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(VENICE COMMISSION)

ARMENIA

DRAFT 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 AMENDMENTS TO THE JUDICIAL CODE
AND SOME OTHER LAWS**

on the basis of comments by

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Draft - restricted

I. Introduction

1. By letter of 6 September 2019, Mr Rustam Badasyan, the Minister of Justice of Armenia, requested the Venice Commission to prepare an opinion on the “Judicial Reform Package” developed by the Ministry and proposing amendments to the Judicial Code (the JC), the law on the Constitutional Court, the law on Public Service, the law on the Commission for the Prevention of Corruption, and some other laws (CDL-REF(2019)023 – hereinafter referred to as the “Package”).¹ The Ministry also provided a consolidated version of the JC with the proposed amendments integrated in it (CDL-REF(2019)024). Finally, on 17 September 2019 the Ministry submitted to the Venice Commission the amended law on the Commission for the Prevention of Corruption (CDL-REF(2010)022) which was adopted by Parliament in the first reading and which replaces the draft amendments to the same law contained in the Package.

2. Per request of the Armenian authorities, this opinion was prepared by the Venice Commission jointly with the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe. Mr Esanu, Mr Hirschfeldt and Mr Kuijer acted as rapporteurs for this opinion on behalf of the Venice Commission. Mr Reissner and Mr Sessa acted as rapporteurs on behalf of the DGI.

3. On 16 – 17 September 2019, a delegation of the Commission, composed of Mr Esanu, Mr Hirschfeldt, Mr Kuijer, accompanied by Mr Dikov from the Secretariat, visited Yerevan and met with parliamentarians, executive authorities, judges and other stakeholders, as well as representatives of the civil society.

4. The present opinion was prepared on the basis of the contributions by the rapporteurs and on the basis of a translation of the reference documents (see above) provided by the authorities. Inaccuracies may occur in this opinion as a result of incorrect translations. In addition, it should be noted that the reform package is not a static text. During the visit to Yerevan, the rapporteurs learned that Parliament had adopted certain amendments which affect the Government proposals as submitted to the Venice Commission (compare CDL-REF(2019)023, pp. 36 – 33, and CDL-REF(2019)022). In drafting this opinion, the Venice Commission did its best to reflect the current state of affairs, but it cannot be ruled out that certain most recent developments were overlooked.

5. This opinion was examined by the Sub-Commission on the Judiciary at its meeting on ... and subsequently adopted by the Venice Commission at its ... Plenary Session (Venice, ... October 2019).

II. Scope of the opinion

6. Given the time constraints, it was decided that the present opinion will focus on the most important amendments introduced by the Package. It therefore does not provide a comprehensive overview of the entirety of the JC and other laws which the Package amends. If this opinion remains silent on other issues, this does not necessarily mean that the Venice Commission supports the introduction of the relevant amendments.² Moreover, many of the proposals formulated in the Package introduce anti-corruption measures, so the Venice Commission encourages the Armenian authorities to continue consultations with the GRECO experts on those issues. This opinion will not deal with other issues related to the judicial reform, such as the 2019-2023 Strategy for Judicial and Legal Reforms of the Republic of Armenia or other related legislative amendments.

¹ The Package includes amendments to thirteen laws in total.

² The Venice Commission refers the Armenian authorities to its previous opinions on the Armenian judiciary, in particular, to opinion CDL-AD(2017)019, where it formulated recommendations on a broader range of topics, and to the post-adoption evaluation review, prepared by the DGI experts in 2018.

7. The Package introduces some parallel amendments to the JC and to the law on the Constitutional Court (the CC) – in particular, insofar as the disciplinary liability of judges and the financial disclosure obligations are concerned. The comments made in this opinion in the context of the amendments to the JC are to be considered applicable *mutatis mutandis* to the similar amendments proposed to the law on the CC.

III. General overview of the reform

8. The current judicial reform has to be considered against the backdrop of the events that took place in the past few years in Armenia, and the Venice Commission previous work in this area.

9. The new Constitution of Armenia was approved at a referendum on 6 December 2015. Following the adoption of the new Constitution, the Armenian Government developed a draft JC which was submitted to the Venice Commission for evaluation. In October 2017 the Venice Commission issued an opinion on the draft Code (the October 2017 Opinion).³ The final version of the JC was adopted on 10 February 2018. The newly adopted JC included many but not all of the recommendations made in the October 2017 Opinion. In August 2018 experts of the Council of Europe conducted a post-adoption review where they compared the final text of the JC with the recommendations of the Venice Commission.

10. The new JC entered into force shortly before the events of the spring of 2018, which are referred to in Armenia as the “velvet revolution”. The “velvet revolution” led to a peaceful overturn of the previous Government, and the appointment of the former opposition leader Nikol Pashinyan as a Prime Minister. It culminated with a landslide victory of the “My Step” alliance in the 2018 parliamentary elections. “My Step”, supporting Nikol Pashinyan, obtained 88 out of 132 seats in the National Assembly (which is a constitutional majority), while the former governing Republican Party did not receive any seats.

11. As explained to the rapporteurs, the Armenian society was dissatisfied with the situation in the judiciary, and that was one of the reasons behind the “velvet revolution”. There is a strong popular demand for quick and visible changes in this area, which explains why the new Government has decided to examine critically the composition of the judicial branch of State power.

12. The new Government has a constitutional majority in Parliament. Originally its intention was to introduce extraordinary vetting procedures to check the suitability of existing judges. However, despite the broad political mandate they obtained following the elections, the Government refrained from a headstrong approach and, instead, engaged in a dialogue within the Armenian society and with its international partners. An original plan providing for a comprehensive vetting of the judiciary was discussed with the Council of Europe representatives in the first half of 2019. Internally, the proposed reform underwent a process of public consultations; many amendments to the proposed texts were made following the input from the civil society organisations, the judicial community and other stakeholders. Many of the NGOs the delegation met in Yerevan noted with satisfaction the transparency and inclusiveness of the process of preparation of the Package.

