

Strasbourg, 5 December 1997

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**CDL-JU (97) 59**  
Or. Fr./Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**CONSTITUTIONAL GUARANTEES OF THE PROTECTION  
OF HUMAN RIGHTS IN THE REPUBLIC OF ARMENIA**

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International seminar on "Constitutional Control  
and the protection of Human Rights"  
Yerevan, Armenia, 22-24 October 1997

My presentation is dealing with one of the crucial issues of constitutional rights - the problem of constitutional guarantees of the protection of Human Rights which is one of the major factors of the establishment and development of a democratic, legal and social State. It is general knowledge that if a State has no basic law, or constitution, then it cannot guarantee the protection of human rights, i.e. there is no stable and precisely operating system regulating the varying legal relationships between the State and its Citizens, with all the ensuing consequences therefrom. It is however to be added by default that the concepts of statehood and democracy in the last quarter of the XXth century indicate unambiguously that the existence of a constitution *per se* is not a sufficient proof of the complete solution of the guarantees for human rights protection within a State. What is also of utmost importance here is the adoption of the constitution with the participation of the large masses of people, with regard to the international experience in the development of constitutional rights, while viewed from our perspective, it is also the constitutional determination of the human rights status within a state and society, provision of guarantees or the protection of human rights and envisaging the practical and integral mechanism for resolving this problem using the legislative, executive and judiciary institutional systems.

When speaking about guarantees for the protection of human rights in the Republic of Armenia, it is my purpose not so much to underscore the constitutionally registered problem of analysing the basic rights and freedoms, but rather to discuss the constitutional contingencies for their protection on the part of different branches of governmental authorities and invite your attention to the discussion and possible resolution of some relevant disputable questions.

About 41 articles of the Armenian Constitution are dedicated to the definition of human rights and freedoms, to the functional assignments of governmental bodies and official persons called upon to secure the registration of those rights and freedoms, their inviolability and their protection. Article 4 of the Constitution in its contents has confronted the State with a major objective, i.e. to secure the protection of human rights and freedoms on the basis of Constitution and Law pursuant to the principles and standards of the International legal right.. It is my belief that it is undoubtedly in this statement that one should look for the key to solving the major issue of human rights protection. Theoretically it should yield the following results:

1. there is a need to provide a constitutional registration or a recognition of the substantive human rights and freedoms.
2. there is a need to make a legislative provision of special mechanisms to implement the human rights and freedoms as well as to secure their efficient application.
3. there is a need for a legislatively secured observance of the unfaltering dispensation of political rights and freedoms in case of their violation using the principle of the rule of law.
4. An institutional system is to be constitutionally and legislatively envisaged to secure an inviolable full-scale implementation of human rights and freedoms and to guarantee their integral operation.

Very important in the last three examples is also the appropriation of international experience.

This, to my mind, is shown as a theoretical vision represented by the generalizing model in Article 4 of the Constitution of the Republic of Armenia (RA) on human and social rights and freedoms.

Now we shall try to define the level of guaranteed security for human rights protection using the principle of comparison between the RA Constitution and the above-mentioned model.

Let us first review the well-known constitutionally registered and recognized subject of Human and Social rights and freedoms in RA. It is to be noted that Chapter two of the RA Constitution titled "Substantive human and social rights and freedoms" (Article 14-48) highlights all basic international legal regulations on human and social rights and freedoms.

They have been implemented in the RA Constitution. Moreover, the list of rights and freedoms given in Article 43 being not considered exhaustive, allows for a possible inclusion of other commonly recognized human and social rights and freedoms, which statement for the first time elevates constitutionally the role of the major human rights problem in the Republic to the highest level.

Accepted as constitutional standards are the inalienable rights and freedoms that have been secured by the following documents: The Universal Declaration of Human Rights (Dec. 10, 1948), Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966), International Covenant on Civil and Political Rights (Dec. 16, 1966), The UN Declaration On Eliminating All Kinds Of Racial Discrimination (Nov. 20, 1963), Convention of Freedom of Association And The Protection of The Rights of Organizations (July 9, 1948), Convention on Elimination of Discrimination against Women (Dec. 18, 1979).

