Strasbourg, 21 July 2017 **CDL(2017)025***

Opinion No. 893/ 2017 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ARMENIA

DRAFT OPINION

ON THE DRAFT JUDICIAL CODE

On the basis of comments by

Mr Andras VARGA (Member, Hungary)
Mr Nicolae ESANU (Substitute Member, Republic of Moldova)
Mr Johan HIRSCHFELDT (Substitute Member, Sweden)
Mr Guido NEPPI MODONA (Substitute Member, Italy)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Contents

I. Introduction

1. By letter of 3 May 2017, the then Minister of Justice of Armenia, Ms Arpine Hovhannisyan, requested the Venice Commission to prepare an opinion on the Draft Judicial Code (CDL-REF(2017)030), to be submitted to Parliament for consideration in September 2017. In addition, a list of five more general questions, related to the future design of the judiciary, was communicated to the Venice Commission (CDL-REF(2017)033), and discussed by the rapporteurs with the representatives of the authorities in Venice on 15 June 2017.

2. Mr Esanu, Mr Hirschfeldt, Mr Neppi Modona, and Mr Varga acted as rapporteurs for this opinion.

3. On 10 – 11 July 2017, a delegation of the Commission, composed of Mr Esanu, Mr Hirschfeldt, Mr Neppi Modona, accompanied by Mr Dikov from the Secretariat, visited Yerevan and met with parliamentarians, executive authorities, judges and other local stakeholders, as well as representatives of the civil society.

4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of a translation of the Draft Judicial Code provided by the authorities. Inaccuracies may occur in this opinion as a result of incorrect translations.

[5. This opinion was adopted by the Venice Commission at its … Plenary Session (Venice, … 2017).]

II. Constitutional framework of the Draft Judicial Code; scope of the present opinion

6. The need to develop a new Judicial Code was dictated by the adoption of the amendments to the Constitution of Armenia, approved at a referendum on 6 December 2015. Those amendments *inter alia* affected the organisation of the judiciary and the status of judges. It is planned to adopt the new Judicial Code by the end of 2017, in order to bring the legislation in line with the Constitution (see Articles 210 et seq. of the Constitution).

7. The 2016 constitutional reform was assessed by the Venice Commission in the First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10)[1] and in the Second Opinion on the Draft Amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16).[2] The final constitutional arrangements regarding the status of judges, the manner of their election and dismissal and the composition and powers of the Supreme Judicial Council received a generally positive assessment of the Venice Commission.[3] Thus, the current Constitution provides a solid legal basis for a well-functioning and independent judicial system.

8. In the centre of the new system is the Supreme Judicial Council (the SJC) composed of ten members: five are judges elected by their peers; five are elected by Parliament from amongst "prominent lawyers", by a qualified majority of votes (Article 174 §§ 1-3). Article 174 also mentions the General Assembly of Judges (the GA), which is an assembly of all Armenian judges. The SJC is responsible for nominating candidates for judicial appointments and promotions (§ 1, pp. 1-4 of Article 175). The SJC also gives consent to the criminal prosecution of a judge (p. 6) and may impose disciplinary liability on judges and terminate their powers (pp. 7-8). Paragraph 2 stipulates that when sitting as a disciplinary body the SJC "shall act as a

[1] CDL-AD(2015)037
[2] CDL-AD(2015)038
[3] See, in particular §§ 43-47 of CDL-AD(2015)038

court." The SJC may adopt "regulatory legal acts" and may have "other powers […] prescribed by the Judicial Code."

9. The judicial system consists of "the Constitutional Court, the Court of Cassation, courts of appeal, courts of first instance of general jurisdiction, as well as the Administrative Court" (Article 163). The Constitutional Court stands apart in this system: its composition, procedures and powers are regulated by a separate constitutional law and are not analysed in the present opinion, unless they relate to the operation of ordinary courts.

10. Under Article 171 the Court of Cassation is defined as a "supreme court instance", except in the field of constitutional justice where the Constitutional Court is a supreme body (§ 1). The tasks of the Court of Cassation are to "ensure uniform interpretation of laws and other regulatory legal acts" and to "eliminate the fundamental violations of human rights and freedoms". The Constitution does not describe the relation between the Administrative Court and the courts of appeal and the Court of Cassation.

11. The status of the judges, the eligibility criteria, the incompatibilities and the procedure for appointment are described in Articles 164-165 of the Constitution. The judges are appointed the National Assembly and/or the President, depending on the level of the judge; however, the SJC is responsible for selecting and proposing all candidates for the judicial appointments. Insofar as the judges of the Court of Cassation are concerned, the SJC proposes to the National Assembly a list of three candidates from which the National Assembly has to elect one, by a 3/5th majority (Article 166 § 3), and submit this candidate to the President for appointment.

12. Due to the time-constraints, this opinion covers only a number of selected topics that are of paramount importance for the future design of the Armenian judiciary; it does not represent, therefore, a comprehensive analysis of all provisions of the Draft Code.

III. Analysis

A. General comments

13. The Draft Code implements positive changes brought by the constitutional reform. Legal mechanisms proposed by the Draft Code are, in general, compatible with the European standards and best practices, they enhance the independence of judges and potentially may strengthen the public trust in the judiciary. However, the Draft Code contains several important gaps; many provisions of the Draft Code have to be clarified or harmonised with other provisions.

14. At the meetings in Yerevan the rapporteurs were told that new procedural codes are being developed in parallel with the Draft Judicial Code. Some of the principles set in the Draft Code (for example, regarding the role of the Court of Cassation in ensuring the uniform interpretation of the law, setting out a procedure of selection of cases for examination by the Court of Cassation, setting the rules regarding reopening of cases of resolving jurisdictional disputes, etc.) may be regulated in those other codes.

B. Comments on the specific chapters

1. Chapters 1 and 2 (general principles)

a. Articles 1 to 13

15. The first articles of the Draft Code set general principles governing the judiciary (judicial independence, tasks of the courts, lawful exercise of judicial powers, etc.).

16. Article 4 contains a closed list of types of courts and, in § 5, proclaims that the "establishment of extraordinary courts shall be prohibited". It is understood that no court that is not explicitly mentioned in Article 4 may be established – this is in line with international standards.[4]

17. Article 9 §§ 1 and 2 provides that the judge should decide cases in accordance with the Constitution, the international treaties, and the law. It does not mention, as a source of law, the interpretations of statutes given by the Court of Cassation. The binding status of the case-law of the Court of Cassation is discussed below, in relation to Article 14 of the Draft Code (see paragraph 21 below).

18. Article 9 § 2 stipulates that the judge, in deciding a case, should "take account of the practice of bodies operating on the basis of international human rights treaties". Thus, § 2 implicitly refers to the case law of the European Court of Human Rights (the ECtHR). The Draft Code in this part reproduces the wording of Article 81 § 1 of the Constitution, which requires "taking into account" of the practice of those bodies. This formula is acceptable; however, in the opinion of the Venice Commission, the Constitution does not prevent the legislator from developing this principle further, in a direction of giving the ECtHR case law more weight in the domestic legal order and requiring the courts to *follow* the ECtHR case law.[5]

19. Articles 10 to 13 contain certain procedural rules (fair trial, publicity, language of court proceedings, prohibition of discrimination, etc.) that are more appropriate in a procedural code.[6] In any event, Article 12 § 5 should make it clear that a decision of the judge to conduct proceedings behind closed doors does not prevent the parties to the proceedings (as opposed to the general public) to have access to the information and materials examined at the trial.

20. In general, the above provisions are in line with the European standards as expressed in the opinions and reports of the Venice Commission.

b. Article 14 § 4 (possibility for a lower court to derogate from the case law of the Court of Cassation) and Articles 30-32 (the role of the Court of Cassation)

21. Article 14 § 4 and Articles 30-32 deal with the role of the Court of Cassation. These provisions develop Article 171 § 2 (1) of the Constitution, which provides that this court "shall ensure the consistent application of laws and other normative legal acts".

22. Article 30 § 1 defines the scope of review exercised by the Court of Cassation: ensuring the uniform interpretation of the law and eliminating fundamental human rights violations. Both functions (ensuring the "uniformity of interpretations" and protecting human rights and freedoms) will be performed by the Court of Cassation "by way of revision of judicial acts", i.e. within the examination of individual cases. Ensuring the "uniformity of interpretations" should indeed not take other forms, such as issuing abstract guidelines to the lower courts.[7]

[4] See, for example, Basic Principles on the Independence of the Judiciary, General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; see also CDL-AD(2015)037, § 150.

[5] More on the effect of the judgments of the ECtHR in the domestic legal order see in CDL-AD(2014)036, Report on the implementation of international human rights treaties in domestic law and the role of courts, §§ 101 et seq., and, in particular, see about the German approach to this issue which requires the domestic courts to "strive to integrate the ECtHR judgments into the German legal system" to the extent that these judgements are not incompatible with the German constitution.

[6] This remark is also applicable to some other Articles of the Draft Code, for example, Article 15 § 3 that speaks of the right of appeal of persons who were not parties to the proceedings before the first instance court.

[7] See CDL-AD(2014)030, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, §§ 33, 34; see also CDL-AD(2014)038, Opinion on the draft

23. The second paragraph of Article 30 stipulates that the Court of Cassation may engage in "interpreting […] another judicial act […] with regard to which there is an issue of law development". The meaning of this phrase is not entirely clear. While the Court of Cassation may, through interpretation, "develop" the law, it should not be involved in the lawmaking (i.e. develop new rules which are contrary to the plain language of the law). That being said, the boundary between the interpretative function of the Court of Cassation and the lawmaking is somewhat blurred, especially where the contested norm is arguably unconstitutional.

24. Article 30 § 2 explains that in order to protect fundamental rights and freedoms the Court of Cassation shall review the judicial acts issued by the lower court "in violation of the right to fair trial or in such violations of substantive or procedural law undermining the basic human rights enshrined in the Constitution and international treaties […], which have affected the outcome of the case." This provision may be construed as inviting the Court of Cassation to give direct effect to the Constitution and to the international human rights treaties and refuse to apply a law that it deems contrary to the Constitution and/or to the international law. The Venice Commission reiterates that in the Armenian legal order there is a separate body specifically entitled to give direct effect to the Constitution, namely the Constitutional Court. The main role of the courts of general jurisdiction is to apply general laws and interpret them in conformity with the Constitution, the European Convention on Human Rights (ECHR) and other internal human rights standards. If a "constitutionally compatible" interpretation of the law is impossible, the Court of Cassation (or a lower court) should use the mechanism provided by Article 169 § 4 and refer the question to the Constitutional Court. A clarification in the Draft Judicial Code in this direction would be useful.

25. Draft Article 14 of the Code ("Binding nature of judicial acts") provides that the lower courts may derogate from legal positions expressed by the Court of Cassation in its case law, but in this case they are obliged to give "strong arguments" justifying such departure.[8] This raises the question of the limits to the function of the Court of Cassation to maintain the consistency of the legal order.

