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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ARMENIA

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

ON THE CONCEPT PAPER CONCERNING THE REFORM OF THE
ETHICS AND DISCIPLINARY COMMISSION OF THE GENERAL
ASSEMBLY OF JUDGES

Adopted by the Venice Commission
at its 137th Plenary Session
(Venice, 15-16 December 2023)

on the basis of comments by

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I. Introduction

1. By letter of 26 September 2023, Mr Grigor Minasyan, the Minister of Justice of Armenia requested an opinion of the Venice Commission on the Concept Paper concerning the reform of the Ethics and Disciplinary Commission of the General Assembly of Judges (“the Concept Paper”, [REF\(2023\)053](#)). The Venice Commission prepared the requested opinion jointly with the Directorate General of Human Rights and Rule of Law (DGI).

2. Ms M. Cartabia, Mr L. Mälksoo, Mr J. Sørensen acted as rapporteurs on behalf of the Venice Commission. Mr G. Reissner acted as a rapporteur on behalf of DGI.

3. On 8 November 2023, a delegation of the Commission and DGI held online meetings with representatives of the Ministry of Justice, the Chair of the Standing Committee on State and Legal Affairs of the National Assembly, the President of the Court of Cassation, the Chairman and members of the Ethics and Disciplinary Commission of the General Assembly of Judges and a member of the Supreme Judicial Council. Meetings were also held with representatives of the international community and civil society organisations. The Commission and DGI are grateful to the Council of Europe Office in Armenia for the excellent organisation of the meetings and to the interlocutors for their availability.

4. This opinion was prepared in reliance on the English translation of the Concept Paper and the relevant legislation. The translation may not accurately reflect the original texts on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings. It was adopted by the Venice Commission at its 137th Plenary Session (Venice, 15-16 December 2023).

II. Background

6. As noted by the Venice Commission and DGI in their previous opinions, there has been public mistrust in the judiciary in Armenia.¹ Interlocutors appear to still consider the system of disciplinary liability of judges as inefficient and overprotective of judges. Despite the Government’s efforts in this area over the past years,² further measures are deemed necessary, notably regarding the legal framework for initiating and investigating disciplinary proceedings against judges.

A. Current legal framework

7. According to Art. 145 § 1 of the Judicial Code of the Republic of Armenia (“the Judicial Code”), disciplinary proceedings against a judge may be initiated by three bodies: the Ethics and Disciplinary Commission of the General Assembly of Judges (“the EDC”), the Minister of Justice, and the Commission for Prevention of Corruption.³ The body deciding on the disciplinary liability of judges is the Supreme Judicial Council (“the SJC”),⁴ which is composed of five judges elected

¹ See e.g. Venice Commission, [CDL-AD\(2019\)024](#), Armenia - Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI), on the amendments to the Judicial Code and some other Laws, para. 11.

² For more details, see Venice Commission, [CDL-AD\(2022\)044](#), Armenia - Joint Opinion of the Venice Commission and Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Judicial Code, para. 5.

³ The latter may only institute disciplinary proceedings connected to infringements of obligations to submit asset declarations (see Article 145 § 1.1 of the Judicial Code).

⁴ See Art. 148 and Art. 149 of the Judicial Code.

for the period of five years by the General Assembly of Judges and five prominent lawyers elected for the same period by Parliament.⁵

8. As regards the EDC, it is composed of six judicial members and two lay members; all members are elected for a term of four years by the General Assembly of Judges;⁶ the lay members may be nominated (proposed for election by the General Assembly of Judges) by civil society organisations meeting the requirements defined by the SJC.⁷

9. The authorities initiating disciplinary proceedings have broad investigating powers: they may request and study the relevant court files, request written explanations from the judge concerned, request information from the persons bringing complaints against judges as well as from the other natural and legal persons, state bodies or officials.⁸ Based on this inquiry, the body which has instituted the proceedings may either discontinue them or submit the case to the SCJ for determination on the merits.⁹

10. The Venice Commission and DGI will not comment on the issues described in paras. 7-9 above and will focus on the proposals made in the Concept Paper.