13. As a result of this dialogue, the most radical proposals for the reform were abandoned, and the Government developed more tailor-made solutions. The Venice Commission welcomes this approach and invites the Government to proceed with the future reforms in the same spirit of dialogue and inclusiveness.

14. The Package that was presented to the Venice Commission is primarily concerned with amendments to the procedure of verifying financial declarations of judges, their disciplinary

³ CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code

liability and periodic evaluations. In addition, the Package introduces a sort of early retirement scheme for judges of the Constitutional Court, which will be dealt with separately in the present opinion.⁴ The overall assessment of the legislative amendments contained in the Package is clearly positive. The proposed mechanisms increase the accountability of judges and are more efficient to prevent corruption, without, at the same time, disproportionately encroaching on the judges' independence. Certain critical remarks made in this opinion should not be seen as undermining a generally positive assessment of the Package.

IV. Institutional changes

15. The Venice Commission recalls that, under the new Constitution of Armenia, in the centre of the system of judicial governance is the Supreme Judicial Council (the SJC). It is 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 of the Constitution of Armenia). The composition of the SJC is fixed in the Constitution and thus remains unaffected by the proposed reform. This composition corresponds to the minimal standard of "substantial" participation of judges (which was advocated by the Venice Commission in many opinions and reports)⁵ and to the threshold set in the recommendation of the Committee of Ministers.⁶

16. Article 174 of the Constitution also mentions the General Assembly of Judges (the GA), which is an assembly of all Armenian judges. Under the current JC, the GA creates specialised commissions, in particular, a Disciplinary Commission, composed of judges of different levels. This commission has the power (along with the Minister of Justice) to bring disciplinary cases against judges before the SJC, the latter being however the final instance in disciplinary matters.

17. The Package proposes to change the composition and functions of some of these specialised commissions, particularly in the context of disciplinary proceedings. Under the proposed amendments, there will be three bodies which can bring disciplinary cases before the SJC: the Ethics and Disciplinary Commission of the GA (the EDC, the successor of the Disciplinary Commission), the Minister of Justice and the Commission for the Prevention of Corruption (the CPC – on a limited number of grounds, related to financial declarations of judges). These three bodies may bring cases *proprio motu* or on the basis of complaints, information in the press, etc. They can conduct preliminary factual inquiries into the allegations of misconduct. These bodies serve as a "filter" for inadmissible complaints against judges. If the EDC turns down a complaint, the latter can still be brought by the Minister, and *vice versa*.⁷ Decisions on imposing disciplinary liability are taken by the SJC, by a simple or qualified majority (depending on the gravity of the sanction), following adversarial proceedings. Finally, decisions of the SJC will not be subject to an appeal before a court of law, but a special procedure of reviewing the SJC decisions by the SJC itself will be provided.

A. The Ethics and Disciplinary Commission of the General Assembly of Judges

a. Composition of the Ethics and Disciplinary Commission

18. The draft JC amends the composition of EDC. While the predecessor of the EDC (the Disciplinary Commission) was composed solely of judges of different levels, the EDC will now

⁴ If interlocutors expressed concerns about the Package, these were mostly related to the possibility of early retirement for judges of the Constitutional Court.

⁵ See, for example, CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 29. See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, § 76

⁶ CM/Rec(2012)12, p. 27 ("not less than half the members of such councils should be judges chosen by their peers")

⁷ Although it is unclear to what extent the EDC and the Minister of Justice may bring complaints related to the financial declaration of judges; it appears that bringing these complaints is an exclusive competency of the CPC.

include 8 members: five judges and three lay members. Lay members will include one representative of the office of the Human Rights Defender and two representatives of the NGOs working in the relevant field. Lay members representing NGOs are selected by the SJC; it is unclear, however, whether they are delegated directly by the SJC or still need an approval by the GA. The same concerns a lay member representing the office of the Human Rights Defender.

19. The idea of having non-judicial members within the EDC is commendable, since it makes the activities of this commission more open for some external scrutiny. However, it is unclear why judges of the Court of Cassation (the highest court in the system of courts of general jurisdiction) are not eligible to sit in the EDC, while those judges are usually amongst the most experienced ones. The proposed model can arguably be explained by the desire to reduce the informal influence of the most senior judges within the judicial system.⁸ This model is not against the European standards; however, the Venice Commission invites the authorities to evaluate whether the total exclusion of the Court of Cassation judges is justified in the Armenian context.

20. Next, the presence in the composition of the EDC of a staff member of the office of the Human Rights Defender may raise issues. First of all, it is questionable whether it is compatible with the role of the Human Rights Defender vis-à-vis the judiciary.⁹ Second, there is a risk that the same person may at the same time be called to examine certain facts as a member of the Human Rights Defender office and as a member of the EDC. If the Ombudsman is to retain a role in this institution, it can be reduced to the nomination of an expert (not a staff member of his or her office) to serve as one of the non-judicial members of the EDC.

b. Advisory opinions by the Ethics and Disciplinary Commission

21. The predecessor of the EDC was entitled to provide advisory opinions on the interpretation of the rules of conduct. This idea was criticised by the Venice Commission in the October 2017 opinion because the same body was giving advice to judges in specific situations and was entitled, at the same time, to bring a disciplinary case against them before the SJC (p. 62). Under the draft JC, the EDC will have the power to give advisory interpretations on the rules of conduct (Article 66 (4)) and on the ethical rules (Article 68 (4)). So, the recommendation of the October 2017 opinion was not followed. Even the advice on ethical rules by the EDC may be problematic, since there will always be a certain interplay between principles of ethical conduct and those of disciplinary regulations.¹⁰ As noted in the October 2017 opinion, a better solution would be to create a separate position of councillor on ethics within the GA with advisory functions, or to entrust one of the most experienced judicial members of the EDA with this task, under condition that this member will not deal with the specific complaints about the alleged misbehaviour of judges.