There is no need to dwell upon the contents of constitutionally registered human and social Rights, since they have quite identical and unambiguous interpretations both domestically and internationally, it is necessary to emphasize that Article 44 and 45 of the RA Constitution provide special guarantees of the inviolability of those rights and freedoms except the cases authorized by Law when there is a threat for the State or public security to be compromised, or a threat to public order, public health and morals or other rights and freedoms like honour and good name; certain rights and freedoms can also be restricted in case of military rule as well as in case of an immediate threat to the constitutional order of RA.

As we see, the RA Constitution is resolving the generally recognized problem of registration and recognition of the Rights of Man and Citizen quite explicitly and unambiguously. We should also remember our recent past, when the Soviet constitution proclaimed a whole bunch of Rights of Man and Citizen with no actual guarantees of their application or protection.

As mentioned above, the next most significant factors of the protection of human rights and freedoms are: to constitutionally contemplate the mechanisms of implementing those rights and freedoms as well as to secure their efficient effectuation in case of those rights and freedoms being trampled, using the principle of the rule of law, to secure an unfaltering application of the enforcement potential of the State.

I would award the mentioned factors a second place by their significance.

The operational efficiency of the State as one of the most fundamental functions of protecting the human and social rights is largely dependent upon how much the current legislation guarantees the possibility of the full-scale implementation of the constitutional rights and freedoms of Man and Citizen, that is also a criterion of whether the State is legal and democratic.

No more than two years had elapsed following the ratification of the newly independent Armenia's constitution, when the National Assembly had passed *ca.* 140 laws including legislative acts on securing the application of constitutional human and social rights and freedoms in the political and social-economic sphere, particularly on citizenship, on state-provided social benefits to the retired, on medical aid and health care, on the rights of children, on private property relationships, and many others. However, I want to distance myself from the idea that the desired legal field to provide the citizens with the constitutionally registered guarantees for rights and freedoms has already been established. Many things have yet to be done. We shall dwell upon some of them in more detail.

1. I want to emphasize the right of participation of citizens to govern the State directly or through the representatives elected by free expression that originates directly from the Universal Declaration of Human Rights, from the International Covenant on Civil Rights. I strongly believe that the prerequisite to refine the current electoral laws of the Republic of Armenia will stay on the agenda as long as there are no precisely defined guarantees of a full-scale election supervision, openness of the whole election process, the eventuality for the unconstrained expression of the judgment of the people, etc.

2. Certain constitutional standards on human and civil rights and freedoms have not yet been legislatively revised or not sufficiently revised. Let us present some here.

- Defined in Article 16 of the RA Constitution is the principle of equality of everyone before the law without discrimination, and the protection of this principle by the law. It is clear that with regard to the civil code operating since the Soviet era, as well as in the absence of the laws on public service, judicial practice, police, prosecution and a number of other major laws, the unfaltering application of the above-mentioned statement cannot be regarded as guaranteed.

- A number of statements set forth in Article 18, 20, 28, 39, 40 and 41 concerning some human rights in the administration of justice and the rehabilitation of disregarded rights, have yet to be executed, either by reason of the absence of proper legislation, or through inability to adapt the old laws to the new social order. The same substantiation also applies to certain statements of Article 21, 29, 31, 32, 35, 36 of the Constitution with regard to the absence of acting legislation on civic affairs, marriage and family, housing, education, judicial procedure, etc. Under such conditions, naturally, a citizen either has no capability to fully effectuate his certain constitutional rights, e.g. residential immunity, protection of intellectual property, a public scrutiny of his case by an independent and impartial court, compensation of injury caused by a violation of rights, or else addressing public bodies or officials who often through absence of necessary authority, using some subterfuges, try through imperfection of legislation or simply through its absence, to channel the case to a certain decision. It should be reminded that according to Article 5 of the RA Constitution, the public bodies and officials have competence to perform only such actions for which they are authorized by the legislation. It is also to be emphasized that still in force is the RA Law "On the procedure for discussing the proposals,

applications and complaints by the citizens,” which, to put it mildly, is unable to regulate the controversial relations arising between the citizens and the public bodies with regard to the speedy, objective and appropriate examination. To my mind, that law should definitely differentiate the functions of the legislative, executive and judiciary bodies within the whole process of discussing and resolving the diverse petitions, complaints and proposals by the citizens.

