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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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ARMENIA

FIVE QUESTIONS

RELATED TO THE DRAFT JUDICIAL CODE

Submitted by the Armenian authorities

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QUESTIONS
concerning the problematic approaches in the Draft Constitutional Law of the Republic of Armenia "The Judicial Code of the Republic of Armenia" last revised on 1 March 2017 (hereinafter referred to as "the Draft")

1. Concerning legal regulations, proposed in the Draft, regarding the judicial acts delivered by the Court of Cassation of the Republic of Armenia (case law):

Article 92 of the Constitution of the Republic of Armenia as amended in 2005 stipulates that the highest judicial instance of the Republic of Armenia — except for matters of constitutional justice — shall be the Court of Cassation which is called to ensure the uniform application of law.

According to part 4 of Article 15 of the Judicial Code currently in force, "The reasoning (including legal interpretations) laid down in a judicial act of the Court of Cassation or the European Court of Human Rights in a case with certain factual circumstances shall be binding for a court when the latter examines a case with similar factual circumstances, except when the court substantiates, putting forth weighty arguments, that it is not applicable to the factual circumstances at hand.".

This rule is an important guarantee for the effective fulfilment of the mission to ensure the uniform application of law assigned to the Court of Cassation of the Republic of Armenia by the Constitution of the Republic of Armenia.

However, the regulation proposed in part 4 of Article 14 of the Draft has stipulated that "where a court derogates from the justifications of a judicial act of the Court of Cassation (including the interpretations of a normative legal act) while examining and deciding on a case, it shall justify its position indicating strong arguments" thus weakening the legal basis for the function of ensuring the uniform application of law, which has been performed by the Court of Cassation of the Republic of Armenia since 2005.

According to point 1 of part 2 of Article 171 of the Constitution of the Republic of Armenia as amended in 2015, the Court of Cassation shall, by way of revision of judicial acts within the scope of powers prescribed by law, ensure the uniform application of laws or other regulatory legal acts.

Currently, the case-law decisions of the Court of Cassation of the Republic of Armenia, being binding, ensure the predictability of justice, legal certainty, uniformity of the judicial practice, and the possibility of resolving the ambiguities and gaps in legislation.

The first step towards the establishment of a predictable and, thus, reliable justice system is to ensure the uniform application of law, which would not serve its goal, were it not followed by the second step which is to ensure compliance with the already rendered case-law decisions. This process, on the one hand, is aimed at ensuring legal certainty, so that each person could predict what fate may await the case, and on the other hand, at ensuring that everyone is equal before the law so that same rules apply the same way to everyone and so that the possibility of arbitrary interpretation of general rules is reduced. In this regard, it should be emphasised that currently the arguments brought forward in the appeals lodged with the courts of appeal and the Court of Cassation tend to be built on various legal opinions expressed by the Court of Cassation.

The Court of Cassation plays a crucial role in guiding the lower courts in setting appropriate standards and accurately applying the ECHR case law. And it is, of course, the task of the

Court of Cassation to set the necessary guiding standards. In this regard, it should be emphasised that in the absence of the above-mentioned standards the workload of courts of all instances will multiply several times. The prediction with regard to the increase in workload is based on the logic that when the decisions rendered by the Court of Cassation with a view to uniform application of law are binding for lower courts, the parties to court proceedings can foresee the path the court will follow were it to examine a case with similar factual circumstances, which very often makes them abstain from unnecessarily applying to the court or appealing the judicial act. Meanwhile, if the decisions rendered by the Court of Cassation with a view to uniform application of law are not binding for lower courts, each time the parties to court proceedings will have to apply to the court or appeal the act delivered by the court, as they are not able to foresee the judicial act that the court will deliver following the examination of a case with similar factual circumstances.

It is noteworthy that for more than 10 years since 2005 the Court of Cassation has been developing its opinions on problematic matters in the field of criminal, civil and administrative justice, and has since been guiding the judicial practice with those opinions.

As a result, the cases of giving by lower judicial instances contradictory solutions to cases with similar factual circumstances were minimised over the last decade.

The elimination of legal grounds for the binding force of case-law decisions will pose a real danger to the establishment of a practice of uniform application of law with courts and other law enforcement authorities of the Republic of Armenia.