26. Contrary to the current Code (Article 15),[9] draft Article 14 does not explicitly stipulate that the legal positions of the Court of Cassation are "binding". However, in essence, the new provision is not so different from the existing one: a judgment of the Court of Cassation may have effect as "case law" and lower courts should follow an interpretation given by the Court of Cassation in a particular case. The binding nature of the Court of Cassation interpretations may be deduced *a contrario*, as the new rule establishes an exception from the formal binding rule, which makes sense only if the binding rule exits. Moreover, the judgments of the Court of

---

laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, § 22; CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 4. And, by no means, the judges of the Court of Cassation should not give informal instructions disseminated from the top to the bottom of the judiciary: with the regard to the Armenian judiciary, the Venice Commission previously noted that it "heard persistent reports of improper and extraordinary interference by judges of higher-level courts with those of lower-level ones. Notably, that lower-level court judges often seek instructions from higher-level court judges – in particular those of the Court of Cassation. Should these allegations be true, then a firm position must be taken in Armenia to ensure that the independence of the judiciary includes the independence from interference by other judges" (CDL-AD(2014)007, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 13).

[8] It reads as follow: "Where a court derogates from the justifications of a judicial act of the Court of Cassation (including the interpretations of a normative legal act) while examining and deciding on a case, it shall justify its position indicating strong arguments."

[9] According to § 4 of Article 15 of the Judicial Code currently in force, "the reasoning (including legal interpretations) laid down in a judicial act of the Court of Cassation or the European Court of Human Rights in a case with certain factual circumstances shall be binding for a court when the latter examines a case with similar factual circumstances, except when the court substantiates, putting forth weighty arguments, that it is not applicable to the factual circumstances at hand."

Cassation will have binding effect *de facto*, simply because the lower courts would not want to see their decisions overturned.

27. The proposed Article 14 § 4 thus *implies* the binding effect of the case law of the Court of Cassation, without stating it openly. The Court of Cassation will have the last word and thus remain the guardian of the uniformity and ensure, as required by the Constitution, the coherence of the legal order of the Republic of Armenia (see Article 171 § 2 (1) of the Constitution). The new provision, however, puts accents differently: instead of stressing the mandatory character of legal positions of the Court of Cassation, it emphasises the power of the court, when indispensable, to develop the case law.

28. An important clarification is needed. Current Article 15 gives the lower courts the right to depart from the case law of the Court of Cassation where the lower court may "substantiate, [by] putting forth weighty arguments, that [the case-law of the Court of Cassation] is not applicable to the factual circumstances at hand". In essence, current Article 15 only speaks about the need to *distinguish factual circumstances* of new cases from the previous cases, and adapt the interpretation accordingly. Strictly speaking, if the relevant facts of the new case are dissimilar from those of the previously decided one, this old case cannot serve as a precedent.

29. New Article 14 describes another situation, namely a clear and net *departure* from the previous case law of the Court of Cassation, which is justified not by differences in factual circumstances, but by other "strong arguments". With this important restriction it recognises, therefore, the possibility of evolutive interpretation of the law, initiated at the bottom-level of the judicial system.[10] Arguably, the Court of Cassation will also have the power to overturn its own precedents (although this is not stated openly).

30. The Armenian legislator has to find a proper balance between two equiponderant principles. On the one hand the "binding rule" (proclaiming the binding nature of the case law of the Court of Cassation) ensures legal certainty (which is one of the pillars of the rule of law),[11] the predictability and uniformity of judicial decisions, and the principle of equality before the law, guaranteed by Article 28 of the Constitution.[12] On the other hand, too rigid an application of the "binding rule" can undermine the independence of the judges, guaranteed by Article 63 § 1 and Article 164 § 1 of the Constitution, in particular the internal independence of lower courts' judges towards justices sitting on the Court of Cassation.[13]

31. In sum, the new provision leaves the door open for incremental development of the case law at the initiative of the lower courts, under control of the Court of Cassation. The proposed formulation of draft Article 14 is therefore acceptable.[14]

[10] As the Venice Commission held in CDL-AD(2014)006, "a judge may not be limited to applying the existing case-law. […] While judges of lower courts should generally follow established case-law, they should not be barred from challenging it, if in their judgment they consider right to do so." (Joint Opinion on the draft Law on disciplinary liability of Judges of the Republic of Moldova, §§ 21 and 22).

[11] See CDL-AD(2016)007, Rule of Law Checklist, Chapter B (p. 15 et seq.).

[12] Ibid., Chapter E (p. 20 et seq.).

[13] The Venice Commission has repeatedly stated that independence of the judiciary depends not only on its relations with other State authorities (external institutional independence), but also on the relations within the judicial system, between different levels of jurisdiction (see CDL-AD(2012)014 § 78-79, CDL-AD(2010)004, § 73). The Committee of Ministers expressed itself in similar terms: "Hierarchical judicial organisation should not undermine individual independence" (CM/Rec(2010)12, § 22).

[14] The word "incremental" is particularly important here; the Venice Commission recalls its earlier position that the overarching principle of legal certainty requires that "legal instruments must not change so often as to make the principle *ignorantia juris non excusat* impossible to be applied by an ordinary individual. Courts should not depart from a previously held interpretation of a legal instrument, unless they have a good reason to do so" (CDL-AD(2012)014, § 28). Whatever option is chosen, it is recommended to harmonise Article 9 and Article 14: if the legislator formulates the "binding rule" more clearly in Article 14, it should be repeated in Article 9.

32. The Venice Commission regrets that Article 14 does not mention the binding effect of the case law of the Constitutional Court. Under Article 170 § 2 of the Constitution decisions of the Constitutional Court are final; however, it is necessary also to acknowledge the binding effect of the *case law* of the Constitutional Court – i.e. of those legal positions which transcend the circumstances of the specific case where they have been formulated and which should be applicable to other similar cases.[15]

c. Articles 15 et seq. (ordinary cassational appeals and extraordinary remedies; *certiorari*).

33. Article 15 distinguishes between cassational appeals (§ 1) and appeals on the basis of "fundamental violations of substantive or procedural law" (§ 2). Article 15 § 2 thus appears to describe an *extraordinary* legal remedy, which is not a part of a *normal procedure* before the Court of Cassation, and which may be used *after* the judgment became final. At the same time, Article 30 does not make this distinction; under § 1 (2) the Court of Cassation should always "eliminate the fundamental violations of human rights and freedoms", whatever is the type of the appeal. This should be clarified. If Article 15 § 2 speaks of an extraordinary remedy, the Venice Commission recalls that the authorities must respect the principle of legal certainty and should not use this remedy (the reopening of a case with reference to "fundamental violations") as an appeal in disguise.[16]

34. Furthermore, § 2 of Article 15 mentions reopening of the case due to newly discovered circumstances. This is a remedy based on facts, whereas the review because of "fundamental violations of substantive or procedural law" is limited to the questions of law. Those two situations should be treated separately in the Draft Code.

35. Article 15 § 3 gives the right to appeal to persons who were not taking part in the proceedings "in the cases and under the procedure provided for by law". This generous *locus standi* rule should be carefully circumscribed in the relevant procedural codes and in the jurisprudence of Court of Cassation in order not to allow frivolous claims by persons who have only very tenuous connection to the subject-matter of the dispute.

36. As the rapporteurs were explained in Yerevan, Article 16 § 3 is designed to give to the Court of Cassation a *de facto certiorari* privilege, i.e. the power to select cases for examination by a panel of judges. This model would permit the Court of Cassation to select from its docket the most important cases, whereas a great majority of appeals will be dismissed by the panel in simplified proceedings, by a summary inadmissibility decision. Such model exists in certain countries; however, it will be necessary to describe, in the relevant procedural codes, the exact powers of the panel and the basic characteristics of the summary inadmissibility decisions it may take.

37. Appeals accepted for examination on the merits should be those that raise *serious* questions of interpretation of law. In particular, this may apply to situations where a lower court deviated from the case law of the Court of Cassation, in order to disapprove such deviation or confirm it. By doing so the Court of Cassation will ensure the uniform application of laws (which is one of its two main functions according to Article 30 § 1 (1) of the Draft Code).

[15] See also CDL-AD(2017)011, Armenia – Opinion on the draft Constitutional Law on the Constitutional Court, §§ 89 et seq.

[16] See, in the Armenian context, the ECtHR judgment *Vardanyan and Nanushyan v. Armenia*, no. 8001/07, 27 October 2016, §§ 64 et seq., with further references to earlier judgments regarding Russia and Romania. In this case the ECtHR concluded that the Armenian courts had violated the principle of the finality of judgments, by allowing a claim by the Mayor of Erevan which in fact constituted an appeal in disguise against a final decision in the applicants' favour rendered by the Court of Cassation in 1997.

2. Chapter 3, 4, 5 and 6 (organisation of the courts' system; specialised courts)

38. The Draft Code, following the Constitution, establishes a three-tier system of courts (first-instance, appellate, Court of Cassation), separated into three different branches (civil, administrative and criminal). The three-tier system existed before the 2015 constitutional reform.[17] There is no international standard on the number of judicial instances;[18] the State is free to choose a model which best suits its needs and is compatible with the national legal traditions.

a. Article 21 (pre-trial judges)

39. Article 21 § 4 empowers the SJC to select judges performing judicial oversight over pre-trial criminal proceedings from amongst the judges of criminal specialisation for a term of one year, by the principle of rotation. This is an acceptable model.[19]

40. If the same judge decides on the pre-trial measures and then examines the case on the merits it is necessary to ensure that the judge's participation in the pre-trial proceedings does not affect his/her impartiality in the subsequent trial. That does not exclude that the judge, at the earlier stages of the proceedings, may assess the *prima facie* plausibility of the accusations, the need for certain investigative actions, and the security risks posed by the accused. The Venice Commission refers the Armenian authorities to the abundant case law of the ECtHR on this matter.[20]

b. Articles 22 and 23 (number of judges in each court)

41. As follows from Article 22, judicial territory of a first-instance court is normally linked to the territory of an administrative district.[21] This model is not unknown, but has disadvantages, one of which is the uneven repartition of workload. Furthermore, there remains a risk that local administrations may be tempted to exert undue influence on local courts located within their territory.[22] Some detachment of the judicial system from the territorial division of the country may be desirable.

42. Article 23 of the Draft Code contains a list of all courts in Armenia with the number of judges serving there. The Venice Commission had previously noted that it is not necessarily correct that the Constitution must define the individual elements of the court organisational structure.[23] To some extent this logic applies to a constitutional law: it may be necessary to fix there the number of judges of the Court of Cassation, to avoid "packing" this court by new judges.[24] By contrast, as to the lower courts, it would be better to provide in the Draft Code only

[17] CDL-AD(2014)007, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 20

[18] Except for the requirement to have an instance of appeal for criminal cases – see Article 2 of Protocol no. 7 to the ECHR.

[19] An alternative model – to establish a permanent corpus of specialised pre-trial judges clearly separated from trial judges (like *juge des libertés et de la detention* in France) is also possible; however, a lot depends on how the system of specialised judges is organised; see, in this respect, CDL-AD(2017)004, Turkey - Opinion on the duties, competences and functioning of the criminal peace judgeships.

[20] See *Hauschildt v. Denmark*, 24 May 1989, § 50, Series A no. 154, and *Perote Pellon v. Spain*, no. 45238/99, § 51, 25 July 2002

[21] Article 22 contains a repetition, which may be the problem of translation.

[22] CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 4

[23] "[…] Only the general framework of the organisation of the court system deserves to be reflected in the Constitution itself"' – see CDL-INF(1996)002, Opinion on the regulatory concept of the Constitution of the Republic of Hungary, p. 32.