B. Previous recommendation and the proposed measures

11. In their joint opinion of December 2022, the Venice Commission and DGI reiterated their earlier recommendation noting that *“even though the involvement of the Minister is currently seen as a tool helping to combat judicial corporatism...in a longer perspective it would be preferable to withdraw the power from the Minister, as soon as other mechanisms – namely the EDC – prove their efficiency”*.¹⁰ In its 2023 report on Armenia, GRECO also supported the idea of removing that competence from the Minister of Justice.¹¹

12. Against the background of this recommendation, the Ministry of Justice developed the Concept Paper seeking to improve the efficiency of the EDC and address the alleged problems of judicial corporatism in that body.

13. The Concept Paper explores ways of strengthening the role of the lay members of the EDC. Firstly, the Ministry of Justice has drafted amendments to the Judicial Code, increasing from two to five the overall number of lay members. With those amendments, the EDC would consist of eleven members in total (five lay members and six judicial members), thus providing substantial participation of lay members.

14. Secondly, the Ministry of Justice considered changing the manner of electing the lay members of the EDC. Under the current legal framework, it is for the General Assembly of Judges to elect both judicial and lay members, the latter being nominated by the CSOs (see paragraph 8 above). The Concept Paper argues that because of this power, the General Assembly may block the access of the lay members to the EDC by failing to elect lay candidates. As an example, the Ministry of Justice mentioned a recent failure of the General Assembly to elect a lay member and the reluctance of civil society organisations, who were aware of the current state of affairs, to nominate their candidates.

15. To avoid such blockages, the Concept Paper proposes amending the Judicial Code as follows:

⁵ See Art. 174 §§ 2, 3 and 4 of the Constitution.

⁶ See Art. 77, §§ 4, 6 and 10 of the Judicial Code.

⁷ See Art. 77, § 9 of the Judicial Code.

⁸ See Art. 147 § 3 of the Judicial Code.

⁹ See Art. Art. 147 § 5 of the Judicial Code.

¹⁰ see Venice Commission, [CDL-AD\(2022\)044](#), cited above, para. 9.

¹¹ See GRECO, [Second Interim Compliance Report](#): Armenia, Fourth Evaluation Round, adopted on 20-24 March 2023, paras. 42 - 43.

- (a) The General Assembly of Judges should retain the power to elect the lay members, but the candidates should be nominated by the Human Rights Defender of the Republic of Armenia, the Commission for the Prevention of Corruption, the Minister of Justice (those bodies would nominate three members) and by civil society organisations (nominating two members). The candidates would be subjected to equal eligibility requirements, and the selection would be carried out through a competition.
- (b) In case the General Assembly fails to elect the nominated candidates, the election must be made by the SJC.
- (c) In case the SJC fails to elect the candidates, the nominated persons shall be deemed elected by virtue of law (*ex lege*). Where the number of candidates exceeds the number of vacant positions, the candidates with longer professional experience (in sequential order) would be considered elected; lastly, in case of equivalent experience preference would be given to more senior candidates.

III. Analysis

A. Sequence of reforms

16. The EDC, the Minister of Justice, and the Commission for Prevention of Corruption are three bodies entitled to initiate disciplinary proceedings against judges. In that capacity, those bodies are provided with broad investigating powers, which they may use to substantiate their request that the disciplinary case should be submitted to the SJC for determination on the merits.

