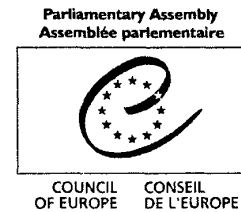


Parliamentary Assembly Assemblée parlementaire



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Constitutional reform process in Armenia

Report

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

Co-rapporteurs: Mr Georges Colombier, France, Group of the European People's Party and Mr Jerzy Jaskiernia, Poland, Socialist Group

Summary

The revision of the Constitution is a pre-condition for the fulfilment of some of the most important commitments that Armenia undertook upon its accession to the Council of Europe. These include the reform of the judicial system, local self-government reform, the introduction of an independent ombudsman, the establishment of independent regulatory authorities for broadcasting and the modification of the powers of and access to the Constitutional Court.

The delay in agreeing and adopting the constitutional amendments is holding back Armenia's progress towards European democratic norms and standards in key areas of political life.

Armenia cannot afford another failure of the constitutional referendum. The expert advice of the Venice Commission is a clear indication of the direction to follow. If it is backed by political will and democratic maturity, the necessary ingredients for a successful constitutional reform would be in place.

I. Draft resolution

1. The Parliamentary Assembly recalls that the revision of the Constitution is a pre-condition for the fulfilment of some of the most important commitments that Armenia undertook upon its accession to the Council of Europe. These include the reform of the judicial system, local self-government reform, the introduction of an independent ombudsman, the establishment of independent regulatory authorities for broadcasting and the modification of the powers of and access to the Constitutional Court. The deadlines for the completion of these commitments, stipulated in the Assembly's Opinion No. 221 (2000) on Armenia's application for membership of the Council of Europe, have now long expired.

2. The Assembly therefore is deeply concerned that the delay in agreeing and adopting the constitutional amendments is holding back Armenia's progress towards European democratic norms and standards in key areas of political life.

3. The present Constitution, adopted in 1995, has played an essential role in the development of democracy and its irreversibility and has allowed Armenia to become a member of the Council of Europe. However, its practical day-to-day implementation has increasingly revealed serious conceptual shortcomings which have become an obstacle for the further democratic development of the country. In the first place, the Constitution endows the President with excessive prerogatives and does not provide for clear separation and balance of powers within the state structures. Equally serious is the lack of constitutional guarantees for basic human rights, of independence of the judiciary and of local self-government in conformity with European standards.

4. The Assembly recalls the failure of the first referendum on constitutional amendments of 25 May 2003 and the fact that the authorities at the time had not committed themselves to a campaign in support of the reform as parliamentary elections were held in parallel. The subsequent deadline fixed by the Assembly in Resolutions 1361 and 1405 (2004) for the holding of a new constitutional referendum – not later than June 2005 – has been missed.

5. The Assembly recalls that in 2001, the Armenian authorities and the European Commission for Democracy through Law (Venice Commission) had arrived at a mutually acceptable draft Constitution in line with European standards. This draft, however, underwent significant changes during its examination and adoption by Parliament and the text submitted to referendum in May 2003 represented an important step back. The Assembly therefore insists that such a scenario must not be repeated with the new draft.

6. The Assembly notes with approval the renewed active and intensive co-operation between the Armenian authorities and the Venice Commission since 2004. It regrets, however, that after several expertises of different subsequent drafts and after the first reading in Parliament on 11 May 2005, the draft still needs substantial revision, according to the Venice Commission. In its second interim opinion of 13 June 2005, the Venice Commission expressed deep disappointment with the lack of satisfactory results, deploring the fact that the recommendations, notably concerning the balance of powers between the President and the Parliament, the independence of the judiciary and the election of the Mayor of Yerevan (instead of his/her appointment by the President), had not been taken into account.

7. The Assembly welcomes the memorandum on further co-operation signed between the Venice Commission working group and the Armenian authorities on 2 June 2005. It commends the Armenian authorities on presenting an improved version of the text within the deadlines agreed in the memorandum. However, the Assembly insists that the final proposed amendments do comply with all the recommendations of the Venice Commission and are finally voted as such by the National Assembly.

8. The Assembly underlines that the new constitutional referendum can only succeed on the basis of a very broad public consensus. In addition to the political significance of such an act, the consensus is also needed for technical reasons – the constitutional amendments must be approved by more than 50% of the votes but not less than one third of all registered voters. It is therefore important that the voters' lists are updated so that the necessary quorum can be achieved.

9. The Assembly deplores the breakdown of dialogue between the ruling coalition and the opposition. It regrets that the ruling coalition has not yet been able to agree on the three key requests of the opposition which coincide with the recommendations of the Venice Commission: separation and balance of powers, independent judiciary and a real local self-government. It equally regrets the fact that the opposition resorted to a boycott of parliamentary sittings. The Assembly therefore strongly hopes that an agreement on the three points will lead to the opposition returning to Parliament.

10. The Assembly points out that a proper awareness-raising campaign in favour of the constitutional reform can only start after agreement has been reached on the remaining problematic areas. If the latest deadline for holding the referendum – November 2005 – is respected, any further delay in reaching a political consensus can jeopardise the chances of the draft being accepted by the population.

11. The Assembly reiterates its previous concerns with regard to media pluralism and balanced political coverage in the electronic media. The media, and television in particular, should play a major role in allowing the public to make a well-informed choice in the referendum. One of the main reasons for the present unsatisfactory situation resides in the shortcomings of the Constitution with regard to the appointment of members of the broadcasting regulatory bodies.

12. The Assembly strongly believes that, for the sake of its own people and for the sake of its further European integration, Armenia cannot afford another failure of the constitutional referendum. It supports the expert advice of the Venice Commission as a clear indication of the direction to follow and believes that if it is backed by political will and democratic maturity, the necessary ingredients for a successful constitutional reform would be in place.