[24] Although this is not a strict requirement: "The Venice Commission [...] consider that the appropriate body to make the ultimate assessment on the number of Supreme Court judges and of the need for more judges is usually the legislator or the High Council of Justice, given that the choice depends, *inter alia*, on the available

general criteria for determining the number of judges and to entrust the SJC and/or Parliament with the power to determine the exact numbers and repartition of judges amongst the lower courts.[25]

c. Article 24 – 30 (administrative courts; resolution of possible disputes between different branches of the judicial system)

43. Article 163 § 1 of the Armenian Constitution establishes administrative courts as a separate branch of the judiciary. The Judicial Code implements this provision by stipulating that the judgments of the administrative court of the first instance may be appealed against before an Administrative Court of Appeal (Article 29 § 1 (3), and, ultimately, before the Administrative Chamber of the Court of Cassation (Article 31 § 1 (3)). This is a three-pillar system, with three separate chambers of the Court of Cassation dealing with three types of cases: criminal, civil and administrative. The Draft Code does not appear to provide for a common sitting of those three chambers.

44. Usually, the Venice Commission refrains from taking a definite stance on the establishment of separate administrative courts.[26] Both models (having special administrative courts or keeping administrative cases within the jurisdiction of ordinary courts) are legitimate. While specialisation may be very useful in certain circumstances,[27] it creates a risk of complicating the system and is not always cost-efficient, especially in small countries.[28] That being said, "it is of course perfectly compatible with European standards to introduce administrative courts with specific jurisdiction standing beside the ordinary general courts".[29]

45. What may be problematic is where such a three-pillar system has no common highest instance, since the three different chambers remain separated within the Court of Cassation. It may give rise to two types of complications: jurisdictional disputes (disputes about which court is competent to hear a particular case)[30] and inconsistent case law, especially between the civil and the administrative pillars. In modern market-oriented societies the sharp differences between private law and administrative law are diminishing. Two cases between different chambers may well concern the same concepts, where interpretation of principles of private and public law must be needed at the same time. If different branches of the judiciary are completely separate, there is a risk that they develop conflicting approaches to the same issues.

46. There are different solutions to this problem. One would be to have a joint chamber with a greater amount of judges, but with separate civil and administrative panels. Within this chamber it would be possible to develop case-management and case-distribution with provisions or routines that could support uniformity. A system of rotations of judges would permit interaction of judges with different experiences. In addition, the workload may differ over the years and there could be, from time to time, the need to rebalance the number of judges in the civil and

budgetary means, which cannot be determined by the Supreme Court judges. It is nevertheless highly recommended that the legislator takes into consideration the opinion of the Supreme Court in the legislative process" (CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, § 19).

[25] See CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§ 13 – 14.

[26] CDL-INF(2001)017, Report on the Revised Constitution of the Republic of Armenia, § 59

[27] See, in particular, CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, § 6

[28] See CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, § 7

[29] Ibid, § 6.

[30] Article 7 of the Draft Code says that the courts are masters of the questions of jurisdiction. This is a correct solution, but it does not work when two courts claim competency over the same case and there is no arbiter to solve this controversy

administrative panels. Previously the Venice Commission recommended some form of rotation of judges between different pillars of the courts' system in order to promote a broader outlook and experience.[31]

47. Another solution would be to keep separate chambers, but provide for a regular (or *ad hoc*) common sitting of all three chambers of the Court of Cassation, which would resolve jurisdictional disputes and ensure coherence of the case law.

3. Chapter 8 (funding of the courts)

48. Article 36 defines the participation of the SJC in the process of development of the budget of the judiciary. It is unclear, however, whether the SJC will play any role in distributing this budget amongst the courts and spending it, or whether this will be the task of the local courts. Article 37, which provides that "logistical support of courts shall be provided by the staff of the relevant court" may be interpreted as suggesting that courts' expenditures will be decentralised and entrusted to the administrative officials of each court, under the supervision of the chairperson. On this topic see more below, in the comments to Chapters 14 and 15 on the eventual decentralisation of the administrative tasks.

49. As regards the *development* of the overall budget of the judiciary, the Ministry of Justice may play some role in this process; for example, the Ministry may be allowed to present to Parliament objections or amendments to the budget proposed by the SJC for adoption.

4. Chapter 7 (status and powers of chairpersons)

50. Articles 33 – 35, which regulate the powers of the chairpersons, are generally acceptable. As a preliminary remark the Venice Commission notes that the reform reduces quite significantly the role of the chairpersons in the judicial system: they are now elected for a fixed term, without the right of immediate re-election;[32] the currently existing Council of Court's Chairpersons is abolished and most of its powers are transferred to the SJC, the chairpersons lose some of their powers (distribution of cases), they cannot be members of the SJC, etc. This is a positive trend – the new system is less hierarchical and centralised, and thus more favorable for developing a culture of internal judicial independence.

51. A chairperson may trigger disciplinary proceedings against a judge of his or her court,[33] but it is understood that such complaint would not have any special weight and will be treated on par with other complaints.

52. Some of the powers of the chairpersons – for example, "ensure the normal operation of the court", "organise the operation of a chamber", "exercise other powers vested therein by law" – may be construed very broadly and should be formulated with more precision.[34] The Venice Commission recalls that "administrative decisions that directly affect adjudication should […] not be within the exclusive competence of Chairpersons. Furthermore, a plethora of Chairpersons' competencies potentially affecting the career of judges could be perceived as a type of

[31] CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, § 7

[32] For the chairpersons of the first instance courts and the courts of appeal; the chairpersons of the chambers of the Court of Cassation can serve only once in this capacity.

[33] See Article 33 § 1 (2): chairperson in courts of first instance and courts of appeal have to submit a relevant report to the Ethics and Disciplinary Commission (here EDC) of the General Assembly of Judges when detecting a violation of the rules of conduct by a judge.

[34] The recent opinion of the Venice Commission regarding the Constitutional Court of Armenia may be of relevance here – see CDL-AD(2017)011, §§ 52 et seq.; see also CDL-AD(2014)021, Opinion on the Draft law on introducing amendments and addenda to the Judicial Code of Armenia (term of office of court presidents).

pressure that could call into question the independence of judges and should thus be avoided".[35]

5. Chapter 9 (distribution of cases)

53. It is positive that the distribution of cases amongst judges will be automatic and based on random selection conducted automatically (Article 38). From Article 43 it is understood that a case cannot be withdrawn from a judge otherwise than in a number of clearly defined situations (such as recusal, transfer of the judge to another court, temporary inability to perform duties), which is also positive.[36]

6. Chapter 10 (status of judges, immunities, salaries and incompatibilities)

54. Article 45 prohibits judges to be members of any party or "otherwise engage in political activities". While the first limb of the rule (not to be a member of a political party) is clear and legitimate (at least, this is a well-known practice in many European countries), the second limb is formulated too broadly. The same concerns Article 60 § 4, which *inter alia* requires the judge "to refrain from practicing any conduct that may leave an impression of being engaged in political activities". This is a very high standard, difficult to reach. As the Venice Commission held previously, "it is rather difficult to make the difference between what is and what is not 'politics'".[37] There is no doubt that "the right of political participation" of judges (essentially the rights guaranteed by Articles 10 and 11 of the ECHR) may be legitimately restricted.[38] Thus, a judge may be required to carefully choose the forums where s/he speaks and the format of his public interventions. However, this rule should not prohibit the judge, as a legal expert, from expressing his views before a professional audience, in specialised journals etc., even if those views relate to policy issues.

55. Since it is difficult to give a precise definition of what is "political", another legislative technique is possible. The Draft Code may give several examples of the most typical cases of "political involvement" which a judge should avoid, while leaving a space for the participation of judges in academic and similar discussions.[39] These examples and exceptions may be used by the Ethics and Disciplinary Commission of the General Assembly of Judges as benchmarks, and steer its practice in the right direction.

56. Article 46 contains a general rule prohibiting judges from being involved in any entrepreneurial activity or holding positions in NGOs. It also contains several exceptions to this rule, which imply that a judge may manage property of his or her relatives, represent their interests, or work for NGOs, provided that the judge does it without compensation. Article 65 repeats the general rule that judges are prohibited from participating in entrepreneurial activities, but, again, a number of exceptions are formulated thereafter: a judge may be a shareholder of a limited liability company, but without the right to participate in the management of this company going beyond participation in the general assembly of shareholders; his/her share, together with his/her relatives, should not exceed 10 per cent, and this company should not be *often* involved in dealings which may be the subject-matter of proceedings before this judge.

57. In principle, if interpreted in good faith, those exceptions are acceptable . However, during the meetings in Yerevan the rapporteurs were told that, in practice, many judges have unofficial "side-jobs" or businesses, and that conflicts of interests are very recurrent because of it. It was

[35] CDL-AD(2011)12, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, § 26
[36] See ECtHR, *Moiseyev v. Russia*, no. 62936/00, judgment of 9 October 2008, §§ 172 et seq.
[37] CDL-AD(2016)013, Republic of Kazakhstan - Opinion on the Draft Code of Judicial Ethic, § 62
[38] On the freedom of expression of judges, see the report CDL-AD(2015)018.
[39] CDL-AD(2016)013, § 63

reported that for a relatively large number of Armenian judges their official salary represents a rather minor part of their income, if compared to their revenues from businesses they co-own (or the revenues of their close relatives). A judge with extensive business interests is more vulnerable to pressure, even if his/her position as a judge is well protected by the law. Several interlocutors expressed concern that too many exceptions from the general rule will perpetuate this situation. From this point of view, a simpler, more categorical rule would be better: once elected, the judge should sell his/her shares and parts in business entities, or at least put them into a blind trust, and refuse any participation in entrepreneurial activities, even when those which concern his/her relatives and are performed without pay.[40]

58. Article 49 of the Draft Code stipulates that the level of the judges' salaries will be defined by the Law on remuneration of persons holding state positions. Article 164 of the Constitution, § 10, provides that judge's salaries should "correspond to the high status and liability of a judge" and should be set by law. The Draft Judicial Code contains the same formula; it does not define the level of the judges' salaries but refers to other laws that regulate salaries of civil servants. The information note attached to the Five Questions contends that the level of the judges' salaries should be set by the Judicial Code (which has the status of the constitutional law) and not by a law on civil servants, which is an ordinary law and may be changed more easily.

59. A constitutional law is a very rigid legal instrument, which cannot always be quickly adapted to the changing economic conditions. It should set certain *basic principles* that would ensure privileged status of judicial salaries. For example, the constitutional law might proclaim that judicial salaries may be reduced only in case of a major financial crisis[41] and only after the commensurate reduction of salaries in all other sectors of public service. The constitutional law may guarantee regular indexation of judicial salaries in line with the cost of living, fix the salaries of judges at the same level as salaries of certain high-level State officials,[42] etc. The choice of specific guarantees belongs to the Armenian authorities. However, a constitutional law does not need to go into further details, and, *a fortiori*, should not set judicial salaries in absolute figures – this may be left to the ordinary legislation.

60. It is also recommended to reduce to the minimum (and better exclude completely) all other kinds of remuneration (especially in-kind remuneration) which open way to possible abuses and manipulations. The Venice Commission recalls that "bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out".[43] These benefits do not necessarily add much to the financial autonomy of a judge and, by contrast, may represent a danger for the judges' independence.