Obviously, the crucial issues of the above-mentioned field can be explained away by the features of the preceding period, or even by lack of experience, however, the priority of the issue of protecting constitutional human rights and freedoms imperatively requires to exert the proper pressure from both the legislative and executive authorities in the future, to fill in that legislative gap, so as to bring the Constitution in line with the current legislation. In connection with this, even a very superficial examination shows that the disparities between the current legislation (including the field of protecting the human rights and freedoms) and the Constitution reach well into the double-digit numbers. To cite a couple of examples, first my distinguished colleague Mr G. Harutiunian’s remark with regard to Article 38, Part two of the RA Constitution. Although Article 38 Part two of the RA Constitution provides the human right of judicial defence of the rights fixed by the Constitution and by Law, that right of defence resulting directly from the Universal Declaration of human rights, contrastingly, in Article 266, Article 287 Items 4 and 5, that same right is out of the question, since in the former case the citizen has not been granted an opportunity to appeal to the court about administrative detention, search or seizure of property or documents as sanctioned by an official person, and in the latter case a decision by the department of the interior or an official person in the form of a notification of possible administrative sanction or else a decision by an official person from the military road police on a notification of a possible administrative sanction. A similar controversy exists between the above-mentioned Article of the RA Constitution and the RA water rights Article 70, 72, 73, 74 and 75. Or else, pursuant to Article 28 of the Constitution, every person can be deprived of a property only through a court decision, while an alienation of property for the State or public needs can be implemented on the basis of the law through an equivalent preliminary compensation. However, the statements contained in Article 59 and 60 of the «Property in the Republic of Armenia» are in direct contravention of the Article 28 of the Constitution mentioned earlier, since there is no provision whatsoever in the mentioned law for the institute of preliminary compensation to the proprietor of alienated property for damages, while the authority for expropriation, according to this law, belongs to State bodies rather than to the court. I, for example, do not intend to claim your attention for the criminal, political, procedural or other operational codes with their inherent unconstitutional formulations, since that would require many more hours of your time than what we are planning for this seminar. Therefore, I would not hesitate to again underscore the expediency of bringing the current Legal Code in line with the Constitution, as well as the urgency for the National Assembly to enact additional legislation that would secure the execution of human rights constitutionally. Thus, inasmuch as there still remain those discrepancies and legally unregulated relations, our citizen still remains unprotected, our state still remains low in its legal and democratic status.

It is my intention now to feature the problem of the institutional system to secure the infallible and full-scale execution of the human rights and freedoms as well as the model of this system as mentioned at the beginning of my presentation. This is, to my mind, a key issue of the problem of the protection of human rights and freedoms in Armenia. It is one problem to constitutionally register the human rights and freedoms, and still another is to have an efficient and integral

institutional system in operation that would secure and guarantee their unfaltering execution. Meanwhile, those problems are very closely interconnected, and theoretically it can be assumed that pursuant to the content of human rights and freedoms, there must be a constitutionally guaranteed and institutionally adequate system of democracy to uphold their efficient operation.

This institutional system, of which one of the major functions is to guarantee and protect the human and social rights and freedoms, could be classified, as I see it, into two basic branches:

1. Institutional state-controlled system
2. Institutional public (non-state-controlled) system

What I mean in the former case is the entire system of governmental entities, according to Article 5 Part One, Chapters 3, 4, 5, 6 of the RA Constitution, while in the latter case it is the local self-governing bodies, according to Article 2 and 105 of the RA Constitution, as well as public organizations and parties, according to Article 25 of the RA Constitution.

