Strasbourg, 19 June 2017 **CDL-AD(2017)011**

Opinion no. 883/2017 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ARMENIA

OPINION
ON THE DRAFT CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT

Adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017)

on the basis of comments by

Mr Aivars Endziņš (Member, Latvia)
Ms Monika Hermanns (Substitute member, Germany)
Mr Christoph Grabenwarter (Member, Austria)
Mr Kaarlo Tuori (Member, Finland)

Contents

I. Introduction

1. By letter of 8 February 2017, Ms Arpine Hovhannisyan, who was then Minister of Justice of Armenia, requested an opinion from the Venice Commission on the draft Constitutional Law on the Constitutional Court of Armenia (CDL-REF(2017)019, hereinafter, the "draft Law").

2. The request relates to the entire draft Law, which was prepared as a result of amendments made to the Constitution of Armenia (hereinafter the "Constitution").

3. The Venice Commission invited Mr Aivars Endziņš, Mr Christoph Grabenwarter, Ms Monika Hermanns and Mr Kaarlo Tuori to act as rapporteurs for this opinion.

4. On 15-16 May 2017, a delegation of the Venice Commission, composed of Mr Aivars Endziņš and Ms Monika Hermanns, accompanied by Ms Tanja Gerwien from the Secretariat, visited Yerevan, Armenia and met with (in chronological order): representatives of civil society; a representative of the Government of the Republic of Armenia; a representative of the Constitutional Court of the Republic of Armenia; a representative of the Standing Committee on State and Legal Affairs of the National Assembly of the Republic of Armenia; representatives of the Ministry of Justice of the Republic of Armenia and a representative of the Association of Judges of the Republic of Armenia.

5. The present draft opinion was prepared on the basis of contributions by the rapporteurs and on the basis of an unofficial translation of the draft Law. Inaccuracies may occur in this opinion as a result of incorrect translations.

6. This opinion was adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), following an exchange of views with Ms Arpine Hovhannisyan, Vice-President of the National Assembly of Armenia.

II. Analysis

7. The draft Law was prepared as a result of amendments made to the Constitution of Armenia, adopted in December 2015. In the Venice Commission's First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of Armenia,[1] recommendations relating to the Constitutional Court were made, some of which remain relevant.

A. Independence

8. The independence of the Constitutional Court and its judges is covered by Articles 1.2 and 8 of the draft Law. Article 1.2 repeats the constitutional provision on the independence of the Constitutional Court and restricts the requirement of independence only to the administration of constitutional justice. However, it is important to remember that the independence of the judiciary also possesses an administrative and financial aspect. Although Article 5.6 provides that the Constitutional Court shall form its staff and manage its resources independently, this does not cover all aspects of administrative and financial independence.

9. It is to be welcomed that the independence of individual judges is guaranteed by Article 8.1.

B. Composition of the Constitutional Court and the status of its judges

10. The rules for the composition of the Constitutional Court, the requirements for judge candidates and the procedure for the election of judges are mainly stipulated in the Constitution

[1] First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, CDL-AD(2015)037, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)037-e.

itself (Articles 165, 166.1, 166.2 and 166.8). The draft Law may prescribe additional requirements for the candidates (Article 165.5 of the Constitution); details related to the election and appointment of judges shall be prescribed by the draft Law (Article 166.9).

11. The status of judges is widely stipulated in Article 164 of the Constitution and the details related to the status of judges shall be prescribed by the draft Law (Article 164.11 of the Constitution).

1. Judge candidates

a. Requirements

12. Article 3.1 of the draft Law, on the requirements for judge candidates of the Constitutional Court, sets out that a candidate must be a lawyer, having command of the Armenian language. The draft Law sets out an additional requirement that is not in the Constitution, notably that the candidate must have high professional and moral qualities. This is positive. Furthermore, the candidate must give documentary evidence with respect to his or her command of Armenian.

13. The criterion of *"high professional qualities,"* as set out in the Constitution, and not further explained by the draft Law, might be difficult to ascertain with precision in practice, but is adequate. The aim of this formula is to ensure that the judges of the Constitutional Court have a special, "higher" legal knowledge. These types of provisions also exist in other countries.[2]

b. Appointment

14. Taking into account the very detailed nature of some of the provisions of this draft Law, it is perhaps surprising that no provisions complementing the constitutional provisions on the appointment of the judges of the Constitutional Court (requested by Article 166.9 of the Constitution) were considered necessary. For instance, there is no reference to the election of judges of the Constitutional Court by the National Assembly; that the Court is composed of nine judges, three of whom shall be elected upon nomination by the President of the Republic, three upon nomination by the Government, and three upon nomination by the General Assembly of Judges (Article 166.1 of the Constitution). To the extent that the procedure for these appointments is not defined in the Constitution, it should be set out in the law on the Constitutional Court.[3]

c. Incompatibilities

15. According to Article 164.6 of the Constitution, a judge may not: hold any position not related to his or her status in other state or local self-government bodies; hold any position in commercial organisations; engage in entrepreneurial activities; perform other paid work, except for scientific, educational and creative work.

16. Although the last sentence of Article 164.6 of the Constitution allows the draft Law to prescribe any additional incompatibility requirements, none were added.

---

[2] E.g. Albania: "*lawyers […] with a renowned activity in the field of the constitutional law, human rights or other areas of law" (Article 125.4 of the Constitution); Croatia: "outstanding jurists, especially judges, public prosecutors, lawyers and university professors of law"* (Article 122); Poland: *"persons distinguished by their knowledge of the law"* (Article 194 of the Constitution); Romania: *"graduated law, and have high professional competence and at least eighteen years' experience in juristic or academic activities in law"* (Article 143 of the Constitution); Slovenia "*expert in the law"* (Article 163 of the Constitution). See also Article 21 of the European Convention on Human Rights: *"The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."*

[3] CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, paragraph 10, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)034-e

17. The Constitutional Court judge may also not engage in political activities (Article 164.7 of the Constitution). What is understood by "*political activities*" should be clearly spelled out in this draft Law.

