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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
(VENICE COMMISSION)

**ARMENIA**

***AMICUS CURIAE* BRIEF  
FOR THE CONSTITUTIONAL COURT  
OF ARMENIA**

**RELATING TO**

**ARTICLE 300.1 OF THE CRIMINAL CODE**

**Adopted by the Venice Commission on 18 June 2020  
by a written procedure replacing the 123<sup>rd</sup> Plenary Session**

**on the basis of comments by**

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Mr Dan MERIDOR (Member, Israel)  
Mr José Luis SARDÓN (Member, Peru)  
Mr Kaarlo TUORI (Member, Finland)**

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## I. Introduction

1. By letter of 2 August 2019, the President of the Constitutional Court of Armenia, Mr Hrayr Tovmasyan, requested an *amicus curiae* brief from the Venice Commission on comparative law with respect to Article 300.1 of the Criminal Code of Armenia<sup>1</sup>, which penalises overthrowing the constitutional order.
2. Ms Monika Hermanns, Mr Dan Meridor, Mr José Luis Sardón and Mr Kaarlo Tuori acted as rapporteurs for this *amicus curiae* brief.
3. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission on 18 June 2020, through a written procedure, which replaced the 123<sup>rd</sup> Plenary Session in Venice, due to the COVID-19 disease.

## II. Request

4. This request for an *amicus curiae* brief relates to Article 300.1 of Armenia's Criminal Code, which penalises overthrowing the constitutional order, a provision which is at issue in two cases pending before the Constitutional Court of Armenia.
5. In parallel to its request to the Venice Commission, the Constitutional Court of Armenia has also requested the European Court of Human Rights to provide an advisory opinion under Protocol No. 16 to the European Convention on Human Rights, in relation to Article 300.1 of Armenia's Criminal Code. Protocol No. 16 allows the highest courts and tribunals, as specified by member States which have ratified it, to request advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the European Convention on Human Rights or its Protocols.
6. For this *amicus curiae* brief, the Constitutional Court of Armenia has asked the Venice Commission five specific questions:
  - 1) Do the offences *against the constitutional order* prescribed in the criminal laws of the member States of the Venice Commission contain references to constitutions or their specific articles?
  - 2) How are the concepts of *constitutional order*, *overthrow of the constitutional order*, *usurpation of power* described in the relevant legal acts of the member States of the Venice Commission and, in particular, in criminal laws, and are there judicial interpretations of these concepts?
  - 3) Which are the European standards for the requirement of certainty of a criminal law?
  - 4) Do the legislations of the member States of the Venice Commission stipulate a similar offence to the one prescribed in Article 300.1 of the Criminal Code of the Republic of Armenia?
  - 5) If so, which is the best practice from the perspective of legal certainty?

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<sup>1</sup> **Article 300. Usurpation of power (this edition of the Article became effective on 24 March 2009)**

1. Seizure of power – appropriation of the powers of the President of the Republic, National Assembly, Government or Constitutional Court through violence or threat of violence, as well as in any other way not envisaged by the Constitution – shall be punishable by ten to fifteen years of imprisonment.

2. Holding power – continuing to exercise the powers of President of the Republic, member of parliament, prime minister, minister after the powers have been terminated shall be punishable by ten to fifteen years of imprisonment.

3. The person, who voluntarily informed the law enforcement bodies on the crime under part 1 of this article at its preparation stage, shall be released from criminal liability under part 1 of this article.

**Article 300.1. Overthrow of the Constitutional Order (this Article became effective on 24 March 2009)**

1. The overthrow of the constitutional order – the factual elimination of any norm stipulated in Articles 1 to 5 of the Constitution or part 1 of Article 6 which is expressed in termination of the validity of norm in the legal system - shall be punishable by ten to fifteen years of imprisonment.

7. The Venice Commission will limit itself to the questions posed above and reply to them mainly from a comparative constitutional law perspective, omitting references to the European Convention on Human Rights (ECHR) or the case-law of the European Court of Human Rights due to the forthcoming advisory opinion under Protocol No. 16 to the ECHR.

### III. Analysis

#### A. General remarks

8. The Venice Commission's secretariat has received information from most of the members of the Venice Commission with respect to the above-mentioned questions.<sup>2</sup> As the material received is not comprehensive and shows significant differences in the issues addressed and the detail provided, the conclusions drawn can only be tentative.

#### B. Do the offences *against the constitutional order* prescribed in the criminal laws of the member States of the Venice Commission contain references to constitutions or their specific articles?

9. Among the Venice Commission's member States, the concept of *constitutional order* almost always refers to the institutional aspect of their constitutions. While some countries will use the term *constitutional order*, others will prefer to use the terms *constitutional system* or *democracy*. It frequently alludes to the principle of the separation of powers – more specifically – to acts against the normal functioning of constitutional institutions.