B. The Commission for the Prevention of Corruption

a. Composition of the Commission for the Prevention of Corruption

22. The new law on the Commission for the Prevention of Corruption (the CPC) was adopted by Parliament in the first reading. It replaced the proposed amendments to the same law contained in the Package. As explained to the rapporteurs, the urgent adoption of the amendments to the law on the CPC was needed to make this body operational as soon as possible. The law on the

⁸ The issue of internal judicial independence was specifically raised in the joint opinion on the Draft Law amending and supplementing the Judicial Code (evaluation system for judges) of Armenia, CDL-AD(2014)007, §§ 11-19 and 126-127.

⁹ In the Venice Principles (CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution), the Commission noted that “the competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system.”

¹⁰ See CCJE opinion No. 3, especially p. 49, which recommends separating the disciplinary liability from the rules on judicial ethics.

CPC was adopted in 2017. According to Article 2 of the law, the CPC is an “autonomous state body” consisting of five members. Those members are to be elected by Parliament by a simple majority.¹¹ The law of the CPC, as adopted in June 2017, provided for the creation of a “competition board” – a collegial body tasked, under Article 11 of the law, to conduct a competition, to select appropriate candidates and to submit them for approval to the National Assembly. However, due to a combination of political and technical factors, the board failed to conduct a competition and propose candidates. As a result, the CPC has not been formed. In such circumstances Parliament decided to proceed with amending the law on the CPC separately, before the rest of the Package is approved by the Government.

23. The new law on the CPC removes the competition board from the process of appointment of members of the CPC, and introduces a system of direct nominations: one candidate will be nominated by the Government, one nominee will be selected by the ruling party in Parliament, two nominees will be selected by the two opposition parties in Parliament, and one nominee will be selected by the SJC.¹² How a nominating body selects a nominee is not regulated (i.e. following a public call for candidates and a competition or not).

24. The Venice Commission understands that the current scheme of direct nominations to the CPC was needed to overcome future deadlocks. During the meetings in Parliament, the rapporteurs understood that the opposition has accepted this new scheme. The proposal therefore seems to be the result of a political compromise. If Parliament approves all of the nominees, the composition of the CPC will be politically balanced: two members nominated by the majority/the Government, two members nominated by the opposition, and a member nominated by the SJC acting as an arbiter.

25. In sum, in the current political landscape the new system of nominations seems to be acceptable. The question remains, however, whether this system will be practicable in the next electoral cycle. Currently there are only two opposition factions in Parliament, and each of them may nominate one candidate, irrespectively of the size of the faction. However, what if in the next Parliament there are more than two opposition parties – how should they nominate the two candidates (out of five) under the “opposition quota”? The law should provide for some form of a block vote in this case. Furthermore, the law is silent as to what happens if the candidates nominated by the opposition are rejected by the majority vote in Parliament – can the CPC function without the “opposition” candidates, and what happens if the opposition candidates are repeatedly rejected by Parliament?

26. The Venice Commission recalls that in the Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy¹³ it recommended the principle of proportional representation in the parliamentary committees. In most important ones – for example, those responsible for the budget or for the oversight of the security services – it is recommended to reserve certain seats for the opposition even going beyond its actual representation in Parliament or give the opposition the chairmanship positions. The CPC is not a parliamentary committee; however, given the importance of this body, a broadly similar principle should apply. Nothing prevents the legislator from giving the opposition a meaningful role in the nomination process (probably by returning to the idea of a collegial nominating body akin the “competition board” now abolished, which may ensure a less politicised process of nomination of candidates), even though the final decision, according to the Constitution, belongs to a simple majority in Parliament. In sum, the current version of the law may be acceptable as a provisional solution which needs to be revisited once the CPC becomes operational.

¹¹ See Article 122 (2) of the Constitution and Article 9 of the Law on the CPC in its original form – the new Article 9 is less explicit in this respect, but the Venice Commission assumes that the final decision on the appointment of the members of the CPC is to be taken by the National Assembly, since it is a requirement for all autonomous bodies under the Constitution.

¹² See Article 1 and 2, as well as Article 9, final and transitional provisions

¹³ CDL-AD(2019)015, § 86

b. Functions of the Commission for the Prevention of Corruption in respect of judges

27. The Venice Commission will now turn to the new power of the CPC to check the financial declarations of judges (declaration of assets, income and interests) and bring disciplinary cases against them before the SJC on grounds related to irregular declarations. Two solutions are possible in this respect: either to create a special body *within* the judiciary responsible for checking financial declarations of judges or to entrust this task to an *external* body which deals with the declarations of all public officials. The first solution is better for judicial independence but lacks transparency, which may give rise to a corporatist behaviour. So, the drafters of the Package preferred the second model: it is the CPC which checks the financial declarations of judges on an equal footing with other State officials and which has now the power to start disciplinary proceedings against judges.

28. It is difficult to find a common European standard in these matters. Some documents suggest that only a judicial body should have the power to bring disciplinary cases against judges.¹⁴ Other authorities accept that the verification of the financial statements by the judges may be performed by a body external to the judiciary.¹⁵ In the opinion of the Venice Commission, whether to entrust the task of verifying declarations to an external body (dealing with all public officials, including judges), or to a specialised body within the judiciary, depends on the local realities. The CCJE Opinion no. 21, in p. 50, stresses that it is “[...] of utmost importance to avoid the deeply damaging impression that the higher-ranking, the cleverer and the better defended an allegedly corrupt public official is, the more he/she benefits from a de facto immunity. Depending on a given country’s history, traditions and administrative structure, as well as the actual extent of corruption inside the system, it might be necessary to establish specialised investigative bodies and specialised prosecutors to fight corruption among judges. [...]”. Thus, the most important question is not who is *initiating* disciplinary proceedings, but who takes the final decision on the judge’s disciplinary liability. In the Armenian context, it belongs to the SJC, and not to the CPC, to conclude whether or not the judge has complied with the obligation to declare property, income and interests. In sum, the solution proposed in the Package – that the CPC may bring to the attention of the SJC disciplinary cases related to the irregularities in the financial declarations of judges – is acceptable.¹⁶

29. The Venice Commission understands that in the process of verification of financial declarations submitted by the judges and their close relatives the CPC will have some investigative powers – for example, the power to obtain information from public bodies and certain financial institutions (see Article 25 of the Law on the CPC). Furthermore, under the amendments to the law “On bank secrecy”, information requested by the CPC “in connection with the performance of [its] functions” will not be considered as covered by the bank secrecy. The question is whether the investigative powers of the CPC may interfere with the judges’ privacy, and how to avoid arbitrary use of those powers. In principle, it may be permissible for the CPC to obtain some *generalised* information about the judge’s finances – for example, about his or her bank accounts, the money flow on them during a certain period of time, or about particularly large payments. At the same time, it seems excessive to give the CPC unrestricted access to the

¹⁴ See the European Charter on the Statute for Judges, approved at a meeting of representatives of 13 European judiciaries in 1998, which speaks of a “tribunal or authority composed at least as to one half of elected judges”.