2. Term of office

18. Under the current Law on the Constitutional Court, judges are appointed for life, up to the retirement age of 65. This needed to be changed in the draft Law due to the amendments made to the Constitution, which stipulate that a Constitutional Court judge has a term of office of 12 years (Article 166.1) or retires at the age of 70 (Article 166.8 of the Constitution).

19. Reasons to terminate the term of office are (Article 164.8 of the Constitution): expiration of the term of office; loss of Armenian citizenship or acquisition of citizenship of another country; the entry into force of a criminal judgment of conviction; the termination of criminal prosecution on non-acquitting grounds; entry into force of a civil judgment on declaring him or her as having no active legal capacity, as missing or dead; or his or her resignation or death.

20. These grounds for termination of the powers of the judges are repeated and clarified as grounds for *automatic* termination in Article 9.2 and Article 13.1 of the draft Law. Article 13.1(5) provides that the powers of a judge of the Constitutional Court shall automatically terminate when he or she has submitted a letter of resignation to the National Assembly and has not withdrawn that letter within the period of one week. An alternative that might be considered is for the judge to submit his or her letter of resignation to the Constitutional Court instead, at least one month before his or her resignation is effective. In any case, the automatic termination that follows will be recorded in a procedural decision by the Constitutional Court (see Article 13.5 of the Law). Under that provision, the Chairperson of the Constitutional Court shall, within a period of two days, notify the President of the Republic, the Government and the General Assembly of Judges, respectively. The Court could then also inform the National Assembly.

21. This means that the position concerned remains vacant until the new member is elected by the National Assembly, according to Article 166.1 of the Constitution, by at least 3/5th of the votes of the total number of Deputies. An exception might be considered if the National Assembly has not elected another judge, in that case the term of office of the outgoing judge might be prolonged to the time at which the National Assembly elects a new judge and he or she has been sworn in. However, this would require an amendment to the Constitution.

22. The draft Law does not provide any regulation for the procedure within the National Assembly. Article 15 of the draft Law refers to time limits *"prescribed by the Constitutional Law of the Republic of Armenia 'Rules of Procedure of the National Assembly'"* and to the manner *"prescribed by the Constitution and law".* The "*Rules of Procedure of the National Assembly of 20 February 2002,"* which are currently in force (with the amendments of 16 March 2016),[4] do not contain any time limits or any other procedural regulations. Due to the Constitutional Court's special status and for reasons of legal certainty, the rules in question should be incorporated into the draft Law directly rather than be referred to as the "*Rules of Procedure of the National Assembly.*" In this respect, it might be considered that the Constitutional Court inform any of the following in writing about the end of the judge's term of office or his or her reaching retirement age: the President of the Republic, the Government or the General Assembly of Judges (see Article 13.5 of the draft Law) at least three months before the end of office of a judge.

23. In addition, default mechanisms should be put into place, in the interest of the Constitutional Court's institutional stability,[5] and to avoid any institutional blockage.[6] It is of the

[4] http://www.parliament.am/parliament.php?id=bylaw&lang=eng
[5] CDL-STD(1997)020, The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 15, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e

utmost importance to ensure that the position does not remain vacant for a prolonged period of time after the end of office of a judge. Rules of procedure on filling a vacant judge's position at the Constitutional Court should foresee the possibility of inaction by the nominating authority.[7] There should either be a procedure that allows the incumbent judge to pursue his or her work until the formal nomination of his or her successor[8] – this solution might require amendments to the Constitution – or a provision which specifies that a procedure of nomination of a new judge could start at least three months before the expiration of the mandate of the incumbent judge.[9]

24. None of these proposals will, however, be sufficient where a vacancy has arisen for other grounds than the end of the 12-year term of office or the retirement age of 70.

25. Violation of incompatibilities (Article 164.6, 164.7 of the Constitution, taken up by Article 13.2(1) and (2) of the draft Law) are also grounds for termination by a decision of the Constitutional Court (Article 168.10 of the Constitution), as are the impossibility of holding office for health reasons (Article 13.2(3) and (4)) and for major disciplinary violations (Article 13.3 of the draft Law).

26. The decision on the termination of the powers of a Constitutional Court judge requires an application to the Constitutional Court by the National Assembly, upon a decision adopted by at least 3/5th of the votes of the total number of deputies (Article 169.1(1) of the Constitution). The decision of the Constitutional Court shall be adopted by at least 2/3rd of the votes of the total number of judges of the Constitutional Court (Article 170.5 of the Constitution).

27. The draft Law repeats and elaborates the grounds for the termination of powers of the judges in Article 13.2. This Article should also refer to Article 62.4 of the draft Law (which requires a 2/3rd majority) and to Article 82 of the draft Law (which provides more detail on these types of cases).

28. Article 13.2 of the draft Law provides for two alternatives for the *impossibility of holding office for health reasons*: that the judge has not been able to exercise his or her powers of a judge for six months due to temporary disability (Article 13.2(3)) or that, following the judge's appointment, he or she has been affected by a physical impairment or an illness as a result of which he or she is unable to exercise his or her powers as a judge (Article 13.2(4)). The time limit of six months seems to be quite short, taking into consideration the constitutional requirement of the independence of judges. On the other hand, it safeguards the institutional stability of the Constitutional Court, which may be weakened by long-lasting factual vacancies.