7. Chapter 11 (rules of conduct)

61. Chapter 11 establishes rules of judicial conduct that relate to the "core" professional duties of judges (to act lawfully, for example) and some rules that relate to ethics and behaviour in non-professional sphere.

62. Under Article 58, the Ethics and Disciplinary Commission of the General Assembly of judges (the EDC) is entitled to provide advisory opinions on the rules of judicial conduct, upon

[40] For more details see the 2016 GRECO evaluation report on Armenia, https://rm.coe.int/16806c2bd8

[41] It would be wrong to proclaim, in absolute terms, that judges' salaries cannot be reduced in any circumstances; see CDL-AD(2010)038, *Amicus Curiae* brief for the Constitutional court of "The Former Yugoslav Republic of Macedonia" on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials, §§16 – 20.

[42] See CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, § 52, where the Commission recommended to guarantee the "scale of remuneration" at the level of the constitutional law.

[43] CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, § 51

the judge's request. However, the EDC has, at the same time, the power to bring a disciplinary case before the SJC (see Article 141 § 1 (1) of the Draft Code). These two functions should better not be performed by the same body: when examining the judge's behaviour in a specific case, the EDC may feel bound by its own previous advice. It is possible, however, to create special "ethics councillors" with advisory functions, under the aegis of the General Assembly of judges (the GA).

63. Articles 60, 61 and 62 define the rules of judicial conduct. Some of those provisions are formulated without sufficient precision. In particular, pursuant to Article 60, a judge should not be involved in a "conduct incompatible with or undermining the high reputation of the judiciary" or "conduct decreasing the public confidence in judiciary", as well as should "refrain from relations and practising any conduct incompatible with the title of a judge that can disgrace his or her reputation, honour and dignity" (Article 60 § 1 (1)).[44] Those formulas are not only excessively vague but also largely overlapping. This should be avoided.

64. Another example of a dangerously vague obligation is the duty of a judge to resist external pressure and to "establish a reputation as an independent person" (Article 60 § 2), the duty to act so as to "ensure public perception of him or her as a well-balanced and fair person". Duties in the professional context (Article 61) include *inter alia* the obligation "to ensure proper level of professionalism" and "consistently improve […] personal qualities" (§ 1 (5)) and "to act reasonably" (§ 1 (9)). All these provisions suffer from the same defect – vagueness.

65. The Venice Commission recalls in this respect that "[…] the conduct giving rise to disciplinary action [should] be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct. More specific and detailed description of grounds for disciplinary proceedings would also help limit discretion and subjectivity in their application."[45] The Venice Commission noted, in another opinion, that the concept of "undermining the reputation of the court and judicial function" is excessively broad.[46]

66. In order to make disciplinary liability foreseeable, the best technique would be to enumerate specific types of behavior the judge should avoid or specific obligations of a judge.[47] To a certain extent, the Draft Code already uses this technique; thus, for example, Article 60 § 1 (4) prohibits public criticism of judicial decisions, § 1 (3) requires to demonstrate political neutrality, § 1 (6) speaks of the duty to avoid inappropriate contacts with the parties, Article 61 § 1 (10) prohibits abusing confidential information, Article 61 § 1 (11) speaks of the duty to be polite to the participants of the proceedings, Article 66 puts limits on accepting gifts, etc.

67. The Venice Commission recalls, however, that, "depending on the constitutional tradition of the State, a more general formula for judicial misconduct can be acceptable, but only under condition that it is understood to be narrowly interpreted".[48] It is difficult to indicate how precise the wording of this general formula should be. Some vagueness here is probably unavoidable; thus, in the Ukrainian context the Venice Commission recognised that the formula "offence incompatible with further discharge of the duties of a judge" was better than even more vague

[44] See, for example, similar criticisms expressed in CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 32.
[45] CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 24; see also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, § 90.
[46] See CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The former Yugoslav Republic of Macedonia", § 36.
[47] See CDL-AD(2014)006, Joint Opinion on the draft Law on disciplinary liability of judges of the Republic of Moldova, § 15
[48] Ibid, § 16

formula of a "breach of oath".[49] Thus, it is possible, in addition to the list of more specific duties, to maintain *one* general formula in the Draft Code, but it is necessary to remove the multitude of vaguely formulated and largely overlapping duties of the judge which are now contained in Article 60 – 62.

68. In sum, the Venice Commission invites the Armenian authorities to review Articles 60 – 62 with the aim of removing unclear, parallel or redundant obligations, and to define misconduct, to the maximum extent possible, with reference to specific situations.

8. Chapter 12 (performance evaluation)

69. Performance evaluation of judges may pursue several goals: to justify decisions concerning career and promotions of judges, to enhance the performance of judges and the quality of the judicial decision-making process, to increase public confidence in the judiciary. Those goals may be pursued simultaneously. It appears that the main focus of the performance evaluation system under the Draft Code is to objectivise promotions (see Article 69 § 1).

70. In 2014 the Venice Commission examined a system of evaluation of judges in Armenia.[50] The recommendations made in that opinion are still valid, but with necessary adaptation, because the Draft Code does not establish a system of periodical performance evaluation of all judges, but only the evaluation of judges who submitted an application for promotion. At least, this follows from Article 68 § 2 which stipulates that "the aim of the performance evaluation […] is to contribute to the selection of the best candidates when compiling the lists of judge candidates for promotion". This system is less dangerous for the independence of the judiciary than the system of comprehensive and regular evaluation of performance of *all* judges. Still, even in this model the law should provide for mechanisms and rules protecting judicial independence against possible abuses of the evaluation system.

71. First, performance evaluation should be conducted by a sufficiently independent and professional evaluation body. Under the Draft Code this is the function of the Evaluation Commission of the GA, the EC. The EC is elected by the GA and has a diverse composition – it is composed of three judges of different levels, one former judge and one academic lawyer. Such a diverse composition is welcome.

72. Second, substantive rules describing what amounts to underperformance should be carefully formulated. The most basic rule is that sporadic underperformance or "honest" judicial errors, corrected on appeal, should not affect the tenure of the judge unless it constitutes a serious disciplinary breach clearly defined in the law.[51]

73. Generally, performance evaluation of individual judges may be based on a combination of qualitative criteria (professional competencies, capacity to organise work efficiently, social skills etc.) and quantitative criteria (the number of the judgements overturned on appeal, the number of procedural delays, etc.). The CCEJ observed that "evaluation must be based on objective criteria. Such criteria should *principally* [italics added] consist of qualitative indicators but, in addition, may consist of quantitative indicators".[52] As to the quantitative indicators, the

[49] CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, § 54

[50] CDL-AD(2014)007, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia

[51] In the context of disciplinary liability Article 139 § 7 stipulates that judicial errors (unless committed with intent or gross negligence) do not give rise to disciplinary liability.

[52] Opinion no. 17 "On the evaluation of judges' work, the quality of justice and respect for judicial independence", § 49 (6)

Commission criticised a system of evaluation which relied too heavily on the mathematical assessment of quantitative performance of judges. [53]

74. Article 69 of the Draft Code uses both types of criteria: quantitative (§ 1) and qualitative (§ 2). Article 69 § 1 lists three types of quantitative criteria – numerical output of the judge, compliance with the time limits and average length of the proceedings. It is noteworthy that the number of reversals of judicial decisions on appeal is not mentioned amongst quantitative criteria. Although this factor could be of relevance, the absence of such criterion encourages the internal independence of the judges.[54]

75. The assessment of the three criteria mentioned in Article 69 § 1 should depend on the complexity of the case. Article 69 § 1 (2) suggests that the "type of cases" is to be taken into account when assessing the average length of the proceedings, but this should be expressed more clearly and applied to all three quantitative criteria. The Venice Commission refers to its recommendation that "the judge's individual performance should be assessed in the light of objective factors, such as the increase/decrease in the court's backlog, availability of trained assistants (secretaries, bailiffs, etc.) and equipment (computers, printers, etc.), etc. The productivity levels […] should be fixed with reference to the average productivity of other judges, and after mandatory consultations with the judges of the courts concerned."[55] Article 69 should be amended in order to reflect this approach: the quantitative performance of a judge should be assessed with reference to the objective factors and to the average performance in the relevant sectors of the judicial system.[56]

76. The qualitative criteria for performance evaluation provided in Article 69 § 2 seem appropriate. But it is not an easy task to measure any of them. Furthermore, the relative weight of qualitative and quantitative criteria is not specified in Article 69. Article 70 implies that the "overall results of evaluation carried out on the basis of quantitative and qualitative criteria" is based not on mathematical addition of certain numerical values attached to each criteria, but on the "rule of the thumb" assessment of all factors taken together.

77. In order to ensure more objective results of the evaluation, further development of these rules is necessary. Indeed, the relative weight of different factors cannot be established in numerical terms; however, it is possible to reverse the order and indicate qualitative criteria first. It is also possible to provide expressly that qualitative criteria have priority. Further explanations about the weight to be attached to each of the evaluation criteria, as follows from § 3, may be contained in the regulations adopted by the SJC. It is recommended to provide in § 3 that the SJC may issue guidance on the criteria for measurement of the qualitative and quantitative criteria, but not to establish new criteria. In doing so the SJC should try to avoid purely "mathematical" approach but rather indicate benchmarks principles for the evaluation process.

78. Article 68 § 5 is not coherent. When speaking of the quantitative criteria, this provision sets a time-period for which the data on quantitative factors should be collected. When speaking of qualitative criteria, it does not set any time limit but refers to Article 69 which lists those criteria.

[53] CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the Former Yugoslav Republic of Macedonia", §§ 99 et seq.
[54] CDL-AD(2014)007, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§ 39 – 40
[55] CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", § 103
[56] See also CDL-AD(2014)007, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§37-40, 42, 43, 49, 50 and 77-78

If the qualitative evaluation is carried out for the entire career of the judge, it does not take into account the efforts of the judge to improve the quality of his work, and puts candidates in unequal positions (since the quality of their work will be assessed against different periods). Thus, the qualitative evaluation should also be limited in time. Furthermore, this provision should refer to Article 69 both in respect of qualitative and quantitative elements of the performance assessment.

79. In the most serious case the judge's performance may be evaluated as "poor". Under Article 71 it temporarily blocks the judge's promotion and, in addition, the judge who was graded as "poor" is directed to the Training Commission, which has to establish his or her training needs. The question arises what happens if the training has not been successfully completed, and who decides that – the Training Commission (which oversees trainings), or the EDC (which oversees disciplinary matters). Under Article 139 of the Draft Code, failure by the judge to "participate in mandatory trainings" is considered as a disciplinary offence. Thus, the evaluation of the judge's performance as "poor" may eventually lead to his or her dismissal; it is therefore important to indicate which bodies are competent to deal with those cases and ensure that those bodies provide sufficient guarantees of independence and procedural fairness.