¹⁵ See the CCJE Opinion no. 21 (Preventing Corruption Amongst Judges), p. 37: “GRECO has issued, in its aforementioned Fourth Evaluation Round, recommendations to a number of countries as to the implementation or improvement of a system of asset declaration to comprehensively record in a regular – often annual – rhythm the judges’ revenues and other assets. GRECO also recommends having a specific body inside or outside the judiciary charged with the scrutiny of the timeliness and accuracy of such declarations. Non-compliance with these rules may constitute, in certain countries, administrative misdemeanours or disciplinary offences. Some countries have extended the asset declaration obligation to spouses and other close relatives of the judges. Sometimes, the declarations of all or certain categories of judges are made publicly accessible.”

¹⁶ The Venice Commission did not examine the specific investigative powers of the CPC in relation to the verification of the financial declarations of judges.

detailed information about every smallest transaction which the judge might have incurred. This information may reveal details about the judge's (and, *a fortiori*, his or her close relatives') private life which are not relevant for the CPC mandate. If such information must be obtained, it can be done within the framework of a criminal investigation, with all appropriate procedural safeguards (a "probable cause" condition, judicial warrant, etc.). As to the process of verification of declarations, the law must indicate more precisely what sort of information the CPC may and may not request.

C. The Minister of Justice

30. The third actor who may bring a disciplinary case to the SJC is the Minister of Justice. The Venice Commission made critical observations with regard to a comparable provision in Montenegro: "Article 99 grants the Minister of Justice the right to initiate disciplinary proceedings against judges. It may be asked whether this is in harmony with the independence of the judiciary and the principle of the separation of powers".¹⁷ However, in the October 2017 opinion (see § 136) the Venice Commission stated that since the Minister may bring disciplinary cases before the SJC on the equal footing with the Disciplinary Commission, and since the Minister does not play any role in the decision-making, the involvement of the Minister of Justice at the stage of initiation of the disciplinary proceedings is not objectionable.¹⁸ At the same time, since the EDC has a more diverse composition than its predecessor, it is possible to envisage that the power of the Minister could be phased out once the new system is up and running.

D. The Supreme Judicial Council

31. As proclaimed by Article 175 (2) of the Constitution, in the disciplinary field the SJC "acts as a court". The JC develops this constitutional provision further: it ensures the adversarial nature of the disciplinary procedures and guarantees procedural rights to the judge concerned (see Chapter 19, in particular Article 151 of the JC). Furthermore, members of the SJC enjoy some basic guarantees of their independence (see the rules on their appointment, tenure, etc. in Chapter 14). Thus, the role of the SJC in the disciplinary matters is generally compatible with the Recommendation CM/Rec(2010)12 (p. 9) which indicates that disciplinary proceedings "should be conducted by an independent authority or a court with all the guarantees of a fair trial [...]",¹⁹ and with CCJE Opinion no. 21, which recommends that "disciplinary proceedings should always be carried out essentially by judicial bodies (such as a disciplinary commission or court, or a branch of the high judicial council)". One issue remains, however unresolved – it is the absence of an appeal to a court of law against decisions of the SJC in disciplinary matters.²⁰

¹⁷ CDL-AD(2014)038, § 68.

¹⁸ CDL-AD(2017)019.

¹⁹ On the second part of this citation – the right of judge to challenge the sanction – see below.

²⁰ In other respects, the Venice Commission refers the Armenian authorities to the October 2017 opinion, in particular, to an observation made in § 140 that a 2/3 majority of the SJC members required to bring a judge to a disciplinary liability may be a very high threshold.

a. Appeals against the decisions of the Supreme Judicial Council in disciplinary matters

32. The proposed amendments contain a new provision on “appealing” decisions of the SJC (see new Article 156-1). However, this mechanism can hardly be characterised as a proper “appeal”. It rather resembles a re-opening by the same body (the SJC) of a previously decided case on newly discovered circumstances.²¹ The very notion of “appeal” implies the control by another body of the legality and merits of the decision based on the same (and not newly discovered) facts and evidence. So, the proposed mechanism cannot replace an appeal in the proper sense of this word.

33. This issue has been already discussed in the October 2017 opinion. The arguments of the current Government in this respect were nearly identical to the arguments of the previous one (see § 147 of the October 2017 opinion): that the Constitution gives the SJC the ultimate power to decide on disciplinary matters, that it does not give the Court of Cassation the right to hear appeals against the decisions of the SJC, and that in disciplinary matters the SJC is acting as a court, both from procedural and institutional points of view. So, an appeal to a court of law against the decisions of the SJC is not only constitutionally impossible, but simply unnecessary, since the judge concerned may enjoy all the guarantees of “fair trial” before the SJC itself.

34. In the opinion of the Venice Commission, there are several reasons to seriously consider introducing an appeal against the decisions of the SJC. First, Article 6 of the European Convention on Human Rights (ECHR) guarantees, implicitly, the right of access to court. Assuming that a disciplinary sanction against a judge affects his or her civil rights and obligations, this judge must be given such access. The question is whether the Armenian SJC qualifies as a “court”. In the case of *Ramos Nunes de Carvalho e Sá v. Portugal* the Grand Chamber of the European Court of Human Rights (ECtHR) concluded that since the Portuguese High Council of the Judiciary was an administrative body,²² Article 6 would require “subsequent control by a judicial body that has full jurisdiction” (§ 132), i.e. full appeal. In other words, if the ECtHR finds that the SJC does not satisfy the requirements of a judicial body (contrary to what is proclaimed in Article 175 (2) of the Constitution), the necessity to have an appeal to a court of law would stem from the requirements of the European Convention.

