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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

DRAFT OPINION

**ON THE POSSIBILITY OF AN
INDIVIDUAL COMPLAINT TO THE
ARMENIAN CONSTITUTIONAL COURT
AND ON
THE CONSTITUTIONALITY OF ARTICLE 7
OF THE DRAFT LAW ON THE
ORGANISATION OF THE JUDICIARY
OF THE REPUBLIC OF ARMENIA**

**Secretariat Memorandum
based on the comments of**

**Mr Sergio BARTOLE (Italy)
and
Mr Aivars ENDZI_Š (Latvia)**

I. Introduction

1. Mr Gaguk HAROUTUNIAN, Chairman of the Constitutional Court and Co-President of the State Commission on Judicial Reform of the Republic of Armenia, has submitted to the Venice Commission two questions. The first question concerns the possibility of an individual complaint being made to the Constitutional Court of Armenia. The second question regards the constitutionality of Article 7 of the Draft Law on the Organisation of the Judiciary of the Republic of Armenia.

2. The present opinion is based on written contributions by Mr ENDZIŠ (Latvia) and Mr BARTOLE (Italy). It also takes into account the relevant comments made, in particular by Mr HAROUTUNIAN, at the International seminar on Constitutional Control and the Protection of Human Rights, held in Yerevan from 22 - 24 October, 1997.

II. The Possibility of an Individual Complaint to the Constitutional Court

3. The Constitution of the Republic of Armenia was adopted by referendum on 5 July 1995. Article 6 of the Constitution proclaims the supremacy and the direct effect of the Constitution: 'The Constitution of the Republic has supreme juridical force, and its norms are applicable directly.' Moreover, it states that 'Laws found to contradict the Constitution, as well as other juridical acts found to contradict the Constitution and the laws, shall have no legal force.'

4. Article 100 of the Constitution delimits the competencies of the Constitutional Court. It presents an apparently exhaustive list of the subject matter jurisdiction of the Constitutional Court. The Law on the Constitutional Court of the Republic of Armenia reproduces this provision in its Article 5, thus reiterating and confirming the Court's competencies. The Article is thus likely to be comprehensive and it does not mention complaints by individuals as to the violation of constitutional rights.

5. Elsewhere, in Article 101 of the Constitution, a list is offered of persons or bodies entitled to submit a case to the Constitutional Court. These are:

- 1) the President of the Republic;
- 2) at least one third of the Deputies;
- 3) Presidential and parliamentary candidates on disputes concerning election results;
- 4) the Government in cases prescribed by Article 59 of the Constitution.

[Article 59 of the Constitution concerns the procedure for declaring the President of the Republic unfit or unable, whether for health or other reasons, to perform his duties as President.]

A further provision in the Constitution, Article 57, provides that the National Assembly may request a determination by the Constitutional Court 'on questions pertaining to the removal of the President of the Republic from office...' Arguably, this provision indicates that the list, in

Article 101 of the Constitution, of those invested with the right to seize the Constitutional Court with a matter, is not exhaustive. However, under Article 57, the National Assembly may *by majority vote* seize the Court for this particular subject matter. Effectively, this means of seizing the Court constitutes a special case of the general provision of Article 101 2), which allows the Court to be seized by *at least one third* of the Deputies on any matter listed in Article 100 (except disputes concerning election results and cases prescribed by Article 59). Therefore, Article 57 does not constitute an extension of the list of persons or bodies which have standing before the Constitutional Court. Article 101 of the Constitution is, therefore, exhaustive. Furthermore, after the list, Article 101 concludes: 'The Constitutional Court shall only hear cases that have been properly submitted.'

Similarly to Article 100, Article 101 of the Constitution is reiterated in the Law on the Constitutional Court, in Article 25, which also includes the case foreseen under Article 57 of the Constitution. Chapter 9 of the Law on the Constitutional Court sets out the requirements and characteristics of a case under review at the Constitutional Court. These requirements also cover the scope of the above provisions.

