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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ARMENIA

DRAFT 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 DRAFT LAWS ON MAKING AMENDMENTS TO THE CONSTITUTIONAL LAW ON THE JUDICIAL CODE AND TO THE CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT

on the basis of comments by

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Contents

I. Introduction

1. By letter of 16 December 2021, Mr Karen Andreasyan, Minister of Justice of Armenia, requested an opinion from the Venice Commission on the draft Laws on making amendments to the Constitutional Law on the Judicial Code and to the Constitutional Law on the Constitutional Court (CDL-REF(2022)003).

2. Mr Peter Bussjäger, Mr Christoph Grabenwarter, Ms Monika Hermanns and Mr Gerhard Reissner acted as rapporteurs for this opinion.

3. Owing to the sanitary situation due to the COVID-19 pandemic, a visit to Yerevan with the rapporteurs was replaced with online meetings organised on 15-16 and on 18 February 2022 with the relevant stakeholders. These included the Minister of Justice, the National Assembly, the Corruption Prevention Commission, the Court of Cassation, the Supreme Judicial Council, the Constitutional Court, the Human Rights Defender, civil society and the international community.

4. This opinion was prepared in reliance on the English translation of the above-mentioned provisions. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. This opinion was drafted on the basis of comments by the rapporteurs and the online meetings. Following an exchange of views with …, the opinion was adopted by the Venice Commission at its … Plenary Session (…).

II. General remarks

6. In the period between 2008 and 2018, a series of cases was brought before the European Court of Human Rights (ECtHR) – some of which are still pending – condemning the state of Armenia for violations of the European Convention on Human Rights (ECHR). The violations concerned notably Article 1 (protection of property) of Protocol no. 1 to the ECHR and Article 2 (right to life), Article 3 (prohibition of torture), Article 5.1 c) (right to liberty and security), Article 6 (right to a fair trial) and Article 11 (freedom of assembly and association) of the ECHR. These cases related to, *inter alia*, the expropriation of flats and houses (property) in the inner-city of Yerevan, which had left many citizens destitute[1] and to the disputed presidential election of February 2008, which had led to nationwide demonstrations ending in violent clashes resulting in deaths and what later were found to be the unlawful detention of peaceful demonstrators.[2]

7. The Venice Commission delegation was informed, during the online meetings, that the series of cases was the result of unsatisfactory decisions rendered by Armenian courts, which had greatly contributed to the Armenian population's distrust in its Judiciary. This is a pressing issue which needed to be addressed.

8. To that end and following a peaceful overturn of the Government of Armenia in April-May 2018, the new Government initially intended to introduce a comprehensive judicial reform that included an extraordinary vetting procedure, to check the suitability of sitting judges. Following a public consultation of the proposed judicial reform, which was to include this extraordinary vetting procedure, the most radical reform proposals were abandoned. This was welcomed by the

[1] (not an exhaustive list) ECtHR, Case of Vardanyan v. Armenia, 25 July 2019 (application no. 8001/07); Case of Minasyan and Semerjyan v. Armenia, 23 June 2009 (application no. 27651/05); Case of Tunyan and Others v. Armenia, 9 October 2012 (application no. 2281/05).

[2] (not an exhaustive list) ECtHR, Case of Mushegh Saghatelyan v. Armenia, 20 September 2018 (application no. 23086/08); Case of Myasnik Malkhasyan v. Armenia, 15 October 2020 (application no. 49020/08); Case of Arzumanyan v. Armenia, 31 August 2021 (application no. 63845/09); Case of Pahinyan v. Armenia, 18 January 2021 (application nos. 22665/10 and 2305/11).

Venice Commission in its Joint Opinion with the Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law (DGI), on the amendments to the Judicial Code and some other Laws in 2019.[3]

9. It was, however, noted by the delegation of the Venice Commission during its online meetings, that the current Armenian legislation – notably the Judicial Code, the Law on the Constitutional Court and the Criminal Code – was felt to not address the issue of the vetting of sitting judges in a satisfactory manner.

10. In addition to these complaints, the Ministry of Justice explained that the existing remedies were ineffective. This means that the demand by a significant part of civil society for quick and more radical reforms of the Judiciary, particularly in its composition, had not been met.

11. Conversely, the Venice Commission delegation was also informed during its online meetings that one of the most pressing issues in the Armenian judiciary was a lack of judges. This led to the problem of effectively meeting the "reasonable time" requirement for a fair trial under Article 6 ECHR, because the current number of judges was not enough to deal with the sheer number of cases.

12. Therefore, introducing effective steps to increase the number of judges – selected thoroughly and in a transparent manner – may not only alleviate this problem, but be an important contribution to give a new, trustworthy appearance to the judiciary. The Venice Commission understands that this is already underway, but that the process is slow.

III. Scope of the opinion

13. In his request for an opinion by the Venice Commission, the Minister of Justice explained that on 10 October 2019, the Government of Armenia had adopted a decision *"On the Approval of the Strategy of Judicial and Legal Reforms of the Republic of Armenia for 2019-2023 and the resulting action plan"*. This decision foresaw the introduction of transitional justice tools and the implementation of constitutional reforms. A Commission on Constitutional Reforms was set up in 2020 to produce a document for the strategic direction to take. This work is still ongoing.

14. One of the issues that still needed to be dealt with on the Government's agenda was the *"vetting of sitting judges"*. This was to be done by neither introducing a separate new law on this issue nor by amending the Constitution. It was to be done by simply referring to existing Article 164.6 of the Constitution (on the status of judges),[4] which allows the introduction of further *incompatibility requirements* for judges to be added to the Law on the Constitutional Court and to the Judicial Code. This would serve as a basis for a vetting mechanism for sitting judges.