The analysis of part 4 of Article 14 of the Draft shows that the requirement prescribed by point 1 of part 2 of Article 171 of the Constitution of the Republic of Armenia (The Court of Cassation shall, by way of revision of judicial acts within the scope of powers prescribed by law, ensure the uniform application of laws or other regulatory legal acts) has been misconstrued, the function of the Court of Cassation of the Republic of Armenia of ensuring the uniform application of laws and other regulatory legal acts has been jeopardised and, as a result, it has become an end in itself, radically and unlawfully changing the constitutional mission of the Court of Cassation of the Republic of Armenia. In addition, the adoption of a legal regulation in the wording proposed by the Draft poses a threat to the ensuring of legal security as it does not restrain the courts from applying various judicial practices in cases with identical factual circumstances. Such wording also contradicts the legal opinion expressed in Decision of the Constitutional Court of the Republic of Armenia No SDVO-690 with regard to the constitutional status of the Court of Cassation of the Republic of Armenia. It may be rightfully noted that the mentioned opinion was originally expressed in connection with the powers reserved to the Court of Cassation of the Republic of Armenia to clarify the constitutional meaning of part 2 of Article 92 of the Constitution of the Republic of Armenia as amended on 27 November 2005; however, as regards the uniform application of law, the content of the mentioned Article of the Constitution of the Republic of Armenia as amended in 2005 essentially resembles that of point 1 of part 2 of Article 171 of the Constitution of the Republic of Armenia as amended on 6 December 2015. Therefore, we believe that in both cases the methods of their implementation should not be fundamentally different, and it [the uniform application of law] must be guaranteed in a manner consistent with the previous legal regulations.

Highlighting the significant — due to its constitutional function of ensuring the uniform application of law — role of the Court of Cassation of the Republic of Armenia in the regulation of legal relations, we find it necessary to present below, as an illustration, the available judicial statistics correlated with the opinions expressed by the Court of Cassation in its case-law decisions. The presented statistics show a dynamic decrease in the number of persons brought before the court under the articles of the Criminal Code of the Republic of Armenia presented

below. In particular, Decision No AVD/0014/01/11 with regard to Shahen Hakhverdyan rendered on 30 March 2012 concerning the offence of hooliganism (Article 258 of the Criminal Code of the Republic of Armenia), Decision No SD/0204/01/11 with regard to Srapion Hovhannisyan rendered on 8 June 2012 concerning the offence of violation of rules of military code of conduct in the case of absence of subordination relations (Article 359 of the Criminal Code of the Republic of Armenia), etc.

It should be noted that due to the above-mentioned decisions of the Court of Cassation of the Republic of Armenia 133 persons were convicted for hooliganism in 2014, 115 persons in 2015, and 79 persons in 2016, and for violation of rules of military code of conduct in the case of absence of subordination relations, 238 persons were convicted in 2014, 189 persons in 2015, and 101 persons in 2016.

By drawing a comparison, it can be noted that after the Court of Cassation of the Republic of Armenia rendered the above-mentioned case-law decisions, in 2016, in contrast to 2014, the number of persons convicted for hooliganism decreased by 54 (41%), and the number of persons convicted for violation of rules of military code of conduct in the case of absence of subordination relations decreased by 137 (57.6%).

From 2014 to 2016, 4 486 cassation appeals concerning 3 353 judicial acts were filed with the Criminal Chamber of the Court of Cassation of the Republic of Armenia. The aforementioned shows that the operation of the Court of Cassation of the Republic of Armenia has resulted in the effectiveness and general predictability of judicial remedies.

The situation is similar when it comes to civil and administrative cases. Clarifications given in the case law with regard to this or that legal concept make it actually possible to foresee the judicial act to be rendered as an outcome of a possible administration of justice and to use them to build a correct procedural strategy (in terms of proper statement of claims aimed at the exercise of rights) and achieve the desired result. In particular, the legislative body made amendments and supplements to the Civil Code of the Republic of Armenia by Law No HO-97-N of 18 May 2010 which prescribed new legal regulations with regard to the protection of honour, dignity and business reputation of persons. Subsequently, courts of the Republic of Armenia started to examine disputes concerning the protection of honour, dignity and business reputation of persons, and, as a result, various judicial acts were rendered. Within the scope of the cases examined in connection with the mentioned disputes, the Court of Cassation of the Republic of Armenia, in its Decision on Civil Case No YeKD/2293/02/10 (based on the action filed by Tatul Manaseryan against “Skizb Media Centre” LLC) rendered on 27 April 2012, made clarifications with regard to the regulations prescribed by Article 1087.1 of the Civil Code of the Republic of Armenia, as a result whereof certain legal concepts established by the mentioned Article were expanded upon and the differences between them were revealed. By the mentioned case-law decision, the issue of civil and legal consequences that may potentially follow mass media publications became foreseeable.

Besides, due to interpretations delivered by the Court of Cassation of the Republic of Armenia with regard to certain legal provisions established in laws, the examination of a significant part of similar cases (having the same factual circumstances) is usually completed in the courts of first instance. In particular, during 2016, only 5% of civil cases completed in the courts of first instance of general jurisdiction were appealed against through the appeals procedure, and 41.6% of the judicial acts rendered by the Civil Court of Appeal of the Republic of Armenia in those cases were appealed against through the cassation procedure.
The next important argument refers to the case law being required by the legal academic community. It contributes to the education and training of lawyers, future judges, prosecutors, investigators and other specialists, with a view to the correct application of the legal concepts prescribed by the legislative body in practical work.