Thus, one may conclude that the Constitution of the Republic of Armenia and the Law on the Constitutional Court thoroughly specify the competence of the Constitutional Court and the scope of subjects entitled to submit an appeal to the Constitutional Court. Moreover, in admissibility proceedings, the Court must reject the claim if the claimant is not entitled to bring an action to the Court (Article 32, para. 2).

6. Normally, if individuals are to be allowed to take actions to the Constitutional Court, this right should be included in the Constitution and strictly regulated by the Constitutional Court Statute. This is also generally the case in practice, either in the original constitutional draft and not least in recently drafted Constitutions, or as a later amendment to the Constitution.

A noteworthy exception to this rule of thumb is Germany, where the possibility of an individual complaint was expressly enacted in the *Grundgesetz* (Article 93(1)(4a)) in 1969, although in practice the possibility of bringing an individual complaint to the *Bundesverfassungsgericht* existed well before 1969. From 1949, when the *Grundgesetz* was passed, until 1969 Article 93 contained no reference to the individual, but Article 93(2) provided that the Court 'shall also rule in such other cases as are assigned to it by federal legislation. The Law on the Federal Constitutional Court of 1951 made reference to the individual complaint (*Verfassungsbeschwerde*) in its Article 93. One can distinguish this exception from the constitutional framework of the Republic of Armenia. In the Armenian Constitution, Article 101 makes express provision for the parties allowed to submit applications to the Constitutional Court without including the individual, whereas Article 93(2) of the *Grundgesetz* of the Federal Republic of Germany made it clear that the parties mentioned in Article 93 by no means constituted an exhaustive list.

One must bear in mind that the Federal Republic of Germany eventually amended its Constitution and Constitutional Court Statute to include an express provision for the availability of an individual complaint in 1969. This was due not to the lack of legal basis for the individual complaint prior to the amendment, but was done in the interest of clarity and in recognition of the fact that such a possibility should normally be expressly provided for in the Constitution.

Furthermore, the Commission noted already in its Opinion on the Law on the Constitutional Court of Ukraine (CDL (97) 18) that, although the existence of the possibility of an individual complaint to the Constitutional Court should be clearly entrenched in the Constitution, there might be exceptions, such as the case of Ukraine. There the Constitution provides that one of the tasks of the Constitutional Court is to give an official interpretation of the Constitution and the laws of Ukraine (Article 150(2)). However, it is not made clear who may seize the Constitutional Court with such a question. The Law on the Constitutional Court gives this right to request an interpretation both to State bodies (Article 41) via petition and to individuals and legal entities (Article 43) by way of constitutional complaint of violation of the constitutional rights and freedoms of the appellant. However, the Ukrainian case is similar to the German one, as a gap in the Constitution was then filled by the Law on the Constitutional Court. No such gap is apparent in the Constitution of the Republic of Armenia.

III. The Constitutional Requirement of Articles 38 and 91. Are constitutional rights sufficiently guaranteed without the availability of an individual complaint?

7. Article 38, para. 2, of the Constitution states that 'Everyone is entitled to defend in court the rights and freedoms engraved in the Constitution.' This does not mean that the individual has the right to bring an action to the Constitutional Court. The words 'in court' refer to the general judicial system of the State.

Article 91 of the Constitution states that 'justice shall be administered solely by the courts in accordance with the Constitution and the laws', and Article 92 proceeds to list the courts of general jurisdiction, then it mentions the existence of courts of special jurisdiction without mentioning the Constitutional Court. Viewed together with Article 91, Article 38, para. 2 is referring to the administration of justice by courts of general jurisdiction. These two articles are to be seen as general norms, whereas Articles 100 and 101 should be seen as special norms, which, as per the principle of *lex specialis derogat legi generali* apply to the extent of conflict with general norms. The Constitutional Court may not interpret the Constitution on its own initiative. The Constitution would have to provide for this possibility expressly, as the Bulgarian Constitution does in its Article 149. Under Articles 100 and 101 of the Constitution, the Constitutional Court may only interpret the Constitution when it reviews cases, initiated by subjects entitled to submit an application, and when it decides whether laws, National Assembly resolutions, orders and decrees of the President of the Republic, Government resolutions and obligations assumed in international treaties which are yet to be ratified are in conformity with the Constitution.