15. This led to the preparation of draft Laws on making amendments to the Constitutional Law on the Judicial Code and to the Constitutional Law on the Constitutional Court (hereinafter, the "Draft Amendments"), the subject of this opinion.

16. The Draft Amendments introduce a new "incompatibility requirement" for sitting judges in the Constitutional Law on the Judicial Code (Articles 1, 2 and 3) and in the Constitutional Law on the Constitutional Court (Articles 1 and 2), as set out in document CDL-REF(2022)003. The

[3] 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, paragraph 13.

[4] Article 164. The Status of a Judge. 6. A judge may not hold office not stemming from his function in other state or local self-government bodies, or hold any position in commercial Organisations, or engage in entrepreneurial activities, or perform any other paid work, except for scientific, educational, and creative activities. The Law on the Constitutional Court and the Judicial Code may stipulate additional requirements on incompatibility.

relevant text introduced in both laws by the Draft Amendments raising this new possible violation of the incompatibility requirements, reads as follows:

> *"a deliberate violation by a judge of a fundamental human right, which was asserted by the act rendered by an international court or another international institution of which the Republic of Armenia is a party, and if fifteen years have not elapsed since the act of an international court or another international institution of the Republic of Armenia is a party came into force."*

17. These Draft Amendments make changes to Article 86, point 1, part 3 (discontinuation, termination and suspension of powers of a member of the Supreme Judicial Council)[5] and Article 159, point 1, part 2 (termination of the powers of a judge)[6] of the Constitutional Law "on the Judicial Code of the Republic of Armenia" of 7 February 2018[7] and Article 12, point 1, part 2 (grounds for termination and suspension of the powers of the judges of the Constitutional Court) of the Law on the Constitutional Court.

18. According to the *Justification (explanatory memorandum) for the adoption of the Law on making amendments to the Constitutional Law "on the Judicial Code of the Republic of Armenia" and related laws* (see document CDL-REF(2022)003, hereinafter, the "Justification"), the Draft Amendments shall apply to judges of the Constitutional Court, other judges and to the members of the Supreme Judicial Council.[8]

19. According to the Draft Amendments, the new "incompatibility requirement" will have retroactive effect i.e. it can refer to facts that occurred prior to a decision/judgment ("act") by an international court or another international institution that was rendered 15 years ago.

20. This new "incompatibility requirement" is in effect a disciplinary measure disguised as an incompatibility requirement. It allows sitting judges to be dismissed for a deliberate violation of a fundamental human right that is based on a decision/judgment ("act") by an international court or another international institution – where 15 years have not elapsed since the rendering of this act.

21. In addition, this new "incompatibility requirement" also raises concerns with regard to its positioning within the Judicial Code and the essence of incompatibility requirements. The Draft Amendments introduce a new "incompatibility requirement" according to which a deliberate violation of a fundamental human right constitutes a violation of incompatibility requirements. However, incompatibility requirements are barriers to engaging in activities other than the judge's professional activity, which is also in line with the international legal approach. In this sense,

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[5] Article 86. 3. The cases of discontinuation of powers of a member of the Supreme Judicial Council shall be the following:
(1) where:
(1) he or she violates incompatibility requirements;

[6] Article 159.2.
Powers of a judge shall be imposingly terminated upon the decision of the Supreme Judicial Council, where he or she:
(1) has violated the incompatibility requirements;

[7] Article 86 supplemented and Article 159 amended and supplemented by HO-197-N of 25 March 2020.

[8] Article 90. Sessions of the Supreme Judicial Council :
2. When examining the issues with regard to giving consent to imposition of disciplinary action against a judge or a member of the Supreme Judicial Council, to imposed termination of powers of a judge or a member of the Supreme Judicial Council, as well as to initiating criminal prosecution against a judge or a member of the Supreme Judicial Council or depriving them of liberty in connection with the exercise of their powers, the Supreme Judicial Council shall act as a court.
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Article 5, part 1, of the Judicial Code, stipulates that a judge may not hold any position that does not stem from his or her status in state or local self-government bodies, any position in commercial organisations, engage in entrepreneurial activities or perform other paid work, except for scientific, educational, and creative work. It is therefore questionable whether draft Article 86, part 3 and Article159, part 2, of the Judicial Code and Article 12, part 2, of the Law on the Constitutional Court, fit into this practice.

22. The Draft Amendments therefore raise a number of concerns, that will be dealt with below.

IV. Assessment

A. European standards

23. The core values of the judiciary are independence, impartiality, integrity and professionalism. Since the concepts of independence and objective impartiality are closely linked, depending on the circumstances, they may require joint examination.[9]

24. This does not mean, however, that judicial independence is a prerogative or privilege granted in the judge's own interest. On the contrary, it is a fundamental principle, an essential element of any democratic state, a pre-condition of the rule of law and the fundamental guarantee of a fair trial.[10]

25. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and the impartial application of the law.[11] It is important that the judiciary is independent so that it can fulfil its role in relation to the other state powers, society in general, and the parties to litigation.[12]

26. It is therefore an element based on the rule of law, but also the pre-condition for the guarantee that all individuals (and the other state powers) will enjoy equality and have access to a fair trial before impartial courts.[13] Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised and can breach Article 6.1 ECHR.[14]

27. As regards disciplinary liability of judges, this has different constitutive elements from criminal liability and applies a different standard of proof. However, criminal and disciplinary liability are not mutually exclusive, as disciplinary sanctions may still be appropriate in case of a criminal acquittal. Also, the fact that criminal proceedings have not been initiated due to the failure of establishing criminal guilt or the facts in a criminal case, does not mean that no disciplinary breach was committed by the judge concerned, precisely because of the different nature of both liabilities. If the misconduct of a judge is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge. Criminal proceedings, however, do not consider the particular disciplinary aspect of the misconduct, but

[9] ECtHR: Case of Parlov-Tkalčić v. Croatia, 22 December 2009 (application no. 24810/06), paragraph 86; Case of Oleksandr Volkov v. Ukraine, 9 January 2013 (application no. 21722/11), paragraph 107; Case of Findlay v. the United Kingdom, 25 February 1997 (application no. 22107/93), paragraph 73.

