

HCA Vanadzor Assessment of RA Constitutional Reforms

Drafting Chronology

1. By RA Presidential Decree № 207-N of September 4, 2013, a Specialized Commission for Constitutional Reforms was set up to develop the concept of constitutional reforms and the draft of the reforms. According to the Decree, the Constitutional Reforms process was brought about by the necessity to apply the principle of rule of law, improve the constitutional mechanisms guaranteeing fundamental human rights and freedoms, ensure the perfect balance of powers and achieve higher efficiency of public administration.
2. On October 14, 2014, the Specialized Commission for Constitutional Reforms approved the Concept Paper on Constitutional Reforms¹ published and submitted to the RA President on October 15. The Venice Commission also issued its Opinion² on the draft Concept Paper.
3. On July 15, 2015, the Specialized Commission published a draft of Chapters 1-7 and Chapter 10³ and subsequently on August 4 – a draft of Chapters 8-16⁴ and updated draft of Chapters 1-7. On July 17, 2015, the Venice Commission published its Opinion⁵ on the draft amendments to Chapters 1-7 and Chapter 10 of the Constitution.
4. On August 20, 2015, the Specialized Commission for Constitutional Reforms approved the Draft of making amendments to the Constitution⁶ and submitted it to the RA President. On September 10, 2015, the Venice Commission published its Opinions^{7,8} on revised draft amendments to Chapters 1-7 and Chapter 10 and on September 11 – to Chapters 8-16 of the Constitution.
5. On August 21, 2015, the draft Constitutional Reforms, with the supporting rationale bases, were submitted to the RA National Assembly.
6. In September 2015, the National Assembly launched debates on the draft amendments to the RA Constitution, which lasted only 4 days (September 15-18).
7. Hence, while the Commission drafted constitutional amendments in 2 years, the public at large had only 2 months to get acquainted with the draft. Moreover, no public debates were held on draft amendments after presentation of the Concept Paper. Note that in June 2015, the RA Law on Referendum underwent changes and amendments most probably in anticipation of the upcoming referendum.

¹ http://www.moj.am/storage/uploads/Sahmanadrakan_barepokhumner.14.10_.pdf

² [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)027-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)027-e)

³ <http://www.moj.am/article/1326>

⁴ <http://www.moj.am/article/1353>

⁵ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)015-e)

⁶ <http://www.moj.am/storage/uploads/Nakhagits.fn.docx>

⁷ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)015rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)015rev-e)

⁸ [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)019-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)019-e)

Reasonability and Necessity of Constitutional Amendments

8. The reasonability and necessity of constitutional amendments are among the most discussed crucial issues. The Concept Paper on Constitutional Reforms covers 11 urgent issues with fundamentally new approaches to constitutional solutions, including:
- consistent shift from the authority-centered constitutional solutions system to human-centered one;
 - exact constitutional guarantees for consistent application of the constitutional principle of social state and clear program- and goal-oriented policies;
 - application of most consistent constitutional principle of separation and balance of powers as a part of system integrity;
 - excluding any performance of state and authority powers by state agencies not authorized to do so by the Constitution;
 - reducing the apparent imbalance between the actual scope of powers vested in various constitutional authorities and their political accountability, etc.
9. While the constitutional amendments are quite extensive and target almost all of the regulations, except for the articles proclaimed unchangeable under the Constitution, the most major amendment covers the shift from the semi-presidential government system to the parliamentary one; this entails changes in the mechanisms and principles for constitutional agencies applied so far.
10. In this context, it should be noted that the next presidential elections in the RA should have been held in February 2018 and the parliamentary ones in May 2017.
11. Upon shifting to the parliamentary system of government under the Draft, the RA National Assembly will be the only national authority to be elected directly by the people.
12. The arguments against the parliamentary system of government in the rationale behind the Draft Constitutional Amendments⁹ inter alia assume that the political parties are still poorly established. At the same time, the counter-arguments on this statement suggest among others that shifting to the parliamentary system might provide a favorable environment for the parties to strengthen their ideological and institutional systems ensuring thereby improved political involvement of the public at large.
13. In this context, it appears necessary to assess the realistic chances for institutional development of the existing parties in the RA.