8. By virtue of Articles 100 and 101 of the Constitution, the Armenian Constitutional Court shall 'only hear cases that have been properly submitted' (i.e. instituted by the list of subjects and bodies in Article 101) and the jurisdiction of the Constitutional Court is restricted to the subject matter set out in Article 100.

Individuals are not entitled to lodge complaints with the Constitutional Court challenging the constitutionality of acts or decisions affecting their rights. This lack of the possibility of an individual complaint to the Armenian Constitutional Court may give rise to problems with regard to the Constitutional requirement for legal protection of the freedoms and of the exercise of duties entrenched in the Constitution (in Articles 38 and 91).

IV. Article 7 and Diffuse Constitutional Control

Article 7 of the Draft Law on the Organisation of the Judiciary reads as follows:

Courts administer justice in accordance with the Constitution of the Republic of Armenia, international agreements of the Republic of Armenia, and laws.

Revealing the incompatibility of the acts of the state or other body with the Constitution of the Republic of Armenia, international agreements of the Republic of Armenia or laws of the Republic of Armenia, the court passes its decision in accordance with legal provisions having higher supremacy.

9. The two questions put to the Venice Commission are linked, as the construction of Article 7 of the Draft Law on the Organisation of the Judiciary would differ according to whether an individual complaint to the Constitutional Court were permissible. If an individual complaint were possible, Article 7 might present problems of construction. If, however, no complaint to the Constitutional Court is available to the individual in the Republic of Armenia, which definitely appears to be the case under the present constitutional system, then Article 7 constitutes the basis for a so-called diffuse constitutional justice system.

10. An example of the diffuse system of constitutional justice is the United States model, under which all judges are competent to review the conformity of laws to the Constitution within the particular cases before them. This is in direct contrast to the European model of constitutional justice, in which a central State body, the Constitutional Court, holds exclusive power to review the constitutionality of legislation. This type of Court is often invested with specific powers of constitutional relevance such as the relationship between superior State bodies.

The effects of decisions in these two systems differ. In the European system the decisions have general application, whereas in the US system judges decide on a case-by-case basis. European decisions of unconstitutionality generally render a provision null and void, so that it cannot be applied again in any other court, whereas an American judge's decision not to give legal effect to a law in a particular case will affect that case alone.

11. Article 7 of the Draft Law on the Organisation of the Judiciary appears to be an attempt to fulfil the above-mentioned constitutional requirement of the legal and judicial protection of freedoms and the exercise of duties entrenched in Articles 38 and 91 of the Constitution. This provision concerns the administration of justice by the courts, and requires them to observe the hierarchy of laws, whereby the Constitution is paramount, followed by international agreements and laws of the Republic of Armenia. Where a court recognises the legal inconsistency of an act of the State or of another body, the court must pass its decision according to this hierarchy of laws. Article 7 effectively provides a guarantee for the protection of the rights and freedoms entrenched in the Constitution insofar as it allows every judge to apply the Constitution directly and refuse to implement an act of the State, if that act infringes a constitutional right. This interpretation is in conformity with Article 6 of the Constitution, which proclaims the supremacy and direct effect of the Constitution and, conversely, the lack of force of 'acts found to contradict the Constitution'.

V. The Constitutionality of Article 7 of the Draft Law on the Organisation of the

Judiciary

12. The constitutionality of Article 7 is in question here, as it allows courts other than the Constitutional Court to decide on issues of inconsistency with the Constitution. Thus, arguably, Article 7 conflicts with Article 100 of the Constitution, which gives the Constitutional Court the power to decide on the conformity of legislation with the Constitution.