17. As recommended earlier by the Venice Commission and DGI, this function of the Minister of Justice should be phased out as soon as the EDC proves its efficiency.¹² Accordingly, it is welcome that the domestic authorities follow this sequence of reforms and currently search for ways of improving the efficiency of the EDC. As to the removal of the Minister of Justice from the disciplinary proceedings, it would be the next necessary step. In this regard, it is relevant to mention that the GRECO has likewise considered that the power of the Minister of Justice to initiate disciplinary proceedings against judges in Armenia was endangering the judicial independence.¹³ In more general terms, the CCEJ has earlier recommended that the bodies dealing with the disciplinary cases against judges should be free from political influence and should not include, in particular, the Minister of Justice.¹⁴ The Venice Commission and DGI encourage therefore the authorities to pursue these changes. However, there should be a brief but realistic timeframe for the authorities to enhance the efficiency of the EDC.

B. Issues related to the increase of the number of EDC lay members

18. In their 2019 opinion on Armenia, the Venice Commission and DGI positively evaluated the presence of lay members in the EDC to limit the risks of judicial corporatism.¹⁵

19. The proposed increase of lay members from two to five persons aligns with that previous assessment and is welcome.

¹² See Venice Commission, [CDL-AD\(2019\)024](#), cited above, para. 30; [CDL-AD\(2022\)044](#), cited above, para. 9.

¹³ See GRECO, [The Fourth Round Evaluation Report on Armenia](#), adopted on 12-16 October 2015, para. 156.

¹⁴ See Consultative Council of European Judges, [Opinion no.10\(2007\)](#) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para. 63.

¹⁵ See Venice Commission, [CDL-AD\(2019\)024](#), cited above, para. 19.

1. Nomination of EDC lay members

20. The enlargement of external participation in the EDC is a positive change because it aims at reducing the risk of corporatism, however this measure should not carry the risks of undue influence on the judiciary by the other State branches. In other words, the aim of social inclusiveness and pluralism should not be achieved at the cost of judicial independence. The judicial members should therefore be usefully counterbalanced by representatives of civil society in a broad sense (including, without being limited to, law professors and other competent academic professionals).

21. Currently, the Judicial Code provides for two lay members who are nominated by CSOs and then elected by the General Assembly of Judges. The Concept Paper proposes that three more lay members would be nominated by the other bodies: the Minister of Justice, the Commission for Prevention of Corruption, and the Human Rights Defender. The Concept Paper does not clarify whether each of those institutions will be given a quota of one lay member or they will have a joint quota of three lay members. In this regard, the Ministry of Justice explained in their written comments that the nominating bodies would have a collective quota of three lay members and that those bodies would be able to nominate more than one candidate for one place.

22. Majority of interlocutors who held discussions with the delegation of the Venice Commission and DGI were of the view that the Human Rights Defender could be vested with a nominating function. However, objections were raised regarding the Minister of Justice and the Commission for Prevention of Corruption. In the view of the Commission and DGI, these objections may be supported; nevertheless, the Minister of Justice could be foreseen to have the nominating power, but only temporarily, for a short period of time, starting from the moment when the Minister's power to initiate disciplinary cases has been withdrawn in accordance with the aforementioned recommendation (see paragraph 17 above). However, the overarching objective is to ensure that the Minister of Justice has neither the power to make nominations nor to initiate disciplinary proceedings.

23. It remains for the national authorities to discuss and devise the most appropriate model for nomination of lay members in view of the political and institutional realities of Armenia. In this context, the authorities could give further consideration to the role of academia in the nomination process, ensuring that the law professors and other competent academic professionals have sufficient access to these positions. The participation of the academia in the bodies of judicial governance is not unusual for the Council of Europe member States. In any event, when elaborating the model, the Armenian authorities should make a genuine attempt to secure that the nominating procedure is not politicised and that the nominating bodies are not precepted as tools for exercising improper influence on the judiciary.

2. Eligibility criteria for nominating CSOs

24. According to Art. 77 § 9 of the Judicial Code, it is for the SJC to determine the requirements for the CSOs to participate in the nomination of lay candidates to the EDC. However, for the sake of legal certainty and foreseeability of law, it would be more appropriate if these requirements were determined by statutory legislation, preferably the Judicial Code. The SJC could be given the role of deciding if a CSO meets the above requirements.

