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<u>EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW</u>

(VENICE COMMISSION)

ARMENIA

DRAFT JOINT OPINION
OF THE VENICE COMMISSION
AND THE DIRECTORATE GENERAL
OF HUMAN RIGHTS AND RULE OF LAW (DGI)
OF THE COUNCIL OF EUROPE

ON THE DRAFT AMENDMENTS TO THE JUDICIAL CODE

On the basis of comments by

Mr Bertrand MATHIEU (Member, Monaco)
Ms Hanna SUCHOCKA (Honorary President, Poland)
Mr Gerhard REISSNER (Expert, DGI)

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I. Introduction

1. By letter of 25 August 2022, the former Minister of Justice of Armenia, Mr Karen Andreasyan, requested an opinion of the Venice Commission on the draft Constitutional Law on making supplements and amendments to the Constitutional Law on the Judicial Code (CDL-REF(2022)052, hereinafter "the draft Law").

2. Mr Bertrand Mathieu, Ms Hanna Suchocka, and Mr Gerhard Reissner (the expert for the Directorate General on Human Rights and Rule of Law, DG I) acted as rapporteurs for this joint opinion. Owing to the time constraints, a visit of the rapporteurs to Yerevan was replaced with online meetings with the competent national authorities and other relevant stakeholders. The online meetings took place on 4 November 2022 with the participation of the rapporteurs accompanied by Mr G. Dikov and Ms S. Japaridze from the Secretariat. The rapporteurs met with the acting Minister of Justice of Armenia, the National Assembly, the judicial members of the Supreme Judicial Council, the judge of the Court of Cassation and with the representatives of civil society. The Commission is grateful to the Council of Europe office in Yerevan for the excellent organisation of the online meetings.

3. This joint opinion was prepared in reliance on the English translation of the draft Law. The translation may not accurately reflect the original version on all points.

4. *This joint opinion was drafted on the basis of comments by the rapporteurs and the online meetings. [Following an exchange of views with ***,] it was adopted by the Venice Commission at its *** Plenary Session (Venice, *** 2022).*

II. Background

5. As noted by the Venice Commission in its previous opinions, there has been a general public mistrust in the judiciary in Armenia. In particular, many interlocutors see the current system of disciplinary liability of judges as inefficient and over-protective of judges. After the "velvet revolution" of 2018 the new government envisaged a comprehensive vetting of all judges,[1] and later proposed to redefine the incompatibility requirements with retroactive effect.[2] However, as a result of the ongoing dialogue with the Council of Europe,[3] the Armenian authorities abandoned these radical plans, and, instead, developed a set of less radical measures which would aim *inter alia* at improving the mechanisms of disciplinary liability of judges. On 21 July 2022, the Government of Armenia approved the Strategy of Judicial and Legal Reforms for 2022-2026 and the resulting Action Plan.[4] The Venice Commission welcomes the openness of the Armenian authorities to a genuine dialogue with the Council of Europe, and their continued effort to improve the system of judicial governance in line with the European standards, within the boundaries set by the national Constitution, and in view of the overall legal and political context of the country.

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[1] See Venice Commission, CDL-AD(2019)024, Armenia - 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), on the amendments to the Judicial Code and some other Laws, paras. 12-13.
[2] See Venice Commission, CDL-AD(2022)002, Armenia - 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), on the draft laws on making amendments to the Constitutional Law on the Judicial Code and to the Constitutional Law on the Constitutional Court, paras. 19-21.
[3] Which involved in particular the review of the Judicial Code conducted by Mr. Gerhard Reissner (former President of the Consultative Council of European Judges) and Mr. Duro Sessa (former President of the Consultative Council of European Judges, the President of the Supreme Court of Croatia), within the Council of Europe project "'Support to the judicial reform – enhancing the independence and professionalism of the judiciary in Armenia'".
[4] Decision of the Government No 1133-L.

6. Two elements of the current disciplinary mechanism were in particular discussed between the Council of Europe and the Armenian authorities: the power of the Minister of Justice to initiate disciplinary cases against judges, and the absence of a proper system of an appellate review of the decisions of the Supreme Judicial Council in disciplinary matters.

