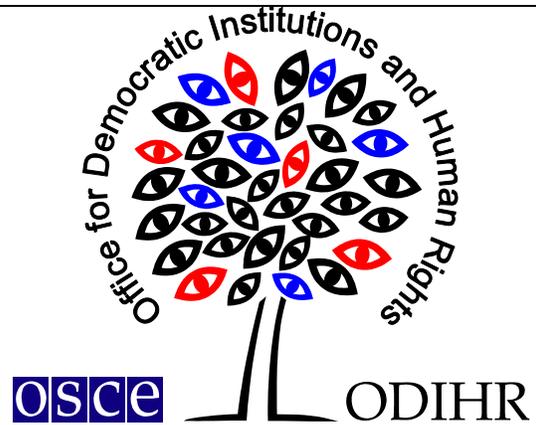


Warsaw, 26 January 2005

Opinion-Nr.: GEN - ARM/015/2005 (IU)

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**COMMENTS**  
**ON THE DRAFT AMENDMENTS**  
**TO THE CONSTITUTION**  
**OF THE REPUBLIC OF ARMENIA**

## **1. SCOPE OF REVIEW**

This is not a comprehensive review, but rather a comment on human rights provisions included in two packages of draft amendments to the Constitution of the Republic of Armenia: draft amendments by the Coalition members (hereinafter referred to as Draft 1) and draft amendments No P370-17.09.2004 by Gurgen Arsenyan, Grigor Ghonjeyan, Mnatsakan Petrosyan, Hripsimeh Avetisyan, Levon Poghosyan, and Artur Petrosyan (hereinafter referred to as Draft 2). The third set of constitutional amendments, namely the one drafted by Arshak Sadoyan, was not reviewed since it does not include any provisions specifically concerning human rights.

The analysis intends to (a) assess the compliance of the draft constitutional amendments with international human rights standards, primarily the European Convention for the Protection Of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR); (b) to propose recommendations considering both the relevant international standards.

The understanding that there is a great degree of flexibility with regard to the level of specificity of constitutional provisions is fundamental to this analysis and permeates all of its aspects. The recommendations contained in it are therefore applicable to the whole array of domestic legal provisions concerning constitutional rights and freedoms.

## **2. RECOMMENDATIONS**

1. It is recommended that Draft 1 include an explicit prohibition of death penalty.
2. It is recommended that Article 16 of Draft 1 be amended to provide for an exhaustive list of reasons whereby a person can be lawfully deprived of his or her liberty. Also, it is recommended that Article 16 of Draft 2 be reviewed to include mental illness as a condition which may justify detention, in order to explicitly extend constitutional safeguards against arbitrary detention to involuntary mental patients.

3. The provisions in both Drafts guaranteeing the detainee's right not to testify without his or her legal counsel should be reworded as to rather guarantee that everyone arrested or detained shall be notified of his or her right not to be compelled to testify against himself or herself, as well as of the right of access to legal counsel of his or her own choice.
4. It is recommended that both Drafts be amended to include the right to choose a lawyer. The drafters may also consider inserting the provision concerning state-provided legal assistance for indigent defendants after the more general provision guaranteeing the right of access to legal counsel.
5. It is recommended that the provisions concerning the right to appeal and the right to enforceable compensation be introduced as separate articles or, alternatively, moved under the relevant provisions on fair trial.
6. It is recommended that Article 22 of Draft 2 be amended to provide for the privilege against self-incrimination.
7. It is recommended that the provisions in both Drafts concerning the freedom of thought, conscience and religion be reviewed to specify what the right to freedom of thought, conscience and religion includes, in order to prevent restrictive and narrow interpretation of this provision. An explicit provision for absolute protection of the *forum internum* is recommended. It is also recommended that the drafter amend the provisions in question to include a prohibition against coercion impairing the person's freedom to have or adopt a religion of his or her own choice, as well as include reference to the law regulating the exercise of freedom of religion.
8. It is recommended that the provision in Article 27 of Draft 1 requiring that the law define the "activities and liabilities" of the media be removed.
9. It is recommended that Article 27 in Draft 2 be amended to exclude the words "in a written form" after "submit letters, recommendations and complaints."
10. The provision in Article 28 of Draft 2, requiring a Constitutional Court decision for the prohibition or dissolution of a political party merits welcome. The drafter may consider adding a provision that a political party may only be prohibited or

- dissolved if it advocates the use of violence or uses violence as a means to overthrow the democratic constitutional order.
11. It is recommended that the distinction between different categories of assemblies, as provided for by Article 29 of both Drafts, be removed.
  12. It is recommended that the words “upon a free and full consent of the intending spouses” be added in Article 35 of both Drafts after “the right to marry and to found a family.” It is also recommended that the provision in Draft 2 requiring that the law set the framework for regulating marriage and family relations be removed as an unnecessarily restrictive and a potential encroachment on the personal autonomy of the spouses.
  13. It is recommended that the Constitution extend the right to vote and to be elected at least to those Armenian nationals with dual citizenship who are permanently resident in the Republic of Armenia.
  14. It is recommended that both Drafts be amended to ensure that the principle of proportionality, which requires that there be a reasonable relationship of proportionality between the means employed and the legitimate aim pursued, is applicable to cases of deprivation of property.