[10] Venice Commission, CDL-AD(2014)018, Joint opinion - Venice Commission and OSCE/ODIHR - on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, paragraph 14; CCJE Opinion No. 1 (2001), paragraph 11; CCJE Opinion No. 17 (2014), paragraph 5; ECtHR, Case of Agrokompleks v. Ukraine, 6 October 2011 (application no. 23465/03), paragraph 136.

[11] Recommendation CM/Rec(2010)12, paragraph 11; CCJE Opinion No. 1 (2001), paragraph 10; CCJE Opinion No. 18 (2015), paragraph 10.

[12] CCJE Opinion No. 18 (2015), paragraph 10.

[13] CCJE's Situation report on the judiciary and judges in the Council of Europe member States Updated version No. 1 (2013), paragraph 5; CCJE Opinion No. 18 (2015), paragraph 10.

[14] CCJE Opinion No. 18 (2015), paragraph 44; ECtHR, Case of Coyne v. United Kingdom, 24 September 1997 (application no. 124/1996/743/94254), paragraph 58.

criminal guilt.[15] It is important that both types of liability be used sparingly in order not to cause a chilling effect on the judiciary.[16]

28. Although European standards allow for the criminal, civil or disciplinary liability of judges in the exercise of their judicial functions, the threshold is high. Paragraph 66 of Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe reads: *"The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence."*

29. The Consultative Council of European Judges (CCJE) has taken the same position in Opinion No. 18 (2015): *"With respect to civil, criminal and disciplinary liability (what has been called above "punitive accountability"), the CCJE stresses that the principal remedy for judicial errors that do not involve bad faith must be the appeal process. In addition, in order to protect judicial independence from undue pressure, great care must be exercised in framing judges' accountability in respect of criminal, civil and disciplinary liability. The tasks of interpreting the law, weighing of evidence and assessing the facts that are carried out by a judge to determine cases should not give rise to civil or disciplinary liability against the judge, save in cases of malice, wilful default or, arguably, gross negligence."*[17]

30. In a similar vein, in its 2016 Rule of Law Checklist, the Venice Commission requires that the grounds for disciplinary measures be "*clearly defined*" and "*sanctions limited to intentional offences and gross negligence*."[18]

31. The Venice Commission has also stated in an *amicus curiae* Brief for the Constitutional Court of the Republic of Moldova, that:

"(…) the mere interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability, even in case of ordinary negligence. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Civil (or criminal) liability may limit the discretion of an individual judge to interpret and apply the law. Therefore, the liability of judges should not be extended to judges' legal interpretation in the adjudication process. Only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability."[19]

[15] Venice Commission, CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, paragraph 56.
[16] Venice Commission, CDL-AD(2017)002, Republic of Moldova – *amicus curiae* Brief for the Constitutional Court on the criminal liability of judges, paragraph 16.
[17] See CCJE Opinion No.18, paragraph 37.
[18] See CDL-AD(2016)007rev, Rule of Law Checklist, E, 1 a. Iii.
[19] Venice Commission, CDL-AD(2017)002, Republic of Moldova – *amicus curiae* Brief for the Constitutional Court on the criminal liability of judges, paragraph 27.

32. The Venice Commission has also adopted several opinions over the years for Armenia on the Judicial Code (since 2014),[20] and on the Law on the Constitutional Court (since 2006)[21], which will be referred to below, if relevant and where necessary.

B. Armenian legislative context on the disciplinary liability of judges

33. In December 2015, Armenia adopted a new Constitution, which was followed by a new Judicial Code, adopted in February 2018, providing grounds for the disciplinary liability of judges under Article 142, part 1.

34. One of the grounds for bringing a disciplinary action against a judge (Article 142, part 1 (1)) was an obvious and gross violation of the provisions of substantive or procedural law in the administration of justice. An essential disciplinary violation, in turn, justified (according to Article 86, part 3 and Article 149, part 1, point 4, Article 164 part 9 of the Constitution), the termination of the powers of a judge by the Supreme Judicial Council, which "acts as a court" in disciplinary proceedings according to Article 175(2) of the Constitution. The following was considered an essential disciplinary violation: (1) commission of a disciplinary violation by a judge having been imposed two warnings or a strict warning, or (2) commission by a judge of an act which is incompatible with the position of a judge (Article 142, part 6).

35. Under the Judicial Code of 2018, time limits for instituting proceedings *"to impose a disciplinary action"* were quite short: On the ground of violation of provisions of substantive or procedural law proceedings with a view to imposing disciplinary action against the respective judge had to be instituted *within a period of six months after detecting the violation*, and *no later than five years after the completion of judicial proceedings* (Article 144, part 1, point 1 of the Judicial Code of 2018).