3. Competitive selection of candidate lay members

25. The Concept Paper provides that the nominating organisations must select and nominate the candidates through a competition. This approach is welcome. The competition and the selection procedure must be sufficiently regulated by statutory legislation.

4. Quorum and deciding majorities in EDC

26. Given the proposal to increase the number of members of the EDC, it is recommended that the Concept Paper address the issues of quorum and deciding majorities. A high quorum raises the risk of blockages, thus preventing the EDC from operating effectively. As regards the voting majorities, for the sake of effective participation of both judicial and non-judicial groups, it might be relevant to secure that EDC decisions should not be adopted exclusively by votes of one of those groups.¹⁶

C. Issues related to the proposed manner of electing EDC lay members

1. Role of the General Assembly of Judges

27. Under the current Judicial Code, the EDC is established by the General Assembly of Judges and it is up to the Assembly (i.e. to judges) to elect (or not elect) the lay members of the EDC who are nominated by CSOs.

28. The Concept Paper suggests that this mechanism will pose problems even when the overall number of lay members has been increased. The Concept Paper argues that the General Assembly of Judges will tend to elect conformist and loyal candidates who will not effectively counterbalance the EDC judicial members. It is understood that the current regime does not encourage CSOs to put energy into nominating strong candidates.

29. Despite the critical assessment, the Concept Paper retains the primary role of the General Assembly of Judges to elect EDC lay members. At the same time, it proposes an anti-blocking mechanism in case the Assembly fails to elect nominated candidates (see paragraph 15 above). Some interlocutors suggested in that context that complete removal of the General Assembly of Judges from the procedure for electing lay members might raise issues of constitutionality, in view of the general principles of judicial independence and judicial self-governance as well as lack of constitutional provisions regarding the status of the EDC. Other interlocutors submitted, however, that the EDC was an institution established by statutory legislation and that there were no constitutional restraints for the legislator to modify the way the EDC members may be elected.

30. In any case, if the General Assembly of Judges remains the electing body, the Concept Paper should elaborate the duty of the Assembly to substantiate its decisions on all the nominated candidates and, in particular, to give concrete and detailed reasons when rejecting a nominated candidate.

31. However, in case the Assembly is removed, the question arises which forum or authority could replace the Assembly in electing the lay members. Some interlocutors reported that there are platforms of relevant CSOs which could be entrusted with such a task. However, direct election by the nominating authorities and the civil society may look problematic in terms of legitimacy and could raise practical challenges. The Venice Commission has recently acknowledged the difficulties concerning the identification and selection of appropriate representatives of CSOs.¹⁷ In this context, the election of members of the Public Integrity Council in Ukraine at the conference of the CSOs would be a rare example.¹⁸ However, that Council has

¹⁶ See, *mutatis mutandis*, Venice Commission, [CDL-AD\(2022\)019](#), Opinion on the draft law on amending some normative acts (Judiciary) of Moldova, para.49.

¹⁷ See Venice Commission, [CDL-AD\(2022\)054](#), Ukraine – Opinion on the draft law “On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis”, paras. 33-35.

¹⁸ See Art. 87 (paras.9-18) of the Law of Ukraine “On Judiciary and Status of Judges”, [CDL-REF\(2021\)080](#).

auxiliary functions¹⁹ which differs from those of the EDC. In general, there is no common practice for CSOs electing their members to the judicial governance bodies.

32. For the purpose of election of the EDC lay members, further consideration could be given to the role that the SJC may play. Indeed, the Concept Paper has already envisaged the electing power of the SJC in the anti-blocking mechanism (see below). In this context, it is relevant to emphasise that the SJC should remain free from political influence. Among the guarantees of political neutrality of the SJC, the authorities could consider, if necessary by way of constitutional amendment,²⁰ the restrictions for the politicians (including recent politicians) to become the SJC members. The Judicial Code forbids the SJC members to engage, among other things, in political activities (Art 83, para.1), however this restriction is not sufficient, and it does not address the problem of politicians who, without a cooling-off period, may take up a position in the SJC.