29. However, what occurs if a judge is able to resume work after six or seven months? Termination of his or her powers should at least require that it is not foreseeable (after six months), whether or when he or she will be able to resume work. In any case, the principle of legality requires that the conditions for a very serious sanction, such as the termination of the powers of a judge, be set out in a very detailed and precise manner.[10] The description of these conditions by the terms *"physical impairment*" or *"illness"* which render the judge *"unable to*

---

[6] CDL-AD(2009)042, Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, paragraph 15, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)042-e

[7] CDL-STD(1997)020, The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 22, http://www.venice.coe.int/webforms/documents/CDL-STD(1997)020.aspx

[8] CDL-AD(2006)016 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, paragraph 21(b), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)016-e; CDL-AD(2006)017, Opinion on amendments to the law on the Constitutional Court of Armenia, paragraphs 22, 31(2), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)017-e

[9] CDL-INF(2001)002, Opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, paragraph 17, http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)002-e

[10] CDL-AD(2014)033, Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 21, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)033-e

exercise his or her powers" should be sufficient in this respect. *"Temporary disability,"* however, must be strictly reduced to disability due to health reasons.

30. Article 13.3 of the draft Law provides that the non-attendance by a judge of the sessions of the Constitutional Court without providing a valid reason having occurred five or more times during the course of a year shall amount to a *"major disciplinary violation"*. It may be assumed that this is not the only type of disciplinary violation. The draft Law should therefore either set out explicitly that this is the only type of disciplinary violation there is or, if there are others, provide explicitly what constitutes a "major" disciplinary violation.

31. In cases concerning the termination of powers of a Constitutional Court judge, with regard to the right to be heard before a court, it is a problem that failure by that judge to appear – no matter whether the failure results from purpose or negligence or whether it is through no fault of his or her own – shall be no hindrance to the trial of the case (Article 82.4, last sentence). The same problem occurs in Articles 78.5, 79.7, 81.3, 83.4 and 84.3 of the draft Law. It should at least be ensured that a representative (see Article 46 of the draft Law) be present in case of absence of the respective judge through no fault of his or her own.

32. During the drafting of this opinion, the rapporteurs were informed that changes had been made to the Final and Transitional Provisions in Article 87.4 and 87.6, as follows:

> *"4. As of the date of entry into force of the Law of the Republic of Armenia "On social guarantees for persons having held state offices", the amount of pension assigned on the grounds of automatically terminating or terminating powers of a judge of the Constitutional Court as prescribed by points 1 and 2 of part 1 and points 3 and 4 of part 2 of Article 13 of this Law and granted to the person having held the position of the Chairperson or a member of the Constitutional Court as appointed prior to entry into force of Chapter 7 of the Constitution, shall be calculated in the amount equal to 75 per cent of the multiplication of the coefficient of decimal zero point nine and the total amount of the official pay rate and the bonus received while holding the position of a judge of the Constitutional Court. Where the amount of pension calculated as prescribed by this paragraph is lower than the amount of pension calculated as prescribed by the first paragraph of this part, pension shall be awarded in the amount calculated as prescribed by the Law of the Republic of Armenia "On social guarantees for persons having held state offices."*
>
> And
>
> *"6. "The ~~Chairperson and~~ members of the Constitutional Court appointed prior to entry into force of Chapter 7 of the Constitution amended as of 2015, whose term of office is less than 12 years at the moment of reaching the age of 65, may ~~shall~~ continue to hold office ~~till~~ until the expiry of his or her 12-year term of office or until he or she reaches the age of 70. ~~their powers prescribed by the Constitution amended as of 2005~~."*

33. As regards Article 87.4, adding "automatically terminating" should be welcomed, as it clarifies the reference made to Article 13.1(1), 13.1(2), 13.2(3) and 13.2(4) of the draft Law, which refer to grounds for *automatic termination* (13.1(1) – end of 12-year term, 13.1(2) – reaching the age of 70) and *termination* (13.2(3) – temporary disability and 13.2(4) – physical impairment or illness) of the powers of a judge of the Constitutional Court.

34. The changes made to Article 87.6 of the draft Law do not entirely seem to follow new Article 213 of the Constitution, which sets out that the Chairperson and members of the Constitutional Court continue to hold office until the expiry of the term of their powers specified in the Constitution with amendments of 2005. [11] The relevant Article in the Constitution of 2005

[11] Article 213. Holding Office on the Part of the Members and Chairperson of the Constitutional Court

is Article 96, which stipulates that *"The Judge and the members of the Constitutional Court shall be irremovable. The Judge and the member of the Constitutional Court shall hold their offices until the age of 65. They may be removed from office only in the cases and in a manner prescribed by the Constitution and the law."* However, the changes made to Article 87.6 could be considered acceptable if new Article 213 of the Constitution is seen as setting a minimum guarantee for the judges, who were elected prior to the entry into force of Chapter 7 of the Constitution, i.e. the judge may continue to work at least up to the age of 65 – whether or not the judge has finished his or her 12-year term of office. But, the judge might also be allowed to continue to work beyond the age of 65, if the judge has not finished his or her 12-year term of office.

3. Liability of judges and termination of judgeship

a. Immunity

35. Article 10.1 of the draft Law stipulates that a judge of the Constitutional Court shall be immune (in general). This goes beyond what is stipulated in the Constitution, which only guarantees *functional immunity* (Article 164.2 of the Constitution).

36. It is important that a balance be struck between immunity as a means of protecting a judge against undue pressure and abuse from state powers or individuals (immunity), on the one hand, and the fact that a judge is not above the law (accountability), on the other.[12] The Venice Commission has consistently pointed out that judges should not be granted *general immunity*, but *functional immunity* only. This is because, in principle, a judge should only benefit from immunity in the exercise of his or her lawful functions.[13] Article 10.1 of the draft Law should therefore be revised.

37. In any event, this provision should be reformulated so as to ensure that non-liability is expressly prescribed as a rule, complemented by the possibility of lifting immunity through a decision taken by the Constitutional Court. In addition, the conditions for lifting immunity (see below, under criminal liability) should be stricter and more precise than a mere existence of *"elements of crime or disciplinary violation"*.

b. Criminal liability

38. According to the Constitution (Article 164.2), a judge may not be held liable for an opinion expressed or judicial act rendered during the administration of justice, except where there are elements of a crime or a disciplinary violation. Criminal prosecution of a judge with respect to the exercise of his or her powers may be initiated only with the consent of the Constitutional Court, except where he or she has been caught at the time of or immediately after committing a criminal offence. In this case, deprivation of liberty may not last longer than 72 hours. The Chairperson of the Constitutional Court shall be immediately notified of the deprivation of liberty of a judge of the Constitutional Court (Article 164.3 of the Constitution).