⁹ <http://www.parliament.am/drafts.php?sel=showdraft&DraftID=7672&Reading=0>

14. The Table below shows the distribution of seats in present RA National Assembly session:

Table 1

Number of Seats of Parties in RA NA

Names of Factions	Number of Faction NA Deputies
RPA	70
BHK (Prosperous Armenia Party)	33
OEK (Rule of Law Party)	5
ARFD (Armenian Revolutionary Federation-Dashnaktsutyun)	5
ANC (Armenian National Congress)	7
HP (Heritage Party (Zharangutyun)	4

15. It should be noted that the number of representativeness of parties in the National Assembly corresponds the level of their resources (See Table 2, Table 3, according to the data submitted to the CEC in 2010).¹⁰ The available data suggest that the RPA, which has been ruling for over 17 years, significantly outdoes all other parties in terms of both material and financial resources owned by the Party. Moreover, the funds of the RPA exceed by almost 3 times the total sum of the funds owned by the rest of the NA parties. It is noteworthy that the second largest political power in the NA, BHK, could have competed with the RPA in terms of resources.

Table 2

Real Estate Owned and/or Used by RA NA Parties

According to declarations submitted to the CEC for Yerevan City Council Elections 2013	Real Estate											
	Building						Land					
	Sole ownership		Free use		Leasing		Sole ownership		Shared ownership		Leasing	
Parties	Quantity	Square meter	Quantity	Square meter	Quantity	Square meter	Quantity	Hectare	Quantity	Hectare	Quantity	Hectar
RPA	33	14408	=	=	9	1051.9	14	0.87949	1	0.05789	1	0.2
BHK	=	=	52	6113.5	1	132.3	=	=	=	=	=	=
ARFD	35	8794.5	=	=	=	=	=	=	=	=	=	=
ANC	1	297.04	=	=	=	=	=	=	=	=	=	=
OEK	1	765.2	=	=	=	=	=	=	=	=	=	=
HP	=	=	=	=	=	=	=	=	=	=	=	=

Table 3

¹⁰ <http://www.elections.am/kus2013/>

Financial Capacities of RA NA Parties

According to declarations submitted to the CEC for Yerevan City Council Elections 2013	Real Estate	Funds	Incomes			
	Sole ownership		Membership fees and donations	Rentals	Budget funding	Other incomes
Parties	Quantity	AMD	AMD	AMD	AMD	AMD
RPA	8	39843822	364539760	13004480	29530400	8035077
BHK	=	8933009	14397000	=	17511000	68772
ARFD	=	2091490	=	=	=	=
ANC	=	2162800	5259700	=	=	=
OEK	2	1036000	8650000	=	4633400	=
HP	=	=	25666000	=	4387000	=

16. In this context, the public threats by RA President and RPA Chairman S. Sargsyan against Gagik Tsarukyan, Chairman of the Prosperous Armenia Party, in February 2015 should be mentioned. At the RPA Executive Board session, Serzh Sargsyan qualified Gagik Tsarukyan as the evil¹¹, and informed that the latter was dismissed from the RA National Security Board and provided the information below:

- “Out of the 145 RA NA sessions in 2013-2014, Gagik Tsarukyan attended only 4 sessions. If he ignores our voters and the role of the National Assembly to that extent, we do not have the right to do so; we are responsible for the rights of every RA citizen. Starting from tomorrow, our deputies will take relevant steps to put an end to this absurd situation.
- For several years, unverified allegations have been hanging in the air about concealed billions of AMD of unpaid taxes that have been stolen from the retirement pensions young peoples’ right to education under the name of “charity”. I hereby urge the Prime Minister of the Republic of Armenia to commission relevant agencies to thoroughly and comprehensively verify the allegations above and openly publish the results for everyone.
- There are also some unverified allegations of establishing a skillful mechanism of concealing a series of crimes. Tomorrow, I shall convene a Security Board session to discuss with our law enforcement agents our next steps to verify such allegations”.

17. As a result, within a month, Gagik Tsarukyan announced about leaving his office of Party Chairman and politics in general. He also announced that he would have nothing to do with the Prosperous Armenia Party any more. After this statement of the Party's ex-chairman, some of the NA Prosperous Armenia faction members left the faction. In fact, the RA NA Prosperous Armenia faction was divided and consequently weakened.

