) and nothing seems to justify the difference of treatment as being proportionate.

43. It is therefore recommended that a provision enabling transfer from military service to alternative service be added and that Article 3 of the Law be deleted or amended accordingly.

44. Article 15 paragraph 2 of the Law on Alternative Service provides that "the term for (their) alternative service shall not be included in the term for compulsory military service". This means that a person nearing completion of the alternative service who decides to switch to military service, would then have to complete a full military service term without any regard for the time spent in alternative service. This provision appears unduly harsh.

[11] See in particular Recommendation No. R(87)8 of the Committee of Ministers to member states regarding conscientious objection to compulsory military service adopted on 9 April 1987 and Recommendation 1518 (2001) adopted by the Standing Committee, acting on behalf of the Parliamentary Assembly of the Council of Europe, on 23 May 2001.

45. It is therefore recommended to introduce a provision allowing for the partial deduction of the already completed alternative service time from the term of the up-coming military service. This deduction should be proportionate and it should not have a punitive nor discouraging character.

46. Moreover, the provision should also provide for a deduction in case of transfer from the military service to the alternative military service. Again, this deduction should be proportionate, and not have a punitive character nor discouraging one .

Article 3 of the draft Law amending Article 16 and 17 of the Law

47. According to this amendment, alternative servicemen will receive a military certificate/military booklet on completion of their alternative service.

48. The delegation of the Venice Commission was told during the visit, that this certificate, which is so far given after completion of military service only, is a crucial document for civil life. These amendments are therefore to be welcome.

49. It is recommended that the military booklet state that its holder had been exempted from performing military service, but that no explicit mention be made of the reason for which this exemption had been granted.

IV. CONCLUSION

50. The draft Law on the amendments and additions to the Law on Alternative Service is to be welcome as it can, to some extent, enhance the Law's conformity with international standards on conscientious objection to military service.

51. The present opinion makes a number of recommendations to improve the draft Law, *inter alia*:

- ensure that the majority of the Commission's members (set up by Article 1 of the draft Law amending Article 14 of the Law) are civilians;
- explicitly state that the military have no supervisory role in the day-to-day operational supervision of those who perform alternative service;
- add a provision enabling transfer from military service to alternative service and delete or amend Article 3 of the Law accordingly;
- allow for the partial deduction of the already completed alternative service time from the term of the up-coming military service and vice-versa;
- provide that no explicit mention of the reason for which an exemption has been granted appear in the military certificate/booklet.

52. The Venice Comisson remains at the disposal of the Armenain authorities for any further assistance that they may need.