39. Article 10.2 und 10.3 of the draft Law repeat Article 164.2 and 164.3 of the Constitution. Article 10.3 of the draft Law provides that criminal prosecution of a judge of the Constitutional Court, with respect to the exercise of his or her powers, may be initiated only with the consent of the Constitutional Court. In the Venice Commission's opinion, Article 62.4 of the draft Law, which requires at least a 2/3rd majority of the votes of the total number of judges for decisions

---

The Chairperson and members of the Constitutional Court appointed prior to the entry into force of Chapter 7 of the Constitution shall continue holding office until the expiry of the term of their powers specified in the Constitution with the amendments of 2005. After entry into force of Chapter 7 of the Constitution, the nominations for vacant positions of judges of the Constitutional Court shall be made successively by the President of the Republic, the General Assembly of Judges, and the Government.

[12] CDL-AD(2014)018, paragraph 41, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)018-e

[13] CDL-AD(2017)008, paragraph 17, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)008-e

on the termination of the office of a constitutional court judge, could be interpreted as also applying to decisions that may lead to termination of office, such as giving consent to initiating criminal proceedings against a judge. It would be advisable, however, to provide for this explicitly in the text of Article 62.4.

40. Article 10.3 also adds that the decision on involving a judge of the Constitutional Court as an accused or imposing a measure of restraint on him or her may be rendered only by the Prosecutor General of the Republic of Armenia. This addition is superfluous since Article 83 of the draft Law (which provides further details for such cases) also assigns the right to apply to the Prosecutor General (pursuant to Article 169.1(9) of the Constitution). It would be better to refer to Article 83 in Article 10 of the draft Law.

41. A criminal judgment of conviction rendered against a judge will automatically terminate his or her powers as a judge (Article 13.1(7) of the draft Law), no matter how serious the offence. Again, the provision repeats the general constitutional provision on judges (Article 164.8 of the Constitution). In this case, it can also be argued that the threshold for criminal liability in the exercise of judicial functions should be high, which means that it should require malice or, arguably, gross negligence, and that the Constitution cannot be considered to prevent such an enhancement of their independence. Criminal liability in the exercise of judicial functions should therefore be narrowed down to serious cases (malice and gross negligence).

42. Where the Constitutional Court gives its consent to initiate criminal proceedings against a judge of the Constitutional Court with regard to the exercise of his or her powers, Article 13.4 of the draft Law stipulates that the powers of the judge shall be considered as suspended for the period of the preliminary investigation and the trial. Where the criminal case initiated against the judge is suspended, the judge shall continue to exercise his or her powers until a decision on re-opening the criminal case is made. For the period of suspension of the powers of the judge, the judge shall receive compensation for enforced idleness, which does not involve any fault on his or her part (Article 13.4 of the draft Law).

43. Article 10.5 of the draft Law sets out that a judge of the Constitutional Court may not be apprehended, except where he or she has been caught at the time of or immediately after committing a criminal offence. A judge of the Constitutional Court, having been apprehended and brought to a competent body without documents, shall be immediately released after his or her identity has been established. It is not clear whether or not a judge may be apprehended when the Constitutional Court has given consent to the deprivation of liberty.

44. According to Article 10.6 of the draft Law, for the purpose of search, inspection, seizure of documents or items, the building of the Constitutional Court may be entered once the Chairperson of the Constitutional Court has been notified. Mere notification of the Chairperson should not be considered enough. Taking into account the independence of judges, the reasons for which these measures may be taken should be set out as well as who may enter the premises of the Constitutional Court and who decides which documents or items may be searched, inspected or seized. It is not clear whether general provisions on criminal procedure are sufficient or whether special provisions are needed here.

c. Disciplinary liability

45. In cases of disciplinary violation, pursuant to Article 164.2 of the Constitution (Article 10.2 of the draft Law), a judge may be held liable for an opinion expressed or judicial act rendered during the administration of justice.

46. The grounds and procedure for imposing disciplinary liability on a judge of the Constitutional Court are regulated by Article 14 of the draft Law. A cross-reference to Article 81 of the draft Law should be included, as it provides more detail for such cases.

47. Article 14.2 refers to the violation of the rules of conduct for the judges to prescribe the grounds for imposing disciplinary liability. Article 14.4 leaves it to the Constitutional Court to adopt a Code of Conduct (by a procedural decision, see Article 61.3 of the draft Law), which prescribes the relevant rules of conduct. This suggests that there is no disciplinary liability for judges for judicial acts, which seems to be allowed, however, by Article 164.2 of the Constitution. This is positive and should be clarified in the draft Law.

48. Article 14.3 deems three types of behaviour to be violations of the rules of conduct:
- displaying behaviour inappropriate for a judge of the Constitutional Court;
- non-observance of the requirements provided by points 2 (participate in Court sessions and voting) or 3 (maintain the secrecy of discussions and voting held in closed deliberations) of part 1 of Article 43 of the draft Law;
- non-observance of the requirement provided by part 9 of Article 59 of the draft Law (obligation to refrain from releasing any information on the decision, before it is made public during the session).

49. These violations are obviously not identical to a "*major disciplinary violation"* provided in Article 13.2(5) and Article 13.3 of the draft Law, because pursuant to Article 13.3, a major disciplinary violation requires the non-attendance of a judge at Court sessions for five or more times within a year. Considering the severity of the sanction provided under Article 13.2 of the draft Law for a *"major disciplinary violation"* and in order to safeguard the independence of the Constitutional Court judges, major disciplinary violations should be established in the draft Law (see comments on Article13.3 above).