III. Analysis

A. The power of the Minister of Justice to initiate disciplinary proceedings against judges

7. Under the Judicial Code currently in force (hereinafter "the JC"), there are three actors who may institute disciplinary proceedings against a judge: the Ethics and Disciplinary Commission of the General Assembly of Judges (the EDC), the Minister of Justice, and the Commission for Prevention of Corruption.[5] The body deciding on the disciplinary liability of judges is the Supreme Judicial Council (hereinafter "the SJC"), which is composed of five judges elected by the General Assembly of Judges and five prominent lawyers elected by the National Assembly.[6]

8. Under the draft Law, the Minister of Justice retains the power to initiate disciplinary proceedings before the SJC. While such a power of the Minister is not unknown in other countries and is not in itself in conflict with the European standards, in the Armenian context it attracted criticism from the Group of States against Corruption (GRECO) in its evaluation[7] and compliance reports,[8] and from the Venice Commission.[9] The Commission recommended in particular that in the light of the reform of the EDC (which resulted in the inclusion of two external non-judge members in the composition of EDC), it should be "possible to envisage that the power of the Minister could be phased out once the new system is up and running".[10]

9. The Venice Commission is aware that in some European legal orders, especially in the post-soviet countries, the power of the Minister of Justice to initiate disciplinary proceedings and conduct investigations in disciplinary cases was sometimes instrumentalised in order to intimidate judges.[11] Even if claims in this regard have not been raised so far, and even though the involvement of the Minister is currently seen as a tool helping to combat judicial corporatism, as suggested by some interlocutors, in a longer perspective it would be preferable to withdraw the power from the Minister, as soon as other mechanisms – namely the EDC – prove their efficiency.[12]

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[5] The latter may only institute disciplinary proceedings connected to infringements of obligations to submit asset declarations. Article 145 part 1.1. JC.

[6] Article 174 part 2 and 3 Constitution.

[7] See GRECO, *Evaluation Report Armenia*, Fourth Evaluation Round, adopted on 12-16 October 2015.

[8] See GRECO, *Interim Compliance Report Armenia*, Fourth Evaluation Round, adopted on 20-22 September 2021, paras. 41 and 43.

[9] See Venice Commission, CDL-AD(2017)019, Armenia - Opinion on the draft Judicial Code, and CDL-AD(2019)024, cited above.

[10] See Venice Commission, CDL-AD(2019)024, cited above, para. 30.

[11] See, for example, the discussion about the Polish system where Article 112b. para 1 of the Law on Ordinary Courts states that "the Minister of Justice may appoint a Disciplinary Ombudsman of the Minister of Justice to handle a specific case involving a judge. The appointment of the Disciplinary Ombudsman of the Minister of Justice shall exclude any other ombudsman from taking action in the case.", in K. Wąsowska, *System dyscyplinarny sędziów pod kontrolą Ministra Sprawiedliwości* (Disciplinary system of judges under the control of the Minister of Justice), in *For Analiza*, 15 February 2019.

[12] The Venice Commission explained its position in a recent Opinion on Lebanon where it stressed that "if only the Minister may trigger disciplinary proceedings, this may be problematic". However, "what the Venice Commission would seek […] is a balanced system where the power to investigate disciplinary complaints [against judges] and bring cases before [a disciplinary body] belongs neither exclusively to the Ministry […] nor exclusively to the judges themselves". See Venice Commission, CDL-AD(2022)020, Lebanon - Opinion on the draft law on the independence of judicial courts, para. 71.

B. The new system of appeal

10. The draft Law introduces a new mechanism of appeal against the decisions in disciplinary matters. Currently the SJC decides on disciplinary cases in a plenary composition with a minimum of 6 members present.[13] To subject a judge to disciplinary liability or dismiss a judge a simple majority of votes is currently required.[14] The decision of the SJC enters into force immediately upon delivery[15] although the law provides for a remedy which the law calls an "appeal" but which is limited to the situations where essential evidence or circumstance has emerged which the person bringing the appeal did not previously submit due to circumstances beyond his or her control and which could have reasonably affected the original decision.[16]

11. The draft Law proposes to split the plenary SJC into two panels. Disciplinary cases will be first examined by a panel of four members of the SJC (the first instance panel). This panel will include two judicial members (elected by the General Assembly of Judges) and two lay members (elected by the National Assembly). This panel shall be formed by drawing lots as prescribed by the SJC (draft amendment to Article 141 of the JC, new paras. 1.1, 1.4 and 1.5). The draft Law explicitly declares that each of the panels acts on behalf of the SJC, while "acting as the Supreme Judicial Council".[17] Parties to disciplinary proceedings will be entitled to lodge appeals against the decision rendered by the first instance panel. Such appeals shall be examined by the second instance panel composed of the remaining members of the SJC (those who have not participated in the adoption of the decision by the first panel).