However, Article 7 of the Draft Law on the Organisation of the Judiciary does not authorise courts to supervise the constitutionality of acts of the State. Instead, what it allows courts of general jurisdiction to do, is, when reviewing a particular case and deciding that a norm contradicts either the Constitution, international treaty obligations or law, to apply the Constitutional norm, international treaty or legal norm directly. Article 7 does not allow a court to declare the conflicting act to be null and void.

13. The Armenian system of constitutional justice appears to comprise elements of both the European and the American models. On the one hand, it has a Constitutional Court with a specific jurisdiction and corresponding subjects and bodies empowered to petition the Court, as outlined in Articles 100 and 101, which is akin to the European model. On the other hand, competence regarding constitutional issues is by no means exclusive to the Constitutional Court, because whenever the issue of a law's conformity with the Constitution arises in a case before any court, the judge may refuse to apply a law he or she considers to be contrary to the Constitution and may apply the Constitution directly.

VI. Problems Surrounding Diffuse Constitutional Control in Armenia

14. One might envisage some problems in the cohabitation of these two forms of constitutional justice. Conflicts may foreseeably arise between the Constitutional Court and other courts if they come to different conclusions concerning a law's conformity with the Constitution. However, this eventuality has, arguably, already been resolved by the provisions presently in force in Armenia.

Only the President of the Republic or one-third of the Members of the National Assembly may submit to the Constitutional Court cases dealing with the constitutionality of laws, National Assembly resolutions, decrees and orders signed by the President of the Republic, and Government resolutions. No deadline is set for these submissions, therefore the President of the Republic and the Members of the National Assembly may still contest the constitutionality of laws long after they have come into force. This absence of a deadline is no accident, as deadlines are set for two other types of petitions to the Court, under Articles 57 and 58 of the Law on the Constitutional Court.

Article 64 of the Law on the Constitutional Court provides that judgments of the Constitutional Court 'shall be mandatorily applicable throughout the territory of the Republic.' This effectively removes the possibility of conflict between the Constitutional Court and other courts regarding a law's conformity with the Constitution. Other courts are bound by the decisions of the Constitutional Court: they are not allowed to apply a law that the Constitutional Court has declared contrary to the Constitution.

VII. Conclusions

15. The wish to institute an individual complaint to the Armenian Constitutional Court is thoroughly commendable, as it would be a positive step in the direction of securing the protection of rights and freedoms as entrenched in the Constitution of Armenia. However, it seems that there is no possibility of an individual complaint to the Constitutional Court of Armenia, unless the Constitution is amended to include it.

By virtue of Article 7 of the Draft Law on the Organisation of the Judiciary, the constitutional rights of individuals may be defended before courts of general jurisdiction, and Article 6 of the Constitution states that '...its norms are applicable directly.' The draft provision introduces a system of diffuse control which allows a compliance with the constitutional requirement of legal protection of the constitutional rights and freedoms of individuals

16. Although the Armenian system of constitutional justice is a mixture of two different models it could very well work in a satisfactory manner. It reserves for the Constitutional Court the important role of resolving conflict with regard to the conformity of a law with the Constitution. In certain systems it is essential to provide for a court charged with the task of examining the law critically, not least where the individual is the aggrieved party.

However, such cases must be submitted to it by the President of the Republic or one-third of the Members of the National Assembly and thus the involvement of the Constitutional Court is reliant on political will. It would be preferable for the Constitutional Court, which is supposed to be the supreme guardian of the Constitution, to be called upon when it matters most or when the constitutional rights of individuals are at stake. Thus Armenia should amend its Constitution to allow individuals access to the Constitutional Court or to afford jurisdiction to the Constitutional Court on constitutional matters, so that whenever the issue of the constitutionality of a law arises before any court, that court could suspend proceedings and refer the constitutional question to the Constitutional Court.