50. Pursuant to Article 81.1 of the draft Law, the examination of cases related to subjecting the judge of the Constitutional Court to disciplinary liability shall be carried out where an application is submitted by at least three judges of the Constitutional Court. This is a result of Article 169.1(13) of the Constitution and adequate, if disciplinary liability does not cover liability for an opinion expressed or judicial act rendered during the administration of justice (see above). As regards Article 81.3 of the draft Law, the same applies as for Article 82.4.

51. However, the personal characteristics of a judge should have no bearing on establishing disciplinary liability. This criterion should be removed from Article 81.9 of the draft Law.

C. General operation of the Constitutional Court

1. Powers of the Chairperson

52. The Chairperson of the Court is granted too strong a position. A notable example is issuing normative acts, such as the Rules of Procedure (Article 17.4(7)), which should be reserved for the plenary of the Constitutional Court.

53. Article 17.1 is a very complicated provision. It should be replaced by wording that merely states that the Chairperson of the Constitutional Court shall be elected from among the judges of the Constitutional Court by an absolute majority vote of the total number of judges, by secret ballot.

54. In particular, Articles 17.4(2) and 17.4(4) provide the Chairperson with a very strong position and should be reworded. It should be provided that either the Chairperson of the

Constitutional Court or his or her Deputy may give "tasks" to judges of the Constitutional Court only in matters pertaining to organisational duties of the Court.

55. There is a mistake in the English version of Article 18.3 of the draft Law. The word "Deputy" is missing in front of the word "Chairperson".

56. Article 18.4 repeats the content of Article 16.2 of the draft Law. However, the Venice Commission's delegation was told in Yerevan that Article 16 is a general reference to the operation of the Constitutional Court and that Article 18 is specifically about the Deputy Chairperson and hence the provision needed to be repeated.

57. Other additions to Chapter 4 on the organisation of the operation of the Constitutional Court, might be considered: for instance, a provision on the Rules of Procedure – explaining that the structure and work procedures of the Constitutional Court shall be set out in the Rules of Procedure of the Constitutional Court, which shall be adopted by an absolute majority vote by the total number of judges. The draft Law or the Rules of Procedure should also provide for an automatic allocation of cases to the judges.

58. Article 43.1(1) on the responsibilities of a judge of the Constitutional Court, what is meant by *"perform the assignments of the Chairperson of the Constitutional Court"?* This could relate to the tasks assigned under Article 17.4(2). It is important that this exclude any instruction on the merits of a case. These provisions should be removed.

59. The Venice Commission's delegation was told in Yerevan that the current Chairperson will retire in March 2018 and that the draft Law will only enter into force in April 2018. Consideration might be given to clarifying the Final and Transitional Provisions with regard to the possibility of electing a new Chairperson.

2. Applications to the Constitutional Court

60. The application should, first of all, indicate the name of the applicant (the overly-detailed regulation on the address should be shortened), the authority or official that has issued the act in dispute, the actual statement of the matter and the legal basis for the application (Article 27.2(1)).

3. Examination of applications

61. The Constitutional Court should be required, when either accepting or rejecting an application, to provide a well-reasoned decision.

a. Rejection of applications

62. An addition should be made to the last part of Article 29.3 to the effect that the Staff of the Constitutional Court shall return the application within five days *following a resolution of the Chairperson of the Constitutional Court.* It should be further noted that the refusal by the staff of the Constitutional Court should always contain information regarding the possibility of filing a complaint to the Chairperson against the decision rendered.

63. In Latvia, for example, the Constitutional Court Law provides that a Division comprising three judges, set up for a year, examine an application. They make their decisions by absolute majority of the members of the Division. A judge who has been overruled may make a reasoned request for the transfer of the case to the plenary.

64. Article 32.1(5) sets out that an application may be rejected because a similar case is already pending before the Constitutional Court. This seems to contradict Article 39.1, which

states that cases on the same issue may be joined and examined at the same session of the Court. Article 39.1 is in line with European standards.

b. Preliminary examination of the application

65. In Article 30.1, the Chairperson of the Constitutional Court should nominate only one judge of the Constitutional Court to conduct the preliminary examination of the application, because assigning more than one judge could lead to problems should they disagree. This would also create the need to prepare special rules to solve these disputes.

66. Another solution could be, instead of giving this power to the Chairperson, the draft Law should simply introduce an automatic allocation of the case to a judge or the Chairperson should at least be bound by pre-determined criteria e.g. a balanced caseload or by specialisation.

c. Case withdrawal

67. Article 33.2 of the draft Law reads as follows: *"The Constitutional Court may reject the withdrawal of the application, where it finds that the examination of the case on the subject matter of the application derives from public interests."* Having the Court examine a case even after the applicant has withdrawn his or her application is unusual, but seems to be a positive step. It enables the Constitutional Court to continue proceedings of public interest even against the will of the applicant.

68. The reason for having such a provision may be to avoid that the applicant withdraw the case under political pressure. But, one should bear in mind that it is quite unusual for a constitutional court to examine a legal act without a pending complaint or motion. On the other hand, in the present situation, an initial application is still required, which means that the Constitutional Court cannot be considered as initiating the case *ex officio*.

69. Nevertheless, it would be advisable to clarify what is meant by "*public interests*," as it seems to be vague and the proceedings would then become of an inquisitorial nature.

d. Suspension of a legal act on decision of the Constitutional Court

70. It is important for the Constitutional Court to take into account the interests of other parties and the public interest before suspending legal acts or norms.