It should be noted at the start that while with regard to the problem of human rights protection the functions of the State system are raised to the constitutional level, i.e. guaranteed by that should also be the relative stability of the system as a carrier of democracy, with the public system this is not the case. Registered in Article 2 of the Constitution is only the argument of the local self-governing bodies being the democracy-carrying entities. Meanwhile, Article 105 of the Constitution, beside other authorizations, has not retained the authorization of protecting the human rights, that is in my opinion one of the most important functions of those bodies. Also ambiguous in this respect is Article 110 of RA Constitution, the content of the Article does not follow from the content of Article 105 of the Constitution. Whereas, Article 27 of the RA Law «On Regional Self-Government» is resolving this issue unambiguously empowering the regional administrator to protect the citizens' rights, which in its turn semantically does not follow from the statements of Article 105 of the Constitution.

However, Article 105 of the Constitution, beside other authorizations« does not provide the authorization of the human rights protection, which, to my mind, is one of the most important functions of those bodies.

With regard to the public organizations and parties, Part. 25 of the Constitution only registers the right of the citizens to establish associations, including professional unions and to join their memberships, as well as to establish parties and join their memberships. The problem of public organizations, functions of the parties, and in particular, of their members' rights, freedoms and legitimate interests, has been solved in this Republic only *de jure*. To be added to this is that until now no law has been passed on professional associations, which situation by my estimation substantially weakens the role and significance of those organizations in the cause of protection of human rights.

The entire system of human rights and freedoms would work much more efficiently if in parallel to the guaranteed institutional activity of the public system there would also be a constitutional provision of close cooperation between those two systems, and the so-called «Checks and Balances» mechanisms. In other words, I think that the institutional state and public systems in the issue of human rights and freedoms must be constitutionally in equivalent

positions.

Let us consider the role of the institutional state system as a most significant constitutionally registered guarantee.

The institutional state system, according to Article 5 of the Constitution, is operational by the principle of differentiating the legislative, executive and judiciary authorities. The institutes of this system are:

1. President of RA
2. The National Assembly
3. The Government
4. The Judicial Entities

A function for the protection of human and social rights and freedoms for the President of RA is not provided directly by the RA Constitution. However, it follows from the substance of Article 49 of RA Constitution and partly from Article 94, ruling that the President of the Republic of Armenia will monitor the observance of the Constitution, secure the regular activities of the judiciary authority, guarantee the RA security, being a guarantor of independence of the judiciary entities.

The mechanisms registered in Article 49 of RA Constitution as well as those relevant to the implementation of a number of other authorizations of the RA President are not stipulated by the current legal code. Article 56 of the Constitution will only conceptualize the mechanisms of implementing its authorizations (including those stipulated by Article 49 of the Constitution) to determine the authority of the RA President. I think that in this question a large role has been played by the reservations indicating that the functions of the RA President are listed in Chapter 3 of RA Constitution, therefore there is no need for additional legislative regulation, moreover, that regulation may be in contravention to the Constitution. With your permission, I will reject this view. What we see here is not the new legislative provisions, but the mechanisms of implementing those authorizations of the RA President which have been registered in the Constitution. In other words, can we question the function of discussing the petitions, complaints and propositions carried out by the Presidential staff? It should be added here that withdrawing the right of legislative initiative from the President is theoretically a substantial impediment to using more active legal leverage in the protection of human rights and freedoms.

Anyway, analysis of Article 55 of the RA Constitution shows that if needed, e.g. to efficiently guarantee the protection of human rights and freedoms, the RA President is a competent entity.

1. Not to endorse a law passed by the National Assembly sending it back with his objections and suggestions to be further debated. (item 2, Article 55);
2. To dissolve the National Assembly following consultations with the National Assembly Speaker and the Prime Minister (item 3, Article 55);

3. To relieve Prime Minister of his duties, to release members of the Government, to accept resignation of the Government (item 4, Article 55) (e.g., with regard to securing the efficient protection of citizens' rights and freedoms);
4. not to conclude the International agreements, not to endorse the International agreements ratified by the National Assembly, or not to ratify the International Agreements that, by his conviction, can violate the human and social Constitutional rights and freedoms (item 7, Article 55);
5. to release the chief prosecutor through a presentation by the Prime Minister (item 9, Article 55);
6. By presentation of the Constitutional Court Chair to release the judges, deputy chief prosecutors, prosecutors heading the sub-structural divisions of the prosecutor's office (item 11, Article 55);
7. to make a decision on making use of the armed forces (item 13, Article 55) (e.g. in case of the Republic being under military attack);
8. in case of immediate danger to the constitutional order to take measures dictated by the current situation (item 14, Article 55);
9. to grant clemency to convicted persons (item 17, Article 55).