1. Elements of the law which need to be clarified

12. Before turning to the analysis of the substance of the proposed changes, the Venice Commission notes that some elements of the new appeal mechanism need to be clarified in the law.

13. The rules concerning the composition of the first instance panel (the number of judge and lay members, the method of forming a panel (by drawing lots) is clearer than the rules concerning the composition of the second instance panel. It is understood that the second instance panel is composed of the remaining six members of the SJC who were not sitting on the first instance panel, but the text of the law should be clearer on this point. Thus, for example, if a member selected by lot to sit on the first instance panel could not take part in the examination of the case (for reasons other than the conflict of interests), would he or she be the member of the second panel?

14. New Article 156.2 para. 4 envisages the postponement of the examination of an appeal for up to maximum three months in case the number of members is less than five. However, the same Article provides for exceptions when the second instance panel can operate with less than five members (when the panel is not replenished within the set time-limit provided by law and in case of recusal or self-recusal of the panel member). It is necessary to stipulate clearly whether the quorum in the appeal panel can ever be less than five.

[13] Article 92 (2) of the JC.
[14] Article 94 (6) of the JC; there seems to be a discrepancy between the Armenian text (requiring the majority of participating members of the SJC with a minimum of 5 votes in favour) and the English translation (requiring the majority of all members, i.e. 6 votes in favour).
[15] Article 155 (7) of the JC.
[16] Article 156.1 (1) of the JC.
[17] Article 141 (1) p. 1.2 and Article 156.2. (3) of the JC

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15. Finally, it is necessary to ensure that the proposed amendments to the disciplinary procedures are properly reflected in other Articles of the JC which at places still refer to the plenary SJC as a decision-making body (see, for example Article 151 (1)).

2. Compliance with the European standards

16. As follows from the explanatory note to the draft Law, the new mechanism of appeal against the decisions of the SJC in disciplinary matters was supposed to address the criticism expressed previously in this regard by the Venice Commission[18] and GRECO.[19] Thus, in the two previous Opinions on the Judicial Code of Armenia (of 2017 and of 2019) the Venice Commission argued that the obligation of the member States to have a proper appeal mechanism can arguably be derived from the ECtHR case-law and is more clearly formulated in a number of other applicable European instruments. The Venice Commission suggested considering other solutions such as "the creation of a special appellate panel for disciplinary matters within the SJC" (see para. 150 of the 2017 Opinion). As to GRECO, in its 2015 Report it recommended to "ensure […] the possibility for judges to challenge disciplinary decisions *before a court*" (italics added). In September 2021, GRECO published its Interim Compliance Report,[20] which reiterated its concern about the lack of possibility to challenge a disciplinary decision including dismissal.[21]

17. The previous recommendations by GRECO and by the Venice Commission were based on the European standards in the area of judicial independence and fair trial. However, an important distinction should be made between the right to a *judicial review* of a disciplinary sanction, and the right to have *two degrees of jurisdiction in such matters* – the right of appeal *stricto sensu*.

18. The right to a judicial review of a disciplinary sanction may be derived from Article 6 of the ECHR. However, Article 6 does not require an appeal against a disciplinary decision if this decision itself has been rendered by a judicial body.[22]

19. Under the Constitution and the law the SJC in disciplinary matters acts as a court. It ultimately belongs to the ECtHR do decide whether the Armenian SJC qualifies as a "court" within the meaning of Article 6 (see para. 34 of the 2019 Opinion), but for the Venice Commission this question can be answered in the affirmative, since the SJC possesses all main characteristics of a judicial body, both institutional and procedural.[23]