36. In 2020, the Judicial Code was amended *inter alia* with respect to a judge's liability for the violation of provisions of substantive or procedural law in the administration of justice. It was provided that a judge could be held responsible only in cases where the acts were committed intentionally or with gross negligence (Article 142, part 1, point 1 of the Judicial Code of 2020; definition in Article 142 Part 4 and 5 of the Judicial Code of 2020). A violation of the provisions of substantive or procedural law, which resulted in a fundamental breach of human rights and/or freedoms stipulated by the Constitution or by international treaties ratified by the Republic of Armenia (or dishonoured the judiciary), should be considered as being essential disciplinary violations (Article 142, part 6 of the Judicial Code of 2020). [22]

[20] Venice Commission, CDL-AD(2014)007, 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) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia ; CDL-AD(2014)021, Armenia – Opinion on the draft law on introducing amendments and addenda to the Judicial Code of Armenia (term of Office of Court Presidents); CDL-AD(2017)019, Armenia – Opinion on the Draft Judicial Code; Armenia - 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.

[21] Venice Commission, CDL-AD(2006)017, Armenia – Opinion on Amendments to the Law on the Constitutional Court of Armenia; CDL-AD(2017)011, Armenia – Opinion on the draft Constitutional Law on the Constitutional Court.

[22] Article 142. 1. Grounds for imposing disciplinary action against judges shall be: (1) violation of provisions of substantive or procedural law while administering justice or exercising — as a court — other powers provided for by law, which has been committed deliberately or with gross negligence;

6. The essential disciplinary violation shall be considered as: (1) violation provided for by point 1 of part 1 of this Article, which has resulted in the fundamental violation of human rights and/or freedoms stipulated by the Constitution or international treaties ratified by the Republic of Armenia, or dishonours the judiciary.

[(3) violation committed on a regular basis and provided for by part 1 of this Article, which, taken individually, may not be considered as essential, whereas, in combination with the violations previously committed, it dishonours the judiciary.]

37. Time limits were extended (Article 144, part 1, point 1 of the Judicial Code of 2020). Proceedings in view of imposing disciplinary action against a judge on the ground of an intentional violation or violation with gross negligence of a norm of substantive or procedural law in the administration of justice could now be instituted within a period of *one year* after the violation was detected. The absolute time limit is reached when *eight years* have passed since the entry into legal force of the final judicial act, except for disciplinary proceedings instituted on the occasion provided for by Article 146, part 1, point 4 of the Judicial Code of 2020. It is unclear whether these amendments entered into force with retroactive effect (either to the detriment of judges within the last five-year-period or even after this period has elapsed).[23] According to the translation of the current version of the Judicial Code of 2020, Law HO-197-N of 25 March 2020, contains a transitional provision relating to Article 144, which has not been provided.

38. The exception in Article 144, part 1, point 1 of the Judicial Code of 2020 relates to *the "detection … of an act containing prima facie elements of disciplinary violation, as a result of examination of an act rendered by an international court to which the Republic of Armenia is a party or by other international instance, that establishes a violation of international obligations assumed by the Republic of Armenia in the field of human rights protection"* (Article 146, part 1, point 4 of the Judicial Code of 2020). The current version of the Judicial Code states that, pursuant to Article 58, part 19 of the Law HO-197-N of 25 March 2020, a disciplinary violation may be instituted in the situations provided for by Article 146, part 1, point 4 *based on the acts rendered by an international court to which the Republic of Armenia is a party or by other international instance following the entry into force of the of the Law HO-197-N of 25 March*.

39. As a result of the above, there seems to be no absolute time limit that would prevent judges from being held liable for human rights violations detected as a result of, for instance, a judgment by the ECtHR, provided the judgment was delivered after March 2020, and further provided that the transitional rules declare Article 144 of the Judicial Code of 2020 applicable.

40. Another aspect to be taken into consideration in this context, is the new Criminal Code of Armenia, adopted on 27 May 2021, which will enter into force on 1 July 2022.[24] Article 482 of this new Criminal Code deals with the "*1. Adoption of an obviously unjust judgment (criminal/civil) or other judicial act by a judge for mercenary, other personal or group interests (…).*"[25] The current Criminal Code, which is still in force at the moment, contains a similar article, which reads as follows:

> *"Article 352. Adoption of an obviously unjust court sentence, verdict or other court act.*
> *1. Adoption of an obviously unjust court sentence, verdict or other court act by the judge for mercenary purposes or for other personal motives, is punished with a fine in the amount of 300 to 500 minimal salaries, with deprivation of the right to hold certain posts or practice certain activities for up to 5 years, or with imprisonment for the term of up to 3 years.*
> *2. The same action which negligently caused grave consequences, is punished with imprisonment for the term of 2 to 4 years, with or without deprivation of the right to hold certain posts or practice certain activities for up to 3 years.*
> *3. The same action which wilfully caused grave consequences, is punished with imprisonment for the term of 3 to 7 years, with or without deprivation of the right to hold certain posts or practice certain activities for up to 3 years."* [26]

41. The Criminal Code therefore also provides a means of dealing with issues pertaining to the liability of judges.

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[23] This would be contrary to the previous opinion of the Venice Commission for Armenia, CDL-AD(2019)024, Joint Opinion, paragraph 41.
[24] https://www.arlis.am/ (in Armenian only for the moment).
[25] Unofficial translation.
[26] http://parliament.am/legislation.php?sel=show&ID=1349&lang=eng

42. This shows that there are quite a few options available to bring wayward judges to justice under the existing Armenian legal system. However, the Ministry of Justice felt that another means of addressing the vetting of sitting judges needed to be introduced, and this gave rise to the Draft Amendments, the content of which are discussed below.