35. Secondly, even if no question under Article 6 arises, the need to have an appeal to a court of law in disciplinary matters stems from a number of European documents, such as, for example, Opinion no. 10 by the CCJE.²³ P. 39 of Opinion no. 10 says that “some decisions” of the JC such as “the decisions in relation to [...] discipline and dismissal of judges” should be “subject to the possibility of a judicial review”. The standards of the Committee of Ministers are more flexible: Recommendation CM(2010)12, in p. 69, says 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.” So, the CM Recommendation will be complied with if there is a possibility to challenge the sanction – but it is not specified whether the body hearing an appeal needs to be a court of law. In any event, the CM requires a second degree of jurisdiction in those matters, which is absent in the Armenian system.

36. Finally, the Venice Commission itself on several occasions recommended having an appeal against the decisions of the judicial councils in disciplinary matters,²⁴ although acknowledging that this appeal may be of a limited scope. Thus, in an opinion on North Macedonia the Venice Commission recommended that “the Appeal Council should be able to annul decisions of the JC

²¹ The “appeal” is possible “where an essential evidence or circumstance has emerged which the judge did not previously introduce due to circumstances beyond his or her control and which may reasonably affect the decision”.

²² It is important to note that the “administrative” character of the Portuguese High Council was accepted by the parties, so the ECtHR took it for granted.

²³ Which is a pan-European body composed of the representative of the national judiciaries.

²⁴ Including in the first opinion on the new Armenian Constitution, see CDL-AD(2015)037, § 153.

only in cases of gross errors in the application of procedural and substantive law”,²⁵ and in an opinion on the Bosnia and Herzegovina it noted that the appeal to a court of law against the decisions of the HJPC was required “at least for cases where a serious penalty was imposed”.²⁶ In the October 2017 opinion, the Venice Commission stressed that “in exercising its appellate review the appellate body should act with deference to the [Judicial Council] as regards the establishment of the factual circumstances and interpretation of the relevant rules of conduct”.²⁷

37. The possibility of appeals against the decisions of the SJC was omitted from the Constitution, and the Armenian authorities refrained from introducing it at the legislative level. The Venice Commission takes the arguments of the Armenian authorities about the meaning of the constitutional text very seriously, even though, in its opinion, the Constitution may be construed differently. Nevertheless, if a constitutional reform is envisaged, it invites the authorities to consider introducing a possibility of an appeal against decisions of the SJC in disciplinary matters, even if of a limited scope.

b. Other changes regarding the Supreme Judicial Council

38. The Package proposes to reduce the term of mandate of the President of the SJC. Under the amended Article 84 (9) of the JC the President of the SJC will be elected for a term of one year, whereas previously the President was elected until the end of his or her mandate. Pursuant to the draft JC, the President will have no right to be re-elected. Since there are 10 members of the SJC elected for 5 years, the new rule comes very close to introducing a rotating presidency. There is nothing wrong with this model; however, it is unclear what would happen with the incumbent President, whether his mandate will expire with the adoption of the new rule. It is important to respect the security of tenure of the current office-holders, so, as to the incumbent President, a transitional rule respecting his legitimate expectations would be advisable.²⁸

V. Changes to the substantive rules on the disciplinary liability of judges

39. The grounds for bringing a judge to a disciplinary liability are enumerated in Article 142 of the JC. This provision makes a reference to the rules of judicial conduct as stated in Article 69, as well as to the duty not to infringe the law in the process of adjudication.²⁹

40. Admittedly, some of the grounds for bringing the judge to a disciplinary liability are formulated in a rather vague manner: “discrediting the judiciary” or “decreasing the public confidence in the independence and impartiality of the judiciary” in Article 69 are amongst them. However, to a certain degree it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility. That was previously recognised by the Venice Commission.³⁰ Where the legislator uses such formulas, it is particularly important which body is assigned with their interpretation and application in practice. In Armenia this task is assigned to the SJC, which enjoys sufficient institutional independence and offers basic guarantees of fair trial (see Chapter 14 of the JC). It is also important that the disciplinary liability may only be engaged for violations

²⁵ CDL-AD(2019)008, § 35.

²⁶ CDL-AD(2014)008, § 110.

²⁷ CDL-AD(2017)019, § 151

²⁸ The Venice Commission, in its Opinion on the draft law on introducing amendments and addenda to the Judicial Code of Armenia (term of office of court presidents, CDL-AD(2014)021, §§ 46 et seq.), argued against an immediate termination of the mandate of all court presidents due after the enactment of the new rules on the duration of mandate of the Court presidents. A similar conclusion was reached in the Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General 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 (CDL-AD(2014)031), §§ 95 et seq.

²⁹ By referring to the “violation of provisions of substantive or procedural law while administering justice [...] committed deliberately or with gross negligence” – see Article 142 (1) p. 1.

³⁰ See the October 2017 opinion, §67.

of rules of judicial conduct, not the more imprecise notion of “rules of ethics” (see Article 68 (3) of the JC). So, it is possible to leave further development and concretisation of those open-ended standards to the SJC, provided that it follows other precepts of the law (related to the intent or gross negligence by the judge, to the material consequences of the breach, etc. – on this see more below).