80. The Draft Code does not regulate the procedure of performance evaluation (with few exceptions). The task to develop this procedure is delegated to the SJC. In principle, the idea that the SJC should be competent to regulate the procedure of performance evaluation is legitimate, and ensures flexibility in regulating those matters. It remains to be seen whether *all* aspects concerning the procedure should be regulated by the SJC. Some rules (for example, rules defining the conflict of interest of an evaluator vis-à-vis the judge under evaluation) should be fixed in the Draft Code. Also, confidentiality of the results of the evaluation should be regulated by the Draft Code. In sum, the Draft Code should fix some basic principles of the evaluation procedure and delegate the rest of the regulations to the SJC.

9. Chapter 13 (the General Assembly of judges and its commissions)

81. The General Assembly (the GA) of judges (Articles 73 – 75) is composed of all the judges of the Republic of Armenia; its main function is to nominate to the National Assembly three candidates to be appointed as judges of the Constitutional Court, and to elect the five judges - members of the SJC. In addition, it establishes commissions dealing with appointments, promotion and disciplining of judges.

82. Article 74 §§ 8 to 10 establishes detailed rules for the election of the members of the commissions. They are elected through secret ballot by the members of the GA for a period of four years. The provision does not clarify whether the mandate is renewable. Furthermore, § 10 indicates that "when voting, a judge shall have one vote". The Venice Commission recalls that for certain commissions the GA has to elect more than one candidate from the same category (for example, the GA has to elect to the EDC three judges from among the judges of the courts of appeal). The principle that one judge has only one vote may lead to a result that very popular candidates will attract most of votes, and be elected along with much less popular candidates. For such situations each member of the GA should have the number of votes equal to the number of candidates.

83. The chairpersons of the courts and of the chambers of the Court of Cassation may not be members of the commissions. It is a welcome signal, stimulating a decentralised and not hierarchically organised judiciary. Article 74 also provides that the members of the SJC cannot be members of the commissions, since the SJC acts as sort of an appellate instance vis-à-vis the decisions of the Commissions. This is also welcome.

84. Article 74 § 4 describes the composition of the Ethics and Disciplinary Commission (EDC). All seven members of this commission are elected by the GA and represent the judiciary. The EDC play an important function in disciplinary proceedings: thus, if both the Minister and the EDC do not start disciplinary proceedings against a judge, a complaint against the judge's behaviour cannot go further to the SJC.

85. The Evaluation Commission (ET) is composed of three judges, one former judge and one academic lawyer. Such diversity of the ET is welcome. Unless it is a problem of translation, the Venice Commission notes that the commission created within the SJC to assess the results of the entry exams for the position of a judge is also entitled the Evaluation Commission (see Article 103 § 1). This should be clarified since their functions and the compositions are not the same.

86. Finally, the Training Commission is composed of five members, selected from among judges of the Court of Cassation (one), courts of appeal (one), and courts of first instance (three). According to Article 51, this commission organises mandatory training programs. It is reasonable that judges of cassation and appeal sit on the commission, because of their wider experience. It is recommended that the cassation and appeal judges represent the majority of this commission.

87. The Draft Code is silent about the status of the members of the commissions of the GA. In particular, it is unclear whether they are performing those tasks on part-time or full-time basis, whether their mandate may be terminated and in which circumstances. Some clarifications to this end may be necessary.

10. Chapters 14 and 15 (the Supreme Judicial Council: composition and powers)

a. Composition

88. The SJC has ten members (Article 77) and is composed in equal parts of judges elected by their peers and of non-judicial members ("lay members") elected by Parliament from amongst the "prominent lawyers" of the country, by a qualified majority of votes. The composition of the SJC is therefore quite balanced.[57]

89. Article 79 § 7 stipulates that the five lay members are elected by the National Assembly with the qualified majority of three fifths; they are proposed by the Bar, by the higher education institutions and "professional NGOs". Detailed provisions on the election on the lay members shall be established by the constitutional law "Rules of Procedure of the National Assembly" (§ 8). It is not excluded that the procedure of nomination of candidates may be regulated in the Draft Code. Anyway, the process of nomination should ensure that diverse professional categories of lay members be represented. The notion of "professional" NGOs should be clarified: if interpreted too narrowly it may excessively reduce the number of nominating organisations and the pool of good candidates.

90. It is welcome that the chairpersons of the SJC are elected by rotation from amongst judge members and lay members, for a term of two and half years (Article 81). This method gives a democratic legitimation to the SJC before the public.

[57] See CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law 'on the status of judges' of Kyrgyzstan, § 24, with further references; but see also CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, § 41, and CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §§ 74 – 76.

91. Article 82 § 2 regulates the termination of mandate of a member of the SJC. It does not provide for termination of powers where a member commits a dishonourable act, other than a crime. It is implied for judicial members – because in this case they would lose their status as judges and therefore lose their seat in the SJC (see § 1 (7)), but not for lay members. The status of judicial and non-judicial members in this respect should be equalised.

92. It is not entirely clear whether the position of a lay member of the SJC is a full-time job. This question is particularly acute because, under the Draft Code, some of the administrative functions currently performed by the Judicial Department are to be transferred to the SJC and, therefore, being a member of the SJC will become more work-intensive.

93. Thus, Article 78 prohibits lay members of the SJC to be engaged in any other paid activity, which implies that they work full-time in the SJC (see also Article 77 § 4). An exception is made for those involved in scientific and educational activities. That means that judges – members of the SJC – will be able to dedicate to the SJC only up to 25% of their working time (see Article 42 § 1); as to the lay members, some of them will work full-time in the SJC, whereas law professors or researchers will be able to keep their academic jobs.

94. Disparity in their status may, in practice, perturb the balance between judicial members and lay members established by the Constitution, even if formally all of them keep their voting rights. Indeed, the CCJE in its Opinion no. 10 recommends that the judicial members of the SJC keep a link with their profession, and this recommendation should also be taken into account. If judicial members of the SJC are still to perform their duties as judges, they should be able to dedicate more than 25% of their working time to the SJC; similarly, legal scholars elected to the SJC should not maintain their academic activities at the same level as before their election. It would be better if all members of the SJC were (more or less) equally involved in its work. At least the Chairperson of the SJC should be able to work for this body full-time.

95. During the meetings in Yerevan the representatives of the judiciary expressed a concern that practicing lawyers elected to the SJC as lay members may continue to provide legal services under the guise of "*pro bono* work". This would be inappropriate; it is advisable to limit the amount of working time a lay member may dedicate to other activities, and to provide that they cannot provide legal services, even *pro bono*.

b. Administrative functions of the SJC

96. Draft Article 85 defines the powers of the SJC, which can grossly be divided in two groups: core constitutional tasks (related to the recruitment and career of judges, judicial discipline and dismissals – those described in Article 175 of the Constitution) and support functions (related to budget of the courts, procurements, maintenance of court buildings, management of non-judicial staff, such as bailiffs and secretaries, organisation of IT services and publications, etc.).[58]

97. As part of the reform, the SJC will receive powers related to the courts' administration and support functions, which are currently performed by the Judicial Department (the JD), which operates as an administrative unit of the CCC (the Council of Courts' Chairpersons, a permanent self-governing body of the judiciary which is to be abolished under the Draft Code). Some of those administrative tasks will be de-centralised and given to the chairpersons of local courts. The main question is whether the liquidation of the JD and distribution of administrative tasks between the SJC and the local courts is advisable.

[58] See in particular points 15, 17, 20, 21, 22, 23, 34, 35, 36, 41, 42, 43, 44.

98. The Constitution does not set a closed list of powers for the SJC; "other powers" of this body may be defined by the Judicial Code (Article 175 § 4). However, those "other powers" should have at least *some reasonable connection* with the core constitutional powers of the SJC, namely the appointment of judges, their promotion, transfers, and disciplinary issues. The main role of the SJC is to ensure the independence of the judiciary; in the previous opinion the Venice Commission recommended not to overburden the Judicial Council with purely administrative tasks, such as "judicial administration, including salaries, court buildings etc.".[59]

99. That being said, the performance of certain administrative tasks may have an impact on the independence of the judiciary. Even such mundane task as the publication of courts' judgements may be abused by the executive in order to curtail the judicial independence. This is why the Consultative Council of European Judges (CCEJ) mentions "administration and management of courts" and "the control and management of a separate budget" amongst possible functions of the SJC.[60] The Kyiv Recommendation, by contrast, recommends establishing "different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority".[61]

100. Thus, there are different models of distribution of administrative functions: they may be concentrated within the SJC itself (as suggested by Opinion no. 10 of the CCEJ), they may be entrusted to a single independent body (the current Armenian model) or split amongst several independent bodies (the model suggested by the Kyiv Recommendation). The only important requirement is that the most important administrative functions should belong to a body or bodies enjoying a significant degree of independence.

101. In sum, to the extent that the JD remains independent from the executive, the currently existing model (with the JD exercising most of the administrative support functions) is acceptable. The JD – as a central body performing support functions – should, however, operate under control of either the GA or the SJC The rapporteurs have a slight preference for the second solution: unlike the GA, the SJC is a permanent body, which may better ensure control over the operations of the JD. Furthermore, the SJC has a more pluralist composition and more democratic legitimacy. Thus, the SJC should have the power to appoint/dismiss the head of staff of the JD, and should be entitled to direct and audit operation of the JD. In this model, the JD will remain a separate body, institutionally linked to and responsible before the SJC.

102. That solution does not exclude that some specific administrative functions connected to daily operation of the judiciary may be performed by the Ministry of Justice (MoJ). One example would be Article 85 § 1 (34), which speaks of the function to "prescribe the procedure for collecting and maintaining the judicial statistics" (see also Article 92 § 3 (6) and Article 19). Statistical data is important for defining the policy of the State in the area of the organisation of the judiciary. To define this policy is one of the few remaining functions of the MoJ in this sphere. To entrust this function entirely to the SJC may be counter-productive. Another power listed in Article 85 § 1 (15) is to define information to be posted on the web site of the judiciary. Management of the web site of the judiciary may be connected to a more general cross-sectorial system of e-governance, which may be managed by the MoJ in a centralised manner.

103. That being said, all administrative support functions which may have effect on the independence of the judiciary should be performed by a body independent from the MoJ and, as stressed above, accountable to the SJC.

[59] CDL-AD(2015)037, § 184
[60] Opinion no.10 (2007), § 42
[61] P. 2

11. Chapter 16 (appointment procedures)

104. The recruitment for the entry-level judicial positions starts with creating a pool of candidates: candidates do not compete for a particular position in a particular court. According to Article 94, the SJC is responsible for creating reserve lists. These reserve lists are composed on the basis of qualification checks of candidates. Under Article 95, qualification checks consist of a written examination, a psychological test and an interview conducted by the SJC.

a. The Evaluation Commission

105. At this point of the procedure the Evaluation Commission (the EC of the SJC) and the Appellate Commission of the SJC intervene: according to Article 103, they have, respectively, the task of checking and evaluating the written examination papers and resolving issues in respect of appealing against the results of examination. The EC of the SJC is composed of five judges of relevant specialisation and two academic lawyers specialised in the relevant field of law; the Appellate Commission is composed of two judges and one academic lawyer. It is welcome that in the two commissions of the SJC there are lay members, which reduces the risk of corporatist management. However, the number of non-judicial members may still be insufficient. In addition, the Venice Commission notes that the judicial members will be selected on the day of holding the written examination from the list of 10 judges; in a country with a relatively small number of judges this may be problematic as it may disturb the normal functioning of the courts.