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[18] See Venice Commission, CDL-AD(2017)019 and CDL-AD(2019)024.
[19] See GRECO, *Evaluation Report Armenia*, Fourth Evaluation Round, adopted on 12-16 October 2015
[20] See GRECO, *Interim Compliance Report Armenia*, Fourth Evaluation Round, adopted on 20-22 September 2021.
[21] According to recommendation VII, "GRECO recommended reforming the procedures for the recruitment, promotion and dismissal of judges, including by i) strengthening the role of the judiciary in those procedures and reducing the role of the President of the Republic and requiring him to give written motivations for his decisions and ii) ensuring that any decisions in those procedures can be appealed to a court."
[22] This approach can be illustrated by the case of *Ramos Nunes de Carvalho e Sá v. Portugal* which concerned the lack of proper appeal against a decision of the High Council of the Judiciary in a disciplinary case against the judge. The European Court of Human Rights (the ECtHR) concluded in that case that since the Portuguese High Council of the Judiciary – *Conselho Superior da Magistratura*, the CSM – was an administrative body, Article 6 § 1 would require "subsequent control by a judicial body that has full jurisdiction" over disciplinary penalties imposed on a judge. See ECtHR, *Ramos Nunes de Carvalho e Sá v. Portuga*l, Nos. 55391/13, 57728/13 and 74041/13, Grand Chamber judgment of 6 November 2018, § 132. See also ECtHR, *Kozan v. Turkey*, No. 16695/19, Chamber judgment of 1 March 2022, *Gręda v. Poland*, No 43572/18, Grand Chamber judgment of 15 March 2022and *Żurek v. Poland*, No. 39650/18, Chamber judgment of 16 June 2022.
[23] Thus, SJC is defined as an "independent" state body (Article 173), and this independence is ensured in particular through its institutional design. Its members – both judicial and non-judicial ("reputed lawyers") – have sufficient stability of tenure (non-renewable mandate of five years – see Article 174

20. In sum, in the opinion of the Venice Commission, the absence of an appeal to a court of law against decisions of the SJC in disciplinary matters does not raise an issue from the ECHR perspective. However, even if the current system is not in conflict with Article 6 of the ECHR, it might still fall short of *other* Council of Europe standards.

21. In particular, in its Recommendation CM/Rec(2010)12, the Committee of Ministers of the Council of Europe (the CM) indicated that disciplinary proceedings against judges "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).[24] This recommendation is consonant with the United Nations' Basic Principles on the Independence of the Judiciary which stress that decisions in disciplinary proceedings should be subject to an independent review (principle 20).

22. Some other European institutions advocate for an even more stringent standard in this area. Thus, Opinion No.10(2007) of the Consultative Council of European Judges (CCJE) insists that "some decisions of the Council for the Judiciary in relation to [..] discipline and dismissal of judges should [... be] *subject to the possibility of a judicial review*" (italics added).[25] The CCJE Opinion No. 24 (2021) reiterates decisions in relation to judges' careers affect the rights protected by the ECHR and thus judges "must have a right to judicial review". In addition, "special attention should be paid to the independence and impartiality of any court reviewing the merits of the Council's decisions, including independence from the Council itself." [26] Thus, for the CCJE the right to "*challenge* the decision and sanction" (required by the CM Recommendation) should take the form of a right of *appeal to a court of law*.

23. The Venice Commission itself, in a number of opinions, recommended introducing a full appeal to a court of law against the decision of a judicial council.[27] In the Armenian context, the most evident solution would be to provide for a right of appeal before an ordinary court, most naturally the Court of Cassation. This option was suggested in the 2017 Opinion.[28] As shown by the comparative study conducted by the Ministry of Justice and summarised in the explanatory note to the draft Law, an appeal to a supreme judicial authority, most often to the Supreme Court, against decisions of the Judicial Council in disciplinary matters, exists in eleven members states included in the study. Only two member states have opted for having a remedy *within* the body which had decided the disciplinary case in first instance (Ukraine and Estonia).

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(4) of the Constitution) and enjoy sufficient guarantees against arbitrary removal (see Articles 85 et seq. of the JC, with further references). They receive appropriate remuneration (see Article 83 (2) of the JC) and are subjected to the strict incompatibility rules, and, when the SJC examines disciplinary cases, the possibility of recusal and self-recusal of the members is provided (Article 88 of the JC). When the SCJ examines disciplinary cases it follows a procedure which provides for all essential fair trial guarantees to the judge concerned (see Chapters 19 and 20 of the JC). The SJC has to issue reasoned decisions in disciplinary cases (Article 155 of the JC).

[24] See Recommendation CMR/Rec(2010)12 of the Committees of Ministers to member states on Judges: Independence, Efficiency and Responsibilities, adopted on 17 November 2010, para. 69.

[25] See Opinion No.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society, adopted on 21-23 November 2007, para.39.

[26] CCJE Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, para.15.

[27] See in particular, Venice Commission, CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, para. 25; see also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, paras. 92 and 110; CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 62

[28] See Venice Commission, CDL-AD(2017)019, para.149.

24. However, as explained by the drafters, giving to the Court of Cassation the power to hear appeals against disciplinary decisions to a body outside the SJC_may be constitutionally impossible. Article 175 para 1 points 7 and 8 of the Constitution entrusts the SJC with the *exclusive* power to decide on discipline and dismissals. The Constitutional Court in its Decisions SDO-1488 and SDO-1063 argued that the Constitution ruled out any possibility of appealing the SJC decisions to an external (judicial) authority.