C. Draft Amendments

1) The term *"deliberate violation"*

43. The Draft Amendments under the new incompatibility requirement, refer to *"a deliberate violation by a judge of a fundamental human right […]"* which seems to comply, in principle, with the recommendations made by the Joint Opinion of the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law (DGI), on the amendments to the Judicial Code and some other Laws in 2019 (hereinafter, the "Joint Opinion of 2019"), if the term "deliberate" refers to an infringement committed by a judge with intent or through gross negligence.[27]

44. The terminology used raises concern with respect to legal certainty to the extent that the subjective requirements are different in Article 142 of the Judicial Code ("intentional violation") and in the Draft Amendments ("deliberate violation") – both in Armenian and in the translation. The Venice Commission delegation was told during its online meetings that "intentional violation" was a defined term in the Armenian legislation, whereas "deliberate violation" was not. It is therefore not clear whether the new requirement will be the same as the older one in the Judicial Code. The Venice Commission strongly recommends that the element of guilt be the same in the laws and this means that the same terminology must be used or that the requirement is clearly defined as stricter than "intentional".

45. Furthermore, a judgment of the ECtHR will normally not address individual judges and ascertain the intent or deliberateness of a violation by an individual judge, nor will it identify different court levels. The ECtHR only assesses the compatibility of a given act with the ECHR. The violation of the ECHR may stem from applicable legislation, insufficient investigation by the police or the suppression of evidence by the prosecutor.

46. Using a judgment of the ECtHR as a basis to construct a finding of intent or deliberateness on the part of a national judge is particularly problematic where the results of legal proceedings, and thus a possible violation of human rights (liberty, property), depend on the finding of facts, the consideration of evidence and the interpretation of the law (i.e. the possibility for the wilful misinterpretation of the law). It is not impossible, but also not obvious to identify deliberateness where facts may be interpreted in different ways. Any such finding must take into account the individual judge's behaviour, not the final outcome (possibly after a decision on the appeal of a case).

47. For this reason, a deliberate human rights violation cannot necessarily be inferred by a ECtHR judgment that finds a human rights violation, as its conclusions relate in general to the malfunctioning of the national system as a whole, which may sometimes be reduced to the fault of a specific court, but rarely to an individual judge.[28]

48. Therefore, the liability of judges brought about by a negative judgment by the ECtHR should only be based on a national court's finding of either intent (deliberateness) or gross

[27] 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, paragraph 62.
[28] 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, paragraph 50.

negligence on the part of the judge. The judgment of the ECtHR cannot be used as the sole basis for a judge's liability. [29]

2) The term *"fundamental human right"*

49. The Draft Amendments refer to the violation of *a fundamental human right* without clearly setting out what these fundamental rights are.

50. During the online meetings, the Venice Commission delegation was informed that only very serious human rights violations would be covered by the Draft Amendments, such as violations of the right to liberty or of property rights, but not all violations of fair trial requirements, for example. The Venice Commission highly recommends that a clear definition be provided about which human rights violations are concerned.

51. Although it may be problematic if domestic courts fail to examine allegations – it makes a difference if the judge's wrongdoing is based on a procedural failure or is related to a decision on the detention of a person or whether a decision clearly led to the torture and death of a person. It is therefore important that in this context, a restrictive interpretation be applied. For instance, it would be disproportionate to terminate the powers of a judge due to a violation of incompatibility requirements because this judge has, contrary to Article 6 ECHR, not conducted an oral hearing. Yet, the Draft Amendments lack a threshold defining the level of violation and, in addition, any form of graduated sanctions; the only sanction to a fundamental human rights violation seems to be the termination of powers.[30]

52. The current wording in the Draft Amendments as to any threshold remains vague at best and should be made explicit. In addition, if not only very serious and obvious violations of human rights shall be covered by the Draft Amendments, but also less serious violations of human rights, then a form of graduated sanctions should be introduced in this context to not have all violations end with the termination of the powers of a judge.

3) The term *"international court or another international institution"*

53. The Draft Amendments refer to *"a deliberate violation by a judge of a fundamental human right, which was asserted by the act rendered by an international court or another international institution of which the Republic of Armenia is a party […]."*

54. It is unclear, what these international institutions are. This is particularly problematic with respect to those "institutions" which do not issue judgments that are binding on the Republic of Armenia, but pure assessments or recommendations of non-binding character, e.g. opinions by the Venice Commission.

55. During the Venice Commission delegation's online meetings, it became quite clear that under "international court" only one court could be referred to and that is the ECtHR. However, it also became quite clear that there was no general consensus as to what is meant by "another international institution". This needs to be clarified and the institutions concerned explicitly listed in the Draft Amendments. Otherwise, the part "*or another international institution of which the Republic of Armenia is a party"* should be deleted.

[29] Venice Commission, CDL-AD(2016)015, Republic of Moldova – *amicus curiae* Brief for the Constitutional Court on the right of recourse, paragraph 25.
[30] Venice Commission, CDL-AD(2021)006, Ukraine - Opinion on the draft law on Constitutional Procedure (draft law no. 4533) and alternative draft law on the procedure for consideration of cases and execution of judgements of the Constitutional Court (draft law no. 4533 -1), paragraph 47.

4) The term deliberate violation *"by a judge"*

56. The Draft Amendments refer to *"a deliberate violation by a judge […]".* This raises the question of attribution, in other words: who can be held accountable for the violation?

57. It is easily possible for three levels of courts to have been involved in a case in which a violation of a fundamental human right has been determined by the ECtHR – which requires the exhaustion of domestic remedies. Under these circumstances, which of the judges who has examined the case will see their powers terminated on the grounds of violating the new incompatibility requirement? Is it possible to determine the share of fault of a judge in the violation, particularly if a case has been examined by a panel of judges? What about majority decisions in which voting ratios or dissenting opinions are not disclosed? As the ECHR requires an exhaustion of domestic remedies, there will rarely be any judgments that could be attributed to a single judge.