¹¹ http://civilnet.am/2015/02/12/serzh-sargsyan-slams-gagik-tsarukyan/#.VfvOlt_tlHx

18. Back in January 2015, Gagik Tsarukyan initiated a campaign to unite non-ruling and non-political forces and to this end, organized a conference for the representatives of non-ruling political forces, non-governmental organizations, civil initiatives and movements to discuss the complicated political and economic situation in the country.
19. In other words, Serzh Sargsyan used G. Tsarukyan's vulnerability as the major oligarch to suspend any possible political processes. In fact, no results of the investigation into Gagik Tsarukyan's "absence from the National Assembly sessions, allegations on unpaid taxes and skillful mechanism to conceal a series of criminal crimes" have been published so far. It is also unknown whether and for how long these issues remain on the table.
20. Hence, early in 2015, the Republican Party of Armenia struck a heavy blow to the second largest NA faction and the Prosperous Armenia Party as a whole. As a result, the Republican Party of Armenia strengthened its dominant position in politics.
21. Also, the facts below are quite noteworthy:
 - The Constitutional Amendments process are launched before the expiration of Serzh Sargsyan's second and final term as an RA President;
 - New candidates, including from the RPA, would have to be nominated for the Presidential elections of 2018, which could serve as an incentive for new political processes and developments. Thus, the shift to the parliamentary system of government will suspend major opportunities for social and political changes in the Republic of Armenia;
 - Upon shifting to the parliamentary system of government, the RA citizens will be able to directly elect only one national authority, namely, the RA National Assembly, which due to the current extreme disparity of party resources will predictably be 'monopolized' by the RPA. This in its turn will result in the key judiciary and executive officials, among others, being appointed by only one political force.
 - Note that as a result of constitutional amendments, the Constitutional Court members, 3 judges of the Cassation Court, 5 members of the Supreme Judicial Council, the Prosecutor General, Human Rights Defender, Central Electoral Commission members, Television and Radio Board members, Control Chamber members and the Central Bank Chairman will be elected by at least 3/5 (60%) of the general number of National Assembly deputies;
 - All national elections held under S. Sargsyan and the RPA so far have been accompanied with such violations that do not inspire trust in the constitutional referendum to be held.
22. Hence, the RPA has ensured all the necessary conditions for its factual monopoly in the RA upon shift to the parliamentary system entailing a one-party system, which contradicts Articles 1 and 2 of the RA Constitution and therefore is unconstitutional.

Several Concerns about Key Provisions of Constitutional Amendments

We hereby present HCA Vanadzor's concerns over a number of key provisions of the draft Constitutional Amendments.

This opinion is based on the research into the draft amendments to the RA Constitution, RA Constitution, Concept Paper on RA Constitutional Reforms and the Venice Commission Opinion on RA Constitutional Amendments. The fundamental principles of international law, as well as the requirements of international treaties signed by the RA and the opinions of a number of individuals and organizations on the draft constitutional amendments and certain draft provisions have been considered as well.

Section on Foundations of Constitutional Order

1. According to Article 5(2), RA Draft Constitutional Amendments, binding regulations of the general international law shall prevail over national laws. This wording provides limited safeguards for fulfillment by the State of its international human rights commitments. Moreover, the draft put into circulation the phrase "constitutional laws" system. However, the Draft fails to stipulate the precedence of binding international provisions over constitutional laws. Along with the requirement of compliance of constitutional laws with the RA Constitution, it should have been stipulated for certain areas (Electoral Code, Judicial Code, etc.) that constitutional laws shall comply with the binding international law regulations. This provision may not be ignored or remain unregulated. Moreover, given the traditional legal framework formation practices in the Republic of Armenia, there are no guarantees that such constitutional laws will not be used to restrict human rights and freedoms.
2. Under Article 3(2) of the Constitution in use, "The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of the international law". Under Article 81(1) of the Draft, "interpretation of the constitutional provisions on fundamental rights and freedoms shall consider the practices of the agencies functioning in compliance with the international human rights treaties signed by the RA"; this is an apparent setback from the binding requirement in the provision above enshrined by the present Constitution.
3. This Chapter on Foundations of Constitutional Order also prescribes the principle of separation of the state and religious organizations (Article 16). At the same time, Article 17 stipulates the unique mission of the Armenian Apostolic Church, as the national church, in the spiritual life of the Armenian people, as well as in the development of national culture and national identity. While the provision repeats the wording in the present Constitution, unlike it, the Draft provides no clear phrase on separation of

church and the state. Although such separation follows from clauses in Article 16(2), the lack of clear regulation might give rise to ambiguous interpretations, since even under the current constitutional regulations, the church performs a special and monopolistic role in key state system structures, namely army, education and other areas, which is contrary to the essence of the freedom of conscience and religion. Under the Draft, the Armenian Apostolic Holy Church receives religious monopoly, which contradicts the notion of a secular state as one of the fundamental principles of human civilization.