13. The Assembly therefore calls on the Armenian authorities and the parliamentary majority to:

- i. fully implement the recommendations of the Venice Commission;
- ii. undertake clear and meaningful steps in order to resume an immediate dialogue with the opposition;
- iii. adopt the text at second reading without altering the agreement reached with the Venice Commission on the above-mentioned points and no later than August 2005;
- iv. provide live broadcasting of the parliamentary sittings where the constitutional amendments will be discussed and voted;
- v. start a well-prepared and professional awareness-raising campaign immediately after the adoption of the text at the second reading;
- vi. implement without delay the Assembly recommendations with regard to media pluralism in order to guarantee the broadest possible public debate;
- vii. urgently update voters' lists;
- viii. hold the referendum no later than November 2005.

14. The Assembly calls on the opposition to stop its parliamentary boycott and do everything possible to promote the recommendations of the Council of Europe with regard to the constitutional reform.

15. The Assembly expresses its support for the adoption of a draft Constitution fully complying with the Council of Europe standards and calls on all political forces and civil society to assure the success of the constitutional reform.

16. The Assembly resolves to observe the constitutional referendum and, in the meantime, declares its readiness to provide any assistance that might be needed for its preparation.

II. Explanatory memorandum by Mr Colombier and Mr Jaskiernia

1. Introduction

1. The constitutional reform *per se* was not a specific commitment that Armenia was asked to honour upon its accession on 25 January 2001. Nevertheless, most of the specific commitments that the country undertook required relevant amendments to the Constitution in order to be implemented properly. These included, *inter alia*, the abolition of the death penalty, the reform of the judicial system, the local self-government reform, the introduction of an independent ombudsman, the establishment of independent regulatory authorities for broadcasting, the modification of the powers of and access to the Constitutional Court, etc.

2. The rejection of the constitutional reform in the referendum held in May 2003 and the subsequent delay in bringing the new drafts in line with European standards have jeopardised the implementation of these fundamental reforms. The deadlines for their completion, stipulated in the Assembly's Opinion No. 221 (2000) on Armenia's application for membership of the Council of Europe, have now long expired.

3. In its Resolutions 1361 and 1405 (2004), the Assembly asked the Armenian authorities to organise a new referendum not later than June 2005.

4. By April 2005 it was clear that this deadline would not be met. At the meeting of the Monitoring Committee on 25 April 2005 the Chairman of the Armenian delegation to the Parliamentary Assembly Mr Tigran Torosyan, who also chairs the ad hoc committee on Armenia's integration with the European institutions, justified the delay with the need to take into consideration all the recommendations of the Venice Commission.

5. However, at the April 2005 Assembly part-session, we advised against the holding of an urgent procedure debate. We were going on a fact-finding mission to Armenia two weeks later, from 9 to 14 May. As the referendum stood no chance of being organised before the June part-session, we believed that the decision on a possible Assembly debate would be more credible if it took into consideration the findings of our mission and the results of the first reading of the draft text in the Armenian Parliament.

6. During our visit in Yerevan on 9-14 May we had extensive discussions with the President, the Prime Minister, the key state authorities, all parliamentary factions, NGOs and the media (see Appendix 1 for the full programme). We did not witness any consensus amongst the main political actors regarding any of the outstanding issues involved in the reform. The situation is further complicated by the fact that the opposition is boycotting the parliament. The electronic media are biased, public awareness is low and, in so far as it exists, public opinion on the issues involved is deeply divided. Finally, even purely technical matters such as updating voters' lists could put the constitutional reform at risk.

7. This is a situation that can no longer be tolerated. Armenia simply cannot afford another failure of the constitutional referendum. The preservation of the status quo and the present Constitution (as we explain in detail in Chapter 3) might serve certain narrow political interests, but would have devastating consequences for the democratic development of the country. This is why we believe that this report is timely and necessary. Our Armenian friends, with whom cooperation has always been excellent, should take it as a sign of support for the so-much needed and so badly overdue democratic reforms.

2. Chronology of events

8. The present Armenian Constitution was adopted on 5 July 1995 by a popular referendum. It is based on the French Constitution but confers powers on the President of the Republic which are judged as too extensive. It is directly applicable and establishes "a sovereign, democratic state, based on social justice and the rule of law". It affirms the principles of the separation of the legislative, executive and judicial powers and the supremacy of law, and recognises the multi-party system. On the same day, Armenia held its first general elections ever. Its President, Levon Ter Petrossian, was re-elected on 22 September 1996.

9. Already at the time, the Constitution was generating wide-spread criticism because of its inability to guarantee proper checks and balances between the different authorities and institutions. The rapporteur on Armenia's application for membership of the Council of Europe pointed out in his explanatory memorandum that it was "extremely important" to ensure separation of powers and independence of the legislature and judiciary. (Doc. 8747). The report of the eminent lawyers on the conformity of the Armenian legal system with the standards of the Council of Europe, despite a favourable overall assessment of the Constitution, also pointed out that the presidential powers could sometimes be "*at the expense of a proper balance between the different authorities and institutions*" and went on to say that "*Under these circumstances it is difficult to claim that the State authorities are independent and that the State is governed by the rule of law*"¹.

10. Current President Robert Kocharyan had therefore made constitutional reform one of the cornerstones of his election campaign in 1998.