106. It is worth mentioning that the MoJ participates in the procedure with the function of guaranteeing the impartiality of these bodies; thus, according to Article 103 § 11, both the Minister and the SJC have the power to dismiss a member of the commissions who gives rise to a reasonable doubt as to her/his impartiality. The question, however, arises whether the Minister should be able to take this decision alone; it is recommended to provide in the Draft Code that the Minister may only question the impartiality of the member, whereas the final decision on the removal of a member is taken by the SJC.

b. Submitting an application; eligibility criteria

107. The process of recruitment starts with the prospective candidates submitting applications with the supporting documents to the EC.

108. Article 96 provides, *inter alia*, that people with double nationality cannot become judges in Armenia. A similar provision is contained in Article 165 § 1 of the Constitution. Thus, the constitutionality of this provision of the Draft Code does not raise doubts. As to the compliance with the international standards, the Venice Commission recalls that a ban for double nationals to be MPs was held by the ECtHR to be contrary to Article 3 of Protocol no. 1 to the ECHR in the case of *Tănase v. Moldova*.[62] Arguably, judges are not in the same position as parliamentarians: there might be better reasons to require them to maintain the link of citizenship only with one State. Furthermore, it is difficult to find a particular provision of the ECHR that would govern this particular aspect of the judicial status (contrary to the situation with the MPs who are a part of the legislature and who are therefore covered by Article 3 of Protocol no. 1 to the Convention).

[62] ECtHR [GC], no. 7/08, §§ 171 et seq., ECHR 2010-....

109. Article 97 § 4 permits the SJC to require additional documents from candidates: the wording of this rule is too broad. The SJC should be allowed to require additional documents only if there is a connection between the required documents and the decision to be taken. As regards the possibility to submit letters of reference (see § 5), it is unclear how those letters will be assessed in the subsequent proceedings and how many letters a candidate may produce.

110. Article 98 provides that an applicant "may appeal the decision on refusal to accept the application with the Supreme Judicial Council or with the Administrative Court […]". The possibility to apply in the alternative to one or another body that would be simultaneously competent to examine appeals will inevitably lead to conflicts of competences. A better solution would be to provide for an appeal first to the SJC and then, if the first appeal fails, to a court. Another possible solution would be to make those decisions directly appealable to a court. In any event, if the decision of the EC is to be appealed against before a court, it should not be the first instance court but rather a Court of Cassation, given the high status of the EC and the important role it plays in the system of appointments.

c. Qualification checks: written exam, psychological test, interview

111. A written examination is the next stage of the recruitment process. As a result of a written examination all candidates are graded (see Article 103 § 16).

112. Article 101 § 1 provides that the SJC shall ensure live broadcast of the entire process of the written examination and the interview conducted by the SJC. Article 101 § 3 grants to the persons participated in the qualification checks the right to receive a duplicate copy of the audio-video recording of the interview. But in the same time § 4 provides that the process of the interview of the contender may be audio-video recorded only upon his or her consent. If this is not a problem of translation the contradiction must be resolved.

113. Article 104 provides for a psychological test as part of the qualification checks. It is positive that "the results of the psychological test shall be only of advisory nature" (§ 3); however, it would be better not to use psychological tests altogether. In addition, § 2 provides that if the contender fails to take a psychological test he or she cannot participate in the interview: it is not clear why a test which has only "advisory" effect is nevertheless mandatory for the contenders.

114. The next step in the qualification procedure is to define the number of potential "finalists" who will be invited for an interview. This number is defined by the staff of the SJC according to a pretty complex formula.[63] For example, if there is a need to fill in 10 vacant judicial positions, the staff of the SJC may propose to the SJC from 11 to 15 candidates to be interviewed, from the top of the list previously composed on the basis of the grades obtained after the written test. Following the interview the SJC takes a decision as to which candidates are to be put on the reserve list. This decision is taken by voting but it is to be motivated (see Article 107 § 4).

115. In this process the staff of the SJC retains a very important discretionary power: to define the number of "excess candidates" to be invited to the interview. In essence, the staff of the SJC is entitled to establish a "pass/fail" threshold for each written examination, which gives candidates access to the next stage. The Draft Code puts a certain limit to this power (50% of the number of candidates needed for the reserve list), but, within these limits, it is unclear

[63] "The Staff of the Supreme Judicial Council shall, for the purpose of holding an interview, submit to the Supreme Judicial Council the list of contenders having obtained the highest total scores where the number thereof exceeds, by 50 per cent but not less than by 5 per cent (except where respective number of contenders have not obtained the necessary scores), the number of candidates necessary for filling vacant positions in a division of relevant specialisation of the list of judge candidates, based on the overall results of written examination. […]".

according to which criteria the number of "excess candidates" is defined. Probably, the results of the psychological test play some role in this process – but, if so, Article 104 § 3 (which provides that the results of the test play only advisory role) does not make any sense.

116. Depending on the number of "excess candidates" fixed by the staff of the SJC, the SJC will have more or less freedom in rejecting candidates with high results obtained at the written exam. For example, if 15 people are to be interviewed for a 10-persons' reserve list, the SJC will be entitled (theoretically), as a result of the interview, to put 5 weakest candidates on list.

117. The Venice Commission acknowledges that the interview is a very important phase of evaluation of candidates. It is not excluded that a candidate who received a good grade at the written exam may be unsuccessful at the interview, and, as a result, be downgraded and even completely disappear from the list. A certain measure of discretion and subjectivism is unavoidable here. However, under the Draft Code, once the written exam is over, all candidates selected for the interview find themselves essentially in the same position, and the grades they received do not matter anymore. Or, at least, it is unclear how important the grades are: everything is decided at the interview.

118. Under this system the strongest candidate may be replaced after the interview with the weakest one. That would create a strong impression of arbitrariness, and may jeopardize pubic trust in the process of recruitment. This would look particularly unfair if there was a big gap in grades between the best candidate who failed the interview and the worst one, who succeeded and was selected in place of the former. The Venice Commission invites the authorities to revisit the selection procedure and address those issues. First, there should be a reasonable explanation for the number of excess candidates invited for the interview each time, and, second, the authorities should reflect on a principle that would permit to commensurate the results of the written exam with the results obtained at the interview. The Draft Code does not necessarily need to address those issues in detail; the task of developing appropriate rule may be delegated to the SJC.

d. Studies and graduation from the Academy of Justice

119. One of the main defects of this chapter is that it does not describe the role played by the Academy of Justice in the process of recruitment of candidates. As the rapporteurs were explained, being on the list of candidates in essence means admission for a 9-months preparation course at the Academy of Justice. All candidates at this stage enter the Academy as equals; at the end of the course, they are graded again, now based on the results of their graduation exams at the Academy. The original grades, obtained previously, at the written exam at the qualification checks stage, do not matter anymore. Only the final grades, obtained from the Academy, are used to establish the order of priority for judicial appointments. In a simplified form, the principle of appointments is the following: the best student in the Academy will be proposed the first vacant post (see Article 114 § 5).[64] If the first candidate refuses, the offer is made to the next best candidate, who should take it or lose his/her place in the list, and so on. The Venice Commission considers that the Draft Code should contain a description of this process, and that a difference between grades received at the qualification checks, and grades obtained in the Academy of Justice, should be made clear.

120. Furthermore, it is important to ensure that the institutional design of the Academy of Justice and, in particular, of its examination and appellate commissions ensures the independence of these bodies. The Venice Commission was not asked to assess the law on the Academy of Justice; however, given the role played by this institution in the process of recruitment of new judges, this law should guarantee, as a minimum, that the MoJ does not

[64] Some special categories of judges may claim this post before the offer is made to the candidate judges, but this does not change the main principle.

play a decisive role in the appointment/removal of the Academy and different bodies of the Academy.

e. Appointment by the President

121. Article 115 §§ 8 and 9 provide that the President shall appoint the candidate proposed by the SJC or veto the appointment. However, the President's veto is only suspensive – under § 10 the SJC may overrule the President. In this case either the President appoints the candidate, or the dispute is submitted to the Constitutional Court, under point 4 of § 1 of Article 168 of the Constitution. That being said, as transpires from § 11 of Article 115, the decision of the Constitutional Court on this matter will not be binding on the SJC, which only have to "discuss" this decision, but not to necessarily follow it. So, the final word in the appointment belongs to the SJC.

122. This model of appointment raises two issues. Some of the interlocutors of the rapporteurs in Yerevan questioned the constitutionality of this arrangement where the President's refusal to appoint a candidate may be overridden by the SJC. The power to assess constitutionality of this arrangement belongs to the Constitutional Court of Armenia. However, for the Venice Commission the model proposed by the Draft Code is largely compatible with the Commission's own recommendations expressed in some earlier opinions, namely that the President's appointment power should be essentially ceremonial. As the Venice Commission held, "as long as the President is bound by a proposal made by an independent judicial council […], the appointment by the President does not appear to be problematic".[65] The President should not exercise his power to reject a candidate proposed by the SJC merely if there are doubts about the candidate's qualifications and qualities. The President may retain this power only in extreme cases of egregious violations of the procedure of selection, or in cases of clear formal incompatibility of the candidate with a judicial position (for example, where a person proposed has a criminal conviction).

123. The second issue relates to the role given to the Constitutional Court in the process. The proposed solution is hardly compatible with the constitutional provision in Article 170 § 2, which implies that the Constitutional Court's decisions are binding. Although the Constitution only proclaims that the decisions of the Constitutional Court are "final and enter into legal force immediately" it is understood that "finality" in this context means binding effect. If a dispute between the SJC and the President on a particular candidate is submitted for the resolution to the Constitutional Court, with reference to Article 168 § 4, then its decisions should be binding.

12. Chapter 17 (promotion procedures)

124. The promotion procedure consists of three phases: inclusion in the list for promotion, selection of a candidate for promotion to a particular higher post, and appointment/election of the candidate by the appointing body. The ultimate decision (third phase) of election or appointment of the judge is taken by the President of the Republic, in accordance with Article 166 § 6 of the Constitution, as regards judges of the court of appeal, and by the National Assembly together with the President, as regards judges of the Court of Cassation.[66]

125. There is a certain link between the process of "performance evaluation", conducted by the EC of the GA, and the promotion process conducted by the SJC. As follows from Article 68 §§ 1 and 2, the goal of the performance evaluation by the EC of the GA is "to contribute to the

[65] CDL-AD(2007)028, Report on Judicial Appointments, § 15 ; see also CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, § 27.

[66] The Venice Commission understands that the President should normally follow the recommendation of the SJC, and that he may use his power to disagree only in extreme cases – for example, where there is a serious flaw in the process of promotion or a clear case of incompatibility.

selection of the best candidates when compiling the lists of judge candidates for promotion". However, under the Draft Code, the role of the EC of the GA in this process is quite limited. This body plays an independent role only where it characterises the judge's performance as "poor", which precludes in absolute terms any promotion (see Article 71). However, if, as a result of the evaluation, the judge receives a better grade (excellent, good, or fair), the SJC may, in essence, re-assess the profile of the candidate and disagree with the EC of the GA. Article 122 of the Draft Code provides that when considering the issues related to drawing up a list of judge candidates for promotion, members of the SJC should *take into account* the results of the performance evaluation. However, members of the SJC are not obliged to explain their vote by reference to the results of the performance evaluation, and the SJC, as a whole, is not required to motivate its decision. Article 123 § 7 provides that the lists of candidates for promotion are composed through "voting by secret ballot", by voting "for" or "against" each candidate.