4. Under Article 6, the Constitution of the Republic of Armenia shall have supreme legal force and the norms thereof shall apply directly. While the Draft of the RA Constitutional Amendments stipulates that the RA Constitution shall have supreme legal force (Article 5), it fails to stipulate the direct application principle, which considerably reduces the significance of Constitution as the supreme legal document and its role in public relations.

Section on Fundamental Rights and Freedoms of the Human Being and the Citizen

5. It is noteworthy that, despite the commitments assumed by the RA, the situation of human rights and freedoms has seen no progress, except in a couple of areas. Instead, it has suffered obvious regress. Some regulations under the Draft are too detailed and specific¹² and may therefore limit the further exercise of such right or legal relations.
6. According to Article 43 of the RA Constitution, the fundamental human and civil rights and freedoms set forth in Articles 23-25, 27, 28-30, 30.1, 32(3) may be temporarily restricted only by law if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as honor and reputation of others. The phrase "democratic society" is one of the focal concepts of this clause. While the necessary condition of "democratic society" is absent from the articles on rights' restrictions in the Draft,¹³
7. Article 77 of the Draft prohibits abuse of the fundamental rights and freedoms. This Article also prohibits using the fundamental rights and freedoms to incite national, racial and religious hatred. Article 29 of the Draft prohibits discrimination on any grounds. Limiting the prohibition of hatred incitement only to a few areas contradicts the general principle of non-discrimination, considering that preaching hatred is among causes of discrimination and discriminatory treatment. The regulations above will have a negative impact on the protection of the rights (right to life, health, property, etc.) of vulnerable groups.

¹² [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)015rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)015rev-e)

¹³ Also see: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2015\)015-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2015)015-e)

8. In terms of human rights restrictions, the lack of any improvement policies for vulnerable groups raises concern. Particularly, the Draft has retained the legal incapacity recognition institute, which is in conflict with the principle of equality before the law and requirements of UN Convention on Rights of Persons with Disabilities ratified by the RA. The institute of recognizing a person incapable may not be acceptable in any democratic and legal state guided by the principles of human dignity and non-discrimination. At the same time, this institute should be replaced with a mechanism to restrict a certain right on sufficient factual and legal grounds, as necessary.¹⁴
9. Article 26(1)(6) of the Draft states that "Everyone shall have the right to liberty of person. No one shall be deprived of the right to liberty of person, except for the persons below and under the procedure prescribed by law: ... persons suffering mental disorders, drug and alcohol users." It should be noted that the sole fact that a person suffers mental disorders, is a drug or alcohol user may never serve a basis for depriving him/her of liberty. Such an approach is not only discriminatory, but also contrary to the very essence of human rights and Article 29 of the Draft. In this case, a person's right to liberty of person might be restricted only on the grounds of his/her posing a threat to his/her own health and safety or those of the others that might be eliminated only by his/her temporary deprivation of liberty that should be stopped immediately after the threat ceases to exist.
10. We consider it essential to address also Article 34 on the freedom of marriage, which has stirred up large-scale debates and reactions. This Article stipulates the right of every man and woman of marriage age to get married by free expression of their will. Under the Draft, this right may be restricted for the public interests. Given such stipulation of the right of marriage, we consider the concerns of the Venice Commission over the draft regulations justified. Also, in the context of recognition of same-sex marriages, it should be noted that the refusal to legally recognize such unions might also bring about violation of property rights and a number of other rights of the other persons as well recognized under the Draft.
11. As for the potential restriction of the right to marriage for the public interests, this provision is vague. Likewise, provisions on possible restriction of the right to information (Article 50), right to strikes (Article 56), freedom of entrepreneurial activity and economic competition safeguards (Article 57) in the name of public interests should also be further clarified. Furthermore, the Draft contains 3 similar phrases: public interest; interest of the public (Article 58(3) and prevailing (overarching) public interest (Article 58(5)).

