



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 7 June 2005

Opinion no. 313/ 2004

Restricted
CDL(2005)043rev
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SECOND INTERIM OPINION

**ON CONSTITUTIONAL REFORMS
IN THE REPUBLIC OF ARMENIA**

On the basis of comments by

Mr Aivars ENDZIŅŠ (Member, Latvia)

Mr Kaarlo TUORI (Member, Finland)

I. Introduction

1. Upon the request of the Armenian authorities, in October 2004 the Venice Commission prepared an opinion (*Interim Opinion on constitutional reforms in the Republic of Armenia, CDL-AD(2004)044*) on three draft proposals of amendments to the Constitution of Armenia (*CDL(2004)100, CDL(2004)101, and CDL(2004)107*).
2. On 10 May 2005, the National Assembly of Armenia adopted in the first reading the first draft proposal of amendments to the Constitution of Armenia, as revised (*CDL(2005)042*). By a letter of 17 May, Mr T. Torossyan, vice-speaker of the Armenian National Assembly, requested the Venice Commission to carry out an expert assessment of this text.
3. Messrs Kaarlo Tuori and Aivars Endzins, members of the Working Group on constitutional reforms in Armenia, carried out such assessment.
4. On 2 June 2005, Mr Aivars Endzins, accompanied by Mr Gianni Buquicchio and Ms Simona Granata-Menghini, travelled to Yerevan, where he met with Mr Robert Kocharyan President of the Republic, Mr Arthur Baghdasaryan, Speaker of the National Assembly, Mr Tigran Torossyan and leaders and representatives of the parliamentary factions. A time-frame for further co-operation of the Venice Commission with the Armenian authorities in relation to the constitutional reforms was agreed upon (see appendix to this opinion).
5. The present opinion, which was drawn up on the basis of the rapporteurs' comments, was adopted by the Venice Commission at its 63rd Plenary Session (Venice, 10-11 June 2005).

II. Analysis of the constitutional amendments adopted in the first reading

6. In its interim opinion on constitutional reforms in Armenia, adopted in December 2004 (hereinafter "the first interim opinion"), the Venice Commission called for "more significant amendments", in particular with respect to the key issues of the balance of powers between the state organs, the independence of the judiciary and local self-government. It considered that the broad powers of the President, not balanced by the necessary strengthening of the role of the National Assembly, and combined with a general clause on presidential immunity were dangerous for the democratic life of the state, and were not in conformity with the Council of Europe standards.
7. In the same spirit, at their 912th meeting in January 2005, the Ministers' Deputies of the Council of Europe "...requested the authorities to speed up democratic reform by strengthening the separation of powers and to continue to make progress towards compliance with the commitments which have not yet been fulfilled...", and "...stressed, in particular, the importance of introducing constitutional reform within the time-limits agreed with the Venice Commission...".
8. The Commission notes and regrets that the text which the Armenian National Assembly has chosen, amongst three draft texts of constitutional amendments submitted to it, as the basis for the constitutional amendments contains only few *substantial* improvements and, in all, does not take into account the comments made by the Commission in its first interim opinion (see CDL-AD (2004) 044, paras. 10 to 71).

a. Amendments with respect to protection of human rights and freedoms

9. The constitutional amendments adopted on 10 May 2005 (hereinafter: “new draft Constitution”) brought about a number of positive changes in the Chapter on protection of human rights and freedoms.

10. The revised Article 15 explicitly abolishes the death penalty in Armenia. The new Article 16. § 1, 1 to 6, now provides an exhaustive list of situations where a person can be deprived of his or her freedom, thus conforming to Article 5 ECHR. The right to an effective remedy for alleged violations of guaranteed rights and freedoms is now clearly established (revised Article 18.1), and the revised Article 29 has removed the distinction between different categories of assemblies, which is to be welcomed.

11. New paragraphs 5 and 6 of Article 27 are also useful and welcomed, as they may contribute to guaranteeing pluralism of the media and independence and transparency of the regulatory authorities.