11. After Mr Kocharyan's election, a Working Group on the Revision of the Constitution was set up between the Venice Commission and the Armenian authorities. It held several meetings as from February 2000 and in July 2001 the Venice Commission adopted a "report on the revised Constitution of the Republic of Armenia"². Despite certain shortcomings, this was considered to be a mutually agreed text. The Presidency of the Republic then tabled it in Parliament, where its adoption, due by spring 2002, fell considerably behind schedule. The National Assembly was simultaneously examining an alternative draft text proposed by the opposition. It was the fruit of a compromise between certain parliamentary factions and independent members and aimed at establishing a parliamentary system, but it was withdrawn by its authors on 3 April 2002.

12. Assembly Resolution 1304 (2002) on the honouring of obligations and commitments by Armenia took note "of the authorities' determination to adopt the draft text of the new constitution by next spring and to submit it to the nation for approval by referendum" and called on increasing the parliamentary supervision role of the National Assembly.

13. The Venice Commission had not been involved in the parliamentary work on the draft and, when finally the Armenian National Assembly adopted the text on 2 April 2003, it became clear that several key provisions no longer corresponded to the text agreed with the Council of Europe experts. Worse, the text had reintroduced some of the previously criticised provisions. It was criticised by the Armenian parliamentary opposition who appealed to voters to reject it.

14. This draft Constitutional Act was put to the citizens in a popular referendum held on the same day as the parliamentary elections, on 25 May 2003. With only 46 percent of the 1.2 million voters having participated, it did not attain the percentage necessary to be validated³.

15. According to international observers, public opinion had not been properly prepared for the vote. In their view, the authorities deliberately had not committed themselves to a campaign in support of the constitutional draft. As the co-rapporteurs noted in their report on honouring of obligations and commitments by Armenia (Doc. 10027), there had been no awareness-raising campaign or public presentation of the draft and its content to the electorate. President Kocharian told the co-rapporteurs during their visit in August 2003 that if he had fully involved himself in the referendum campaign, his political opponents would certainly have denounced it as a plebiscite.

16. Since the Constitution does not permit the organisation of referenda at less than a one-year interval, at the time of the co-rapporteurs' visit in 2003 the authorities contemplated organising another referendum in the late spring of 2004. They said that the draft would probably not be the same as the one submitted to referendum in May 2003. Rather than drafting a new Constitution embodying fundamental changes, it would incorporate into the present Constitution those changes strictly essential to the fulfilment of Armenia's undertakings viz.: abolition of capital punishment; guarantees in

¹ AS/Bur/Armenia (1997) 1, Bureau of the Assembly, Report on the Conformity of the Armenian Legal System with the Standards of the Council of Europe.

² CDL-INF (2002)14.

³ A reform of the Constitution requires a referendum to be called by the President of the Republic, at Parliament's request. The constitutional amendments must be approved by more than fifty percent of the votes, but not less than one third of the number of registered voters (Article 113 of the Armenian Constitution).

the event of arrest and detention; respect for individual rights and freedoms, and the machinery for safeguarding human rights; the status of the ombudsman; local self-government and the status of Yerevan.

17. An ad hoc committee on Armenia's integration with the European institutions, chaired by Mr Torossyan, was set up in Parliament. The process of constitutional reform was resumed at a conference by the Committee on questions of European Integration of the National Assembly in co-operation with the Venice Commission in January 2004.

18. However, the opposition has been boycotting the sittings of the National Assembly since the Parliament refused in February 2004 to discuss the opposition bill on amending the Law on Referendum. The proposed bill intended to introduce a so-called "referendum of confidence" in the President. This had been proposed by the Constitutional Court in its decision of 16 April 2003. The ruling of the Constitutional Court at the time had attempted to solve the political crisis following the presidential elections in March 2003 and the parliamentary elections (coupled with the constitutional referendum) in May 2003, both severely criticised by the Assembly and other international observers. Later the Constitutional Court reversed its position, but the opposition kept insisting on holding such a referendum. It organised a series of protests in March-April 2004 in which a number of people, including members of parliament and the Assembly, as well as journalists, were arrested and mistreated. Hence dialogue between the authorities and the opposition has broken down, including on the issue of constitutional amendments.

19. In summer/autumn 2004, three draft proposals of amendments were submitted to Parliament: the first set of proposals, prepared and adopted by the ruling coalition; the second set, prepared by Mr Arshak Sadoyan, leader of the National Democratic Alliance of Armenia, part of the opposition "Justice" faction but submitted in his personal capacity; and the third set prepared, inter alia, by Mr Gurgen Arsenyan, of the "United Labour Party" faction.

20. All three drafts were sent to the Venice Commission for expertise. It provided an assessment of each one of them in December 2004 (CDL-AD (2004) 44). The conclusions were presented on the web site of the parliament.

21. According to the experts, the first and the third sets of proposals represented a step forward with respect to the Constitution currently in force, but important shortcomings, namely with respect to the key issue of the balance of powers between the state organs, remained. The second set of proposals failed to address a number of fundamental issues, such as the protection of human rights and freedoms, or the independence of the judiciary, and included a number of provisions that cannot be realistically implemented in practice.

22. The Commission therefore considered that the 2001 draft constitution should still be taken as a basis for the reform, with some further discussion and refinement of the amendments before their adoption. This can be interpreted as an implicit acknowledgement that the current drafts represent a step back compared to the 2001 draft.

23. The Committee on European Integration discussed those recommendations between February and April 2005. The Council of Europe received assurances that the considerations of the Venice Commission would be taken into account. The first reading was held on 11 May, at the same time as the co-rapporteurs were visiting the Parliament in Yerevan. The first draft was chosen.

24. After examining the text, the Venice Commission in its Second interim opinion (CDL(2005)043) expressed its deep disappointment with the lack of progress in the co-operation with the Armenian authorities. Most of the Commission's comments had not been taken into consideration, notably those concerning 1) the balance of powers among the State organs, 2) the independence of the judiciary and 3) the manner of appointment of the Mayor of Yerevan. In a press statement issued on 27 May 2005 the members of the Venice Commission called for drastic changes before the second reading, failing which "*the whole constitutional reform process would fail to bring Armenia closer to European values and attain the aim of further European integration*".