In light of the aforementioned, we insist that the regulation proposed in part 4 of Article 14 of the Draft — according to which, the reasoning (including legal interpretations) laid down in a judicial act of the Court of Cassation in a case with certain factual circumstances shall be merely taken into consideration by lower courts when examining a case with similar factual circumstances — is unacceptable. In our opinion, the reasoning (including legal interpretations) laid down in a judicial act of the Court of Cassation must be binding not only for lower courts, but also state and local self-government bodies, as well as bodies conducting pre-trial proceedings in criminal cases. Summing up the arguments above, the following question is posed:

QUESTION NO 1

Can the provision provided in part 4 of Article 15 of the Judicial Code of the Republic of Armenia currently in force, which requires that the reasoning (including legal interpretations) laid down in judicial acts of the Court of Cassation in cases with certain factual circumstances be binding for courts when the latter examine cases with similar factual circumstances, anyhow restrict the courts from taking their decisions autonomously or restrict the independence of the courts, and will the removal of that requirement through the Draft not undermine the predictability of the exercise of the right to judicial remedy?

2. Concerning legal regulations, proposed in the Draft, regarding the introduction of a decentralised court administration system (specifically, regarding the abolition of the Judicial Department of the Republic of Armenia):

The legal regulations introduced in the Draft with regard to the staffs and personnel of the SJC [Supreme Judicial Council], courts and the General Assembly of Judges of the Republic of Armenia lack coordination and contain serious risks in terms of ensuring the normal functioning of the mentioned bodies, as well as of wasting excessive human and financial resources.

The best international practice in the court administration shows that, irrespective of the form of the judicial system (centralised, decentralised, or mixed) of the state in question, the regular operation of the judicial bodies must be ensured in a coordinated, unified manner. It must not be confused with the centralised management of the judiciary, as the coordinated nature of the services provided to courts and judicial bodies makes the use of human and financial resources as efficient as possible and prevents these resources from being wasted.
At the same time, it should be noted that services supporting bodies administering justice must also be organised in such a way as to be able to promptly respond to the various problems emerging during the operation of these bodies and give a proper and complete solution thereto.

Currently, the Judicial Department of the Republic of Armenia is the key structure performing the coordinative function of ensuring the regular operation of the judicial bodies, which, due to the work of the structural and separated subdivisions within the central body, is able to provide for and meet, with maximum efficiency, the various needs arising in connection with ensuring the regular operation of courts, judicial self-governance bodies and the Council of Justice.
The above-mentioned powers are exercised by the Judicial Department of the Republic of Armenia through the effective performance of a number of functions, which may be conditionally divided into three groups:

(1) coordination functions;
(2) legal support functions;
(3) financial support functions.

Coordination functions are implemented by a limited number of employees of the structural subdivisions within the central body, due to the everyday work whereof the proper performance of a number of processes is ensured. In particular, the process of recruitment of judicial officers, the proper coordination of the working relationships between judges, judicial officers and bailiffs in courts, formation and maintenance of a constructive atmosphere, and other functions are ensured.

Besides, the current system prevents judges, to the extent possible, from performing administrative functions and this is a positive attribute as in the process of administering justice judges do not have to attend to technical, material or any other matters not arising from functions directly aimed at the administration of justice and are able to concentrate their (human, time) resources entirely on the actual administration of justice. While, in the case of the now proposed regulation, judges will often be involved in the implementation of functions incompatible with justice.

It should also be mentioned that the coordination functions must not be confused with centralised management, as in order to ensure the independence of courts it is often necessary to find prompt solutions to various problems and have the possibility of preventing, as well as quickly responding, to similar problems in other courts. Whereas, given the decentralisation of the judiciary, the coordinated work of the body ensuring the regular operation thereof is the guarantee to ensure that the needs of the mentioned decentralised bodies will be met as efficiently as possible.

It should be mentioned that, within the scope of **the legal support function,** studies, researches and analyses are being carried out by the employees of the structural subdivisions within the central body of the Judicial Department of the Republic of Armenia, which are followed by relevant conclusions and recommendations aimed at raising the effectiveness of services and works implemented in the courts. In total, the statistics for just the last three years show that 41 456 various letters were received by the Judicial Department of the Republic of Armenia (13 192 in 2014, 13 159 in 2015, 15 105 in 2016).
In 2016 alone, the subdivisions within the central body of the Judicial Department of the Republic of Armenia, within the scope of the legal support function, submitted 36 opinions to the Constitutional Court of the Republic of Armenia, as well as relevant opinions to the Ministry of Justice of the Republic of Armenia with regard to the questions put forward to the Government of the Republic of Armenia in connection with nearly 40 cases concerning applications submitted to the European Court of Human Rights, and recommendations with regard to 83 draft laws and other legal acts submitted by the Government of the Republic of Armenia and other competent state bodies; they also ensured the fulfilment of 822 judicial assignments, studied nearly 80 000 completed civil, administrative and criminal cases within the scope of the review of the judicial practice in the courts of the Republic of Armenia, summarised and created public access to the entire judicial statistics.