12. In the English version of the text, Article 27 § 3 still contains the previously criticized provision whereby “the activities and liabilities for mass media shall be defined by law”, which leaves open the possibility of not clearly defined restrictions on the freedom of the media and should therefore be deleted. According to the Armenian authorities, this provision has however already been deleted in the Armenian text.

13. Article 22 § 7 of the new draft constitution, allowing for a person to be sentenced twice for one and the same act “when thus prescribed by the law”, is, according to the Armenian authorities, intended to implement paragraph 2 of Article 4 of the Protocol 7 to the ECHR, which reads: “The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.” The wording of Article 22 § 7 should be modified to mirror Article 4 of Protocol 7.

14. In addition, the Commission considers that, in order to ensure an effective protection of guaranteed human rights and freedoms, this constitutional Chapter should also include an explicit definition of the Human Rights Defender’s powers.

b. Amendments with respect to relations between President, National Assembly and Government

15. The Commission regrets that the main points of criticism raised in its first interim opinion, which related to the power of the President to nominate and dismiss the Prime Minister and, on the latter’s recommendation, the members of the Government; the right of the President to convene and chair a sitting of the Government; a general clause on presidential immunity as well as the power of the President to dissolve the National Assembly (which was strengthened even further¹) have not been taken into account.

¹ According to the revised Article 74 .1, « if the National Assembly does not give a vote of confidence in the main provisions of the Action Plan of the Government two times in succession within two months... » instead of former three times.

16. It is true that some improvements have been made, and that provision has been made, for example, for a duty of the President to “consult the factions of the National Assembly” before appointment and dismissal of the Prime Minister and the members of the Government (revised Article 55.4), for a more significant role of the National Assembly in the procedure for declaring martial law and the state of emergency (revised Article 55, paras.13 – 14), and for the right of Deputies and groups of Deputies to address written and oral questions to the Government (Article 80). The presidential right of legislative initiative (revised Article 75) and the right of the Prime Minister to put forward a motion on confidence with respect to the adoption of a draft law proposed by a Deputy (revised Article 75 § 4) have been removed.

17. Nevertheless, having in mind the other powers of the President which were analysed in detail in the Commission’s first interim opinion, the new draft Constitution does not provide guarantees either for an effective independence of the Government vis-à-vis the President, or for a strong National Assembly.

18. With respect to Article 85 §2 of the new draft Constitution and the Government’s power to “implement” domestic and foreign policy, the Commission considers that it is yet another sign of the dominant role of the President in respect of the other State organs.

19. Overall, this section of the new draft constitution still contains provisions that conflict with European standards, and fails to provide guarantees for the indispensable balance in the relations between the main constitutional organs in Armenia.

c. Amendments with respect to judiciary

20. The changes in the constitutional provisions on judicial system brought by the new draft constitution are also rather limited. It is still the President who appoints and dismisses the Prosecutor General and, upon the latter’s recommendation, his or her deputies and appoints the Chairman of the Council of Justice, the chairmen of courts and the judges. The legal effects of the nomination of candidates for judges made by the Council of Justice, and of the latter’s “recommendation” for their dismissal, appear to be merely advisory.

21. The removal of the right of the President to chair the Council of Justice, and the right of the National Assembly to appoint two non-judge members of the Council of Justice (revised Article 94.1), the role of the Council of Justice in the procedure of dismissal of judges (revised Article 95 § 4) as well as the introduction of the right of the individual complaint before the Constitutional Court (new Article 101§ 1, 6) are, instead, useful and welcomed.

22. The Commission thus reiterates the comments and recommendations made in its first interim opinion with respect to the necessary independence of the Prosecutor and the judiciary from the executive.

d. Amendments with respect to local self-government

23. Although significant, the changes brought about by the new draft constitution relating to provisions on local self-government do not touch upon the main problem raised in this respect by the Commission in its first interim opinion. In contradiction with Article 107 of the same draft constitution, which provides for a direct election of the Heads of Community, Article 88.1

has maintained the previously criticised system of appointment and removal of the Yerevan Mayor by the President².