25. The Monitoring Committee discussed the co-rapporteurs' latest visit and the Venice Commission reaction at its meeting on 1 June in Paris. The Committee was assured that most recommendations had been taken into account and that the few remaining outstanding issues would be clarified during a visit of the Venice Commission in Yerevan on 2 June.

26. At the meeting on 2 June, the Armenian authorities committed themselves to improving the draft and bringing it in line with the Venice Commission's recommendations in the above-mentioned three areas. A new draft was presented to the Venice Commission working group on 17 June 2005, as agreed. A working meeting would then be held between representatives of the Armenian National Assembly and the Venice Commission Working Group in Strasbourg on 23 June 2005. The draft amendments would then be finalised and presented to the Venice Commission for expertise before the second reading.

27. The second reading is now unlikely to take place before August 2005 and the Constitutional Referendum should be held in October or November 2005.

3. Main problems in the constitutional revision

28. When joint work on the revision of the Constitution started in 2000, the Venice Commission identified the following main areas where important changes were needed⁴:

3.1. Human rights

29. In the present Constitution human rights are not an ultimate value; besides, human dignity is stipulated not as an object of constitutional law but as an object of criminal and civil law, an approach characteristic of the former Soviet legal system. There is no clear distinction between the right and the law; moreover, there is a danger of subordination of the right to the law. The implementation of fundamental human rights and freedoms depends on the State and its branches of power, rather than being clearly enshrined in the Constitution.

30. Most of these deficiencies have been remedied by the amendments adopted on 10 May 2005. Human rights have been made directly applicable and are placed at the very top of the hierarchy of norms in the Armenian legal order. The death penalty is explicitly abolished. The text now provides an exhaustive list of situations where a person can be deprived of his or her freedom, conforming to Article 5 of ECHR. The right to an effective remedy for alleged violations of guaranteed rights and freedoms is clearly established, the right to peaceful assembly has been granted to "everyone" and the distinction between different categories of assemblies has been removed. Provisions which would contribute to guaranteeing pluralism of the media and independence and transparency of the regulatory bodies have also been introduced (see par. ...)

31. However, concern is still raised over the provision allowing for a person to be sentenced twice for one and the same act "when thus prescribed by the law". The Venice Commission has also considered that this chapter should include an explicit definition of the Human Rights Defender's (Ombudsman) powers.

3.2. Separation of powers

32. According to the Venice Commission, in the current Constitution the implementation of the principle of separation of powers is inconsistent; there is a deficiency of separated, mutually checking and balancing legislative, executive and judicial powers. In particular, the place of the RA President in the system of state power is not clear, neither is the President's responsibility in the sphere of executive power. Also, there is a need to specify the place and role of the institution of the Prime Minister in the system of executive power.

33. Although, in Article 5, the Constitution provides for the existence of three powers, legislative, executive and judicial, it does not specify that the President is part of them (namely the executive, since by definition he cannot be part of the other two). The chapter devoted to the presidential powers is separate and precedes those devoted to the three powers, thus creating the impression that he constitutes a sort of fourth power within the state. Furthermore, Article 56, giving the President the

⁴ see CDL (2000) 88, Basic provisions for the Concept of Reforming the Constitution of the Republic of Armenia.

right to issue orders and decrees, entitles him to priority norm-setting. This is incompatible with the principle of supremacy of the law, whereby sub-legislative normative acts should not only conform to law but also be rooted in law. These serious problems have not been remedied in the text adopted at first reading.

34. In addition to that, the list of presidential prerogatives is impressive. According to Art. 55 of the current Constitution, the President, *inter alia*:

- may dissolve the National Assembly and call special elections after consultations with the President of the National Assembly and the Prime Minister;
- appoints and removes the Prime Minister and the members of the Government upon the recommendation of the Prime Minister; the parliament does not play any role in the procedure of appointment and dismissal;
- makes appointments to civilian positions in cases prescribed by law;
- appoints and removes the Prosecutor General upon the recommendation of the Prime Minister;
- appoints members and the President of the Constitutional Court;
- appoints the president and judges of the Court of Cassation and its chambers, the courts of appeal, the courts of first instance and other courts, the deputy prosecutors general and prosecutors heading the organizational subdivisions of the office of the Prosecutor General;
- in addition, he or she may remove from office any of his or her appointees to the Constitutional Court or any judge, sanction their arrest and through the judicial process, authorise the initiation of administrative or criminal proceedings against a member of the Constitutional Court or a judge and remove the prosecutors that he or she has appointed.

35. Although taken separately, some of these prerogatives are not totally unusual in a democratic presidential system, their combination creates serious disproportion, especially as there is no counterbalancing power, whether parliamentary or judicial. The co-rapporteurs pointed out in their 2004 monitoring report (Doc. 10027) that "*the functioning of institutions could generate side-slips and lead to the exercise of power by an oligarchy. Such failures would not be compatible with the respect of the principles of the rule of law if connected with a backdrop of nepotism and corruption in the state and society*".

36. The efficiency of law-making and the actual supervisory role of the National Assembly are not guaranteed either.

37. The right of the president to make appointments to civilian positions deserves a special mention. Since the competences of the President are not exhaustively laid down in the Constitution, the law can give him/her the right to make appointments to the regulatory bodies. There are six such bodies at present and the President appoints all their members⁵. The consequences, for instance with regard to media pluralism, have been rather serious, as has been repeatedly pointed out in previous Assembly resolutions. The President appoints all the members of the Council of the Public Television and Radio and the National Television and Radio Commission, responsible, respectively for regulating public and private broadcasting. The Council of Europe experts have been trying for years to suggest more diverse methods of appointment, but all their efforts have consistently been rebuked with the argument that no changes are possible until the Constitution is changed. For the same reason, the Human Rights' Defender (Ombudsman) is appointed by the President.

