

## OPINION

### *On the Republic of Armenia Draft Constitutional Law on Amending the Constitutional Law on the Judicial Code of the Republic of Armenia and Related Draft Laws*

One of the main requirements of the people towards the legislature and executive formed by people's will after the 2018 revolution has been the formation of an independent and uncorrupted judiciary, about which the authorities had earlier expressed their commitment. Vetting of judges was to be introduced as a key tool for accomplishing that goal. However, the Republic of Armenia Draft Constitutional Law on Amending the Constitutional Law on the Judicial Code of the Republic of Armenia, which is put to discussion in the National Assembly of the Republic of Armenia (hereinafter, "the Draft Law") fails to contemplate comprehensive vetting of judges; moreover, its intended provisions pose a major threat to the independence of the judiciary.

In the 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) of the Council of Europe, on the amendments to the Judicial Code and some other laws (CDL-AD(2019)024),<sup>1</sup> it was noted that the Government's intention originally was to introduce extraordinary vetting procedures to check the suitability of existing judges. However, the Government refrained from a headstrong approach and, instead, engaged in a dialogue within the Armenian society and with its international partners. The Venice Commission also noted that, as a result of this dialogue, the most radical proposals for the reform were abandoned, and the Government developed more tailor-made solutions. However, it is not true that the Government refrained from the objective of comprehensive vetting as a result of a "dialogue within the Armenian society." Moreover, during the Parliamentary Hearing on Prospects of Implementing Transitional Justice Tools in Armenia on 24 May 2019, the majority of civil society representatives spoke about the need for comprehensive vetting of judges as a means of restoring public trust in the independence of courts and in the judiciary.

The Draft Law that has been circulated must be revised substantially in order to prescribe the following principles and rules to contemplate specific steps to increase public trust in the judiciary:

**A) A one-year timeframe should be prescribed for vetting the currently sitting judges.**

**B) The vetting of currently sitting judges should be performed on the basis of an opinion of the Corruption Prevention Commission (hereinafter, "the CPC") on the property condition of the judge, which must include retrospective checking of the origin of property and professional tests of knowledge conducted within the Justice Academy of the Republic of Armenia. The review of judges' declaration of assets, income, and interests must reach as far back as 2012, and the CPC must be vested with the tools necessary to obtain the required information.**

**C) A professional commission should conduct an interview with candidates that score a minimum of 80 points as a result of the test and based on the CPC's opinion.**

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<sup>1</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)024-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)024-e)

**D) The professional commission should consist of: one legal scholar nominated by each of the Republic of Armenia President, Prime Minister, all the factions of the National Assembly, and the Human Rights Defender (clear criteria should be prescribed for these nominees), as well as representatives of two NGOs that are active in human rights protection and the fight against corruption, and two international experts (a selection procedure should be developed). Judges that receive a minimum two thirds of the vote should be allowed to continue serving in office, and the powers of judges that do not pass the evaluation shall be terminated in the procedure provided by law. The same mechanism should be prescribed for judge candidates, as well.**

**E) The Law should provide for an early retirement opportunity for judges who previously did commit violations subject to criminal prosecution, but criminal cases were not initiated due to the statute of limitations.**

As to the provisions of the proposed Draft Law, they not only fail to address the need for systemic vetting, but also create the possibility of arbitrary interference with the activities and independence of judges on the following grounds:

1. The Draft Law proposes that **the performance evaluation of judges** should be based also on the reasoning of their judgments. While intentional or negligent failures of judges in reasoning certain judgments are possible, prescribing this criterion as a standard for evaluating work effectiveness is impermissible and too risky. Evaluation of the reasoning of judgments requires legal procedures for appeals, which is a basic principle underlying the structure of judicial systems. Prescribing such a criterion contradicts the key principle of judicial independence and lays grounds for having leverages to influence judges. Moreover, the legal consequences of the intentional or negligent failures of judges in reasoning judgments are already provided by the relevant articles of the criminal legislation, namely Article 352 of the Criminal Code of the Republic of Armenia, which proscribes the crime of “making a judgment, ruling, or other judicial act that is obviously unfair.”