In the Draft, the framework of the implementation of **the financial function** must conform to the conditions required for the accomplishment of the objectives of the programme budgeting (PB) to be introduced in the Republic of Armenia in 2018. In particular, the main objective of the PB introduction is to improve the prioritisation of public expenditures and improve the efficiency of public funds management. In the context of PB, the state bodies will be responsible and accountable for determining and pursuing their field policies. This implies that they will be responsible for the development of field policies and budgets within the framework of the funds prescribed by the Government or the Ministry of Finance of the Republic of Armenia. Moreover, they must have the relevant technical competence and possess the necessary information in order to be able to reasonably choose between their field policies and programmes and assess the new programmes in their field.

We believe that due to the adoption of the decentralised form of court administration proposed by the Draft, the above-mentioned objectives cannot be accomplished. Due to the centralised court administration system, as currently represented by the structural and separated subdivisions within the central body of the Judicial Department of the Republic of Armenia, the financial support is provided in a consistent, coordinated manner, and has undoubtedly yielded the expected and justified result. In this regard, the radical changes proposed by the Draft entail risks of losing the achievements accomplished during the almost ten-year operation of this structural form of court administration. In proof of efficiency of the centralised form of court administration, we consider it necessary to present the following statistics on expenditure of funds allocated to the judiciary of the Republic of Armenia by the State Budget of the last four years, i.e., the 2012-2016 State Budget. Thus, AMD 156 401 220 was returned to the State Budget of the Republic of Armenia in 2012, AMD 239 340 920 in 2013, AMD 604 541 150 in 2014, AMD 144 709 490 in 2015, and AMD 234 517 100 in 2016, which makes AMD 1 379 509 890 in total from 2012 to 2016. It should also be noted that besides returning the above-mentioned sums to the State Budget of the Republic of Armenia, due to the effective centralised system of implementing the financial function, double purchases were made at the expense of the savings in 2012-2016, namely in the amount of AMD 45 478 600 in 2012, AMD 66 546 900 in 2013, AMD 89 676 730 in 2014, AMD 95 736 400 in 2015, AMD 77 473 900 in 2016, which makes AMD 374 912 530 in total.

The legal regulations, proposed by the Draft, implying decentralisation of the personnel management in the courts of the Republic of Armenia will necessitate the involvement of not

only additional financial but also human resources (for example, 22 accountants for accounting services and budget planning alone and so forth).

The overall impression is that an attempt is made to go back in time and return to the situation in 2006 when there was no unified system of judiciary services and each court exercised its own “local governance” which, as experience has shown, had a number of disadvantages and thus was replaced by the current system of judiciary services (submission of budget requests, election of the head of staff, etc.).

The current system prevents judges, as much as possible, from performing administrative functions and this is a positive attribute as in the process of administering justice judges do not have to attend to technical, material or any other matters not arising from functions directly aimed at the administration of justice and are able to concentrate all their resources entirely on the administration of justice. Meanwhile, in the case of the now proposed regulation, both the chairpersons of the courts and the judges will be involved in matters incompatible with the function of administration of justice. Summing up the arguments above, the following question is posed:

QUESTION NO 2

Is the abolition of the Judicial Department of the Republic of Armenia, i.e., the centralised court administration system established with a view to ensuring the efficient operation of the judicial system, and the transfer from the current system to the system of decentralised court administration and vesting the functions of the Judicial Department of the Republic of Armenia in the staffs of the courts well-reasoned and justified? Will this decentralisation not result in the loss of uniformity and consistency of performance in the court support services, as well as cause waste of human, time and financial resources?

3. Concerning the remuneration, pension and social guarantees offered to judges:

The Draft does not contain any regulations on remuneration, pension and social guarantees offered to judges. Article 48 of the Draft simply reiterates part 10 of Article 164 of the Constitution of the Republic of Armenia which provides that "[t]he remuneration of a judge shall be determined in compliance with his or her high status and responsibility" and does not provide for any specific standards or other guiding principles for determining the amount of remuneration "in compliance with his or her high status and responsibility". Thus, in this case, the Judicial Code which has the purpose of, *inter alia*, guaranteeing the independence of the activities of judges at the level of a constitutional law (specifically referring to the contents of Articles 1 and 2 of the Draft), fails to regulate one of the crucial elements of that independence, i.e., the issue of the remuneration of judges, thus leaving it to be regulated by a non-constitutional law.