24. The power of the Yerevan Council to remove the Mayor in the cases prescribed by law is a step in the right direction, but is still not sufficient to fully comply with the European Charter of Local Self-Government, which implies directly or indirectly elected Mayors (heads of local executives).

25. On the other hand, paragraph 3 of the revised Article 88.1 appears to have been substantially modified compared to the previous version of these draft amendments that were submitted to and evaluated by the Venice Commission in its first interim opinion. In fact, the current text of Article 88.1 no longer presents the Yerevan Mayor as an official in charge of territorial (State) administration, alongside regional governors. Combined with Article 108, where the Yerevan Mayor is defined as a “head of community”, these provisions allow for clear separation of the State and local government administrations in Yerevan, which is to be welcomed.

26. Finally, the balancing of the power of the Government to discharge the Head of community (the revised Article 109 of the new draft constitution) with the need for a previous “court judgment” on the issue is to be welcomed; however, this provision should explicitly state that it is a *Constitutional court* judgment.

III. CONCLUSIONS

27. The Venice Commission and the Council of Europe have long worked together with the Armenian authorities on constitutional reform. This co-operation started in 2000, when the Commission got involved in the process of drafting constitutional amendments that resulted in the proposed draft constitution in July 2001 and the related report (CDL-INF (2001)017). Regrettably, before being submitted to the popular referendum in May 2003, the 2001 draft constitution was again revised by the Armenian authorities to include some of the previously criticised provisions.

28. Following the failure of the May 2003 referendum, in early 2004, the Commission, in co-operation with the National Assembly of Armenia, organised a conference on constitutional reforms in Yerevan aiming at resuming the process of reforms involving all political forces and civil society, and arriving at true improvement of the current semi-presidential regime.

29. In spite of all the above-mentioned, certain important aspects of the text which was approved in the first reading do not conform to European standards and do not reflect the suggestions made by the Venice Commission and the Council of Europe, particularly as regards the balance of powers among the State organs, the independence of the judiciary and the manner of appointment of the mayor of Yerevan.

30. In this respect, the Commission wishes to express its deep disappointment with the lack of satisfactory results as regards the constitutional amendments.

² Pursuant to Article 108 of the draft amendments, « The city of Yerevan shall be a community ».

31. The Commission cannot but stress once again that in order to achieve a truly democratic constitutional text, the constitutional amendments should first of all retain the comments made by the Commission and the Council of Europe; in addition, constitutional changes should only be made after open and free public discussions and should be based on a large consensus among the political forces and within the civil society.

32. The Commission considers that the text of the constitutional amendments should be substantially revised before the second reading, and should be made to reflect fully the previous opinions given by the Commission on this matter.

APPENDIX

Agreed Conclusions

Of the Meetings between the Venice Commission's Working Group

And the Representatives of the Armenian Authorities

(Yerevan, 2 June 2005)

- *The Venice Commission's Working Group considers that the draft constitutional amendments, as adopted in the first reading in May 2005, still present important shortcomings in three main respects:*
 - a) *the balance of powers between the state organs;*
 - b) *the independence of the judiciary; and*
 - c) *the manner of appointment of the Mayor of Yerevan.*

- *The Armenian Authorities:*
 - a) *intend to improve the draft by making important amendments which will bring it in line with the Venice Commission's recommendations in these three areas; and*
 - b) *will present the improved draft to the Venice Commission working group before 20 June 2005, before holding the second reading.*

- *A working meeting will be held between representatives of the Armenian National Assembly and the Venice Commission Working Group, in Strasbourg, on 23 June 2005 (to be continued, if necessary, on 24 June 2005), with a view to discussing further improvement of the draft amendments.*

- *The draft amendments will be finalized as a result of this working meeting, and will be presented to the Venice Commission for expertise before the second reading takes place.*

- *The second reading in the National Assembly will be held on a mutually acceptable draft as soon as possible.*

- *The Constitutional Referendum should be held in October 2005.*