The competence to secure the constitutional human rights and freedoms is also exercised by the RA President when ratifying the governmental decisions, as well as when defining the structure and functions of the government (Article 85, 86 of the Constitution).

I fully agree with the distinguished Chairman of the Constitutional Court Mr G. Harutiunian in that the RA President should make a full use of the competence provided by item 6 Article 55 of the RA Constitution to establish under his aegis an advisory body or a similar subsidiary division within the presidential staff dealing with the basic questions of human rights protection which body will certainly assist the RA President to secure a regular operation of governmental entities in this crucial domain as well.

The second major place in the institutional state system of the protection of human rights and liberties is occupied by the National Assembly; its function in the domain of protection of human rights and freedoms originates from Article 62 of RA Constitution and partly from Article 74 of the Constitution. In the latter case, the National Assembly is authorized to declare the vote of no confidence to the government with regard, among other things, to the faults in the programmatic activities of the government dealing with the protection of human rights.

While implementing the legislative authority, the National Assembly affects the state and public life, including the spheres of protection of human and social rights and freedoms. It can unambiguously be stated that the efficiency of the National Assembly's law-making activity is largely dependent upon the efficient implementation of the human Constitutional rights and freedoms. Moreover, as has been mentioned, there is still a lot of work to do in adjusting the legislation to RA Constitution and in adopting the laws that would secure a full-fledged

implementation of the constitutional human rights. I think, while the legislative key issues of this domain are still awaiting their solutions, it would be expedient to establish a permanent committee on human rights under the National Assembly.

The next and central place in the state institutional system of human rights belongs to the government. In contrast to the RA President and the National Assembly, the Government is confronted with a more specific constitutional objective: to take action aimed at consolidating the rule of law in the way of securing the citizens' rights and freedoms (item 7, Article 89). For the key issues of this domain I could suggest the following classification:

- a) implementation of structural reforms in the sphere of management
- b) expansion of the legal basis

Despite the brevity of the key issues indicated, they are very content-rich. They are essentially the strategic problems of establishing the legal social State, providing a reliable protection of constitutional human rights in the transitional period. It is hardly possible to conceive a system securing the constitutional human rights and freedoms in Armenia with no reforms in the management structure. It is not possible to run the currently operational State machine using old-time techniques. I think, it is a very expedient priority to establish professional entities dealing with the key issues of human rights. While it is currently hardly financially or organizationally feasible to establish a freestanding ministry or another entity with a comparable status, still I consider it an urgent assignment to establish certain ministries (e.g., justice, foreign affairs, interior, national security), as well as to build up the relevant subdivisions within the governmental staff. It may be appropriate to cite the United States experience here. Established in the US Ministry of Justice in 1957 was Department of Political Rights, whose function is to monitor the precise execution of the federal laws banning the racial and national discrimination as well as the laws on religious freedom, in other words, the Department secures the protection of such human rights and freedoms that are guaranteed by the US Constitution.

It is necessary to thoroughly examine the key issues of human rights and freedoms in Armenia under the sponsorship of the State, primarily in those structures of the executive authority, where people address most frequently for the violated rights. Systemic approach to this type of work on the part of a proper authority or official person assumes not only practical steps at rehabilitating the violated human rights, but also day-to-day statistical-analytical work, processing the relevant proposals (also including the ones directed at producing relevant changes in the current legislation) and presenting them in a systematic form to the government for further discussion.