In this regard, it is also important to note that Article 75 of the Judicial Code of the Republic of Armenia which entered into force on 18 May 2007 regulated the judges' salaries and increments added thereon. In particular, part 3 of the mentioned Article clearly provided that a judge's salary and increments added thereon may not be reduced during his or her term of office. We believe that among the material guarantees offered to judges, the stipulation of the mentioned provision is of particular importance and is aimed at preventing future reductions of the judges' salaries.

Part 3 of Article 75 of the Judicial Code of the Republic of Armenia was repealed by the Law of the Republic of Armenia "On making amendments to the Judicial Code" entered into force on 1 July 2014; in particular, Article 75 of the Law provides that the issues pertaining to the remuneration of judges, as well as the calculation and amount of the regular and additional salaries shall be regulated by the Law of the Republic of Armenia "On remuneration of persons holding state positions". However, the current legal regulation of the relations in connection with ensuring the judges' right to remuneration, as opposed to the previous legal regulation, reduces the material and social protection guarantees offered to judges, which does not serve the further strengthening of financial independence of judges. Moreover, it is in direct contradiction to the principle — prescribed by Article 78 of the Law of the Republic of Armenian "On Legal Acts" — of non-retroactivity of legal acts aggravating in any way the legal status of a person.

Based on the aforementioned, we insist that the social guarantees for judges, as well as the principal issues pertaining to their salaries and pensions, must be addressed in the new Draft Judicial Code of the Republic of Armenia and that the regulations prescribed by individual laws (namely, the Law of the Republic of Armenia "On remuneration of persons holding state positions") must be removed. Our position is based on the fact that there are only 3 categories of officials (namely, the President of the Republic of Armenia, deputies, and judges) with regard to which the Constitution of the Republic of Armenia contains provisions stipulating that the amount of their remuneration must be prescribed by law; moreover, the Constitution contains a general guiding standard only with regard to the remuneration of judges (remuneration in compliance with his or her high status and responsibility).

In our view, Article 48 of the Draft must also provide for the prohibition of future reduction of judges' salaries and increments added thereon. In this context, we believe that it is necessary to provide for increments also for the judges included in all the Commissions of the General Assembly of Judges.
The Draft should also be supplemented with a new article entitled "Social guarantees for judges" which will provide for judges guarantees of functional, financial and social independence, such as compulsory insurance, free of charge medical treatment, etc. Summing up the arguments above, the following question is posed:

QUESTION NO 3

Should the key issues related to the social guarantees, as well as salaries and pensions, offered to judges not be regulated by the Draft and not any other non-constitutional law? At the same time, wouldn’t it be more preferable to prescribe in the Draft certain criteria for determining the number of judges instead of defining a specific number of judges?

4. Concerning the Supreme Judicial Council:

The provisions proposed in the Draft with regard to the Supreme Judicial Council (SJC) do not reflect the real requirements deriving from the relevant constitutional regulations, and this essentially contradicts the will of the constitutional body. Thus:

According to Article 173 of the Constitution of the Republic of Armenia, the Supreme Judicial Council shall be an independent state body that guarantees the independence of courts and judges.

According to part 4 of Article 175 of the Constitution of the Republic of Armenia, other powers and rules of operation of the Supreme Judicial Council shall be prescribed by the Judicial Code.

The constitutional status (of an independent state body) of the SJC and the fundamental functions (to guarantee the independence of courts and judges) deriving from the constitutional status of the SJC have been established by the aforementioned constitutional provisions. Moreover, the Constitution has instructed the legislative body to stipulate the other powers deriving from the status and the scope of functions of the SJC in the Judicial Code. Consequently, it should be taken into account that not only the other powers vested in the SJC by the legislative body via the Judicial Code of the Republic of Armenia must derive from the constitutional status and be aimed at ensuring full and effective implementation of the constitutional functions of the SJC, but also the above-mentioned constitutional solutions must serve as guidelines for determining in the Judicial Code the scope of the other powers of the SJC.

Within this context, we find that the automatic transfer of the powers vested in the judicial self-governance body, i.e., the Council of Court Chairpersons, prescribed by Article 72 of the current Judicial Code of the Republic of Armenia to the SJC will result in non-legitimate change of its constitutional status and functions, simultaneously disrupting the organic relation present in the “function-institution-power” chain underlying the constitutional amendments.

According to part 2 of Article 174 of the Constitution of the Republic of Armenia, “Five members of the Supreme Judicial Council shall be elected by the General Assembly of Judges, from among judges having at least ten years of experience as a judge. Judges from all court instances must be included in the Supreme Judicial Council. A member elected by the General Assembly of Judges may not act as chairperson of a court or chairperson of a chamber of the Court of Cassation.”.