58. This question of attribution has therefore not been answered and needs to be addressed by the Draft Amendments in order to meet the general standards of legal certainty of laws with far reaching consequences.

5) Procedure

a. Procedural safeguards

59. It is not clear which procedural rules will apply to the proceedings that lead to the termination of powers of a judge on the basis of this new incompatibility ground in the Draft Amendments. According to Article 159, part 1 of the Judicial Code of 2020, the rules of Chapter 19 of this Code (Disciplinary action against judges) shall apply *mutatis mutandis* to the proceedings on termination of powers of a judge, insofar as they are applicable and unless otherwise prescribed by Chapter 20. This leads to the possibility that not all guarantees and procedural rights that would be given to the respective judge during disciplinary proceedings will apply. This needs to be addressed and as the new ground for incompatibility is equivalent to a disciplinary offence, all procedural rights and safeguards under the disciplinary procedure should apply. This also means that, since disciplinary procedures provide a remedy against the termination of powers, these remedies should also be in place against decisions in the procedure for establishing the applicability of incompatibility criteria.

60. In addition, the Supreme Judicial Council is competent to resolve issues with respect to the termination of the powers of a judge and a member of the Supreme Judicial Council and the Constitutional Court is competent to resolve issues with respect to the termination of the powers of a Constitutional Court judge. In this context, it remains unclear what procedures and which criteria the Supreme Judicial Council and the Constitutional Court will follow in order to qualify the violations as intentional/deliberate. That should be clarified.

b. Role of the Supreme Judicial Council

61. With respect to members of the Supreme Judicial Council and the Draft Amendments - it is not clear whether Article 86 of the Draft Amendments to the Judicial Code (1) shall only apply to those members of the Supreme Judicial Council that rendered acts violating human rights as a judge or (2) whether decisions of the Supreme Judicial Council itself – acting as court – may also give rise to the termination of the power of its members, if such a decision violated human rights.

62. In the first case, the Draft Amendments would only apply to the five judge members of the Supreme Judicial Council, but not to the five members elected by the National Assembly from among academic lawyers and other prominent lawyers (see Article 174 of the Constitution).

63. In the second case, it is problematic that it is the Supreme Judicial Council itself which decides on the issue of termination of the powers of members of the Supreme Judicial Council (Article 89, part 1, point 16 of the Judicial Code of 2020). Even if concrete members may be identified as being liable for human rights violations – as decisions of the Supreme Judicial Council shall be adopted by open ballot (Article 94, part 4 of the Judicial Code) – these members (as a party to the proceedings) may not participate in the sessions to terminate their powers. However, as decisions of the Supreme Judicial Council shall be adopted by a majority of votes (of all members of the Supreme Judicial Council, at least in the past) it is questionable whether the minimum quorum for holding a session will be reached in these cases.

c. Role of the Constitutional Court

64. A situation very similar to that of the Supreme Judicial Council seems to exist for the judges of the Constitutional Court.

65. Constitutional Court judges are not supposed to be held liable under the current law for the violation of substantive or procedural law, particularly of the Constitution. The powers of a Constitutional Court judge shall be terminated, if s/he has committed a major disciplinary violation (Article 12, part 2, point 5 of the Law on the Constitutional Court).

66. A significant disciplinary violation is defined as *"an intentional or grossly negligent violation of the rules of conduct prescribed in Clauses 1-4, 8, 9, 11, 12, 15 and 16 of Part 1 of Article 14 of this Law, incompatible with the status of a judge due to the circumstances of the execution and/or the consequences"* (Article 12, part 3, point 3 of the Law on the Constitutional Court). The violation of the provisions of substantive or procedural law is not mentioned in Article 14, part 1 of the Law on the Constitutional Court.

67. Judges of the Constitutional Court, under the current situation with respect to the procedure for the termination of office, are not subject to the Supreme Judicial Council, but to the Constitutional Court itself. During the online meetings, the Venice Commission delegation was informed that, under the Draft Amendments, if the impugned act of a Constitutional Court judge occurred when that judge was a judge at another court, then the Constitutional Court will take a decision. However, an impugned act cannot be attributed to a Constitutional Court judge while he or she was a judge at the Constitutional Court – because all decisions are voted for or against by at least five judges – which would mean that all five judges would face the procedure. As six judges are needed to vote in disciplinary proceedings, a decision cannot technically be made by the Constitutional Court (total number of nine judges). Hence, we are at an impasse.

68. It seems clear that procedural aspects need to be revisited and clarified in the Draft Amendments.

6) Retroactive effects of the legislation

69. The Draft Amendments set out that the new "incompatibility requirement" applies *"(…) if fifteen years have not elapsed since the act of an international court or another international institution of the Republic of Armenia is a party came into force."* This means that the new "incompatibility requirement" will have retroactive effect.

70. According to the Justification, this retroactive effect is held to be in line with international and European standards as the strict observance of the ban on retroactivity applies to criminal law and not in practice to other branches of law if there is a legitimate aim of public policy – and case law is cited from the ECtHR, the US and the UK.