¹⁴ See: HCA Vanadzor Position on Institute to Consider Adults Incapable in the RA
<http://hcav.am/events/04-06-2015-5/>

Social, Economic and Cultural Rights

12. Given the highlighted obligation set forth in the Draft for the Government to report to the RA National Assembly on the state measures to promote economic, social and cultural rights,¹⁵ it remains unclear why the Draft lacks any similar obligation regarding fundamental human and civil rights and freedoms. Also, the Draft lacks any provisions on the requirement to ensure progress within the protection of human rights in the areas above.¹⁶
13. At the same time, provisions in Chapter 3 are quite vague; it is not clear whether the "law provides for (that)" phrase means that the right in question is recognized by the RA Constitution or not and what minimal standards and initial contents should be stipulated by the RA legislation of the areas above. Such wording rather implies avoiding recognition of such rights. The present Constitution clearly stipulates the right to social security (Article 37), free basic medical services (Article 38) and a number of other rights. Note that the restriction of the person's right to apply to the Constitutional Court for protection of such rights also constitutes apparent regress from the effective Constitution's regulations.

State Agencies

14. Under Article 158 of the Draft Constitution, public government system agencies shall include as follows: ministries, as well as other agencies subordinate to the Government, Prime Minister and ministries. The formation procedures and powers of such agencies shall be established by law. While the Draft Amendments to the Constitution regulate the Government's accountability system, the extent and procedures of accountability by the state agencies under the Prime Minister to the RA National Assembly remain vague. This means that there is a potential risk of setting up similar agencies under the Government almost beyond control of the representative body.
15. In this context, it is also unclear what the status of investigation agencies will be. Presently, such agencies cover as follows: Investigative Committee, Special Investigation Service, National Security Service and investigative agencies under the Ministry of Finance vested with investigative powers. Heads of the Investigative Committee and the Special Investigation Service are appointed by the RA President. As for the Draft, it provides no clear details on the status and formation procedures applicable to investigative agencies and the control powers of the National Assembly to ensure surveillance of the activities of such agencies (no requirement on annual reports).

¹⁵ In this context, the Draft even lacks the word «right».

¹⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

16. While the Draft stipulates procedure for assigning the RA Prosecutor General, the key directions of Prosecutor's Office activities remain unchanged. At the same time, no obligations are set out in the Draft for the Prosecutor's Office to submit annual reports to the RA National Assembly, despite the fact that such obligations are stipulated for other agencies covered in the Constitution.
17. An issue of serious concern is the provision under Article 201(2) of the Draft stating that the National Assembly shall adopt amendments of a number of Constitutional Articles. While the authors of the Draft mentioned that provisions of crucial significance shall be amended in a referendum, it is not clear what principle shall be applied to determine the **articles of focal significance**. The National Assembly shall be entitled to amend key provisions ensuring the democratic component of the parliamentary system regarding the deputy powers, local government activities, Government accountability, state budget control, etc.
18. At the same time, only provisions on the Human Rights Defender, out of independent constitutional agencies, may be amended through referendum; as for regulations of the grounds for other state agency (Central Election Commission, Television and Radio Board, Control Chamber, Prosecutor's Office) activities, they also may be amended by the RA National Assembly. The National Assembly's power to amend the constitutional provisions above will result in the situation below: the ruling party making a stable parliamentary majority will remove the duties of the state agencies responsible for the exercise of human rights and freedoms, and the clauses on human rights and freedoms will become of declaratory.
19. To sum up, it should be noted that the HCA Vanadzor also shares the concerns of other experts and organizations on overly broad possibilities of restrictions of the right to property, freedom of assembly and other rights. Another issue of concern is that the persons responsible failed to consider in the Constitutional Amendments Package even the key provisions of the Concept Paper on Constitutional Reforms authored by them, particularly access to the mechanism of involving the jury in the judicial proceedings.



Summary

Based on the aforementioned, we hereby state as follows.

The constitutional amendment process evolves quite hurriedly; public debates on the circulating Constitutional Amendments Draft have lasted for less than 2 months, and the essential debates in the National Assembly lasted only 4 days. Such approach to the Constitution is unacceptable and intolerable.

The constitutional amendments process and solutions for shifting to the parliamentary system of government as suggested under the Constitutional Amendments Draft is not required by the public, but is rather intended to meet the requirements of a political party; therefore, the constitutional amendments process is premature.

Not only does the Constitutional Amendments Draft fail to resolve a number of problematic issues in the area of human rights, but also carries serious threats.