25. At the time of the 2017 Opinion the Venice Commission proposed a less rigid reading of the Constitution (see para. 148), which would open a possibility of appealing the decisions of the SJC to the Court of Cassation. At the same time, the Venice Commission acknowledged – and still holds to this position of principle – that the final word in such discussions belongs to the Constitutional Court. The Commission also observes that the recommendation to introduce the right of appeal was not included in the revised Constitution, despite a clear recommendation to this end in the Venice Commission's 2015 opinion on the constitutional reform.[29] That implies that not giving the Court of Cassation the power of examining appeals against decisions of the SJC in disciplinary matters was a conscious choice of the constitutional legislator.

26. That means that other solutions, not involving an appeal to a court of law, should be explored. As noted in the 2019 Opinion, "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" (para. 35). This is what is proposed by the draft Law under examination.

27. The future mechanism does not introduce the "right of appeal" in the sense of a review by a separate appellate instance, as foreseen in most national legal orders, where the appellate instance is institutionally distinct from the first instance and composed of (often more senior) judges who permanently occupy their positions. Instead, in the proposed model both instances are composed of the members of the same body, and there is no permanent assignment to one of the two panels.

28. As explained to the Commission, this model was inspired by the mechanism of the ECtHR, where the judgments delivered by each of the Chambers of the Court (composed of 7 judges) may be reviewed by a Grand Chamber (composed of 17 judges most of whom are selected by lot specifically for each particular case).

29. That being said, <u>the</u> proposed form of the appellate review permits the judge concerned to have his or her case reviewed by a differently composed second-instance panel, which has more members, and which may review both factual and legal findings of the first-instance panel. For the Venice Commission, this model addresses the essence of the recommendation of the CM, which is to give the judge a possibility to "*challenge the decision and sanction*" in a disciplinary case.

30. There might be some ways of bringing the proposed model even closer to a classical appeal mechanism. Thus, the possibility of having a fixed composition of the first instance and second-instance panels was discussed with several interlocutors. However, as explained to the Commission, such model would be open to criticism, because it would create a relation of hierarchy between the members of the SJC, which are seen as equal in all other respects. Therefore, the current solution of panels created on *ad hoc* basis (like in the ECtHR) is more respectful of the constitutional provisions on the SJC.

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[29] See Venice Commission, CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 153

31. In sum, the proposed mechanism of appeals against disciplinary decisions brings the Armenian system in compliance with recommendation CM/Rec(2010)12. More stringent standard of an "appeal to a court of law" advocated by some other European bodies may necessitate a change to the Constitution, which, as understood by the Venice Commission, is a politically difficult endeavour at the moment. Therefore, the proposed model may be seen as an acceptable compromise solution which satisfies the essential European standard, while remaining within the boundaries set by the Constitution.

3. Constitutional limitations to the proposed model

32. Some of the interlocutors argued that the proposed system of the two panels within the SJC may be unconstitutional on other grounds. In their opinion, the Constitution requires that disciplinary decisions should always be taken by the SJC in its plenary composition, by a simple majority. Splitting the plenary into two panels would produce results incompatible with the constitutional design.

33. This type of argument has been previously examined by the Venice Commission in a number of opinions on other countries, in the context of the presumed "dilution" of the mandate of a constitutional body in the legislation.[30] Thus, in respect of the Supreme Prosecutorial Council (the SPC) of the Republic of Moldova the Venice Commission noted that the law may make institutional arrangements within the boundaries set by the Constitution, in particular by creating "panels, committees, etc." which "contribute to the work of the SCP or to which the SCP may delegate a part of its powers". However, the fundamental constitutional setup of such bodies in terms of its composition and proportions needs to be respected.

34. From the comparative perspective, it is not unusual that subcommittees of the councils for the judiciary deal with certain tasks, while certain other tasks are kept for the plenary sitting of the council. Such matters can be regulated in the law even if the Constitution is silent about such a division of labour. However, the legislator should not create new bodies in order to circumvent constitutional limitations and perturb the balance of power which is reflected in the composition of the SJC.

35. The Venice Commission stresses that the mechanism proposed in the draft Law is designed to *respect* this balance. Both panels are composed of an equal number of judicial and lay members of the SJC, thus mirroring the "plenary" composition of this body.[31] Furthermore, the composition of both panels is decided by lot, which (if properly implemented) excludes the risk of manipulations which would affect the composition of the two panels.