A. New rules of conduct and new forms of the disciplinary liability

41. The amended JC introduces certain new duties for the judges and people closely affiliated to them (mostly related to the acceptance of gifts and the duty to submit financial declarations). Furthermore, certain provisions of the JC have been reformulated in order to expand the judge’s obligations, extend time-limits for bringing them to liability etc. As an important preliminary remark, the Venice Commission expects that those provisions will not have retroactive effect, as the Armenian authorities assured the rapporteurs during the visit. To make sure this understanding of the amendments is followed in practice, the Armenian legislator might consider including a special clause on non-retroactivity to the text of the JC.

a. Duty to submit a financial declaration

42. The new pp. 15. and 16 of Article 69 (1) of the JC introduce two new rules of conduct of a judge: a duty to submit a declaration of the property, income and interest in accordance with the law “On Public Service” (p. 15), and a duty to submit to the CPC “materials justifying any changes in the property”, as prescribed by the law “On the Commission for the Prevention of Corruption” (point 16). Non-fulfilment of those duties may lead to a disciplinary liability. The Venice Commission welcomes the inclusion of these two new provisions, which are an important step in the process of eradicating corruption.³¹ The Venice Commission stresses, however, that the change in the judge’s financial situation should be of a certain magnitude to trigger the obligation set in p. 16. The judge cannot be required to explain every single expenditure he or she might incur, but only those which are clearly out of proportion to his or her official income. Moreover, it is important that the requirements to the content of the declarations are reasonable, that they do not put an impossible obligation on the judges and on their close relatives, and do not expose their private lives more than necessary for preventing corruption. As to the scope and specific practical modalities of the obligation to declare assets, income and interests, and to explain “changes in property”, the Venice Commission refers the Armenian authorities to the expertise of GRECO.

43. Article 149 of the JC provides that the most severe disciplinary penalty – the termination of powers – is reserved for essential disciplinary violations. A failure to report the information according to pp. 15 and 16, cited above, is listed as essential disciplinary violation (Article 142 (6) p. 2). This is acceptable as long as the principle of proportionality is observed, which is expressly stated in Article 149 (2).

b. Rules on accepting gifts

44. Amended Article 73 changes the definition of a gift a judge should not accept. It removes the currently existing condition that in order to be unacceptable a gift should be “related to the performance of his or her official duties”. Henceforth all the gifts – except in the specific situations described in pp. 3 and 4 of this article – will be unacceptable. The list of exception is broad enough; whether this list is compatible with the international best practices may be verified by the Armenian authorities in consultations with the GRECO experts. On the face, the general rule and

³¹ See CDL-AD(2002)15, § 57 and § 70 where the Venice Commission welcomed the obligation of the judges to submit their declaration to the Court of Auditors.

the list of exceptions do not appear unreasonable and seem to go in the same direction as the rationale behind Article 12 of the Council of Europe Criminal Law Convention on Corruption.³²

c. Extending the declaration obligation to persons closely affiliated with the judge

45. The law "On Public Service" and the JC extend the declaration obligation and/or the rules on accepting gifts on people closely connected with the judge. This is a reasonable approach. Not only is a judge obliged to make such a declaration but so are his or her family members and other persons "affiliated with the declarant official" (see the amendments to Article 34 of the law "On Public Service").³³ Again, the Venice Commission invites the Armenian authorities to check with GRECO whether the definition of affiliated persons is in line with the European best practices. On its side, the Venice Commission only notes that it is unclear from the proposed amendments to what extent the failure of the persons closely affiliated with the judge to submit a declaration and explain any changes in the property, or the failure of the judge's close relative to respect the rules on accepting gifts may be used as a ground for bringing the judge to a disciplinary liability.³⁴

46. Article 73 also regulates the gifts received by close relatives of the judge residing with him or her. P. 6 of this article obliges the judge to inform the EDC about gifts received by his/her close relatives if those gifts "may be reasonably perceived as given in relation to the official duties of the judge". This last condition was removed insofar as the gifts received by the judge him- or herself are concerned. It is unclear whether the fact that this condition remained in respect of the judge's relatives is an omission, or an attempt to distinguish between the legal regime of the gifts received by the judge and gifts received by the judge's close relatives. This should be clarified.

d. Grounds for imposing disciplinary sanctions

47. Amended Article 142 of the JC provides that the judge can be held disciplinary liable for "violation of provisions of substantive or procedural law" ((1) p.1) or for "violation by the judge of the rules of judicial conduct" ((1) p. 2).³⁵ Article 149 clarifies which sanctions can be imposed, ranging from a warning to the dismissal of the judge in case of an 'essential disciplinary violation'. The latter notion is explained in Article 142 (6) of the Code. It is further provided that the judge can be held responsible only in cases when the acts were committed intentionally or with gross negligence. This is a useful addition.

48. However, the definition of "gross negligence" is not entirely satisfactory.³⁶ It would be better to indicate that the breach of the rules of the procedural or substantive law could not be only "reasonably assumed" but be *evident*. Indeed, the difference between simple error and "gross negligence" is a matter of degree, but the language of the law should show that only errors obvious for any legal professional can be punishable with a disciplinary sanction. That would

³² Which reads: "Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of *any undue advantage* [emphasis added] to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 [Article 11 refers to holders of judicial office] in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."

³³ In the recent opinion on Romania, the Commission stated: "The intended material benefit [...] should, however, extend beyond the individual and his/her family members, and include benefits to individuals and organisations in which the official has an interest - for example, a political party". According to those working in the field, in most cases a friend or a colleague benefits from the offence.

³⁴ See the wording of pp. 15 and 16 of Article 69 (1) which implies that the disciplinary liability may be triggered only by the judge's failure to submit his or her own declaration.

³⁵ Rules of conduct are defined in Articles 69 and 70, and, by virtue of Article 69 (1) (11) – by Article 73, regulating gifts.

³⁶ "Where the judge did not realize the unlawfulness of his or her conduct, though he or she could and ought to have reasonably done it in that situation"

reinforce a very important reservation made in p. 7 that the overturning of a judge's decision on appeal does not by itself justify imposing a disciplinary liability which is in line with CM Recommendation 2010/12 (p. 66) and the CCJE Opinion No 3. In addition, the definition of "gross negligence" may be compared with the definition of this term contained in the Criminal Code.