10. When it comes to dealing with offences *against the constitutional order* (or its equivalent), national constitutions and legislation tend to vary among Venice Commission member States. In countries in which offences *against the constitutional order* – described as such – exist in the criminal law, an explicit reference to specific articles of the constitution seems to be lacking. On the other hand, a number of constitutions explicitly refer to the duty of respecting the *constitutional order*, however while some define it (mostly by providing lists or referring to a section of the constitution e.g. North Macedonia<sup>3</sup> and Kyrgyzstan<sup>4</sup>), most do not define it (e.g. Cyprus<sup>5</sup>, Estonia<sup>6</sup>, Hungary<sup>7</sup>, Kazakhstan<sup>8</sup>, Kosovo<sup>9</sup>, Lithuania<sup>10</sup>, Republic of Moldova<sup>11</sup>, Montenegro<sup>12</sup>, Peru<sup>13</sup>, Russia<sup>14</sup>).

11. Nonetheless, the conclusion may be drawn that most (if not all because the terms used slightly differ as seen above) of the criminal law provisions implicitly refer to the constitution by citing certain constitutional principles (e.g. sovereignty, territorial integrity, principle of democracy) or by referring to certain constitutional institutions (e.g. parliament, institutions/government organs established by the constitution). By means of such references, criminal law provisions indirectly refer to the respective articles of the constitution that specify these principles or establish and govern these institutions.

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<sup>2</sup> 42 out of 61 members of the Venice Commission have provided relevant information.

<sup>3</sup> Article 8 of the Constitution of North Macedonia.

<sup>4</sup> Section 1 of the Constitution of Kyrgyzstan.

<sup>5</sup> Article 34 of the Constitution of Cyprus.

<sup>6</sup> §§54-55 of the Constitution of Estonia.

<sup>7</sup> Article 25 of the Constitution of Hungary.

<sup>8</sup> Articles 3.3, 5.3 and 20.3 of the Constitution of Kazakhstan.

<sup>9</sup> Article 7 of the Constitution of Kosovo.

<sup>10</sup> Article 3 of the Constitution of Lithuania.

<sup>11</sup> Articles 2 and 339 of the Constitution of the Republic of Moldova.

<sup>12</sup> Article 55 of the Constitution of Montenegro.

<sup>13</sup> Article 38 of the Constitution of Peru.

<sup>14</sup> Chapter I of the Constitution of the Russian Federation.

**C. How are the concepts of “constitutional order”, “overthrow of the constitutional order”, “usurpation of power” described in the relevant legal acts of the member states of the Venice Commission and, in particular, in criminal laws, and are there judicial interpretations of these concepts?**

*1. Description of the concepts in legal acts, notably criminal laws, of member States of the Venice Commission*

12. In most member States, statutory provisions do not provide any legal definition of the concept of *constitutional order* or what would constitute *overthrowing the constitutional order* or the *usurpation of power*. In most member States, ordinary law, mostly criminal codes, will refer to an offence that corresponds (more or less) to the offence of *overthrowing the constitutional order*. In some, but not all member States, this crime is referred to as *high treason*<sup>15</sup> (some refer to it as *sedition* or *sedition conspiracy*<sup>16</sup>) and will often require intent or an actual attempt to deceitfully, forcefully and unlawfully *amend* the constitution, which does not always require an actual *overthrowing of the constitutional order*.

13. Some insight into the concept of *constitutional order* may be gained by looking more closely at the details provided by some of the provisions on *high treason*. For instance, Article 65 (1) of the Czech Constitution defines *high treason* as the “*conduct of the President of the Republic directed against sovereignty and integrity of the Republic as well as against the democratic order*”. According to Article 34 of the Danish Constitution, the infringement of the “*security or freedom*” of Parliament as well as the issuing or obeying of any command aimed thereat constitutes *high treason*. In these countries, the provisions that establish offences *against the constitutional order* and their resulting punishment are conceived as protecting parliament against the executive branch and other external forces.

14. In a ruling<sup>17</sup> of 1959, the German Federal Constitutional Court held that the provisions on *high treason* were “*intended to protect the constitutional institutions in their specific form created by the Basic Law against violent or threatened violent attacks by individuals*”.

15. Article 91 of the Republic of Korea’s Criminal Code defines the requirement of “*subverting the Constitution*” required by the offence of “*insurrection*” (Article 87 of the Republic of Korea’s Criminal Code) as (1) the extinguishment of the “*function of the Constitution or Acts without observing the procedure provided by the Constitution or Acts*” or (2) the “*overthrow [of] government organs established by the Constitution*” or rendering the exercise of their functions impossible by force.