According to part 3 of the same Article, “Five members of the Supreme Judicial Council shall be elected by the National Assembly, by at least three fifths of votes of the total number of Deputies, from among academic lawyers and other prominent lawyers holding citizenship of only the Republic of Armenia, having the right of suffrage, with high professional qualities and at least fifteen years of professional work experience. The member elected by the National Assembly may not be a judge.”.

It follows from the systematic analysis of the above-mentioned legal provisions that the Constitution has introduced a balancing mechanism for the formation of the SJC, which implies that in the SJC the number of the representatives elected among the judicial community must be equal to the number of non-judge academic lawyers and other prominent lawyers elected by the National Assembly. This mechanism is the important constitutional guarantee of the SJC’s independence. Consequently, the aforementioned shows clearly that the SJC cannot, in essence, act as a judicial self-governance body both in terms of its status and functions.

The situation is different in the case of the activities of the Council of Court Chairpersons (hereinafter referred to as “the CCC”) within the scope of the existing legal regulations. The CCC is a permanently functioning judicial self-governance body composed entirely of judges and based on the mandatory membership of the chairpersons of all the courts (except for the Constitutional Court of the Republic of Armenia) functioning in the Republic of Armenia. Thus, the legislative body vested the relevant powers in the SJC based on the fact that the members of the SJC were judges and the SJC was a permanently functioning judicial self-governance body (one that ensures that all the courts of the Republic of Armenia are represented). Therefore, it should be stated that the legal regulations proposed by the Draft alter the status and functions of the SJC in such a way which contradicts the essence of the status and functions vested in the SJC by the Constitution of the Republic of Armenia.

To substantiate the aforementioned, the powers prescribed by points 15 (defining the structure of the official website of the judiciary, the procedure for maintenance thereof, other information posted on the website), 17 (approving the documentation management rules of courts), 15 (defining the procedure for publishing judicial acts on the official website of the judiciary of the Republic of Armenia) and other points of part 1 of Article 85 of the Draft, which are exclusively characteristic of the volume of the functions of a judicial self-governance body, should be noted. In this regard, we find that there is an objective necessity for the Draft to provide for a permanently functioning judicial self-governance body (for example, a council, commission or other representative body formed by the General Assembly of Judges of the Republic of Armenia) which will be provided with the possibilities to solve in a flexible manner the daily issues faced by the judiciary.

At the same time, it is noteworthy that in contrast to the existing legal regulations with regard to guaranteeing the independence of judges by the SJC, the Draft does not expand on the meaning of the constitutional provision guaranteeing the independence of courts and proposes no relevant legal regulations. Summing up the arguments above, the following question is posed:

QUESTION NO 4

Can the Supreme Judicial Council act also as the judiciary’s self-governance body? In particular, shall the Supreme Judicial Council be entitled to perform other functions — such as defining the structure of the official website of the judiciary, the procedure for maintenance thereof, other information posted on the website, approving the documentation management rules of courts, determining the court seats not prescribed by law, prescribing the procedure for the collection and maintenance of judicial statistics, approving the list of positions in the judicial service, the number and structure of staff positions, prescribing the form of stamps, approving the procedure for providing judges with electronic mails, etc. — not deriving from the functions of appointment or promotion of judges, or the (automatic or imposed) termination of the powers of judges?

5. Concerning the division of the Civil and Administrative Chamber of the Court of Cassation of the Republic of Armenia:

According to part 2 of Article 52 of the Judicial Code of the Republic of Armenia, the Court of Cassation shall have two Chambers: (1) the Criminal Chamber; (2) the Civil and Administrative Chamber.

According to part 2 of Article 32 of the Draft Judicial Code of the Republic of Armenia, the Court of Cassation shall have three Chambers: (1) Criminal; (2) Civil; (3) Administrative.
The comparative analysis of the above-mentioned provisions shows that the concept of division of the Civil and Administrative Chamber of the Court of Cassation of the Republic of Armenia has been adopted while developing the Draft Judicial Code of the Republic of Armenia. Such an approach is probably conditioned by the fact that the existence of a specialised administrative court also implies the existence of specialised judicial instances at the level of appeal and cassation procedures. The existing legal regulations have addressed the issue by establishing a separate court to take over the appeals procedure, while at the stage of the cassation procedure the problem is solved due to the structure of the unified chamber. The concept of the unified chamber is not an end in itself and is conditioned by the mission of the Court of Cassation of the Republic of Armenia of ensuring the uniform application of law, as well as by the close connection between the civil justice and the administrative justice. Before the legislative amendments of 2008, in particular, the introduction of the administrative justice in the legal system of the Republic of Armenia, the cases under the jurisdiction of the Administrative Court of the Republic of Armenia used to be investigated in accordance with the rules of civil procedure which attests to the close connection between these two judicial branches. Such connection is basically conditioned by certain similarities in their subject-matter jurisdictions, which, in their turn, stem from certain overlapping legal concepts (such as damages, removal of the attachment on the property, etc.) found in public and private legal relations. Therefore, in light of the aforementioned, splitting the subject-matter jurisdiction will inevitably result in complications. Such complications have already been recorded in the judicial practice of the recent years.