According to the opinion of the Consultative Council of European Judges, the evaluation of the work of judges must be mainly qualitative and based on their skills, including professional abilities (knowledge of the law, ability to conduct trial, ability to make reasoned judgments), personal skills (ability to deal with workload, decision-making ability, and openness to new technologies), social skills (negotiation skills and respect for the parties), and leadership skills needed for potential promotion.<sup>2</sup> It is necessary to preclude the evaluation of judges’ work on the basis of only quantitative elements. The Venice Commission of the Council of Europe has noted that regulations of performance evaluation of judges should clearly prescribe appraisal of the judge’s ability to manage the administration of justice, for example through the keeping of deadlines, complying with schedules etc., should take into account the work-load and other relevant circumstances.<sup>3</sup> Importantly, the appraisal must be largely qualitative and focus on the judge’s professional abilities. The judge’s appraisal should not be based on the content of the judge’s decisions or judgments. Moreover, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation.<sup>4</sup>

The Venice Commission has noted that the regulatory assessment of judges “aimed at identification of the judge’s individual needs in improvement and incentives for maintaining

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<sup>2</sup> [\(CCJE\) OPINION N° 17 \(2014\)](#)

<sup>3</sup> [CDL-AD\(2017\)018, Bulgaria - Opinion on the Judicial System Act](#)

<sup>4</sup> [CDL-AD\(2014\)007, Joint opinion on the draft law amending and supplementing the judicial code \(evaluation system for judges\) of Armenia](#)

his/her qualification at the proper level and for professional growth.<sup>5</sup> Regular assessments are important tools for the judge's activities, in order for judges to improve their work, and may also serve as a basis for promotion. According to the Kyiv Recommendation, evaluations of judges may be used to help judges identify aspects of their work on which they might want to improve and for purposes of possible promotion. Periodic exams for judges (attestations) that may lead to dismissal or other sanctions are not appropriate for judges with life tenure.<sup>6</sup>

Therefore, the Draft Law should prescribe the following safeguards:

- The appraisal may not interfere with the judges' independence and obstruct their right to tenure. Appraisal of a judge's work should not turn into a review of the content of the judge's decisions.
- The judge undergoing appraisal should have the right to participate in their appraisal (the right to be heard), as well as the possibility of appeal.
- The appraisal criteria must be public for all judges, and the appraisal must be based on credible and objective information.<sup>7</sup>

2. The Draft Law proposes amending Article 142 of the Judicial Code of the Republic of Armenia (hereinafter, "the Code") regarding **the grounds for imposing disciplinary sanctions on judges**, i.e. replace the "obvious and grave breach of material and substantive law" with an "intentional or grossly negligent breach of material and substantive law." The proposed grounds fail to meet the requirements of clarity and legal certainty.

In opinion CDL-AD(2019)024 of 14 October 2019 regarding amendments to the Judicial Code of the Republic of Armenia, the Venice Commission has noted that "it would be better to indicate that the breach of the rules of the procedural or substantive law could not be only "reasonably assumed" but be evident. Indeed, the difference between simple error and "gross negligence" is a matter of degree, but the language of the law should show that only errors obvious for any legal professional can be punishable with a disciplinary sanction. Therefore, it is unacceptable to eliminate the "obvious violation" as a basis for disciplinary sanctions. Such regulation might in practice lead to arbitrary imposition of disciplinary sanctions on judges."<sup>8</sup>

According to the proposed addition to Paragraph 2 of Article 142 of the Code, an act will not be deemed a disciplinary breach if it, despite formally containing the elements of grounds prescribed by the Code for imposing a disciplinary sanction on the judge, is of such lesser importance that it does not cast doubt on the judge's conformity to the judge's status and cannot by its essence affect the reputation of the judiciary.

This rule does not have legal certainty. First of all, it introduces an additional element for imposing a disciplinary penalty on a judge (*"the judge's conformity to the judge's status"* and

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<sup>5</sup> [CDL-AD\(2015\)007-e](#)

<sup>6</sup> [OSCE/ Kyiv Recommendations on Judicial Independence in Eastern Europe](#)

<sup>7</sup> ["Independence and integrity of the judiciary", judicial councils, other self-governance institutions and their role to ensure integrity and independence of judges, proceedings of the regional seminar](#)

<http://www.oecd.org/corruption/acn/IstanbulJune2012ExpertSeminarProceedingsEN.pdf>

<sup>8</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)024-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)024-e)

“*affect the reputation of the judiciary*”), which are defined in the Draft Law as criteria for an essential disciplinary breach under the amendment proposed to Paragraph 6 of Article 142.