16. In one of the few decisions<sup>18</sup> on this issue dating back to 1997, the Supreme Court of the Republic of Korea held that the requirement of “*rendering the exercise of the functions of the government organs impossible*” not only referred to the institutional and permanent abolition of said government organs, but actually involved rendering them unable to function properly for some time.

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<sup>15</sup> For instance in Canada, neither the Constitution nor the Criminal Code make it a specific offence to attempt to overthrow the “constitutional order” as such, but it is clear from the definitions of treasonable offences in the Criminal Code that “using force or violence for the purpose of overthrowing the government of Canada or a province” (see paragraph 46(2)(a) of the Criminal Code) would be tantamount to overthrowing the constitutional order in Canada.

<sup>16</sup> E.g. In the U.S: Title 18 U.S Code § 2384 - Seditious conspiracy: If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

<sup>17</sup> Judgment 1 BvR 419/54 of 3 February 1959 of the Federal Constitutional Court of Germany, BVerfGE 9, 162.

<sup>18</sup> Supreme Court of the Republic of Korea, Case No. 96Do3376(1997).

17. Finally, Article 56 of the Maltese Criminal Code sets out a list of criminal acts that constitute the offence of *insurrection* (“*subvert or attempt to subvert the Government of Malta*”). These acts include, amongst others, (1) taking up arms against the government for the purpose of subverting it or for the purpose of compelling the government to change its measures or counsels, or of obstructing the exercise of its lawful authority and (2) usurping or unlawfully assuming any of the executive powers of the government for the purpose of subverting it. This latter reference to the usurpation of power is made in the constitutions and laws of several member States, including Azerbaijan<sup>19</sup>, Iceland<sup>20</sup>, Ireland<sup>21</sup>, the Republic of Korea<sup>22</sup>, Kyrgyzstan<sup>23</sup>, Russia<sup>24</sup>, Malta<sup>25</sup> and Ukraine<sup>26</sup>.

18. Some member States even go so far as to provide for the right to resist anyone who undertakes to abolish the constitutional order and/or authority that abuses its power (*ultra vires*), e.g. Estonia<sup>27</sup>, Germany<sup>28</sup>, Hungary<sup>29</sup> and Lithuania<sup>30</sup>. There is a comprehensive empirical study on the evolution of the right to resist in modern constitutions (Ginsburg, et.al., 2013) – and, over the last fifty years, this right has reappeared in constitutions, notably in Latin American countries.

19. These specifications suggest that the *constitutional order* in the respective member States relates to different constitutional principles (such as sovereignty, territorial integrity, democratic order, state of law, rule of law, legal formalism, balance of powers) and also comprises the institutions as established by the respective constitutions and their proper functioning.

20. Furthermore, the systematic context of the concept of the *constitutional order*, especially alternative acts that are also penalised by the respective crimes in question (*high treason, insurrection and rebellion*) need to be considered, as these acts carry the same punishment and can therefore be deemed to be similar. These criminal acts include the overthrowing of the highest institutions<sup>31</sup> (including, but not limited to, the government<sup>32</sup>), altering the political foundations<sup>33</sup> as well as different forms of violation of territorial integrity<sup>34</sup>.

21. Finally, the material provided remains largely silent on whether an act that presents a “simple” breach of the constitution is enough to constitute *overthrowing the constitutional order*. The Turkish Court of Cassation (see below<sup>35</sup>) seems to indicate that a “simple” breach of the constitution is not enough, but that the fundamental principle related to the establishment of the political order must be breached. Given the extent to which a broad interpretation and a severe penalty attached to it would infringe on the individual’s basic rights and on the individual freedoms of the accused, such an approach would not seem proportionate.

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<sup>19</sup> Article 6 of the Constitution.

<sup>20</sup> Article 116 of the General Penal Code.

<sup>21</sup> Sections 6 of the Offences against the State Act.

<sup>22</sup> Article 87 of the Criminal Law.

<sup>23</sup> Article 5.2 of the Constitution.

<sup>24</sup> Article 3 part 4 of the Constitution.

<sup>25</sup> Section 56(1)(d) of the Criminal Code.

<sup>26</sup> Article 5 of the Constitution.

<sup>27</sup> §54 of the Constitution.

<sup>28</sup> Article 20.4 of the Basic Law.

<sup>29</sup> Article C(2) of the Fundamental Law.

<sup>30</sup> Article 3(2) of the Constitution.

<sup>31</sup> Article 156 Criminal Code of Bosnia Herzegovina.

<sup>32</sup> Sec. 56 Maltese Criminal Code, Article 94 Dutch Criminal Code.

<sup>33</sup> Chapter 13 Sec. 1 (578/1995) Criminal Code of Finland.