### **3. SPECIFIC ISSUES THAT REQUIRE PARTICULAR ATTENTION**

**3.1 *The right to life. Prohibition of death penalty.*** The explicit prohibition of death penalty in Draft 2 is welcome. **It is recommended that Draft 1 follow this approach and include a provision prohibiting death penalty**, which would bring it in line with the requirements of the Protocol No. 6 to the ECHR Concerning the Abolition of the Death Penalty.<sup>1</sup>

**3.2 *Prohibition on arbitrary arrest and detention.*** **It is recommended that Article 16 of Draft 1 be amended to provide for an exhaustive list of reasons whereby a person can be lawfully deprived of his or her liberty.** The inclusion of such a list in the relevant provisions of Draft 2 merits welcome. However, while this list is overall compliant with the requirements of Article 5 of the ECHR, **the non-inclusion of mental illness as a**

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<sup>1</sup> Ratified by Armenia on 29 September 2003.

**condition which may justify detention should still be noted as a serious omission**, since it ultimately implies that involuntary mental patients are not detainees by definition and therefore can be stripped off the essential safeguards against the unlawful deprivation of liberty. **It is therefore recommended that Article 16 of Draft 2 be reviewed accordingly.**

**3.3 Notification of rights.** Both Drafts include a provision that “[t]he arrested is not obliged to testify without his/her defense attorney” (Article 16). The provision partially negates the right to remain silent by implying that forced confession may be acceptable and admissible as evidence if obtained in the legal counsel’s presence. **It should be reworded as to rather guarantee that everyone arrested or detained shall be notified of his or her right not to be compelled to testify against himself or herself, as well as of the right of access to legal counsel of his or her own choice.** Note that both drafts include separate provisions concerning the access to legal counsel and the privilege against self-incrimination (Articles 20 and 22, respectively) which are reviewed in subsequent subsections of this comment.

**3.4 Access to legal counsel.** Both Drafts provide for everyone’s “right to a legal counsel starting from the moment of being interrogated, arrested, detained or charged” (Article 20). In order to ensure compliance with relevant provisions of the ECHR and the ICCPR, **this provision should be amended by adding “of his or her own choice” after the words “right to a legal counsel.”** The drafters may also consider inserting the provision concerning state-provided legal assistance for indigent defendants after the more general provision guaranteeing the right of access to legal counsel, to ensure that a more specific provision follows a more general one, and not *vice versa*.

Furthermore, the **provisions concerning the right to appeal and the right to enforceable compensation** are currently included in Article 20. This creates an impression that these rights constitute part of the right to legal assistance, which should not be the case. **It is therefore recommended that these provisions be introduced as separate articles or, alternatively, moved under the relevant provisions on fair trial.**

**3.5 Privilege against self-incrimination.** Article 22 of Draft 2 provides that “[n]o one shall be obliged to testify against his/her spouse and close relatives. The law may prescribe other cases of release from the obligation to testify.” Under this provision, individuals would not be afforded the essential protection of the prohibition to be compelled to testify against oneself or to confess guilt. **It is recommended that Article 22 be amended to provide for the privilege against self-incrimination,** which bring it in line with the standards established by Article 14(3) of the ICCPR.

**3.6 Freedom of thought, conscience and religion.** Both Drafts contain a provision that “[e]veryone shall have the right to freedom of thought, conscience and religion” (Article 26). **This provision is too vague and should be reviewed to specify what the right to freedom of thought, conscience and religion includes** in order to prevent restrictive and narrow interpretation of the provision.

Examples drawn from other Constitutions can illustrate this point. For example, Article 15 of the Federal Constitution of the Swiss Confederation provides that:

- “(1) The freedom of religion and philosophy is guaranteed.
- (2) All persons have the right to choose their religion freely, and to profess them alone or in community with others.
- (3) All persons have the right to join or to belong to a religious community, and to follow religious teachings.
- (4) No person shall be forced to join or belong to a religious community, participate in a religious act, or to follow religious teachings.”

Likewise, Article 60 of the Constitution of the Republic of Hungary provides that

- “(1) In the Republic of Hungary everyone has the right to freedom of thought, freedom of conscience and freedom of religion.
- (2) This right shall include the free choice or acceptance of a religion or belief, and the freedom to publicly or privately express or decline to express, exercise and

teach such religions and beliefs by way of religious actions, rites or in any other way, either individually or in a group.”