126. In practice very few judges who know that they are weak candidates would submit themselves to a performance evaluation (which is reserved for those who want to be promoted). Most likely, the performance of the overwhelming majority of the judges will be rated as "fair", "good", or "excellent". But those grades do not bind the SJC. In means, in essence, that the judicial self-governance body (the EC of the GA) plays only a consultative role in the process. Even more so, results of the performance evaluation, conducted by the EC, are listed amongst eight other criteria. It reduces even more the effect this evaluation has on the potential promotion.

127. This impression is further strengthened by the fact that nearly the same criteria are used for performance evaluation and for the promotion. Thus, if Article 122 is compared with Article 69, it appears that the same qualities of a judge may be taken into account twice – first by the EC of the GA in the process of preparation of a performance evaluation report, and, second, by the SDL in the process of composing the list of candidates for promotion, which should take into account the results of the evaluation. For example, Article 69 mentions "professional abilities" of a judge as a qualitative criterion for evaluation; Article 122 speaks, in addition to evaluation results as such (§ 1 (9)), about other factors such as "professional knowledge" (§ 1 (1)) and "working skills" (§ 1 (2)). In general, the scope of assessment of the judge's professional and personal qualities, exercised by the EC of the GA and by the SJC seems very similar.

128. The second phase of the promotion procedure is the nomination for appointment to a vacant post. Here the members of the SJC again have to take into account "features prescribed by Article 122", which include the results of the performance evaluation.[67] However, since the nomination by appointment takes place by voting, the performance evaluation, again, plays no formal role in this process.

129. The legislator has to decide which model it prefers, and how much weight is to be attached to the performance evaluation conducted by the EC of the GA. In the current model the EC plays only a consultative role, while the real decision-making power belongs to the SJC. This model is not entirely coherent with the overall design of the Draft Code. On the one hand, the Draft Code establishes a special body entitled to conduct performance evaluations, and provides for a complicated procedure thereof. On the other hand, opinions of this body have no particular weight in the ensuing process of promotions (except when the judge's performance is graded as "poor"). It is thus necessary to provide in Articles 122 and 129 that, in establishing the lists of judge candidates for promotion or when nominating candidate(s) for appointment, the results of the performance evaluation by the EC will be decisive or, at least, will be more weighty than other possible factors.

[67] The reference to the SJC as a whole contradicts the approach of Article 122, where this obligation is established for the members of the SJC.

13. Chapter 18 (disciplinary procedures)

a. Substantive rules

130. Article 139 § 1 defines three grounds for imposing a disciplinary penalty: violations of laws, violation of the rules of conduct and failure to participate in mandatory trainings. The first two offences are to be committed intentionally or with "gross negligence". Under Article 155 § 1 (5) of the Draft Code, termination of the powers of the judge (which is in essence the most serious disciplinary penalty) may follow "gross disciplinary violation". It is understood that "gross negligence" in Article 139 refers to *mens rea*, whereas "gross violation" in Article 155 § 1 (5) refers to the seriousness of the breach, to *actus reus*. Thus, the status of a judge may be terminated if two conditions are met concurrently; the judge acted with "gross negligence" (or intentionally), and his mistake or omission had particularly grave consequences ("gross violation").

131. It would be useful to give more precise definition to "gross negligence" in article 139 § 3. Furthermore, it would be preferable not to pursue disciplinary proceedings at all if the violation (even committed with gross negligence) itself is insignificant, to introduce a sort of a *de minimis* requirement (in addition to the proportionality principle set in Article 138 § 2). That would lighten the workload of the MoJ, the EDC, and the SJC and direct those bodies towards a more lenient approach.

b. Preliminary inquiry by the EDC and the MoJ

132. Under the Draft Code a disciplinary procedure may have up to two stages: (1) institution of the procedure by the MoJ or the EDC (accompanied by a preliminary inquiry), and (2) examination of the disciplinary case by the SJC.

133. Article 141 empowers the EDC and the MoJ to open a disciplinary case. The case may be opened following a communication from official bodies, on the basis of mass media publications or as a result of an independent discovery of a violation (Article 142).[68] It appears that reports by the chairpersons about irregular behaviour of judges have no special status, which is positive.

134. The power to impose a disciplinary sanction on a judge belongs to the SJC (Article 85 § 1 (7) and Article 138 § 1). However, the MoJ and the EDC retain a very important "negative" power, namely the power to close the proceedings if they find that there is no case to answer (see Article 143 § 4). Therefore, these bodies play the role of a "filter" before any case may reach the SJC. The question is whether this role should be given to a representative of the executive (the Minister) or to a body representing the judicial community (the EDC), or to both of them.

135. The Venice Commission recalls that the EDC is composed solely of judges; there is, therefore, a risk that that this body will adopt a corporatist stance. In order to reduce this risk several solutions are possible. One solution would be to balance the composition of the EDC by adding there a number of non-judicial members, representing other legal professions. Another option would be to require a particularly high majority for a decision not to proceed with a case.[69] Finally, there exists the option chosen by the Draft Code – to entitle the MoJ to bring

[68] Article 33 empowers the chairpersons of the courts to submit to the EDC reports on the violation of ethical rules by the judges; however, in theory the EDC may institute proceedings even without such a report. That means that the chairpersons of the court play only a very modest role in the process of institution of disciplinary proceedings, which is positive.

[69] See CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on

proceedings before the SJC, independently from the EDC. The Minister serves thus as a counterbalance vis-à-vis the EDC.

136. This model – where disciplinary proceedings against a judge may be initiated by the Minister of Justice – is not unknown in other countries (for example, in Italy). In relation to Bulgaria, the Venice Commission has previously observed that "notwithstanding the Minister's power to make proposals [on disciplinary liability of judges], the actual decision to […] dismiss is made by the Supreme Judicial Council, on which the judicial branch has a majority representation. This decision follows a hearing before a disciplinary panel composed of five members drawn by lot. Furthermore, decisions of the Supreme Judicial Council […] are subject to review by the Supreme Administrative Court in relation to procedural, though not substantive reasons. […] [The Minister of Justice] does not chair the disciplinary panel."[70] Under the Draft Code the decisions on the disciplinary liability are taken by the SJC which is composed in equal parts by judges and lay members, by a qualified majority of votes (Article 150 § 3). The Minister of Justice does not play any role in the decision-making; she or he only presents the case before the SJC as a party (Article 147 § 1). In such conditions, the involvement of the Minister of Justice at the stage of initiation of the disciplinary proceedings is not objectionable. It is also understood that a member of the EDC who presents the case before the SJC cannot be, at the same time, the member of the SJC (see Article 74, § 3 of the Draft Code).

137. That being said, this solution – to entitle two bodies to bring cases before the SJC – may lead to "forum-shopping". Article 143 §§ 6 and 7 contains a mechanism which reduces this risk: thus, the EDC and the MoJ should inform each other about cases being examined, and the proceedings before one body should be suspended if another is already examining the same case. If the first body decides not to proceed with the case, the second body may still bring this case to the SJC. This approach is reasonable: where there is a disagreement about a case, it should be resolved by the SJC. However, from the text of the Draft Code it appears that this mechanism works only when the same case is examined by the two bodies simultaneously; by contrast, under Article 143 § 7 it would not work if the case is brought first before one body, and then, after the proceedings are terminated, before another. In this case the decision taken in the first round of proceedings would take precedence. So, some "forum-shopping" is still possible. If this was not the intention of the drafters, the Draft Code should specify what happens in a situation of two consecutive complaints, and whether one body may overrule another, and under which conditions.

138. The Venice Commission notes that even at the stage of the preliminary inquiry the Draft Code provides for some sort of a hearing where evidence is examined and arguments are presented (see Article 143 § 3 (3) and (4)). Another hearing takes place when (and if) the case goes before the SJC (see Article 147, in particular § 4 thereof). While this model gives additional guarantees to the judge concerned, it may be too cumbersome. It would suffice to ensure procedural rights of the defence (the judge) in the proceedings before the SJC; as to the preliminary inquiry, this stage may be more informal, quick, and based essentially on written materials.

139. Article 138 § 2 stipulates that disciplinary proceedings should be guided by the principle of transparency. When dealing with disciplinary cases, the SJC sessions are open to the public if the SJC does not decide to the contrary. This is acceptable, but the SJC should always state reasons for such a decision. In addition, the judge concerned should have a right to demand a session behind closed doors. That should be explicitly provided for in Article 86 § 5.[71]

---

making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, § 24

[70] CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, § 34

[71] See CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§ 35 and 37.

c. Examination of the case by the SCJ

140. Article 88 requires a quorum of 2/3 of the members of the SJC to hold a session. Article 91 § 4 prescribes that the SJC, when acting as a court, takes decisions by at least 2/3 of all members of SJC. This is a very high threshold; it means that judicial members of the SJC will need support of at least two non-judicial members to pass a decision, and *vice versa.*

141. The question arises what if there is no required majority to take a decision on bringing the judge to a disciplinary liability. It may be inferred that in this case the judge is considered to be "acquitted"; the Draft Code should clarify this.

142. Articles 147 and 149 describe the procedure before the SJC, which, in principle, provides the judges concerned with sufficient procedural guarantees equal to those of the "fair trial" guarantees under Article 6 § 1 of the ECHR. A direct reference in Article 149 § 3 to this Convention provision is welcome.

d. Right of appeal against the decisions of the SJC

143. The Draft Code does not provide for a right of appeal against the decisions of the SJC in disciplinary matters.

144. Under the Draft Code, the only legal avenue available to the judge concerned is to lodge a constitutional complaint before the Constitutional Court: thus, under Article 152 § 8 of the Draft Code, the Constitutional Court is entitled to examine the "constitutionality of the regulatory legal act applied against [the judge] by the decision of the Supreme Judicial Council on imposing disciplinary action".

145. However, such a complaint to a Constitutional Court cannot be seen as an appellate review. First of all, this complaint has a very narrow scope: in many such cases, no "constitutionality" issue would arise, and yet the disciplinary sanction may be imposed unjustly. Second, constitutional basis for such a complaint is unclear. The Armenian Constitution does not list, amongst other competencies of the Constitutional Court, the power to examine appeals against the decisions of the SJC. Indeed, Article 169 of the Constitution provides that everyone has the right to appeal to the Constitutional Court "in a concrete case when there is a final act of court […]". However, for this provision to be applicable a decision of the SJC in a disciplinary case should be qualified as a "final act of court", which is questionable – even if the disciplinary decisions of the SJC are to be seen as "acts of court", it is dubious whether they are "final" (on this see more below) and whether the SJC is in itself a "court" (since it is not listed as such in Article 4 of the Draft Code). In addition, as the Venice Commission held previously, "examination of appeals against the decisions [of the judicial council] in disciplinary cases is not a part of the core functions of a constitutional court."[72] Therefore, in any event the Constitutional Court is not well adapted to hear such cases. In sum, a constitutional complaint by the aggrieved judge cannot qualify as a proper appeal against the disciplinary sanction.