⁵ Commission for Regulation of Public Services, State Council for Statistics, Commission for Securities, State Commission for Protection of Economic Competition, National Commission for TV and Radio, Council for Civil Service. The Central Electoral Committee is also considered to be a regulatory commission.

38. With the first reading, some modest improvements have been made in this section: for example, the President has to consult the factions of the National Assembly before appointing and dismissing the Prime Minister and the members of the Government; the National Assembly plays a more significant role in the procedure for declaring martial law and the state of emergency; the Deputies and groups of Deputies have been given the right to address written and oral questions to the Government. The presidential right of legislative initiative and the right of the Prime Minister to put forward a motion of no confidence with respect to the adoption of a draft law proposed by a Deputy have been removed.

39. Other positive points are that Article 27 now explicitly guarantees the existence of "an independent and all-national radio and television public service" and introduces the provision that "the activities of the broadcast media shall be regulated by an independent body established by the law, the members of which shall be appointed in a democratic and transparent manner and the decisions of which shall be subject to judicial review". As regards the Ombudsman, he/she will be appointed by the National Assembly.

40. However, these improvements are not sufficient in order to redress the disproportionate powers of the President. The main points of criticism have not been taken into account: they are related to the power of the President to nominate and dismiss the Prime Minister and 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 has been strengthened even further. Actually, the list of issues which fall within the exclusive legislative competence of the National Assembly is shorter than the one in the draft revised constitution of 2001 prepared in co-operation with the Venice Commission. In general, with respect to the relations between the main constitutional organs, the text adopted at first reading expresses a shift in favour of the President when compared to the 2001 draft.

41. The Venice Commission concluded therefore in its second interim opinion that the new draft "*does not provide guarantees either for an effective independence of the Government vis-à-vis the President, or for a strong National Assembly*". Certain provisions still conflict with European standards and, in general, the text fails to provide guarantees for the indispensable balance in the relations between the main constitutional organs in Armenia.

3.3. Independence of the judiciary

42. The present Constitution does not provide sufficient guarantees for the independence of the judicial power. In addition to the above-mentioned powers in judicial matters (Art. 55 of the present Constitution), articles 94, 95, 101 and 103 of the present Constitution are also highly problematic.

43. Under Article 94, the President is the guarantor of the independence of the judicial bodies (rather than this independence being guaranteed by the Constitution and the laws), presides over the Judicial Council and appoints its fourteen members, including two legal scholars, nine judges and three prosecutors. Under Article 95, the Judicial Council drafts and submits for the approval of the President of the Republic the annual list of judges (upon the recommendation of the Minister of Justice) and the annual list of prosecutors (upon the recommendation of the Prosecutor General).

44. The most significant change in this respect concerns the composition of the Judicial Council. Nine judges out of 13 members would be elected by their peers (the General Assembly of Judges of the Republic of Armenia) and two out of the four remaining non-judge members would be appointed by the National Assembly. The Judicial Council would no longer be chaired by the President and would have a role in the dismissal of judges.

45. The current draft has also remedied a major shortcoming in Article 101 of the present Constitution, by introducing the right of individual complaint before the Constitutional Court.

46. However, it is still the President who appoints and dismisses the Prosecutor General and his deputies, appoints the Chairman of the Judicial Council, the chairmen of courts and the judges. There is still a lack of clarity as to how independent the Prosecutor is from the executive.

3.4. Local self-government

47. Under the current Constitution, the administrative territorial units are the provinces and the districts. Local self-government is realised in the districts. The State government appoints and removes the Governors of the provinces. The districts have self-governing local bodies elected for a three-year period: a Council of Elders, composed of five to fifteen members, and a District Administrator: a City Mayor or Village Mayor.

48. Despite him being elected, the Administrator can be removed by the State government upon the recommendation of the Governor of the Province. In the Venice Commission's initial opinion, this might lead to situations which are incompatible with the very essence of democracy. The first reading in May 2005 has at least specified that this could only be done on the basis of a "court judgment". The Venice Commission still insists that this should be a Constitutional Court judgment.

49. The City of Yerevan is considered to be a province. Its Mayor is appointed by the President of the Republic, upon the recommendation of the Prime Minister (also appointed by the President). Local self-government in Yerevan is instituted not directly, but through neighbourhood districts.

50. At the beginning of the joint work on the constitutional revision in 2000, the Venice Commission had estimated that such a system left local self-government as a subordinate link of governance derived from state governance, rather than an independent democratic sub-system of society.

51. According to the latest version of the draft Constitution, local self-government is exercised in the communities. The bodies of local self-government are the Council of Aldermen and the Head of Community, who shall be elected for a 4-year term of office. The city of Yerevan is a community and therefore its Mayor exercises the powers of a head of community in the city of Yerevan. However, in contradiction with the newly introduced provisions for a direct election of the heads of communities, the Mayor of Yerevan is still appointed and removed by the President.

52. In our lengthy and numerous discussions on this issue, most interlocutors came up with a similar explanation: more than one third of the entire population of the country and more than 60% of the economic potential is concentrated in the capital city. If the Mayor was elected directly, they claim, this would create a new, mighty centre of power which could potentially destabilise a small country such as Armenia.

53. While one can see some logic in this kind of reasoning, nothing in a democratic country can justify having one third of the entire population automatically governed by the same party as the ruling President, as it is now. It is incomprehensible why the Parliament did not follow the solution which was advanced by most of our interlocutors and which is compatible with democratic standards – to have a directly elected city council which, in turn, appoints the Mayor of Yerevan.