71. Article 34.2 should not provide a link to a website, which might suddenly change due to the introduction of new IT tools, requiring this provision to be amended.

e. Evidence

72. Article 51.5, on explanations of the parties, of the draft Law reads as follows: *"The information presented in the explanations of the parties concerning the facts shall not have probative value. A party may disclose information of probative value relating to the facts only through the procedure provided for by Article 52 of this Law."*

73. This provision is highly unusual for a Constitutional Court, as it contains strict rules on the evaluation of evidence. In particular, a constitutional court should have full discretionary power in the consideration of evidence. This provision should therefore be removed. If the Constitutional Court decides on cases involving the determination of "*civil rights and obligations*" within the meaning of Article 6 of the European Convention on Human Rights, the provision might be in conflict with the case-law of the European Court of Human Rights in this field.

4. Publicity

74. Reasons to restrict filming and broadcasting of sessions should be laid down (Article 23.2), to ensure proportionality and the inclusion of safeguards against arbitrariness.

5. Oral and written proceedings

75. General provisions are needed to set out in which cases a) oral proceedings are obligatory, b) the Court can decide on oral proceedings and, c) proceedings are exclusively in writing (Article 38). It is important that this be clarified.

6. Pronouncement and signature of decisions

76. One of the crucial points in constitutional justice is the procedure that applies once a constitutional court has reached a decision in a given case. The importance of this procedure was highlighted recently in Slovakia in the context of a dispute on the role of the President in the appointment of judges of the Constitutional Court.

77. The first step is to publish the decision, once court proceedings are finalised. It is important that the published decision precisely reflect the conclusions reached by the Court. The decision should only be pronounced once the written decision is ready and should be published at the same time.[14] There are several ways to achieve this and one is that all the judges of the Constitutional Court sign the final version of the decision.

78. Article 64.2 of the draft Law reads as follows: *"The decision and opinion rendered by the Constitutional Court on the merits of a case shall be signed by the judges of the Constitutional Court having participated in rendering of the decision or opinion on the given case."*

79. Under normal circumstances, that provision would make sure that the final text of the decision is accepted by every judge. This can be considered to be an effective safeguard against inaccurate adjustments on the editorial level.

80. However, Article 64.2 of the draft Law raises a certain number of risks: it allows a single judge to obstruct the release of a decision without providing any reasons. Although the draft Law does not assign such a competence to the judges of the Court, the legal consequences of such a conduct are unclear. From a formal point of view, a decision could simply not be validly released should but one signature be missing. The draft Law does not contain any rule to resolve such a problem. It should be pointed out that this issue not only arises in the case of an obstructive judge, who wilfully refuses to sign, but can also arise where a judge is seriously ill.

81. The Venice Commission dealt with such an issue in its Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings [of Georgia].[15] The Constitutional Court of Georgia was dealing with a case in which one of the judges was unable to sign a judgment because he was in hospital for urgent treatment.[16] Even the amended relevant provision could not avoid a situation of *non liquet*. The Venice Commission therefore recommended the following.[17]

> *"An alternative would be to replace the requirement of a signature of the Courts' judgments by all judges with a signature of the President of the Court and the Secretary General only.*

[14] See Ukraine – Opinion on the draft Law on the Constitutional Court, CDL-AD(2016)034, paragraph 65, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)034-e; Slovak Republic – Opinion on questions relating to the appointment of judges of the Constitutional Court, CDL-AD(2017)001, paragraphs 37-39, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)001-e

[15] CDL-AD(2016)017, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)017-e

[16] Ibid, paragraph 52.

[17] Ibid, paragraph 57.

An – incomplete – comparative overview shows that two major groups can be distinguished as concerns the modalities for signing decisions of the constitutional courts and equivalent bodies. In a first group, all judges who participated in the case sign. This group includes Albania, Algeria, Andorra, Brazil, Chile, Estonia, Germany, Kazakhstan, Kyrgyzstan, Lithuania, Peru, Poland, Republic of Korea, Romania, Russia, Turkey and Ukraine. In the second group, only the President / session chair, secretary general and/or the rapporteur judge sign. This group comprises Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, "the former Yugoslav Republic of Macedonia", France, Italy, Kosovo, Latvia, Liechtenstein, Luxembourg, Mexico, Moldova, Monaco, Montenegro, Portugal, Serbia and Slovenia. It is clear that Georgia currently belongs to the first group."[18]

82. An additional option could be that an adequate mechanism for solving conflicts be implemented in that respect. Since every mechanism takes time and therefore delays the release of the decision, the requirement that only the president of the constitutional court sign (and possibly the secretary general), could resolve such a deadlock. However, as is often the case, this solution requires a certain level of trust by the judges of the signing president, which cannot be established by law.

D. Legal effects and publication of the decisions rendered by the Constitutional Court

1. Legal effects

83. Article 66.2 and Article 68.9(4) read as follows:

"In case another legal act has been fully or partially declared as contradicting the Constitution by the decision of the Constitutional Court and a deadline has been set for repealing the legal norm, the state body or official having rendered that act shall make that legal act a subject matter of examination within the deadline set for repealing the legal norm and ensure its compliance with the requirements of the decision of the Constitutional Court."

"The Constitutional Court may render one of the following decisions in the cases referred to in this Article: […](4) recognising the challenged act as fully or partially contradicting the Constitution and prescribing a deadline for repealing it."

84. These provisions should be changed: they govern the case in which the Constitutional Court declares a legal act contrary to the Constitution, but according to Article 66.2 of the draft Law, it is the task of the state body or official having rendered that act to ensure the compliance of that act with the requirements of the decision of the Constitutional Court. It is of course possible to assign that task to another state organ, but it remains unclear why the Constitutional Court should not declare the act unconstitutional itself, as is provided by Article 68.9(3) of the draft Law.