33. Moreover, while the mandates of the SJC members are longer than those of the EDC members, it is useful to provide safeguards which would exclude in practice scenarios when the majority of mandates of both bodies expire at the same time.

2. Anti-blocking mechanism

34. The Concept Paper provides that, in case the General Assembly of Judges fails to elect the nominated candidate lay members of the EDC, the election from among the nominated persons must be made by the SJC. Should the SJC fail to elect candidates, the nominated persons would be deemed elected by virtue of law (*ex lege*), where the candidates with longer professional experience and more senior age would have preference over the other candidates.

35. The Venice Commission and DGI welcome the efforts of the authorities to devise an anti-blocking mechanism for the election of the EDC lay members. In general, the transfer of the electing power from the General Assembly of Judges to the SJC is a reasonable proposal. However, the mechanism outlined by the Concept Paper lacks important details. There should be clear and fair conditions and time-limits when the electing power is transferred from the General Assembly of Judges to the SJC. The General Assembly of Judges should have adequate time and facilities to vote on the nominated candidates. Moreover, the Assembly's reasoned decision not to elect a candidate, especially if the decision is taken by a qualified majority, should carry considerable weight in further procedures before the SJC. Similar considerations (as to the fair conditions) apply to the procedure before the SJC.

36. Finally, choosing candidates by virtue of law, on the mere basis of professional seniority or by age is risky; It is in contrast with the idea of opening a competition among all the candidates, in order to select the best ones according to their professional skills and to their personal and ethical integrity. Seniority as such is not an equivalent either of professionalism or integrity.

IV. Conclusion

37. At the request of the Minister of Justice of the Republic of Armenia, the present opinion assesses the Concept Paper on the reform of the Ethics and Disciplinary Commission of the General Assembly of Judges ("the EDC"), a body which is entitled to initiate and investigate disciplinary cases against judges and submit those cases to the Supreme Judicial Council for determination on the merits. The authorities wish to enhance the role of lay members of the EDC

¹⁹ According to Art. 87 (para. 1) of the Law of Ukraine "On Judiciary and Status of Judges", the Public Integrity Council is established to assist the High Qualification Commission of Judges of Ukraine in determining whether a judge (candidate for the position of judge) meets the criteria of professional ethics and integrity for the purposes of qualification assessment.

²⁰ See the current eligibility criteria in Art. 174, para.3. of the Constitution.

by: (a) increasing the overall number of lay members, and (b) changing the manner of their election, in an effort to overcome alleged judicial corporatism.

38. It is welcome that the authorities have developed the Concept Paper aimed at increasing the efficiency of the EDC. This is in line with the earlier recommendation made by the Venice Commission and DGI to ensure the efficiency of the EDC, making thus possible to remove the Minister of Justice from the procedure of initiating and investigating disciplinary cases against judges. The Venice Commission and DGI encourage the authorities to pursue this reform.

39. The increase of the overall number of lay members of the EDC is welcome. The authorities are invited to reconsider the list of nominating bodies, given that some of them are entitled to initiate disciplinary proceedings against judges on their own. Moreover, the Concept Paper could secure the role of academic professionals in the nomination procedure.

40. The proposed anti-blocking mechanism should provide clear and fair conditions in cases where the General Assembly fails to elect candidate lay members of the EDC. The proposal for automatic appointment of candidates *ex lege* by seniority is not consistent with the principle of competitive selection of the most suitable candidates.

41. As the present opinion deals with the Concept Paper which provides only general approach and an outline for the possible solutions without specific draft provisions, the current recommendations should not affect any further assessment of the actual draft law that the authorities may elaborate.

42. The Venice Commission and DGI remain at the disposal of the Armenian authorities for further assistance in this matter.