<sup>34</sup> Sec. 82 German Criminal Code, Article 87 Criminal Code of the Republic of Korea, Article 307 Criminal Code of North Macedonia; Sec. 312 Slovakian Criminal Code.

<sup>35</sup> Case No. 2018/7103 Decision No. 2019/1953.

## 2. Judicial interpretations of these concepts

22. There is not much case-law on these concepts and reference to *overthrowing the constitutional order* is often made with respect to the freedom of association and the establishment of political parties, for instance, that their programme and activities may not be directed towards the (violent) destruction of the constitutional order<sup>36</sup> (source: CODICES database, [www.codices.coe.int](http://www.codices.coe.int)).

23. National case-law also refers to the freedom of thought, conscience and religion with respect to associations. In this context, its application is weighed against the fundamental freedoms of third parties, or whether the exercise of this freedom is not precluded by other values in the constitutional order,<sup>37</sup> which can lead to the banning of an association that rejects democracy and the constitutional order of the country in which it is based and asserts its ideas by means of violence or channels donations to a terrorist organisation fighting the foundations of the constitutional order.<sup>38</sup>

24. National case-law also refers to the freedom of expression or speech as being an essential element of democracy, on the one hand, but – subject to strict conditions – a potential threat to the constitutional order, on the other. Some cases refer to defamation of the state that, when it reaches a certain degree, could indirectly endanger the existence and functioning of state institutions.<sup>39</sup> In the U.S., freedom of speech has a significant impact on penalties for sedition. In order to get a conviction for seditious conspiracy it is necessary that the government proves the *use of force*; merely *advocating* for the use of force has been considered protected speech under the First Amendment to the U.S. Constitution. Such speech must be accompanied by specific actions, such as distribution of guns, preparation of logistics for an attack, or clear disregard of government orders. The U.S. government won several seditious conspiracy cases related to Puerto Rican nationalists plotting to overthrow the U.S. government and assert Puerto Rico's independence. The case of Pedro Albizu Campos in 1937 was one of the most notorious ones, in which Mr Campos was convicted of sedition and jailed for 10 years for attempting to overthrow the government. More recently, members of a militia group located in Michigan, Ohio, and Indiana called *the Hutaree* were charged with seditious conspiracy in 2010, however were acquitted in 2012<sup>40</sup>.

25. In other member States, this concept is connected to territorial integrity and the obligation of state power and of all citizens to protect these concepts so as to guarantee the security of the state, one means being the military service.<sup>41</sup>

26. As regards *high treason*, the above-mentioned 1959 ruling by the German Federal Constitutional Court should be repeated here, which held that provisions against *high treason* are intended to protect constitutional institutions against violence or the threat thereof, as well as the above-mentioned decision in 1997 by the Supreme Court of the Republic of Korea, which held

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<sup>36</sup> Judgment U.br.168/2000; U.br.169/2000 of 21 March 2001 of the Constitutional Court of North Macedonia, *Sluzben vesnik na Republika Makedonija* (Official Gazette), 27/2001; CODICES: MKD-2001-1-004.

<sup>37</sup> Judgment Pl. ÚS 42/02 of 26 March 2003, Constitutional Court of the Czech Republic, *Sbírka zákonu* (Official Gazette), no. 106/2003; CODICES: CZE-2003-1-005.

<sup>38</sup> Judgment 1 BvR 536/03 of 2 October 2003 of the Federal Constitutional Court of Germany, *Europäische Grundrechtezeitschrift* 2003, 746-749; CODICES: GER-2003-3-023 and Judgment 1 BvR 1474/12, 1 BvR 57/14, 1 BvR 670/13 of 13 July 2018 of the Federal Constitutional Court of Germany, *Europäische Grundrechte-Zeitschrift* 2018, 575; CODICES: GER-2018-2-20).

<sup>39</sup> Judgment 1 BvR 917/09 of 28 November 2011 of the Federal Constitutional Court of Germany, [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de); *Zeitschrift für Urheber - und Medienrecht* 2012, 322-324; *Neue Juristische Wochenschrift* 2012, 1273-1275; CODICES: GER-2012-1-002.

<sup>40</sup> NY Times. *U.S. Judge in Michigan Acquits Militia Members of Sedition*. Available at: <https://www.nytimes.com/2012/03/28/us/hutaree-militia-members-acquitted-of-sedition.html>

<sup>41</sup> Judgment 16/09 of 24 September 2009 of the Constitutional Court of Lithuania on the Constitutionality of legislation relating to reorganisation of the armed forces, *Valstybes žinios* (Official Gazette), 115-4888, 26.09.2009; CODICES: LTU-2009-3-007.

that acts constituting *high treason* must render impossible the work of both the institutional and permanent governmental bodies of the country.