85. It is difficult to see where the benefit of assigning the task of repealing an unconstitutional act to another organ than the Constitutional Court lies. Furthermore, there is no provision for cases of conflict which could arise if the other state organ disobeys the order of the Constitutional Court. If it would be inadequate – for whatever reason – to repeal an unconstitutional act immediately, the Constitutional Court may, by recognising that act as unconstitutional, postpone the effect of its decision to a time when that act shall lose its legal force. In that case, the act shall remain in force until it loses its legal force.[19] A provision of a similar nature exists in the Austrian constitutional law: Article 140.5, which provides for a time limit of up to 18 months during which the law – although found to be unconstitutional – remains

[18] Ibid, paragraph 58.
[19] Article 68.18 of the draft Law, CDL-REF(2017)019.

in force in order to avoid the creation of a legal gap. Against this background, Article 66.2 and Article 68.9(4) do not seem to be necessary.

2. Execution of decisions

86. As regards the execution of the Constitutional Court's decisions – and taking into account the information the Venice Commission's delegation received during its visit to Yerevan concerning the insufficient level of implementation of the Constitutional Court's decisions – it may be questionable whether Articles 66-67 will be efficient enough to guarantee it. Complementary means may be needed, notably the development of a constitutional culture respecting the Constitution and the decisions of the Constitutional Court.

87. Article 67 of the draft Law, which is intended to regulate the implementation of the Constitutional Court's decisions, states that this Court shall, within a 45-day period after the end of each year, issue a communication on the official website of the Constitutional Court on the status of execution of its decisions. It shall be sent to the relevant state and local self-government bodies and officials.

88. More practical mechanisms for the supervision of the execution of decisions as well as legal consequences for non-compliance with their requirements seem to be necessary.[20]

89. The Constitutional Court must ensure the supremacy of the Constitution (Article 167.1 of the Constitution). Therefore the decisions rendered by the Constitutional Court on the merits of a case must be binding for all state and local self-government bodies, the officials thereof, as well as for natural and legal persons throughout the territory of the Republic of Armenia (Article 61.5 of the draft Law). It is essential that parliament not ignore the constitutional court's decisions when it adopts or amends laws. Whether a constitutional court is part of the judiciary or has its own chapter in the constitution, the constitutional court's role is to be the main institutional safeguard for the constitution and for the principle of the separation of powers. The very purpose of a constitutional court is to limit the transgressions of the legislator and that of other state powers and parliament cannot refer to the 'separation of powers' to refuse the implementation of the constitutional court's decisions.

90. This does not mean, however, that a constitutional court's jurisdiction is unlimited; its jurisdiction is limited by the constitution.

91. Another issue raised during the visit of the Venice Commission's delegation to Yerevan concerned the question of which parts of the decisions of the Constitutional Court are binding. The argument put forward by some of our interlocutors was that only the conclusive part of the decision should be binding and not the reasoning of the Court leading to it. The counter argument provided by the Constitutional Court was that the reasoning, which leads to the conclusive part of the decision, is included in the operative part of the decision and is therefore also binding. Article 61.5 of the draft Law leaves a bit of a grey area in this respect, by stating that "*The decisions rendered by the Constitutional Court on the merits of a case shall be binding […].*" The following solution might be considered: in case of a declaration of unconstitutionality, only the conclusive part of the judgment should be binding. In case of a declaration of constitutionality, however, the conclusive part and the interpretation of the relevant norm, as referred to in the conclusive part of the judgment, should be binding.

92. The Venice Commission would like to stress that the failure to implement the Constitutional Court's decisions poses a great threat to constitutional justice and the rule of law and is a matter that needs to be addressed urgently. Failure to execute this Court's decisions is all the

[20] Spain – Opinion on the Law of 16 October 2015 amending the Organic Law no. 2/1979 on The Constitutional Court, CDL-AD(2017) 003, paragraphs 35-39 and 44-45, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)003-e

more serious in cases where any delay in the implementation of the Court's decision could affect the life or health of the applicant (e.g. deprivation of liberty under a provision of a law that was found to be unconstitutional).

93. The Venice Commission would therefore like to encourage the Armenian authorities to identify the problems in the implementation process and to ensure, as far as possible, that these are addressed by the draft Law and in subsequent practice.

3. Publication

94. It is a prerequisite for the effectiveness of constitutional justice that the decisions of a constitutional court be published. A comparative overview[21] shows that in some countries, the legal authority of decisions of a constitutional court depends on their publication; in other countries the decision released by the constitutional court has itself legal effect even without its publication e.g. in an official gazette. In Poland, in 2016, the Venice Commission was confronted with a situation in which a number of decisions of the Constitutional Tribunal had not been published by the executive branch for reasons other than legal ones. These circumstances led the Venice Commission to the following considerations.[22]

> *"Under the rule of law and in particular the principle of the independence of the judiciary the validity and force of judgments cannot depend on a decision of the executive or the legislature. In particular, refusal to publish the judgements of a Constitutional Tribunal without sanction constitutes a fundamental challenge to the court's authority and independence as the final arbiter on constitutional issues."*
>
> *"The legal force of a court judgment cannot be dependent on whether or not that decision is published by some actor other than the Court. Such control over the legal force of a judgement would egregiously violate the independence of the court and the rule of law. When this concerns the Constitutional Tribunal this is a challenge to its authority as the final arbiter on constitutional issues."*
>
> *"Article 80 should be revised in order to ensure that a judgment has binding force without any interference from the executive. Moreover, consistent with the position of the Supreme Court, issuance of a decision by the Tribunal on its web-site must be recognised as having legal value in itself and should then be followed by publication in official gazette."*

95. The Venice Commission also dealt with the issue in its Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings [of Georgia]. The Georgian example shows one possible way of making a constitutional court more independent from the executive branch in that respect. The Venice Commission established the following requirements:

> *"The Commission welcomes that while introducing a publication of the acts of the Court in the Legislative Herald, Article 25.6 OLCC also makes it clear that "the Constitutional Court act is regarded as promulgated if its whole text is published on the webpage of the Constitutional Court". It must be ensured that the Court has full control over the publication of its acts on its own web-site. This avoids any interference by the Executive in the work of the Court by refusing to publish a judgment."*[23]

---

[21] Poland – Opinion on the Act on the Constitutional Tribunal, CDL-AD(2016)026, paragraphs 79-81, http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e

[22] Ibid, paragraphs 77, 82-83 (quotation without footnotes).