4. Political background

54. For the constitutional referendum to succeed, two major ingredients are needed: broad consensus and political will.

55. The first ingredient is clearly missing.

56. The ruling coalition consists of three parties with quite different ideologies and political behaviour. The President is often referred to as the "fourth party" of the coalition. Personalities within parliament and government also differ enormously – from old, Soviet-style apparatchiks to young and dynamic reformists. Their views on the main contentious issues of the constitutional reform vary from full support for the recommendations of the Venice Commission to support for the *status quo* (for instance, the Mayor of Yerevan was in favour of the appointment to his position remaining a Presidential prerogative).

57. The parliamentary opposition consists of 24 members of the National Assembly (total membership: 131) belonging to two parliamentary groups, the "Justice" and "National Unity" groups. It is not boycotting all committee meetings; it participates in events where its views and positions can be

conveyed, such as TV transmissions from the Parliament, press conferences, question-time to Government etc., as well as visits by foreign delegations and visits to other countries by delegations from the Armenian National Assembly.

58. The opposition's conditions for dialogue with the ruling coalition and for resuming normal parliamentary work are in fact the key issues of the constitutional reform: separation and balance of powers, independent judiciary and a real local self-government. On 31 May 2005 the two opposition factions signed a statement that if these conditions were fulfilled, they were ready to co-operate in the whole process of constitutional reforms. However, as things stand for the moment, the opposition would appeal to their supporters to reject the constitutional amendments in the referendum.

59. The ruling coalition maintains that NGOs have been widely consulted all through the process of elaboration of the draft constitution. The NGOs that we met do not share this point of view and, in any case, maintain that, even if they have participated in discussions, their views (supporting the recommendations of the Venice Commission) have not been taken into account.

60. Furthermore, the population seems to be totally unprepared to make a well-informed choice. During our visit, it was expected that the second reading would take place before the summer recess, which would have allowed enough time for an awareness-raising campaign until the holding of the referendum in the autumn. Now it seems that the second reading will take place in September, which would only leave about a month to prepare public opinion. Any awareness-raising campaign starting before the three major issues are resolved would only confuse voters and might jeopardise the whole exercise.

61. The success of the referendum will very much depend on the involvement of the media and, in the first place, of television – by far the most popular and influential means of communication and information. At present, it is difficult to imagine that a pluralistic and balanced public debate⁶ could take place.

62. The second ingredient – political will – also has to be questioned.

63. This is unfortunate, as co-operation with the Armenian parliamentary delegation has always been excellent and we have never doubted our colleagues' good intentions and their determination to improve democracy in Armenia. The political reality in the country, however, is rather complicated.

64. The current constitution gives the President two consecutive terms. In our conversation the President, who is now in his second term, ruled out the possibility that he might try to change the Constitution in order to allow a third mandate; the representatives of the ruling coalition also declared that they would not allow such a change. Even if the next presidential elections are not due before 2008, the political run-up has already started. In October this year there will be local elections, which will be important for setting the ground on which different political parties and alliances will develop. It seems unlikely that major changes would be introduced in the Constitution just before then.

65. Several politicians, including from the ruling majority, also acknowledged that it would be difficult for many people in key positions to relinquish their comfortable status as presidential appointees and submit themselves to the hazards of democratic elections. Some even hinted at divergences with the President himself as to the need for the Presidential institution to lose some of its powers.

66. As to the President, he maintains that the presidential regime is the best for the country, since it has now been firmly established and the entire legal system and human mentality has been built around it. He refuses any dialogue with those parts of the opposition who still contest his legitimacy following the 2003 Presidential elections.

67. Bare facts hardly speak in favour of the existence of any political will: the saga with the Venice Commission (Chapter 2 of the present report) is a good example. Furthermore, the authorities tend to present the compliance with the Venice Commission recommendations in quantitative, rather than

⁶ The concerns of the Parliamentary Assembly with regard to the media situation expressed in 2004 in Resolutions 1405, 1374 and 1361 and the appended reports are still valid. Neither has the problem with the independent TV channels A1+ and Noyan Tapan been resolved.

qualitative terms. They claim that at least 90% of the recommendations have been followed: "only" three issues remain. But it so happens that the remaining three are probably the most important for the democratic functioning of the country: the separation and balance of powers, the independence of the judiciary and the possibility of one third of the country's population to have a say in the way it is governed.

68. If the revision of the constitution was simply a matter of statistics, there should be no problem incorporating the remaining three recommendations in the text.

69. As times passes, the systematic consultation of the Venice Commission on every new version of the draft appears to be nothing other than dilatory tactics in order to delay the adoption of a constitutional reform in accordance with European standards. This ping pong game has to stop. The Venice Commission has made its recommendations perfectly clear – and by European standards they are non negotiable.

70. In the clear absence of at least one of the two major ingredients, the success of the referendum is far from certain.

71. Even if the final draft fully complies with the Venice Commission recommendations, the referendum might still fail because of the inaccuracy of voters' lists. As the co-rapporteurs found out during their visit in August 2003 (Doc. 10027), those lists, despite promises that they would be revised in accordance with the 2002 census, still contained a very high proportion of double registrations, of deceased persons or of citizens resident abroad. The difficulties in adopting a modern Electoral Code have delayed the setting up of a National Voters Register.

72. Since the constitutional amendments can be approved with no less than one third of all registered voters, it is far from certain that even a high turnout would make up for all the "missing souls".

