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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# OPINION

# ON THE DRAFT LAW ON INTRODUCING AMENDMENTS AND ADDENDA TO THE JUDICIAL CODE

# OF ARMENIA

# (TERM OF OFFICE OF COURT PRESIDENTS)

**Adopted by the Venice Commission**
**at its 99th Plenary Session**
**(Venice, 13-14 June 2014)**

**on the basis of comments by**

**Mr Johan HIRSCHFELDT (Substitute member, Sweden)**
**Ms Wilhelmina THOMASSEN (Substitute member, Netherlands)**
**Mr Kaarlo TUORI (Member, Finland)**
**Mr Andras VARGA (Member, Hungary)**

## I. Introduction

1. By letter of 1 April 2014, the President of the National Assembly of the Republic of Armenia, at that time, Mr H. Abrahamyan, requested an opinion on the draft law on Introducing amendments and addenda to the Judicial Code of the Republic of Armenia (CDL-REF(2014)016, hereinafter "the Draft Law").

2. Ms Wilhelmina Thomassen and Mr Johan Hirschfeldt, Mr Kaarlo Tuori and Mr Andras Varga were invited to act as rapporteurs for the present opinion.

3. On 30 April 2014, one of the rapporteurs, Ms Wilhelmina Thomassen had meetings in Yerevan on the Draft Law with the First Deputy Minister of Justice, Mr Grigor Muradyan, the legal expert of the Standing Committee on State and Legal Affairs of the National Assembly, Ms Lilit Yeremyan and the Executive Director of the Association of Judges, Mr Vahe Engibarayan.

4. Following an exchange of views with Mr Vrezh Gasparyan, Chief Adviser to the President of the National Assembly of the Republic of Armenia, this opinion was adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June).

## II. Request by Armenia

5. The Draft Law amends the Judicial Code of the Republic of Armenia by providing rules on 1) the length and the expiry of office of chairpersons of courts of first instance and of courts of appeal[1] 2) on the election of the new chairpersons of courts (including the chairperson of the Court of Cassation).

6. According to the Draft Law, chairpersons of courts (including the chairperson of the Court of Cassation) will be elected by the Council of Justice from among the judges of the respective court (draft Article 125.3). The result of the election is not a binding decision but just a proposal: the candidate person (judge) who "receives the greatest number of affirmative votes shall be proposed to the President of the Republic" for appointment (draft Article 125.9). However, the President of the Republic is not obliged to accept the proposal, but he/she may reject it; in that case a new process of election starts (draft Articles 125.12 and 150.8). Chairpersons of first instance courts and courts of appeal are appointed for a four year term (draft Articles 125.13 and 145.1) while the chairperson of the Court of Cassation will be appointed for an indefinite time (similar to the rule in force). The Draft Law limits the opportunity for re-election: a judge may not be appointed to the position of the chairperson of the court for more than two consecutive terms (draft Articles 125.14 and 145.1); this rule does not apply to the chairperson of the Court of Cassation hence he/she will be appointed until retirement.

7. The Draft Law contains transitional rules. Its Article 10.2 intends to terminate the office of the sitting chairpersons of the courts of first instance and the courts of appeal on 1 January 2015. Draft Article 10.3 exempts the current chairpersons of the courts of first instance and the courts of appeal from the limitation of consecutive appointments meaning that at the first election they may run for a new appointment without any restriction.

8. According to the explanatory memorandum, the necessity of the Draft Law is preconditioned by the fact that the Judicial Code of Armenia does not envisage any

[1] In view of the text of the Draft Law, the sentence in its rationale: "the term of office of the chairpersons of First Instance Court and Court of Cassation is limited for a term of four years" is obviously a clerical error.

limitations on the term of office of court chairpersons. They keep their functions for an indefinite time (in practice until the retirement age of 65). This follows from part 2 of the current Article 14 of the Judicial Code, which also applies to court chairpersons.
Such a limitation, however, is seen as necessary, as the explanatory memorandum informs, in order to be in keeping with international criteria, particularly the Kyiv Recommendations, and the practice of different countries in this field.

9. The President of the National Assembly of the Republic of Armenia requested the Venice Commission to prepare an opinion on the Draft Law focusing on the following two questions:

"1. In the light of the aforementioned regulations of the Constitution of the Republic of Armenia, would the mentioned provision of the Draft Law concerning termination of the powers of the presidents of the appeal and first instance courts by operation of law be in line with the European standards?

2. Will it be consistent with the European standards if the powers of current presidents of the courts, who have already been appointed with no specified term of office, terminate by operation of law (i. e. upon the expiry of the four-year term specified by the new law)?"

10. This opinion is based on an English translation of the draft amendments to the Judicial Code and the explanatory memorandum. Some issues raised may be due to problems of translation.

## III. General constitutional principles

### A. Independence of judges and of the Judiciary

11. The principles of judicial independence and related standards are reflected in European and international documents, such as Article 6 of the European Convention on Human Rights (Right to a fair trial: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."), UN Basic Principles on the Independence of the Judiciary (endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 – "the independence of the judiciary shall be guaranteed by the State"), Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities[2] and in various documents of the Venice Commission.[3]

12. The most important safeguard of judicial independence is the permanent appointment of judges and rules against arbitrary dismissal (grounds dismissal limited to exceptional cases previously regulated by law)[4]. However, purely administrative functions correctly carried out, even if held by judges (e.g. chairpersons of courts, chambers, members of different judicial councils and advisory bodies) do not directly relate to judicial decision making which is at the centre of judicial independence. At the same time, the borderline between the administration of a court and the administration of justice (judicial decision making) might in practice not always be such clear and can be a sensitive issue.