[23] CDL-AD(2016)017, paragraph 60 (quotation without footnotes), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)017-e.

96. Against this background, Articles 61.4, 63.4 and 65.2 of the draft Law raises concern. Pursuant to Article 61.4, the decisions of the Constitutional Court shall be final and enter into force upon publication thereof at the session of the Constitutional Court. According to Article 63.4, the decisions shall be made public at the session. It is important that it be clarified what is meant by "*publication at the session" (*especially in the case of written proceedings). Article 65.2 reads as follows: *"The decisions and opinions of the Constitutional Court shall be published in the Official Journal of the Republic of Armenia in the procedure prescribed by law, as well as in the Journal of the Constitutional Court and at the official website of the Constitutional Court."*

97. It should be emphasised that the legal authority of a decision of the Constitutional Court does not depend on its publication in the Official Journal of the Republic of Armenia, which seems to be the task of the executive branch. As in Georgia, it should be clarified that the issuance of a decision by the Constitutional Court on its website or in its journal, must be recognised as having legal value in itself and should then be followed by a publication in the official gazette. It must be stressed that such precautions seem to be unnecessary in a system in which state powers cooperate without friction. But, as this type of loyal cooperation cannot be guaranteed in the future, a clarification in this context would seem to be advisable.

98. In addition, although dissenting and concurring opinions are allowed and are, according to Article 62.8 of the draft Law, referred to as a "*special opinion*" on both the concluding and reasoning parts of a decision or opinion – Article 59.6 of the draft Law sets out that the results of the roll-call voting shall not be published. This provision intends to shield judges against external pressure. However, it is of course clear that the votes of judges having made a concurring or dissenting opinion will be known.

E. Pervasive and other issues

99. One pervasive issue in this draft Law is the very detailed nature of some of its provisions. A number of them could be considered to be too detailed for a constitutional law such as this draft Law and might find their place in the Rules of Procedure, which are easier to amend.

100. These provisions include: Article 6 on the seat of the Constitutional Court, which sets out the exact address of the Court. This becomes a problem should the Court need to move, for whatever reason, and would entail the need to amend the Law. Another example is the provision that requires that the flag of Armenia be hoisted at the seat of the Constitutional Court (Article 7.2) or that those present rise when the judges enter the courtroom (Article 49.1, see also Article 49.5). These provisions are not significant enough to appear in a constitutional law.[24]

101. In light of the above, the Venice Commission strongly suggests that the Armenian authorities reconsider the demarcation between what should appear in this draft Law and what should appear in the Rules of Procedure.

102. Another issue concerns the seven-year waiting period, under Article 68.15 of the draft Law, for the Constitutional Court to be able to review its decision on the merits of cases falling under Article 68.1. This means that where there is a change to a provision in the Constitution that was applied to a given case or where there is a new interpretation of a provision in the Constitution that was applied to a given case – there is an imposed 7-year wait on the Constitutional Court. Even if this provision intends to create legal certainty, as was explained to the Venice Commission's delegation in Yerevan, this is a very problematic issue and should be solved in a different manner, as it hampers the development of constitutional justice. One way around this would be to allow the Court to accept cases on the same issue within the 7-year period.

[24] Others include: Articles 3.5, 6.1, 27.1 and 49.5.

103. In the same chapter of the draft Law, Article 71 deals with cases determining compliance of regulatory legal acts with the Constitution based on an application by the courts and by the Prosecutor General. Article 71.3 provides that the state or local self-government body, which rendered the challenged regulatory legal act, shall be involved in the case as a respondent. However, in such cases – which are not adversarial, but an objective constitutional control procedure – it would be more appropriate for the state or local self-government body to be involved as a participant. The same concern arises for Articles 68.5, 69.2, 70.4, 71.3, 75.2, 76.2 and 77.2.

III. Conclusion

104. The Venice Commission welcomes the draft Law on the Constitutional Court as a positive step in ensuring the Constitutional Court of Armenia's role as an effective guardian of the Constitution.

105. Nevertheless, the draft Law contains a number of provisions which need to be clarified, others that provide so much detail that they might be included in the Rules of Procedure and others still, which could possibly impair or even jeopardise the implementation of the Constitutional Court's tasks.

106. The Venice Commission would therefore like to make the following main recommendations:

- *Appointment of Constitutional Court judges:* to the extent that the procedure for the appointment is not defined in the Constitution, it should be set out in the draft Law on the Constitutional Court, at least by reference to the relevant provisions of the Rules of Procedure of the National Assembly of Armenia.

- *Termination of a judge's powers:* criminal liability in the exercise of judicial functions should be narrowed down to serious cases (malice and gross negligence).

- *Powers of the Chairperson:* the Chairperson is granted too strong a position. For instance, issuing normative acts, such as the Rules of Procedure, should be reserved for the Constitutional Court as a whole. Also, the Chairperson should be able to give tasks, but not orders, to the judges of the Constitutional Court in matters pertaining to organisational duties of the Court. The draft Law or the Rules of Procedure should provide for an automatic allocation of cases to the judges to conduct the preliminary examination of an application and to act as case rapporteur or the Chairperson should at least be bound by predetermined criteria e.g. a balanced caseload or by specialisation.

- *Publication*: It is important that the legal authority of the Constitutional Court's decisions not depend on their publication in the Official Journal of the Republic of Armenia and it needs to be clarified in what manner the decisions of the Constitutional Court must be published by the Court itself in order to enter into force.

107. The Venice Commission would also like to underline that, as the execution of the Constitutional Court's decisions is an important matter, more practical mechanisms for the supervision of the execution of its decisions need to be introduced as well as consequences for the non-compliance with their requirements.

108. The Venice Commission remains at the disposal of the Armenian authorities for any further assistance they may require in this matter.