5. Conclusions

73. Firstly, it has to be made clear from the outset that the constitutional system of government – be it presidential, semi-presidential or parliamentarian – is a matter of a sovereign choice of the people of every country. The Council of Europe has no right – and intention – to interfere with this choice. Each one of these systems can be and is, in the variety of Council of Europe members States – a democratic success provided that proper checks and balances are put in place.

74. If the present report concentrates on the too extensive presidential powers, this is by no means because we defend a change of regime (for instance, part of the opposition is in favour of a parliamentary system) but in order to insist on making the political system fully compliant with European norms. Democracy is probably the biggest capital that the country needs: being small, with limited natural resources and suffering badly from an armed conflict in Nagorno Karabakh and boycotted by some of its neighbours.

75. The constitutional reform is not a necessity for its own sake. As we have been pointing out since the very beginning, the delay in the constitutional reform process will significantly slow down the necessary legislative reforms, as well as legal and political processes. This will not only prevent completion of the monitoring procedure but will also seriously hinder the further integration of the country into other European structures. Most importantly, the people of Armenia do not deserve such grim prospects.

76. After the failure of the 2003 constitutional referendum, Armenia simply cannot afford to fail at yet another constitutional referendum. Such a failure may have serious consequences.

77. This is why the authorities have to be urged to comply fully with the Venice Commission recommendations on the three remaining points. They also have to be warned against any attempts to repeat the 2003 scenario whereby the text submitted to the referendum had made several important steps back with regard to the version that had been agreed with the Venice Commission in 2001. The

civil society and the general public should be involved in the preparation as much as possible; special provisions should be made to open up television to the broadest possible range of opinions and, in the first place, to the opposition.

78. The authorities, but also the opposition, should not spare any effort to establish democratic dialogue.

APPENDIX

COMMITTEE ON THE HONOURING OF OBLIGATIONS AND COMMITMENTS
BY MEMBER STATES OF THE COUNCIL OF EUROPE

Visit of the co-rapporteurs of the Monitoring Committee of the PACE to Armenia
(10-13 May 2005)

PROGRAMME

Members of the delegation:

Co-rapporteurs: Mr Georges COLOMBIER (France, EPP/CD)
Mr Jerzy JASKIERNIA (Poland, SOC)

Secretariat: Mrs Bonnie THEOPHILOVA-PERMAUL, Co-Secretary to the PACE Monitoring
Committee

Tuesday, 10 May 2005

- 04.45 Arrival of Mr G. COLOMBIER, Mr J. JASKIERNIA and Mrs B. THEOPHILOVA-PERMAUL
- 12.00 Working lunch with ambassadors of Council of Europe member States (Armenia Marriott Hotel) organised by the Embassy of Poland in Armenia
- 14.30-16.00 HR NGOs*
- **Helsinki Committee of Armenia:** Mr Avetik ISHKHANYAN, Chairman
 - **Open Society Institute:** Mrs Larisa MINASYAN, Executive Director
 - **Helsinki Citizens' Assembly:** Mrs Natalia MARTIROSYAN, co-chairman
 - **Civil Society Institute:** Mr Artak KIRAKOSYAN, chairman
- 16.00-16.30 "A1+"
- **"A1+" TV:** Mr Mesrop MOVSISYAN, President of "Meltex" company
 - Mr Tigran TER-YESAYAN, lawyer
- 16.30-18.00 Press and Media NGOs*
- **Noyan-Tapan:** Mr Tigran HARUTYUNYAN, President
 - **National Press Club:** Mrs Narine MKRTCHYAN, Ms Narine Dilbaryan
 - **"Ankyun+3" TV:** Karine SIMONYAN, editor
- 18.00-18.45 Constitutional, election code and rally law issues*
- **Democracy:** Mr Vardan POGHOSYAN
- 18.45-19.15 Religious organisations*
- **Jehowa's witnesses:** Mr Hrachya KESHISHYAN
 - Mr Levon MARGARYAN, lawyer
- 19.30 Working dinner with Ambassador Vladimir PRYAKHIN, Head of the OSCE Office in Yerevan, Mrs Elaine CONKIEVICH, Deputy Head of OSCE Office in Yerevan, Mrs Bojana URUMOVA, Special Representative of the Secretary General of the Council of Europe in Armenia (Armenia Marriott Hotel)

* Meetings co-ordinated by the Council of Europe Office in Yerevan.

Wednesday, 11 May 2005

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|---------------|------------------------------------------------------------------------------------------------------------------------|
| 07:45-08:45 | Breakfast |
| 08:50 | Departure for the National Assembly |
| 09:00-09:30 | Meeting with the Armenian parliamentary delegation to the Council of Europe |
| 09:35-10:05 | Meeting with Mr Rafik PETROSSYAN, Chairman of the State-Legal Committee and the members |
| 10:10-10:40 | Meeting with representatives of the "Republican party of Armenia" faction of the National Assembly |
| 10:45-11:15 | Meeting with representatives of the "Rule of Law" faction of the National Assembly |
| 11:20 – 11:50 | Meeting with representatives of the "Armenian Revolutionary Federation" faction of the National Assembly |
| 11:55-12:25 | Meeting with representatives of the "Justice" faction of the National Assembly |
| 12:30-13:00 | Meeting with representatives of the "National Unity" faction of the National Assembly |
| 13:00-14:15 | Lunch |
| 14:20 – 14:50 | Meeting with representatives of the "United Labour Party" faction of the National Assembly |
| 14:55-15:25 | Meeting with representatives of the "People's Deputy" parliamentary group of the National Assembly |
| 15:30-16:25 | Meeting with members of the Ad Hoc Committee of the National Assembly on Matters of Integration in European Structures |
| 16:30-17:15 | Meeting with Mr Arthur BAGHDASSARYAN, President of the National Assembly of Armenia |
| 17:30 – 18:30 | Meeting with Mr Hayk HAROUTUNYAN, Head of the Police Department of the Republic of Armenia |
| 20:00 | Dinner hosted by Mr Arthur BAGHDASSARYAN, President of the of the National Assembly of Armenia |