Moreover, the “lesser importance” wording proposed in the same provision is uncertain and gives the Supreme Judicial Council wide discretion for subjectively interpreting each act, which in practice is very likely to lead to arbitrary imposition of disciplinary penalties. The opposite situation may be problematic, as well, when the body having the power to initiate disciplinary proceedings may evaluate a breach as a breach of “lesser importance” and thereby preclude the imposition of a disciplinary sanction on the judge. This proposed regulation is unacceptable given the absence of an effective remedy to appeal against decisions taken in connection with the initiation of disciplinary proceedings.

3. Considering that, under the Draft Law, the **Ethics and Disciplinary Commission shall consist of** eight members, including two [non-judge] lawyers in the commission cannot have a significant impact on the commission’s decisions, because the judge members will still have majority in the commission.

In the initial version of the draft amendments to the Judicial Code, which was sent to the Venice Commission of the Council of Europe for expert assessment, the Ethics and Disciplinary Commission was supposed to have three non-judge members, which the Venice Commission had welcomed in order to make the commission’s work more open to external oversight/monitoring.<sup>9</sup> However, in its opinion on the draft Judicial Code of the Republic of Armenia, in October 2017,<sup>10</sup> it emphasized that the Ethics and Disciplinary Commission consists only of judges, which poses a risk of adopting a corporate approach, and as a means of reducing this risk, had proposed balancing the composition of the commission by including some non-judge members, as well.

According to the Draft Law, the Performance Evaluation Commission will consist of three judges and two legal scholars. We believe that the General Assembly of Judges should appoint to the Performance Evaluation Commission an equal number of non-judge members as judge members, in order to ensure impartiality of the evaluation process.

4. Article 25 of the Draft Law provides that the members of the Performance Evaluation Commission shall have a grading scale corresponding to the evaluation criteria and a guide on the standard responses. [...] In the scoring, the Commission members shall take into consideration the elements provided by Article 103 of this Code, to which the evaluation criteria approved by the Supreme Judicial Council shall correspond. The proposed regulation does not prescribe the obligation of the Evaluation Commission members to justify and reason the score given to a particular candidate, which in practice will lead to arbitrary evaluation of performance.

Moreover, the evaluation criteria and standards approved by the Supreme Judicial Council are not clear and do not contain clear explanations or indicators based on which the responses can be evaluated in a specific situation. As a result, the written test evaluation principles and reasons for deducting points are unclear. This renders ineffective the possibility of appeals concerning the content of the responses.

The Draft Law proposes introducing a procedure for appealing the written test results to the Appeals Commission. Although this regulation may be seen as positive, the proposed

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<sup>9</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)024-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)024-e)

<sup>10</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)019-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)019-e)

language, according to which the Appeals Commission may reject a complaint against the test results or to grant it partially or fully is problematic, because the Draft Law once again fails to prescribe the obligation of the Appeals Commission to reason its decision. In these circumstances, a candidate has no possibility of obtaining a reasoned decision on their test or score.

The Draft Law proposes limiting court appeals concerning the written test to procedural matters only, provided that they were appealed to the Appeals Commission already. This regulation significantly restricts the candidates' access to an effective remedy, especially as the Evaluation and Appeals Commissions are not required to reason their evaluation or the response to an appeal.

The Draft Law proposes introducing an open voting procedure for the selection of judge candidates by members of the Supreme Judicial Council. Although the Draft Law attempts to define the factors to be taken into consideration in the evaluation of candidates by the Supreme Judicial Council (the results of the written qualification test and the interview, the results of the psychological test, and the consultative opinion of the Corruption Prevention Commission on the candidate's integrity), the evaluation of judge candidates by the members of the Supreme Judicial Council is left to the "inner conviction" of each member, which means that the voting does not have to be reasoned. As a result, the evaluation is unpredictable, and candidates cannot understand the reasons for the members' vote.

Transparency International Anti-Corruption Center NGO

Protection of Rights without Borders NGO

Fund for Protection and Development of Rights

Helsinki Citizens' Assembly Vanadzor Office NGO

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