71. Retroactive application of the law is strictly precluded in criminal law matters. In other legal fields (e.g. civil law), retroactive application of the law may be adopted by the legislature, but the principle of legal certainty, as an important element of the rule of law, should be carefully considered. Article 6 ECHR precludes any interference by the legislature in the administration of justice designed to influence the judicial determination of a dispute except on "*compelling grounds of general interest*".[31]

72. For instance, the ECtHR found violations in respect of recourse by the State to retroactive legislation influencing the judicial determination of a pending dispute to which the State was a party, without demonstrating that there were "*compelling general-interest reasons"* for such action. The ECtHR pointed out that financial considerations could not by themselves warrant the legislature taking the place of the courts in order to settle disputes.[32]

73. Article 6.1 sets limits to interferences by the authorities with pending legal proceedings to which they are a party, and the ECtHR held that in this regard, *"Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection"*.[33] In other cases, the ECtHR has held that the considerations relied on by the respondent State were based on the compelling public-interest motives required to justify the retroactive effect of the law.[34]

74. The Justification refers to an article[35] where case law of different countries as well as of the ECtHR is quoted in which certain criteria have been singled out to allow a law to have retroactive effect (e.g. achieving legitimate goals of the legislature; public interest; existence of a reliance interest of the parties). According to this article, the principle of non-retroactivity has not shaped into a binding general principle of law in administrative law: there are only a few states in which the principle applies equally in administrative and criminal law. The US prohibits making conduct illegal that was not illegal when performed without identifying any specific area of law (but courts have limited the prohibition to criminal laws). Most countries do not have explicit provisions relating to non-retroactivity outside criminal law; however, in tax law, retroactive application is common (e.g. Australia, France, United Kingdom). The ECtHR has relied on certain factors to decide on the lawfulness of the retroactive application of law, however, it leaves open the possibility that retroactive legislation may be deemed impermissible where these factors are not present.

75. According to the Justification, the ECtHR's case law suggests that proportionate retroactive administrative measures are usually valid. Conversely, if such measures are of confiscatory and punitive character, they are likely to be struck down (e.g. because retroactivity with punitive effect may conflict with the respect of legitimate expectations). Outside the area of criminal law, domestic legal systems differ from a general ban of retroactivity to specifying certain areas of law or consequences where it is permissible and where the need for non-retroactivity is balanced against other legitimate public policy considerations.[36]

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[31] ECtHR, Case of Zielinski, Pradal, Gonzalez and Others v. France, 28 October 1999 (application nos. 24846/94 and 34165/96 to 34173/96), paragraph 57; Case of Scordino v. Italy (no.1), 29 March 2006 (application no. 36813/97), paragraph 126.

[32] ECtHR, Case of Azienda Agricola Silverfunghi S.a.s. and Others v. Italy, 24 June 2014 (application nos. 48357/07, 52677/07, 52687/07 et al., paragraphs 76 and 88-89.

[33] ECtHR, Case of National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, 23 October 1997 (application nos. 117/1996/736/933-935), paragraph 112.

[34] See Guide on Article 6 of the European Convention on Human Rights (civil limb); ECtHR, Case of National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, 23 October 1997 (application nos. 21319/93, 21449/93 and 21675/93), paragraph 112; Case of Forrer-Niedenthal v. Germany, 2003, paragraph 64; Case of OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others v. France, 2004, paragraphs 71-72; Case of EEG-Slachthuis Verbist Izegem v. Belgium (dec.), 2005; Case of Hôpital local Saint-Pierre d'Oléron and Others v. France, 2018, paragraphs 72-73.

[35] Kryvoi/Matos, Non-Retroactivity as a General Principle of Law, 2021 Utrecht Law Review, 17(1), 46–58.

[36] Ibid., 51 f, 57 f.

76. In a judgment quoted in the Justification, the ECtHR dealt with retroactivity in the context of disciplinary proceedings.[37] It found – while referring to the examination of previously accumulated property of judges – that the process of valuation of personal or family assets accumulated during a judge's professional life does not contradict Article 6 ECHR from the point of view of an alleged violation of the principle of legal certainty. In this recent case, the ECtHR held that limitation periods serve to ensure legal certainty and prevent injustice which might arise if the courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable because of the passage of time. However, given that personal or family assets are normally accumulated over the course of a working life, strict temporal limits for their evaluation would restrict the authorities' ability to evaluate the lawfulness of the assets acquired.[38]

77. As regards the Draft Amendments, the Venice Commission does not find the ECtHR judgments mentioned in the Justification directly relevant nor helpful in this context because they concern special situations that are not comparable to the situation dealt with by the Draft Amendments, notably incompatibility requirements.

78. In its Rule of Law Checklist,[39] the Venice Commission notes that: "62*. People must be informed in advance of the consequences of their behaviour. This implies foreseeability (above II.B.3) and non-retroactivity especially of criminal legislation. In civil and administrative law, retroactivity may negatively affect rights and legal interests. However, outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally). The legislator should not interfere with the application of existing legislation by courts."*

79. The Venice Commission is opposed to the retroactive effect of legislation, as stated in its previous opinion for Armenia – Joint Opinion CDL-AD(2019)024:

> *"41. **The amended JC introduces certain new duties for the judges** and people closely affiliated to them (mostly related to the acceptance of gifts and the duty to submit financial declarations). Furthermore, certain provisions of the JC have been reformulated in order to expand the judge's obligations, extend time-limits for bringing them to liability etc. **As an important preliminary remark, the Venice Commission expects that those provisions will not have retroactive effect, as the Armenian authorities assured the rapporteurs during the visit. To make sure this understanding of the amendments is followed in practice, the Armenian legislator might consider including a special clause on non-retroactivity to the text of the JC.**"*[40] [emphasis added]

80. This issue of retroactivity should be excluded altogether to ensure that it does not create yet further possible challenges against the Armenian state before the ECtHR. Although not strictly speaking a violation of European standards, it will need to prove "compelling grounds of the general interest" or "public-interest considerations".