Thursday, 12 May 2005

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|---------------|-----------------------------------------------------------------------------------------|
| 07:00 – 09:30 | Breakfast in the hotel |
| 09:00 – 09:50 | Meeting with Mr Davit HAROUTIUNYAN, Minister of Justice of the Republic of Armenia |
| 10:00-11:00 | Meeting with Mr Gevorg DANIELYAN, Deputy Prosecutor General of the Republic of Armenia |
| 11:10-12:00 | Meeting with Mr Vardan OSKANYAN, Minister of Foreign Affairs of the Republic of Armenia |

Doc. 10601

- 12:10-12:40 Meeting with Mr Vache TERTERYAN, Deputy Minister of Territorial Administration
- 12:50-13:30 Meeting with Mr Yervand ZAKHARYAN, Mayor of Yerevan
- 13:00-15:10 Lunch
- 15:20-16:20 Meeting with members of the National Commission on Radio and Television and members of the Council of Radio-Television Company and joint meeting between the National Commission on Radio and Television and A1+ and Noyan Tapan television companies
- 16:30-17:15 Meeting with Mr Serge SARGSYAN, Minister of Defense of the Republic Armenia
- 19:30 Dinner hosted by the Armenian parliamentary delegation to the Council of Europe

Friday, 13 May 2005

- 07:45-08:45 Breakfast in the Hotel
- 09:00 – 09:45 Meeting with Mr Gagik HAROUTYUNYAN, President of the Constitutional Court of Armenia
- 10:00-10:45 Meeting with Mr Rafik MKHITARYAN, Deputy Ombudsman of the Republic of Armenia
- 11:00 Visit to a Republican Psychiatric Hospital of Sevan (where alternative service is performed)
- 13:00-14:30 Lunch
- 15:00-15:45 Meeting with Mr Andranik MARGARYAN, Prime Minister of the Republic Armenia and Anti-Corruption Council Adjunct to the Prime Minister
- 16:00 Meeting with Mr Robert KOCHARYAN, President of the Republic of Armenia
- 19:30 Dinner

Saturday, 14 May 2005

- 03:30 Departure for Airport
- 05:45 Flight to Vienna

Reporting committee: Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee).

Reference to committee: Ref. No. 3098 of 20 June 2005.

Draft resolution unanimously adopted by the committee on 21 June 2005.

Members of the committee: Mr György Frunda (Chairperson), Mrs Hanne **Severinsen**, Mrs Naira **Shakhtakhtinskaya**, Mr Mikko **Elo** (Vice-Chairpersons), Mr Pedro Agramunt, Mr Bakhtiyar **Aliyev**, Mr René André, Mr Giuseppe Arzilli, Mr David **Atkinson**, Mr Jaume Bartumeu Cassany, Mrs Mertixell Batet, Mrs Gülsün Bilgehan, Mr Rudolf **Bindig**, Mrs Mimount Bousakla, Mr Luc Van den Brande, Mr Patrick Breen, Mrs Beáta Brestensktá, Mr Milos Budin, Mr Mevlüt **Çavuşoğlu**, Mr Jonas Čekuolis, Mr Doros Christodoulides, Mr Boriss **Cilevičs**, Mr Georges **Colombier**, Mr Joseph Debono Grech, Mr Juris **Dobelis**, Mrs Josette **Durrieu**, Mr Mátyás **Eörsi**, Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Marcel Glesener, Mr Stef Goris, Mr Andreas **Gross**, Mr Alfred Gusenbauer, Mr Michael **Hagberg**, Mr Michael **Hancock**, Mr Andres **Herkel**, Mr Serhiy Holovaty, Mr Jerzy **Jaskiernia**, Mr Erik **Jurgens**, Lord Kilclooney of Armagh, Mr Evgeni Kirilov, Mr Shavarsh **Kocharian**, Ms Synnøve Konglevoll, Mr Konstantin **Kosachev**, Mr André Kvakkestad, Mrs Darja Lavtižar-Bebler, Mrs Sabine Leutheusser-Schnarrenberger, Mr Eduard Lintner, Mr Mikhail Margelov, Mr Dick Marty, Mr Frano Matušić, Mr José Medeiros Ferreira, Mr Miloš **Melčák**, Mr Azim Mollazade, Mr Zsolt Németh, Mr İbrahim **Özal**, Mr Theodoros Pangalos, Mrs Eleonora Petrova-Mitevaska, Mrs Sólveig Pétursdóttir, Mr Leo **Platvoet**, Mr Christos Pourgourides, Mr Dumitru **Prijmireanu**, Mr Anatoliy **Rakhansky**, Mr Dario Rivolta, Mr Armen **Rustamyan**, Mrs Katrin Saks, Mr Kimmo **Sasi**, Mr Adrian Severin, Mr Vitaliy Shybko, Mr Leonid Slutsky, Mr Jerzy Smorawiński, Mr Michael **Spindelegger**, Mrs Maria Stoyanova, Mr Qazim Tepshi, Mrs Elene **Tevdoradze**, Mr Tigran **Torosyan**, Mr Miltiadis Varvitsiotis, Mrs Birutė Vėsaitė, Mr Rudolf Vis, Mr Oldřich Vojří, Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Emanuelis Zingeris.

N.B. The names of those members who were present at the meeting are printed in bold.

Head of the secretariat: Mrs Ravaud

Secretaries to the committee: Mr Gruden, Mrs Odrats, Mrs Teophilova-Permaul, Mr Kotlyar.