49. The intent or gross negligence describe the fault of the judge, *mens rea*. The next question is to what extent the *material consequences* of the breach are relevant in the context of the disciplinary breaches (provided that the subjective element – the "intent or gross negligence" - is present). "Consequences" are mentioned in the definition of an "essential violation" (see 6 (2)) of the rules of conduct, and, albeit not explicitly, in the context of the breach of the law which should be serious enough to "dishonour the judiciary". Furthermore, "consequences" define the level of a disciplinary penalty appropriate in the circumstances (Article 149 (2)). In sum, it appears that under the JC, disciplinary breach and the sanction are defined with reference to both the subjective element ("intent or gross negligence") and objective element (the material consequences of the breach). This is a correct approach, although it might have been expressed more clearly. In additions, as the Venice Commission recommended in CDL-AD(2017)019 "...it will be preferable not 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...".

e. Human rights violations as a ground for disciplinary sanctions

50. Amended Article 142 (6) p. 1 gives a definition of "essential" disciplinary violation related to the violation of provisions of substantive or procedural law in the exercise of the judicial duties (Article 142 (1) p. 1). Under Article 164 (9) of the Constitution, only essential ("gross") disciplinary violations may lead to the dismissal of a judge by the SJC. To be "essential" (and thus potentially punishable with a dismissal) the violation of law should *inter alia* "result in fundamental violation of human rights or freedoms stipulated by the Constitution or international treaties ratified by Republic of Armenia". This formulation is better than the previously envisaged proposal to declare every act of a judge which led to a finding of a violation of the ECHR by the ECtHR as a disciplinary offence. The Venice Commission recalls that the ECtHR never establishes a personal guilt of an individual judge. Its conclusions relate to the malfunctioning of the national system as a whole which can rarely be reduced to the fault of an isolated judge. Article 142 (9) contains an important reservation³⁷ which should be taken into account in the interpretation of new Article 142 (6) p. 1. That being said, there is nothing wrong in explicitly mentioning human rights infringements established by international courts if the judge's acts can be explained by intent or gross negligence, so the proposed text is acceptable.

f. Duty to submit financial declarations and the burden of proof

51. According to Article 142 (1) p. 2, "violation of the rules of judicial conduct prescribed by the JC is a ground for imposing disciplinary action against a judge". However, it is not entirely clear how pp. 15 and 16 of Article 69 (1) will be applied in the context of Article 142. As they are formulated now, pp. 15 and 16 establish two purely *procedural* obligations of a judge: to submit a declaration and to explain "changes in property". What would happen if the judge complied with those two obligations, but his or her declaration is inaccurate, or if the explanation he or she gives is implausible? Would it be possible for the SJC to sanction the judge for the flaws in the declaration or for the lack of a reasonable justification of expenditures, and, if so, who should prove what in such situations?

52. The JC does not explain how the burden of proof is distributed. Some of the provisions of the JC imply that that the judge's "fault" is a pre-condition for bringing him or her to disciplinary liability, and that the burden of proof is always on the body which brings the case before the

³⁷ "Interpretation of the law or assessment of facts and proofs while administering justice and exercising — as a court — other powers provided for by law may not itself result in disciplinary action."

SJC.³⁸ However, it may be very difficult to prove the illicit character of certain assets or transactions, so there are good reasons to distribute the burden of proof differently. For example, the JC might establish that if a judge's expenditures substantially exceed his official income, he or she must provide a reasonable explanation of their lawful origin, failing which he may be considered in breach of the rules of conduct. Whether or not to establish such a rebuttable presumption is within the discretion of the authorities, but, at least, the JC (and not other laws) must be clearer as to how the burden of proof is distributed in such cases. Again, in those matters best practices of other countries may provide a useful guidance, and the Armenian authorities may seek advice of GRECO experts in this regard.

B. Removal of court presidents as a disciplinary sanction

53. Article 166 of the Constitution provides that presidents of the courts are appointed by the President upon proposal of the SJC, for a fixed term. The President of the Court of Cassation is appointed by Parliament upon proposal of the SJC. The question is whether the court presidents and, in particular, the President of the Court of Cassation, may be removed, by way of disciplinary proceedings, if the breach imputed to him or her is not sufficiently grave to justify their dismissal as a judge.

54. The fact that a court president is appointed for a fixed term does not exclude the possibility of an early termination of his or her function as a president. Judges of the CC, even though they are also appointed for a fixed term (cf. Article 164 (9) and Article 166 (1)), can be removed for a serious disciplinary violation. Furthermore, the body deciding on the removal should not be necessarily the same as the body deciding on the appointment (again, judges of the CC are elected by Parliament but may be dismissed by the decision of the CC itself). To guarantee the security of tenure it is important that the grounds for dismissal are described sufficiently clearly in the law (or even in the Constitution), that they are serious enough to warrant this measure, that they exclude removal on political grounds or because of the simple disagreement with the judge's decisions in his/her capacity of a judge or a president, that the body deciding on the early termination of mandate is sufficiently independent, and that the removal is accompanied with the main guarantees of due process of law. All those elements are present in the disciplinary procedure under the JC. Therefore, adding a new disciplinary sanction – removal from the position of the president – is not contrary, on the face, with the logic of the Constitution or with the European standards.

C. Recruitment and evaluation

55. Amended Article 97 of the JC lowers the required age to become a judge from 28 years to 25 years. During the visit to Armenia, the rapporteurs heard a lot of criticism about the idea of lowering the minimal age to become a judge. However, the Venice Commission cannot criticize this proposal *in abstracto*, since it does not have sufficient knowledge of the Armenian education system, the "demographics" of the Armenian judiciary etc. As to the Council of Europe standards regarding conditions for appointing judges, they do not mention certain age as a limit even though there are national systems with such provisions.³⁹ When the Council of Europe standards are

³⁸ Thus, Article 142 (10) stipulates that "Disciplinary action shall not be imposed against a judge in case of absence of his or her guilt." Article 143 stipulates that the body having instituted the proceedings has the obligation to prove that there is a ground to impose a disciplinary penalty on a judge. Further down this Article provides that "any unresolved doubts as to the disciplinary violation committed by a judge shall be interpreted in favour of the judge" – which means a very high standard of proof in those matters.