[37] ECtHR, Case of Xhoxhaj v. Albania, 9 February 2021 (application no. 15227/19).
[38] Ibid., paragraph 348 f.
[39] Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, p. 16.
[40] The above said does not exclude that a judge may be legitimately required to explain "changes" in his or her assets – a new duty introduced by the Package – in relation to the acquisition of property or other transactions which occurred before the adoption of the new law. However, the duty to demonstrate the lawful origin of such property or transactions should not impose a disproportionate burden on the judge, should concern only particularly significant transactions and should not concern, for example, property which the judge or his or her family have owned for decades. The duty to give explanations should remain reasonable.

7) Issues relating to the compatibility with the Constitution

81. The Venice Commission would like to point out that it is for the Armenian Constitutional Court to assess the compatibility of the Draft Amendments with the Constitution, not for the Venice Commission, which makes a mere assessment of the situation as it sees it and provides recommendations on the basis of this assessment.

82. To that end, the Venice Commissions finds that the Draft Amendments relating to Article 86 and to Article 159 of the Judicial Code of 2020 as well as to Article 12 of the Law on the Constitutional Court raise real doubts as to their compatibility with Article 164, part 2 of the Constitution. The latter provides that a judge may not be held liable for an opinion expressed or judicial act rendered during the administration of justice, except where there are elements of a crime or a disciplinary violation.

83. The Draft Amendments rely on Article 164, part 6 of the Constitution, which allows to prescribe by law further incompatibility requirements which are not set out in the Constitution itself.

84. The Venice Commission delegation was informed during its online meetings that the term "incompatibility requirements" refers and is limited to activities or the behaviour of a judge outside his or her professional life (that means not in the administration of justice), which are not compatible with their position as a judge (see Article 5 of the Judicial Code of 2020). It was emphasised that the same applies to all public servants. This would indicate that Article 164, part 2 of the Constitution may not be overruled by Article 164, part 6 of the Constitution, because they address different issues.

85. Furthermore, it should be mentioned that the Armenian Constitution does not only forbid retroactivity in defining crimes and imposing punishments (Article 72 of the Constitution), but also the retroactive effect of (other) laws and legal acts that deteriorate the legal condition of a person (Article 73 of the Constitution). This would seem to exclude the retroactive application of the provisions of the Draft Amendments.

V. Conclusion

86. The Venice Commission welcomes the Armenian authorities' intention to reform the judiciary. It also understands the motivation behind the preparation of the Draft Amendments, notably to free the judiciary of judges who, in the past, had committed serious human rights violations and thus undermined the general public trust in the judiciary.

87. The Venice Commission does not see the need for new preventive measures, as they already seem to exist in the current Judicial Code, which provides strong grounds to hold judges liable for the violation of human rights which take place in the future. In addition, the new Criminal Code (Article 482), which will enter into force on 1 July 2022, as well as the old one, which is currently still in force (Article 352) provide criminal sanctions for obviously unjust judgments or other judicial acts, delivered for "mercenary purposes" or for other personal interest. Although this will not cover all cases of human-rights violations by judges, these norms provide sanctions at least for the most serious and obvious cases.

88. There is also a general concern with regard to the positioning of the new incompatibility requirement within the Judicial Code (Article 5, Part 1) and the essence of incompatibility requirements (Article 164.6 of the Constitution). The new "incompatibility requirement", is a deliberate violation of a fundamental human right which constitutes a violation of incompatibility requirements. However, incompatibility requirements are barriers to engaging in activities other than the judge's professional activity, which is also in line with the international legal approach. It

is therefore questionable whether draft Article 86, part 3 and Article159, part 2, of the Judicial Code and Article 12, part 2, of the Law on the Constitutional Court, fit into this practice.

89. However, if these Draft Amendments are to be adopted, there are several concerns that need to be addressed:

- The term *"deliberate violation":* it is important that a judgment of the ECtHR against Armenia not be used as the sole basis for a judge's liability. Liability should only be based on a national court's finding of either intent (deliberateness) or gross negligence on the part of a judge. In addition, the word "deliberate" has been used whereas the word "intentional" is used in other Armenian legislation, including the Judicial Code and is a defined term. This raises concerns with respect to legal certainty as it is not clear whether the new requirement will be the same as the older one in the Judicial Code. This needs to be clarified.

- The term *"fundamental human right":* these fundamental human rights must be clearly defined in the Draft Amendments. In addition, the Draft Amendments should introduce a high threshold defining the level of violation or introduce graduated sanctions to not have all violations end with the termination of the powers of a judge.

- The term *"international court or another international institution*": to ensure clarity, if by 'international court' the ECtHR is meant, then this should be set out explicitly in the Draft Amendments. The international institutions concerned must also be clearly enumerated. Otherwise this part should be deleted.

- The term deliberate violation *"by a judge"*: this raises, but does not answer, the question of attribution i.e. who (which judge) can be held accountable. This is especially difficult in cases where decisions are rendered by chambers of judges. This needs to be explicitly addressed.

- Procedure: which are the procedural rules that will apply to the proceedings that lead to the termination of powers of a judge on the basis of this new incompatibility ground? This needs to be provided in the Draft Amendments. In addition, which procedures and which criteria will the Supreme Judicial Council and the Constitutional Court follow in order to qualify the violations as intentional/deliberate? This also needs to be clarified.

- Retroactive legislation: retroactive legislation should be excluded altogether to ensure that it does not create yet further possible challenges against the Armenian state before the ECtHR. Although not strictly speaking a violation of European standards, it will need to prove *"compelling grounds of the general interest"* or *"public-interest considerations".*

90. The Venice Commission remains at the disposal of the Armenian authorities for further assistance in this matter.