146. This absence of an appeal system it a source of concern. The Venice Commission recalls § 69 of Recommendation CM/Rec(2010)12 where the Council of Ministers indicates that disciplinary proceedings "should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with *the right to challenge* the decision and sanction" (italics added). The OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia mention that there should be a "right to

[72] CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, § 93.

appeal to a competent court" against a decision by a disciplinary body.[73] The Venice Commission previously recommended that "an appeal against disciplinary measures to an independent court should be available."[74] The Venice Commission repeated this recommendation in an opinion on the Armenian Constitution.[75]

147. At the meetings in Yerevan some of the interlocutors insisted that these recommendations are not applicable in the current constitutional framework. Thus, under Article 175 § 2 of the Constitution "when discussing the question of imposing disciplinary liability upon a judge […] the Supreme Judicial Council shall act as a court". It is not uncommon for a non-judicial constitutional body to perform, occasionally, judicial functions (like it happens in France, for example, where Parliament may seat as a High Court for the purposes of impeachment).[76] In their words, the institutional design of the SJC, the status of its members and the procedure before it permit to characterise the SJC as a judicial body. If seen from this perspective, proceedings before the SJC provide sufficient guarantees to the judges subjected to disciplinary liability and a separate appeal to a court is not therefore necessary. The SJC is a special tribunal identified by the Constitution as a final instance in disciplinary matters; this model exists in some other legal orders (for example, in Greece).[77] Giving the Court of Cassation the powers of an appeal instance would erode the authority of the SJC.

148. The Venice Commission takes note of these arguments; however, it reiterates its earlier recommendations that an appeal is necessary and observes that the current constitutional framework in Armenia does not exclude the possibility of an appeal to a court. For example, under Article 98 § 4 of the Draft Code the refusal of the SJC to accept application from a prospective candidate to a judicial position may be appealed before the Administrative Court. So, in some situations the Draft Code provides for an appeal to a court of law against the decision of the SJC – but not in disciplinary matters.

149. Another question is which body should hear appeals against disciplinary sanctions imposed on judges. The most evident solution would be to entrust the Court of Cassation with this task, but the Constitution does not provide expressly for this possibility; as transpires from Article 171 § 2, the role of the Court of Cassation is to "review judicial acts". Given that a decision of the SJC may qualify, under the Constitution, as a "judicial act", the Court of Cassation might be, in principle, competent to examine appeals, but in this case this competency should be directly provided for in the Draft Code, and the procedure of appellate review should be described there at least briefly.

150. Admittedly, other solutions may be considered – such as the creation of a special appellate panel for disciplinary matters within the SJC or within the Court of Cassation. It is important, however, that the appeal instance qualifies as a "court", i.e. provides for sufficient procedural guarantees and is institutionally independent. In addition, in developing this model the authorities should ensure that the functions of initiating disciplinary proceedings, imposing a disciplinary sanction and deciding on appeals are clearly separated; for example, a person who triggered a disciplinary case should not participate in the subsequent decision-making.

[73] P. 26
[74] CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §25; see also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §110
[75] CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, § 153
[76] Article 68 of the French Constitution
[77] Article 91 § 4 of the Constitution of Greece

151. Finally, the Venice Commission recalls that "Judicial Councils should have a certain discretion, which must be respected by the appellate body".[78] In exercising its appellate review the appellate body should act with deference to the SJC (or any other body or panel within the SJC imposing the disciplinary sanction), especially as regards the establishment of the factual circumstances and interpretation of the relevant rules of conduct.[79]

e. Reopening of disciplinary proceedings

152. Article 153 provides for a possibility to reopen a disciplinary case if "newly emerged or new circumstances" are discovered. It should be possible to reopen cases with reference to facts that had already existed at the moment of the original proceedings but were not known and were discovered only later ("newly emerged" circumstances). However, it is more problematic when the case is re-opened with reference to the "new" circumstances, which came into existence *ex post facto*. From § 1 it transpires that the reopening may concern only decisions "on imposing disciplinary action against a judge". This could mean that the reopening cannot aggravate the situation of the judge. However, if the reopening leads to a new or more serious sanction, this may be seen as a retroactive imposition of a disciplinary penalty.

153. Next, the possibility to re-open the case within twenty years after the decision of the SJC (see Article 153 § 4) is objectionable. A disciplinary sanction is, most often, a short-lived form of liability; for example, under Article 140 of the Draft Code the SJC has one year (from the date of the alleged offence) to start disciplinary proceedings. Against this background it is difficult to understand why the reopening may take place twenty years after the facts.

14. Chapter 19 (termination of powers of a judge)

154. Under Article 164 § 9 of the Constitution, "the powers of a judge shall be terminated by a decision of the Supreme Judicial Council, in cases of violating the incompatibility requirements, engaging in political activities, the health condition rendering the discharge of his powers impossible, or *committing a grave disciplinary offence*" (italics added). Article 139 of the Draft Code reproduces those grounds almost word by word. Thus, a serious disciplinary offence is regarded as one of the grounds for termination of the powers of a judge.

155. Under Article 60 of the Draft Code, one of the rules of conduct for a judge is not to have political engagements. A serious breach of this requirement is a disciplinary offence and may lead to a dismissal. At the same time, Article 155 § 1 (2) entitles the SJC to terminate the status of a judge "if s/he is engaged in political activities". In sum, political engagement of a judge may lead to his/her dismissal either as a disciplinary sanction (under Article 155 § 1 (5)) or as a separate *sui generis* sanction (under Article 155 § 1 (2)).

156. The co-existence of two identical grounds for dismissal is a source of potential problems. Thus, a disciplinary sanction under Article 155 § 1 (5) is imposed within disciplinary proceedings, whereas the termination of powers under Article 155 § 1 (2) does not need to be imposed within disciplinary proceedings and hence does not provide the judge with the necessary procedural guarantees. Second, disciplinary sanctions are governed by the principle of proportionality (see Article 138 § 2), whereas termination of the status under Article 155 § 1 (2) is formulated as a categorical sanction (which is imposed irrespectively of the seriousness of the breach). In the opinion of the Venice Commission, those two parallel regimes should be merged into one, governed by the rules of disciplinary proceedings and by the principle of proportionality.

[78] CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, § 92

[79] See, for a similar discussion, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, § 66.

157. Article 155 § 6 describes what constitutes a "gross disciplinary violation". This threshold may be reached (1) if the judge commits a certain number of less serious violations,[80] or (2) if the judge commits an "act which dishonours the judiciary" or an act which "is incompatible with the position of a judge". Again, the Venice Commission observes here a certain parallelism: under Article 60 § 1 an act "undermining the high reputation of the judiciary" is characterised as ground for disciplinary liability, but not necessarily as a "gross disciplinary violation". The interrelation between Article 60 § 1 and Article 155 § 6 should be clarified: it seems that the same type of violation may lead to a less severe disciplinary sanction (such as a warning, for example), or be qualified as a "gross violation" independently from the record of the previous violations and thus lead directly to the termination of the status of a judge. In principle, such model is acceptable, but the disciplinary bodies should be aware that not every "act which dishonours the judiciary" or and act which "is incompatible with the position of a judge" necessarily amounts to a gross violation; the principle of proportionality should always apply (Article 138 § 2 of the Draft Code). This should be explicitly indicated in the Draft Code.

158. Finally, insofar as several repeated less serious disciplinary violations are regarded as a "gross violation", it is necessary to indicate the time-period within which such violation may have this effect by accumulation. Otherwise the judges who committed some small errors in the beginning of their career would be constantly under the threat of dismissal, and their independence would be jeopardized.

15. Final chapters

159. Article 162, according to its title, is supposed to "ensure the proper operation of courts" after the abolition of the Judicial Department. However, this provision is too vague and indefinite. It gives the chairpersons of the courts unlimited discretion in managing the staff. The legal status of the staff of a court and the rules of procedure thereof shall be prescribed by the Draft Code, other laws, "the charter of the staff and other acts". However the status and the specific functions of the staff of the courts are not described anywhere in the Draft Code; as to "other acts", this formula is too vague and may give the chairpersons too much of a discretion. If material and human resources of a court are managed exclusively by the staff appointed by the chairperson, and on the basis of rules developed by the chairperson, it may turn the latter into a very influential figure and risks endangering the internal judicial independence.

IV. Level of details in the constitutional law

160. Pursuant to Article 103 § 2 of the Constitution, the Judicial Code is a constitutional law adopted by 3/5 of the total number of MPs. This is a rigid legal instrument, which is not supposed to be changed too often. However, many provisions of the Draft Code are too detailed for a constitutional law.[81] There are numerous examples of excessively detailed regulations.[82]

[80] The number varies depending on the severity of the disciplinary sanction previously imposed, and depending on whether the violation has been committed intentionally or by negligence.

[81] In this respect the Draft Code is similar to the Draft Constitutional Law on the Constitutional Court, which has been criticised by the Venice Commission for being overly detailed (see CDL-AD(2017)011, Armenia – Opinion on the draft Constitutional Law on the Constitutional Court § 99).

[82] For instance, Article 19, regulating the maintenance of judicial statistics, Article 54, regulating on the form of the official identification card of a judge, Article 89, regulating the process of taking minutes of sessions of the Supreme Judicial Council, Article 123, regulating the process of drawing up and approval of the list of judge candidates for promotion, Article 152, regulating content of the decisions of the Supreme Judicial Council on disciplinary sanctions, etc.

161. The Venice Commission understands that this legislative technique may be a part of the national legal tradition. However, where too detailed regulations are enacted through a constitutional law, any error made in the original law cannot be easily rectified. Therefore, the Venice Commission strongly invites the Armenian authorities to review the Draft Code in order to identify and remove excessive regulations. The Draft Code may delegate the power to adopt relevant regulations either to the lawmaker or, even better, to the SJC.

V. Conclusion

162. The Draft Judicial Code implements positive changes brought by the constitutional reform (in particular, as regards the Supreme Judicial Council) and is generally compatible with European standards and the European best practices (with few exceptions discussed in the present opinion). At the same time, it is an extremely long, detailed and complex document that would certainly benefit from simplification. Furthermore, it has a number of lacunas and inconsistencies, which need to be addressed. The most important recommendations of the Venice Commission in this respect are the following:

- It is recommended to provide for a common sitting of all chambers of the Court of Cassation, in order to harmonise the case-law of different chambers and settle possible jurisdictional disputes.

- Lower courts may be allowed to derogate from the established case law, but only if there are "strong arguments" justifying such departure and under control of the Court of Cassation. Incremental development of the case law by the courts should not be assimilated with the law-making, which is the prerogative of Parliament.

- The Draft Code should define how the results of the written qualification exam are accounted in the process of recruitment of candidates.

- Rules of conduct and duties of the judge should be formulated more precisely, preferably with reference to specific types of behaviour. The multitude of vague and overlapping formulas now contained in Articles 60 – 62 should be removed or merged into one general formula, which should be interpreted narrowly.

- Liability for inappropriate political engagement of the judges should be imposed within the framework of disciplinary proceedings and should be governed by the principle of proportionality.

- The Draft Code should provide for a possibility of appeal against decisions in disciplinary matters.

- The Judicial Department may remain the central body performing administrative support functions vis-à-vis the courts, provided that its head is appointed by the Supreme Judicial Council and is answerable to it.

163. The Venice Commission remains at the disposal of the Armenian authorities for further assistance in this matter.