27. The Constitutional Court of Turkey has rendered a judgment, *Aydin Yavuz and others*, on 20 June 2017, related to the attempted *coup d'état* on 15 July 2016 against state institutions. The applicants in this case had been accused of being members of an armed terrorist organisation and of attempting to *overthrow the constitutional order* by the use of force and violence. However, in this case, the Constitutional Court focused on its authority to examine individual applications lodged during times of emergency, which allege that a fundamental right or freedom safeguarded by the Constitution, the ECHR or its additional Protocols has been violated by the use of public force. With respect to the accusation of the offence of *attempting to overthrow the constitutional order*, the Court focused on the timeframe of detention and the holding of hearings, taking into account the heavy workload of the investigation authorities and judicial organs after the *coup* attempt, as many judges and prosecutors had been dismissed or suspended. The Court found that the continuation of the applicants' detention over the case file without holding a hearing was proportionate, taking into account the exigency of the state of emergency. The Court has therefore not dealt with the scope of the concepts that are the subject of this *amicus curiae* brief.

28. However, the Court of Cassation of Turkey has defined the content of the offence of *overthrowing the constitutional order* in Case No. 2018/7103, Decision No. 2019/1953. This case also concerns the military *coup* attempt of 15 July 2016. Here, the legal interest to be protected under Article 309 of the Turkish Criminal Code no. 5237<sup>42</sup> is the principle governing the constitutional order, which includes the bulk of the principles related to the establishment and functioning of the political power. According to the Court, by using the term *constitutional order*, the provision took a clear stance on the legal interest to be protected by this provision. The Court found that the offence described in the provision may be deemed to have been committed only when there is an attempt to change the constitutional order by the use of force or threat thereof. The attempt should not be limited to "preparatory acts", but should reach the enforcement stage.

29. More recently, the Supreme Court of Spain has dealt with a case concerning the country's *constitutional order*, notably the Catalan referendum, in which it addressed the issue of what constitutes the crimes of rebellion and sedition. The Criminal Chamber of the Supreme Court issued a ruling on 14 October 2019 on acts committed by some of the former members of the regional government of Catalonia in September and October 2017. These are Spanish public servants who were in breach of the Spanish Constitution, because they attempted to create a parallel and independent legal order. The facts considered were: (i) the initiation and approval of the unconstitutional act of secession by the regional government and a part of the regional parliament, respectively; (ii) the convocation and organisation of a referendum on the independence of the region, as well as the allocation of public funds for the provision of propaganda services and the organisation of the referendum; (iii) the organisation of a massive action to prevent the judicial commission from collecting evidence of the misuse of public funds to carry out acts of propaganda and the holding of the referendum; and (iv) the organisation of the occupation and blockade of ballot polling centres on 1<sup>st</sup> October 2017, in order to prevent the police from seizing ballot boxes and other material related to the referendum. The Spanish Constitutional Court had banned the referendum of 1<sup>st</sup> October and, in the exercise of its jurisdictional powers, sent a specific order to the twelve defendants to stop organising the referendum and to do everything in their power to stop the referendum from occurring – which

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<sup>42</sup> Violation of the Constitution  
Article 309

(1) Any person who attempts to abolish, replace or prevent the implementation of, through force and violence, the constitutional order of the republic of Turkey shall be sentenced to a penalty of aggravated life imprisonment.

(2) Where any other offences are committed during the commission of this offence, an additional penalty for such offences shall be imposed according to the relevant provisions.

(3) Legal entities shall be subject to security measures specific to them for the commission of offences defined in this article.



was left unheeded. Their attempt was carried out by involving regional institutions, public resources, public media and by encouraging social movements to put “pressure” on police officers who were complying with judicial orders. The violence of this attempt of creating a parallel and independent legal order was found not to be sufficient to constitute the crime of rebellion. Therefore, their attempt to implement an unconstitutional *coup d'état* was an impossible one. However, the Supreme Court held that their acts constituted the crime of sedition, by trying to massively prevent security forces from accomplishing their judicial orders. The Supreme Court found that their behaviour could not be justified by the exercise of any right.

30. The last concept referred to in the questions for this *amicus curiae* brief is that of *usurpation of power*. This concept is rarely referred to as such in constitutional court judgments of the member States of the Venice Commission. Where it is referred to, it will often relate to one institution usurping the power of another, notably in situations concerning the relationship between provinces and the national government (e.g. South Africa<sup>43</sup>) or will be mentioned with respect to judicial power going beyond its judicial functions (e.g. USA<sup>44</sup>), or where the government acts beyond its powers, for instance in a judgment by the Constitutional Court of Lithuania, which held that where the government adopts a resolution that is in breach of the notion of the general welfare of the nation and poses a threat to its independence and territorial integrity, constitutional order and the security or vital interests of the state, it acted *ultra vires* (see above).<sup>45</sup>

31. In conclusion, member States, for the most part, report that the statutory provisions governing these concepts have not been applied to this day. Therefore, there seems to be no common best practice as to the factual circumstances under which charges of *high treason*, etc. would be brought in member States.