Speaking about the governmental connections in the system of protecting the human rights and freedoms, I recommend a strong link between the government and the prosecutor's office. According to the law on the prosecutor's office, it is necessary to even more clarify the right-protection role of this body both with regard to the constitutional human rights and freedoms and to cooperation between the institutional state and public structures in this field.

One of the most significant places in the state institutional system of human rights belongs to the judicial system. It is in this domain of authority that the citizen finds the eventual resolution of his problems of violated rights.

The organizational and functional procedure of the judicial authority is envisaged in Chapter 6 of the Constitution. However, the problems of execution of justice constitutionally and directly have not been resolved. The function of the court, as the chief protector of human rights and freedoms, is defined by law, according to Article 91 of the Constitution.

There are still too many unresolved issues in the domain of the judiciary authority, as has been already noted in the preceding presentations. I fully agree with the presentation of my distinguished colleague Mr G. Harutiunian as to his statements and proposed solutions, however I have certain reservations on several approaches concerning the system, where I would like to invite your attention.

One of the major objectives of the newly designed judicial system is to rehabilitate the trust of the citizen in the court and the judge as the executors of justice, in the entities protecting the citizen's Constitutional rights and freedoms. This objective can be achieved only by establishing a system that would be able to initiate an impartial and independent judicial authority. As a lawyer, I can make certain remarks on the constitutional principles of forming an independent and valid judiciary system. In my opinion, in the matter of judicial nominations following the procedure indicated in Article 95 of the Constitution, there is no equilibrium between the roles of RA President, the legislative and executive entities. While the first and the second ones have acquired a certain significance, the role of the third one is completely out of the question or brought down to an infinitesimal level, viz.: the passage of laws in the sphere of justice. Examples can be found in the international experience, to substantiate the efficiency of establishing the judiciary system according to Article 95 of the Constitution. However, the future Armenian judiciary system is going to be most efficient and operational, and, which is very important, independent, if it is to be formed through the balanced participation of the legislative and executive authorities and the RA President, with the same equilibrium to be used while forming the judicial council.

Judging from this viewpoint, I think that the statement in Article 94 of the Constitution is too unilateral to prescribe the role of guarantor of judicial independence to RA President, since this independence has to be secured not through RA President, National Assembly or the Government, but just through the contingency to build up an independent judiciary authority by virtue of the Constitution. Indeed, constitutionally the National Assembly is not a guarantor of independence of the Government or the RA President is not a guarantor of the independence of National assembly. And finally, pursuant to Article 5 of the Constitution, the power is administered by the differentiation of the legislative, executive and judiciary authorities. To my mind, this is an incongruity.

Also disputable is the mechanism of judicial selection from a list, all the more so that the rating characteristics of judges and the mechanism of their determination have not yet been clearly defined in different currently circulated projects concerning the structure of the forthcoming judicial system.

Viewed from the point of guaranteeing the human rights and freedoms, Armenia does not have even a satisfactory constitutional solution for the issues of constitutional justice. That has been the subject of Mr G. Harutiunian's presentation. It is to be repetitively emphasized that in most civilized countries the constitutional protection of human rights and freedoms is a major

problem of constitutional justice. I have witnessed many times individual citizens frustrated by the legal incompetence of the Constitutional court in examining the rehabilitation of their violated human rights and freedoms. The number of appeals of this type, within only 6 months of this year, amounted to 225, and is on the increase.

There are also numerous problems within the domain of the institutional state system of human rights and freedoms in connection with securing that system's integral operation, perceiving and applying its checks and balances as well as its legislative support. Avoiding a deviation from the subject of my presentation, I will however expect a forthcoming vivid discussion of this matter.

To conclude my report, dear participants of the Seminar, it is my wish to note that there exists no integral model structure of a legal democratic State. In the case of Armenia, the best solution is that there should be consolidation of integral mechanisms of the state-controlled and public institutional activities to be continually concentrated not only upon State independence, security, economy, development, etc., but also upon the Human being, the citizen, his constitutional rights and freedoms, upon their reliable protection as an outstanding motivation for building a democratic, legal and social State.