36. Splitting the plenary SJC into two panels might nevertheless have some *unintended* consequences which might raise questions from the constitutional perspective.

37. Thus, in the current model a judge will be brought to a disciplinary liability by a majority vote of the plenary SJC. Under the proposed mechanism, in the case of a split vote in each panel the decision is to be considered to be taken in favour of the judge. This may appear as a rule setting a high standard for protecting judicial independence, but in practice it may lead to the opposite result, due to a possible combination of majorities in two panels.

38. Thus, in the future system there might be a situation where disciplinary liability is imposed on a judge by only four votes out of ten. This would happen if the first panel took the decision to

[30] See, for example, Venice Commission, CDL-AD(2019)034, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor's Office, para. 27

[31] This balance may be perturbed if some of the members failed to participate in the examination of the case or withdraw, but this may also happen with the Plenary SJC.

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acquit the judge concerned by four votes against zero, but the second panel decided to convict the judge by four votes against two. If the decision of the second panel was to prevail, the judge would be sentenced to a disciplinary liability even though six members of the SJC voted for his or her acquittal. This may be at odds with the most evident reading of the Constitution that a majority of votes is needed to convict a judge.

39. In most national appellate systems, the decision of a court of appeal would always prevail, irrespectively of how the first instance judges have voted. The draft Law creates a system *sui generis* which has to remain within the confines of the Constitution, and which is therefore different from a classic appeal. That may require some unorthodox solutions. For example, the law might establish a *flexible majority* in the second-instance panel.[32] In such a model, in order to convict a judge of a disciplinary breach two majorities would be required: the overall majority of the members who participated in the voting at both levels, and the majority in the second panel. Alternatively, the right to appeal could be given only to the judge concerned and not to the Minister, as the Minster is a part of the executive.

40. The Venice Commission is aware that both those proposals create a certain asymmetry in favour of the judge. One may argue that if either of them is implemented it would set too high a threshold for bringing judges to disciplinary liability. Nevertheless, at least the double majority /asymmetrical appeal would exclude the risk of conviction by a minority of votes, described above. Indeed, it would be much simpler to provide for an appeal to a court of law, but this cannot be achieved without amending the Constitution. Therefore, the proposed solutions may be the only viable option in the circumstances. The Venice Commission stresses that it would not necessarily recommend it in other legal orders.

41. It is not for the Venice Commission to take a firm stance on the question of constitutionality of the proposed model. This model does not appear to be *designed* to cripple the constitutional provisions on the SCJ, but, to the contrary, to remove any risk of manipulations. Therefore, it is likely that the new model remains within the constitutional boundaries, even though the patterns of decision-making in two panels may be different from the decision-making in the plenary composition. It ultimately belongs to the Constitutional Court to resolve this issue, if a constitutional complaint is brought before it after the adoption of the law.

IV. Conclusion

42. By letter of 25 August 2022, the former Minister of Justice of Armenia, Mr Karen Andreasyan, requested an opinion of the Venice Commission on the draft constitutional Law amending the Judicial Code (the draft Law). The Venice Commission welcomes the readiness of the Armenian authorities to maintain a meaningful dialogue with the Council of Europe, and their continued effort to improve the system of judicial governance in line with the European standards.

43. The Venice Commission reiterates that while the power of the Minister of Justice to initiate disciplinary proceedings is not as such in conflict with the European standards, it remains desirable to phase out this power as soon as other mechanisms – namely the Ethics and Disciplinary Commission – prove their efficiency in ensuring judicial accountability.

44. The draft Law seeks to respond to some of the earlier recommendations of the Venice Commission and GRECO. In particular, the draft Law introduces a new system of appeal against the decisions of the Supreme Judicial Council in disciplinary matters, by a second-instance panel created within the Council itself. The Venice Commission is of the view that the new mechanism would address the essence of the recommendation of the Committee of Ministers (CM/Rec(2010)12). An appeal to an *external judicial body* could be a better option, but it requires

[32] I.e. to overturn a unanimous decision by the first four-member panel in favour of the judge the second panel would have to vote unanimously against the judge.

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amending the Constitution. Therefore, the creation of an appellate instance *within* the Supreme Judicial Council appears to be an acceptable compromise.

45. Finally, it may be necessary to ensure in the draft Law that a judge cannot be disciplined or dismissed if less than six members of the Supreme Judicial Council voted for this decision. The Commission stresses, however, that it belongs to the Constitutional Court of Armenia to evaluate the compatibility of the proposed model with the constitutional design of the Supreme Judicial Council.

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

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