#### **D. Which are the European standards for the requirement of certainty of a criminal law?**

32. The principle of legal certainty is found in legal instruments to which Armenia is a party, notably the European Convention on Human Rights (Articles 5-7)<sup>46</sup> (just a brief mentioning here) and the International Covenant on Civil and Political Rights (Articles 14-15)<sup>47</sup>. The principle is also found in soft-law instruments adopted by the United Nations<sup>48</sup> and the Council of Europe.<sup>49</sup> On the European level, the unequivocal standard is Article 7 ECHR and the case-law pertaining to it – but this is the subject of the advisory opinion before the European Court of Human Rights.

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<sup>43</sup> E.g. Judgment by the Constitutional Court of South Africa of 6 September 1996 on the Certification of the Constitution of the Province of Kwazulu-Natal (CODICES: RSA-1996-3-015).

<sup>44</sup> E.g. Supreme Court Judgment of Sanchez-Llamas v. Oregon

<sup>45</sup> Judgment 19/2008-25/2009 of 26 February 2010 of the Constitutional Court of Lithuania on the privatisation of the 34% block of shares of the JSC “Lietuvos dujos”, *Valstybes žinios* (Official Gazette), 25-1179, 02.03.2010; CODICES: LTU-2010-1-002.

<sup>46</sup> Ratified in 2002.

<sup>47</sup> Ratified in 1993.

<sup>48</sup> See UN Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; UN Basic Principles on the Role of Lawyers and UN Guidelines on the Role of Prosecutors, adopted at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, September 1990.

<sup>49</sup> See European Charter on the Status of Judges, adopted at the multilateral meeting on the statute for judges in Europe, organised by the Council of Europe, 10 July 1998; Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities; the Venice Commission's Rule of Law Checklist [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e); the Venice Commission's Report on the Independence of the Judicial System Part I: the Independence of judges, [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)004-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)004-e.pdf); the Venice Commission's Report on European Standards as regards the Independence of the Judicial System Part II: the Prosecution Service, [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)040-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)040-e.pdf).

33. The Venice Commission has dealt with the principle of legal certainty in its *Rule of Law Checklist* (2016). In its Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina (2012), the Venice Commission stated that: “*Legal certainty has several functions: it helps in ensuring peace and order in a society and contributes to legal efficiency by allowing individuals to have sufficient knowledge of the law so as to be able to comply with it. It also provides the individual with a means whereby he or she can measure whether there has been arbitrariness in the exercise of state power. It helps individuals in organising their lives by enabling them to make long-term plans and formulate legitimate expectations.*”<sup>50</sup>

34. The *Rule of Law Checklist* sets out that legal certainty depends on whether laws are accessible (*accessibility of legislation*) and whether court decisions are accessible (*accessibility of court decisions*). Since court decisions can establish, elaborate and clarify the law, access to these decisions forms an integral part of legal certainty. Limitations thereto are only allowed where individual rights need to be protected. The effects of the law must also be foreseeable, which means that the law must be proclaimed before its implementation and its effects foreseeable i.e. the law must be worded with sufficient precision and clarity to enable legal subjects to align their conduct accordingly. The degree of foreseeability required will depend on the nature of the law (especially important for criminal law), followed by the question of whether laws are stable and consistent (*nullum crimen, nulla poena sine lege* or non-retroactivity, see below under F).

35. The prohibition of retroactivity of criminal laws and the requirement of providing sufficiently clear and precise definitions of criminal acts in laws are crucial for their application. With respect to the requirement of clarity and precision in the context of this *amicus curiae* brief, it might be argued that the unspecified concept of *constitutional order* could present a problem in this respect. Yet, perhaps in most member States, there seems to be a widespread consensus that might cover possible criticisms of the imprecision of the constitutions and the laws, with respect to what this concept is (*constitutional order, the overthrowing of the constitutional order*). The common practice, disclosed by the material received by the Venice Commission, on leaving the *constitutional order* undefined, does not allow us to conclude that the principle of legal certainty is breached where there is no further definition of this concept. If it is not possible to provide a general definition for *constitutional order* in all cases in which criminal law is applied, reference should be made to specific constitutional provisions or to clear constitutional principles that were allegedly violated.