³⁹ CM Recommendation 2010(12) suggests that decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity. There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. A requirement that a judge or a candidate

followed (i.e. judges are appointed without any discrimination, on the base of merit, having regard to qualifications, skills and capacity to fulfill judicial duties), the lower age of the candidate is within the discretion of the authorities.

56. The procedure of recruitment of new judges comprises two main phases: a written test and an interview. The results of the written test are checked by an evaluation commission, established by the SJC and composed of five judges and two legal scholars.⁴⁰ The interview is conducted by the SJC, which is followed by the voting. The Venice Commission recalls its earlier observations on this point, namely that the role of the written test in the appointment procedure is not clear. Is it a “pass-fail” exercise, or are all of the candidates ranked, according to the marks received following the written test? If the latter is true, how do those marks influence the voting in the SJC? It appears that the voting is discretionary and is completely detached from the results of the written test. Consequently, the SJC may select a candidate who obtained very poor results in the written test, and vice versa – not to elect a candidate with excellent grades. This should be clarified, at least in general terms. Written tests permit to evaluate the knowledge and the skills of the candidates in a more objective way. Therefore, the result of the test should play at least some role in the final appointment decision. Indeed, that does not exclude that the final ranking of the candidates must also be influenced by their performance at the interview. Probably, a mixed system, where the points obtained at the written test are added to the points obtained at the interview, could be used.⁴¹ That being said, the most important guarantees against arbitrariness are the transparency of the procedure and the reasoning of the appointment decisions.

VI. Early retirement of judges of the Constitutional Court

57. One of the amendments contained in the Package stands apart: this is an amendment to the Law on the Constitutional Court (the CC) which introduces the possibility for a certain category of CC judges (members – i.e. those justices who obtained their mandates under the old Constitution for life, until retirement) to resign before the end of the mandate with several advantages, if they so wish. The authorities were straightforward as to what their intentions are: they want to offer certain judges whom they associate with the “old regime” a “dignified exit”, as an alternative to more radical modalities which were considered earlier this year. The authorities defended this proposal by reference to a revolutionary context, which necessitates the renewal of the composition of the CC appointed largely under the previous regime, and by the public distrust in the current composition of the CC.

58. The Venice Commission wishes to underscore that the security of tenure of constitutional court judges is an essential guarantee of their independence. Immovability is designed to shield the constitutional court judges from influence from the political majority of the day.⁴² It would be unacceptable if each new government could replace sitting judges with newly elected ones of their choice.

59. Armenia plans an exceptional early retirement scheme invoking the implementation of a new Constitution in a post-revolutionary context and considers that the shift from the life-time tenure of constitutional justices (provided by the old Constitution) to fixed-term mandate (provided by

for judicial office must be a national of the state concerned should not be considered discriminatory (pp. 42., 43 of the Recommendation).

⁴⁰ Members of the evaluation commission are selected by drawing lot from the list composed by the Training Commission of the General Assembly of Judges and by the Ministry of Justice.

⁴¹ As regards the “psychological tests”, the Venice Commission was always skeptical about their usefulness and reliability. It is thus positive that although the recruitment procedure still involves such test, its results are not binding.

⁴² See CDL-STD(1997)020, the Report on the composition of the constitutional courts, 1997, p. 21, where the Venice Commission stressed that a ruling party should not be in a position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms. One way of accomplishing this can be by long terms of office or office until the age of retirement.”

the new one) should be applied immediately. The Venice Commission has previously criticised such early retirement schemes when they were mandatory⁴³ or when they affected a large number of judges.⁴⁴ This is, however, not the case in Armenia where the resignation depends on a voluntary decision of the “old” CC justices. In the light of the very specific circumstances prevailing in Armenia as set out above, the Venice Commission may accept that the situation is genuinely exceptional and, therefore, it will not oppose to this measure.

VII. Conclusion

60. The Judicial Reform Package, developed by the Ministry of Justice, generally deserves praise. In the process of preparation of the Package the Government of Armenia acted in a responsible and thoughtful manner and demonstrated openness to dialogue with all interlocutors, within and outside the country.

61. The large majority of proposals contained in the Package are in line with European standards and contribute to combatting corruption without, at the same time, encroaching on the independence of the judiciary. Nonetheless, clarifications and, in places, improvements are called for. The most important recommendations by the Venice Commission are as follows:

- The new pluralist composition of the Ethics and Disciplinary Commission (including judges and non-judicial members) is welcome, but the legislator might consider including there a representative of the Court of Cassation;
- While the current method of election of members of the Commission for the Prevention of Corruption (the CPC) by direct nominations may be acceptable, it needs to be revisited in a foreseeable future, once the CPC becomes operational;
- It is necessary to develop – probably, at the constitutional level – a mechanism of appealing decisions of the Supreme Judicial Council (the SJC) in disciplinary matters;
- The new duties of the judges related to the financial declarations are acceptable (provided they are not retroactive), but the JC must be clearer as to how the burden of proof is distributed in such cases. The responsibility of a judge for violation of human rights should be treated like any other violation if there is intent or gross negligence;
- The JC should explain better the role of the written test and of the interview in the process of recruitment of young judges.

62. One aspect of the proposed reform stands apart, namely the early retirement scheme proposed to the judges of the Constitutional Court appointed for life under the old Constitution. In principle, it is important to respect the stability of a judicial office. It is not normal if the composition of the Constitutional Court changes every time a new Government comes to power. However, in the specific context of Armenia the proposed early retirement scheme may be accepted, provided that it is justified by the fundamental political change and on condition that it remains strictly voluntary.

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

⁴³ CDL-AD(2017)031, §§ 44-52 and 130.

⁴⁴ CDL-AD(2012)001, §§ 102-110. Furthermore, on 6 November 2012 the Court of Justice of the European Union ruled that the sudden lowering of the retirement age for judges in Hungary violated European equal treatment rules (C-286/12, European Commission versus Hungary). In its judgment, the Luxembourg Court stated that early retirement could also “undermine the operational capacity of the courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary”.