Thus, on the one hand, the Administrative Procedure Code of the Republic of Armenia prescribes that disputes arising from public legal relations shall fall under the jurisdiction of the Administrative Court of the Republic of Armenia and, on the other hand, the Civil Procedure Code of the Republic of Armenia prescribes that all civil cases shall fall under the jurisdiction of the court of first instance of general jurisdiction; however, in practice there are cases when the public or private nature of a disputed legal relation gives rise to various interpretations. In judicial practice, such issues have been recorded especially with regard to disputes concerning succession, intellectual property, labour and a number of other matters. The Court of Cassation of the Republic of Armenia has had its role in the solution of this issue by defining, within the scope of its decisions in a number of cases, clear standards for the settlement of such disputes. Thus, firstly, in its Decision of 22 April 2016 on Civil Case No YeMD/1029/02/14, the Court of Cassation of the Republic of Armenia clearly defined the conditions which are necessarily required for a legal relation to be characterised as public and for a dispute arising of such relation to fall under the jurisdiction of the Administrative Court of the Republic of Armenia. Simultaneously, within the scope of the same decision, the Court of Cassation of the Republic of Armenia established that in the cases when the Administrative Court of the Republic of Armenia is entitled to readdress a statement of claim not falling under its jurisdiction to a court of general jurisdiction of the Republic of Armenia, the court of general jurisdiction of the Republic of Armenia must dismiss the case proceedings.

With regard to succession disputes, the Court of Cassation of the Republic of Armenia, in its Decision of 29 October 2010 on Administrative Case No VD/3465/05/09, Decision of 27 December 2010 on Administrative Case No VD5/0006/05/10, Decision of 27 November 2015

on Administrative Case No VD/4901/05/11, Decision of 28 December 2015 on Civil Case No ARD1/0019/02/13, expressed the legal opinion that if the claims are based on disputed notarial actions, then such disputes shall fall under the jurisdiction of the Administrative Court of the Republic of Armenia, whereas if the claims are based on other disputed legal relations arising directly between heirs in connection with succession, acceptance of succession, then such disputes shall definitely fall under the jurisdiction of the court of general jurisdiction.

The Court of Cassation of the Republic of Armenia has also expressed a noteworthy opinion with regard to the issue of determining the jurisdiction under which a case based on an action claiming revocation of a trademark registration shall fall. In particular, within the scope of Decision of 22 April 2016 on Administrative Case No VD/0823/05/14, the Court of Cassation of the Republic of Armenia established that only private persons may be subjects of a dispute concerning the revocation of a trademark registration on the ground of its non-use; disputes concerning the revocation of a trademark registration on the ground of its non-use arise from legal relations pertaining to the duty of a private subject of civil law, i.e., the owner of the trademark or the person having the right to use the trademark, to exercise his or her civil rights in good faith, as well as to the adverse legal consequences arising from the refusal to exercise that civil right; although the revocation of a trademark registration on the ground of its non-use is ultimately aimed at protecting the public interest and, in particular, the normal operation of the market economy, the aforementioned legal relation arises not in connection with pursuing said public interest but rather due to the interested person — that has applied to the court for the revocation of the registration of the trademark in question — pursuing the realisation and materialisation of its private economic interests in social and legal practice; therefore, the Court of Cassation of the Republic of Armenia found that cases involving such claims shall fall under the jurisdiction of the court of general jurisdiction of the Republic of Armenia.

In another case, the Court of Cassation of the Republic of Armenia addressed and made its assessments of the nature of the legal relations arising in connection with the compulsory electronic auction of a property. In particular, the Court of Cassation of the Republic of Armenia established that the task of the JACES [Judicial Acts Compulsory Enforcement Service] functioning within the system of the Ministry of Justice of the Republic of Armenia, as a body exercising public authority, is to ensure the compulsory enforcement of judicial acts in accordance with the Law of the Republic of Armenia "On compulsory enforcement of judicial acts", as well as in accordance with other legal acts, such as the Law of the Republic of Armenia "On public bidding".