**E. Do the legislations of the member States of the Venice Commission stipulate a similar offence to the one prescribed in Article 300.1 of the Criminal Code of the Republic of Armenia?**

36. Article 300.1 of the Armenian Criminal Code leaves room for interpretation as to what is meant by the “*actual elimination of any norm provided for in Articles 1 to 5 or in Part 1 of Article 6 of the Constitution*”, making it difficult to identify similar provisions in the legislation of other member States. In addition, the legal definition provided by the provisions (“*which is expressed in termination of the action in the legal system*”) does not clarify the situation, which may however be due to the translation. For the sake of clarity, the aspect of the “*actual elimination*” is therefore omitted from the following comments.

37. Of the member States reporting, all jurisdictions have provisions protecting the *constitutional order* or certain aspects thereof. While most of the member States provide for these offences in

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<sup>50</sup> Paragraph 24, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)014-e).

their respective criminal codes, many also have special constitutional provisions pertaining to the prosecution of actions directed against the *constitutional order*<sup>51</sup> (see also above).

### 1. Constitutional Provisions: Limited Liability and Immunity

38. These constitutional provisions usually serve to limit any (criminal) charges that can be brought against a list of government officials (usually against the President,<sup>52</sup> in some cases also against Ministers and State Secretaries<sup>53</sup>) for acts performed within their official capacity. Often, these constitutions will also grant immunity to the respective government officials for all other acts performed within his or her official capacity that do not fall under the aforesaid constitutional provision.

39. In the constitutional law of some countries, *high treason* is included in the grounds for impeaching the President of the country. The constitutional provision on impeachment may explicitly or implicitly refer to the ordinary law offence of *high treason*. Arguably, for instance, Section 113 of the Finnish Constitution<sup>54</sup> includes such an implicit reference.

40. However, the relationship between the grounds for impeachment and the ordinary law offence of *high treason* can also be unclear and open to interpretation. Here the nature of the impeachment procedure in the constitutional system plays a role. The more prominent the strictly legal aspect is, the more likely it is that impeachment is possible only for acts explicitly defined as crimes. This is the case, for instance, in Finland. The more prominent the political aspect of the procedure is, the more vaguely the grounds will be defined, and the less exclusionary relevance can be meted to criminal law definitions.

### 2. Criminal Law Provisions

41. Many member States have statutory provisions protecting the *constitutional order* in their criminal codes. These provisions can be divided into roughly two categories: (1) the more broadly worded criminal offences of *high treason*, *insurrection* and/or *rebellion* and (2) the more detailed criminal offences that penalise specific actions directed against the *constitutional order* or specific constitutional principles.

#### a. Aggravating or Extenuating Circumstances

42. Some countries combine the latter approach with the (usually enumerated) description of aggravating or extenuating circumstances of the crime. These aggravating circumstances, in turn, can be subcategorised into (1) serious consequences as a result of the acts carried out (e.g. grievous bodily harm, death, severe or extensive damage), (2) unusual circumstances in which the acts were carried out (e.g. during a state of war or a state of emergency, involving the use of arms) and (3) cases in which the offender was the holder of a special responsibility or owed the state special loyalty (e.g. when the offender was an office holder or a citizen).

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<sup>51</sup> Article 34, Constitution of Cyprus; Article 65, Constitution of the Czech Republic; Article 34, Constitution of Denmark; §54, Constitution of Estonia; Articles 14 and 48, Constitution of Greece; Article 25, Constitution of Hungary; Articles 3.3, 5.3 and 20.3, Constitution of Kazakhstan; Articles 3 and 8, Constitution of Lithuania; Article 2.2, Constitution of the Republic of Moldova; Article 55, Constitution of Montenegro; Article 20, Constitution of North Macedonia; Article 117, Constitution of Peru; Article 3.4, Constitution of the Russian Federation; Article 55, Constitution of Serbia; Article 107, Constitution of the Slovak Republic; Articles 5, 17 and 37, Constitution of Ukraine; Article III, Section 3, Constitution of the United States of America.

<sup>52</sup> E.g. Article 65 Constitution of the Czech Republic; Article 117, Constitution of Peru.

<sup>53</sup> E.g. Article 119 Constitution of the Netherlands in conjunction with the Ministerial Responsibility Act.

<sup>54</sup> Section 113 - Criminal liability of the President of the Republic – If the Chancellor of Justice, the Ombudsman or the Government deem that the President of the Republic is guilty of treason or high treason, or a crime against humanity, the matter shall be communicated to the Parliament. In this event, if the Parliament, by three fourths of the votes cast, decides that charges are to be brought, the Prosecutor-General shall prosecute the President in the High Court of Impeachment and the President shall abstain from office for the duration of the proceedings.

43. Extenuating circumstances are assumed, *inter alia*, where the offender voluntarily decides not to complete the crime and, as a result, the crime is not committed.