It is especially important to draw the line between *forum internum*, i.e. the freedom to entertain any religious conscience or philosophical thoughts, on the one hand, and *forum externum*, i.e. the external manifestations of one’s conscience, on the other. This distinction is crucial since the stance of the international law, which extends absolute protection to the inviolability of the *forum internum*, needs to be reflected in the domestic legislation. While freedom to manifest one’s religion is a qualified right and “may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,”<sup>2</sup> the right to freedom to hold religious or moral convictions or to entertain any philosophical thoughts is absolute and cannot be restricted.<sup>3</sup>

**It is also recommended that the drafter amend the provisions in question to include a prohibition against coercion impairing the person’s freedom to have or adopt a religion of his or her own choice, as well as include reference to the law regulating the exercise of freedom of religion.**

**3.7 Freedom of opinion and expression.** Article 27 of Draft 1 includes a **provision requiring that the law define the “activities and liabilities” of the media. It is recommended that this provision be removed from the draft**, since otherwise it is likely to present a constitutional endorsement of any unnecessarily restrictive laws impairing the media freedoms.

Furthermore, Article 27 of Draft 2 presents a concern as unduly restricting the right to petition the government for a redress of grievances by specifying the form of the petition. Under this wording only limited protection would be granted, for instance, to the right of individuals and groups to lobby for laws and policies that favor them. **It is therefore**

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<sup>2</sup> Article 18, para 3, ICCPR.

<sup>3</sup> Note that freedom of thought, conscience and religion as a whole is a non-derogable right (see ICCPR Article 4, para 2).

**recommended that Article 27 be amended to exclude the words “in a written form” after “submit letters, recommendations and complaints.”**

**3.8 Freedom of association.** The provision in Article 28 of Draft 2, requiring a Constitutional Court decision for the prohibition or dissolution of a political party merits welcome. The drafter may consider adding a provision that a political party may only be prohibited or dissolved if it advocates the use of violence or uses violence as a means to overthrow the democratic constitutional order.

**3.9 Freedom of assembly.** Both Drafts provide for an **unnecessary distinction between different categories of assemblies (Article 29). It is recommended that this distinction be removed.** All forms of peaceful assembly deserve equal protection and, while the categorization of assemblies in specific, e.g. police-related, legislation may be warranted for purposes of better regulation of such assemblies, the inclusion of a constitutional provision setting such a distinction is likely to lead to unnecessary restrictions and arbitrariness in the application of the law.

**3.10 Right to marry and to found a family.** Neither Draft mentions the issue of consent of the potential marital partners. It is recommended that the words “upon a free and full consent of the intending spouses” be added in Article 35 after “the right to marry and to found a family.”

It is also recommended that the provision in Draft 2 requiring that the law set the framework for regulating marriage and family relations be removed as an unnecessarily restrictive and a potential encroachment on the personal autonomy of the spouses.

**3.11 Right to participate in the conduct of public affairs, to vote and to be elected.** The provision in Article 30 of Draft 2, denying the Armenian citizens with dual citizenship the right to vote and to be elected, is in breach of the prohibition of discrimination as enshrined in Article 26 of the ICCPR and Article 14 of the ECHR.

This provision is also inconsistent with the European Convention on Nationality, Article 17 of which provides that “[n]ationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party.” Although the European Convention on Nationality has not yet been ratified by Armenia, its provisions are still a valuable source of guidance for the Armenian legislator since they provide an interpretation of the prohibition of discrimination in the ECHR, which Armenia has committed itself to adhere to as a Member State of the Council of Europe.

The stance of the Convention is that the only condition which may justify not extending the right to vote to a person with dual citizenship is the fact that the person in question has his or her permanent domicile outside of the country.

The central role of the residence factor in determining a person’s real and effective nationality is firmly rooted in the international law and reflected in the reasoning of the International Court of Justice in the landmark *Nottebohm* case.<sup>4</sup> Summarizing the practice of international arbitrators in cases when two States have conferred their nationality upon the same individual, the Court reaffirms the priority of “stronger factual ties between the person concerned and one of these States whose nationality is involved.” The Court explicitly mentions “habitual residence of the individual concerned” as a factor to be taken into consideration when assessing the factual ties.

**It is therefore recommended that the Constitution extend the right to vote and to be elected at least to those Armenian nationals with dual citizenship who are permanently resident in the Republic of Armenia.**

**3.12 Right to peaceful enjoyment of property.** Both Drafts include a similarly worded provision that “[n]o one shall be deprived of property except for cases prescribed by law in conformity with the court decision” (Article 31). **It is recommended that this provision**

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<sup>4</sup> International Court of Justice, *Nottebohm* case, judgment of 6 April 1955.

**be merged with the provision concerning the alienation of property further in the same Article to avoid vagueness and ensure consistency.**

The provision in Article 31 of Draft 1 requiring that equivalent compensation be provided prior to the alienation of property is welcome.

At the same time, **it is recommended that both Drafts be amended to ensure that the principle of proportionality**, which requires that there be a reasonable relationship of proportionality between the means employed and the legitimate aim pursued, **is applicable to cases of deprivation of property.**