The Court of Cassation of the Republic of Armenia has established that the levy of execution on a debtor's property via attachment and sale of property may, *inter alia*, be carried out by putting up the property for compulsory electronic auction, i.e., by means of its trade in a bidding procedure and its further sale. Moreover, in contrast to biddings held on the basis of Articles 463-465 of the Civil Code of the Republic of Armenia — where the organiser of the bidding may be the property owner, a rightsholder, the offeror of works or services, as well as a person acting, on the basis of a written contract signed with the owner or rightsholder, either in the name of the latter or in that person's own name — in the case of sale of property via compulsory electronic auction, the bidding shall be organised and held by the JACES in accordance with the writ of execution issued on the basis of the relevant judicial act. Given the aforementioned situation, the Court of Cassation of the Republic of Armenia found that one of the parties to the disputable legal relation in cases involving disputes over an electronic auction is the JACES, which is an entity endowed with powers of public authority, as well as an administrative body within the meaning of Article 3 of the Law of the Republic of Armenia "On fundamentals of administrative action and administrative proceedings", and that the disputed legal relation arises from a public interest, namely, that of the enforcement of a judicial act; said legal relation pertains to the duty of the JACES — an agency endowed with powers of public authority — to exercise its powers of public authority; therefore, disputes arising from such

matters are public by nature and shall be examined by the Administrative Court of the Republic of Armenia.

In its decision on Administrative Case No VD/0477/05/15 rendered on 28 September 2016, the Court of Cassation of the Republic of Armenia expressed a legal opinion on whether decisions on appointing a guardian for a person declared as having no active legal capacity shall be appealed against through civil procedure or administrative procedure. Analysing the decision on appointing a guardian for a person declared as having no active legal capacity within the context of the comprehensive requirements set for administrative acts to be regarded as such, the Court of Cassation of the Republic of Armenia found that the aforementioned decision is indeed an administrative act, since it is an individual legal act addressed to the person appointed as the guardian of a person declared as having no active legal capacity, is adopted by an administrative body and has an external effect, i.e., its addressee is a natural person who has no organisational, work-related, internal subordination or any other direct ties with the body who adopts that decision, and the decision on appointing a guardian for a person declared as having no active legal capacity is adopted for the purpose of regulating a specific case in order to solve an issue of appointing a guardian for a specific person declared as having no active legal capacity; therefore, said decision may be challenged through administrative procedure.

The legal issues raised in the aforementioned legal cases (moreover, the list of the aforementioned decisions was not exhaustive, there remaining various other case-law decisions pertaining to the issue discussed) are indicative of the fact that in judicial practice the differentiation between civil and administrative cases is problematic and can in many cases give rise to disputes between the specialised courts and the courts of general jurisdiction of the Republic of Armenia as to whose subject-matter jurisdiction a given case falls under, such disputes being resolved by the Civil and Administrative Chamber of the Court of Cassation of the Republic of Armenia. The existence of a single Chamber is valued especially in light of this issue, since it contributes to the formation of a unanimous position binding in both civil and administrative procedures. Whereas the operation of separate chambers may give rise to a situation where their positions may not only essentially differ from each other but also result in contradictions in certain cases, not only negatively impacting the judicial practice, but also rendering pointless the mission of the Court of Cassation of the Republic of Armenia to ensure uniformity of the judicial practice. In the case of criminal procedure the subject-matter jurisdiction is clearly distinguishable, making the presence of a criminal chamber fully justified from this perspective; however, in the case of an administrative chamber the aforementioned complications will be inevitable.

Moreover, the study of about a decade-long activity of the single Chamber shows that it efficiently handles both civil and administrative justice matters.

At the same time, it should be noted that a legislative amendment is never an end in itself and should objectively stem from both the changes occurring in the public relations subject to regulation and the need for eliminating the shortcomings marked in the activities of a given institution. The Draft Judicial Code of the Republic of Armenia has been developed on the basis of the constitutional amendments of 2015, which, however, did not make essential changes to the administrative justice system and, particularly, the cassation procedure. Therefore, the need for the establishment of a separate administrative chamber does not stem from the Constitution of the Republic of Armenia as amended in 2015; moreover, the need for such a legislative amendment is not substantiated either. Nor is it conditioned by any shortcomings in the activities of the Civil and Administrative Chamber of the Court of Cassation of the Republic of Armenia, as a unified institution, in the sphere of administrative justice.

Apart from this, the impracticality of establishing a separate administrative chamber is also displayed by statistical indicators, the comparative analysis whereof shows that the overwhelming part of the appeals examined by the Civil and Administrative Chamber of the

Court of Cassation of the Republic of Armenia relate to civil cases; in light of the aforementioned, the reduction in the number of the civil chamber judges is also out of the question. Thus:

Year	Cassation appeals brought against judicial acts of the Civil Court of Appeal of the Republic of Armenia	Cassation appeals brought against judicial acts of the Administrative Court of Appeal of the Republic of Armenia
2012	1 816	829
2013	2 072	889
2014	1 668	1 006
2015	1 599	1 086
2016	1 556	931

Summing up the arguments above, the following question is posed:

QUESTION NO 5

Is the concept of establishing a separate administrative chamber in the Court of Cassation of the Republic of Armenia justified, considering the issues of subject-matter jurisdiction arising between the civil justice and the administrative justice, the challenges their separation will pose, and the resulting conflicts between the practices of the civil and administrative chambers?