*b. Usually Two Elements of the Crime*

44. The rather broadly worded offences of *high treason*, *insurrection* or *rebellion* usually require an element of violence, force or threat combined with the intent (or an actual attempt) to direct said violent or forceful act against the *constitutional order* or a related protected interest. Provisions that do not require violence and/or such intent directed against the constitutional order generally stipulate more specific acts (e.g. distribution of writings or use of symbols of an unconstitutional party or association) that are deemed inherently anti-constitutional.

**F. If so, which is the best practice from the perspective of legal certainty?**

45. Since the constitutionality of broadly worded criminal statutory law in terms of legal certainty may very well depend on its actual application, the lack of cases in which these provisions have been applied – because most member States of the Venice Commission have never had to apply them – precludes any statement on what would constitute a constitutional best practice. Any such inference would suffer from the fact that potential constitutional shortcomings of these provisions might not have come to light because they have not come under constitutional review.

46. Another aspect of this *amicus curiae* brief request touches upon the *nullum crimen, nulla poena sine lege* – subcategory of the principle of legal certainty, i.e. the question of the retroactive application of criminal law (as mentioned under D, above). In the interest of legal certainty, the criminal prosecution of an act requires that the act was defined by law as a criminal offence before the act was carried out. If the *constitutional order* is a defining element of the crime and is not defined as such – be it by law or by case-law – then the alleged criminal act must be connected to a constitutional provision or at least to constitutional principles that were violated by the act.

47. If the law was amended with regard to the punishment after the crime was committed, the punishment to be imposed is determined by the law in effect at the time the crime was committed unless the amended law is more lenient. Article 72 of the Armenian Constitution of 2015 indicates that the Armenian Constitution recognises this principle.

48. In view of this principle and the principle of proportionality, it seems only reasonable to expect that the more broadly the statutory provision is worded, the more consideration should be given to the individual freedoms and basic rights of the accused.

**IV. Conclusion**

49. In reply to the five questions regarding Article 300.1 of the Armenian Criminal Code – which penalises *overthrowing the constitutional order* – addressed to the Venice Commission by the Constitutional Court of Armenia for this *amicus curiae* brief – the Venice Commission noted that the material received from most of its member States shows significant differences in the issues addressed and the detail provided. For this reason, the conclusions drawn in this *amicus curiae* brief are only tentative.

50. National constitutions and legislation tend to vary from one member State to the next in the way crimes *against the constitutional order* are dealt with. In member States where such offences exist and are referred to in the constitution, they often stipulate the *forceful and unlawful amendment of the constitution* as an element of this crime – and refer to the constitution in its entirety. Others explicitly refer to the duty of respecting the constitutional order, however, without defining it. Nevertheless, there seem to be no statutory provisions that contain an explicit reference to specific articles of constitutions. However, most (if not all because terms used may

differ) provisions in criminal codes/legislation will implicitly refer to the constitution by citing constitutional principles such as sovereignty, territorial integrity, democracy and elections or refer to certain constitutional institutions such as parliament. Hence, there seem to be no explicit references to constitutions with respect to crimes “*against the constitutional order*”, however the conclusion may be drawn that there are indirect or implicit references to them.

51. The concepts of *constitutional order*, *overthrow of the constitutional order*, *usurpation of power* as such seem not to be defined in the statutory provisions of most member States. Many – but not all – member States will refer to the offence of *overthrowing the constitutional order* as *high treason* i.e. the intent or actual attempt to *deceitfully, forcefully and unlawfully amend the constitution*, which does not always require an actual *overthrowing* of the constitutional order.

52. There is a lack of case-law on the concepts of *constitutional order*, *overthrow of the constitutional order*, *usurpation of power*, showing that, for the most part, statutory provisions governing these concepts have not been applied to this day. This, in turn, shows that there is no best practice as to the factual circumstances under which charges of the most similar crime, notably *high treason*, would be dealt with in member States. With respect to the prohibition of retroactivity of criminal laws and the requirement of providing sufficiently clear and precise definitions of criminal acts in laws, criticisms of imprecisions regarding the concepts of *constitutional order* and *the overthrowing of the constitutional order* might be appeased in the knowledge that there seems to be a convergence among the member States of the Venice Commission to leave these concepts undefined or imprecise. Hence, no conclusion can be drawn with respect to what constitutes a best practice from the perspective of legal certainty. Nevertheless, in view of this principle and the principle of proportionality, it seems only reasonable to expect that the more broadly the statutory provision is worded, the more consideration should be given to the individual freedoms and basic rights of the accused. Such a provision should be interpreted narrowly, taking into account the principle *in dubio pro reo*.

53. The Venice Commission remains at the disposal of the Armenian Constitutional Court for further assistance in this matter.