[2] Paras 3-7 and 11, 22.
[3] Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004 paras 68-80 and Report on the Rule of Law, CDL-AD(2011)003rev paras 44, 53-55, Opinion on legal certainty and the independence of the Judiciary in Bosnia and Herzegovina, CDL-AD(2012)014 paras 25-28, 74-81.
[4] CM/Rec(2010)12 para 49: "Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists".

B. Internal independence of judges

13. Principles regarding chairpersons of courts and other judges fulfilling administrative functions emerge also from the principle of independence of judges and of the Judiciary.

14. Independence of the Judiciary focuses not only in its relations with other branches of state (external institutional independence), but "[t]he relationship between courts within the same judicial system should also be taken into account (internal independence)"[5]. Moreover, "the issue of internal independence arises not only between judges of the lower and of the higher courts but also between the president or presidium of a court and the other judges of the same court as well as among its judges".[6]

15. Recommendation CM/Rec(2010)12 of the Committee of Ministers sets out: "[t]he principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organisation should not undermine individual independence".[7]

16. The Venice Commission previously remarked that "[t]he issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that "judges are subject only to the law". This principle protects judges first of all against undue *external* influence. It is, however, also applicable *within* the judiciary. A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle".[8] Consequently, independence of individual (decision-making) judges should be also assured in their relations within the judicial organisation.[9]

17. Legal rules regulating election, term of office and termination of term of office of non-decision-making judicial offices have to maintain and strengthen the independency of the Judiciary. The system must hinder that the position of a court president becomes politicised and it must protect the individual judge against administrative measures by court presidents that would threaten his or her internal independence when adjudicating cases (distribution of cases, involvement in the appointment-process of judges, attribution of judges to different chambers or panels of the court etc.).

C. Legal certainty

18. As regards legal certainty, the Venice Commission observed that it is "essential to the confidence in the judicial system and the rule of law", it "requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable. Retroactivity goes against the principle of legal certainty, at least in criminal law (Article 7

[5] Opinion on legal certainty and the independence of the Judiciary in Bosnia and Herzegovina, CDL-AD(2012)014 paras 78-79.
[6] Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004 para 73. See also ECtHR, Parlov-Tkalčić v. Croatia, judgment of 22 December 2009, § 86.
[7] CM/Rec(2010)12 para 22.
[8] Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004 para 68.
[9] Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004 para 72-74 and 82. The issue of internal judicial independence was specifically raised in the recent joint opinion on the Draft Law amending and supplementing the Judicial Code (evaluation system for judges) of Armenia, CDL-AD(2014)007, paras 11-19 and 126-127.

ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests".[10]

19. Components of legal certainty "could be defined as including the following requirements: publicity, precision, consistency, stability, non-retroactivity and the finality and binding force of decisions". And further: "Stability means that legal instruments must not change so often as to make the principle *ignorantia juris non excusat* impossible to be applied by an ordinary individual. Courts should not depart from a previously held interpretation of a legal instrument, unless they have a good reason to do so. Non-retroactivity requires that legal instruments not be applied retroactively. This rule can be derogated from only in exceptional circumstances".[11]

20. However, legal certainty should not mean that legal regulations are unchangeable. Just the opposite is true: legal development, new principles or generally shared opinions may and in certain cases even should lead to amendments of laws.

21. On the other hand, any change of law may affect the existing legal status of persons regulated by the law in force before amendment. As a general conclusion it can be stated that retroactivity of the new law may be only exceptional, especially when it negatively affects cases which have been closed in the past. However, in some situations the respect of this principle may cause that the new law has practically no effect, can be applied only after a longer period of time which is perfectly acceptable if fundamental rights are directly at stake, but it can be less acceptable in the case of institutions of state administration and of office-holders.

22. The situation is even more complicated if regulations regarding the Judiciary are amended. As it was presented above independence of individual judges and of the judicial system is similarly safeguarded in constitutional thinking as fundamental rights of the individual persons. Retroactivity of new regulations can be accepted only in exceptional cases. Legitimate expectations of individuals should as much as possible be respected.

## IV. The first question

23. The first question to the Venice Commission seems to consist of two sub questions. The first sub question is whether the limitation of terms of office of court presidents as such complies with the European standards on the independence of judges and the Judiciary, as presented above. The second sub question, which the Venice Commission identified, is whether the Draft Law concerning the termination of the powers of court presidents by the operation of law is in conformity with the Constitution of the Republic of Armenia. As appears from the request letter, the court presidents are currently appointed for an indefinite period of time (until the retirement age).

### A. First sub question – European Standards

*Judicial independence vis-à-vis the court presidents and appointments for a definite term of office*

24. The Venice Commission previously observed that the possible influence of court chairpersons on individual judges – which could threaten their internal independence – can be diminished by rules and principles prohibiting any pressure on individual judges (e.g. non-

[10] Report on the rule of law, CDL-AD(2011)003rev paras 44 and 46.
[11] Opinion on legal certainty and the independence of the Judiciary in Bosnia and Herzegovina, CDL-AD(2012)014 paras 27-28.

discretional distribution of cases, transparent process of appointment of judges etc.[12]), but also by limitation of terms of office of these chairpersons.[13]

25. Indeed, a change in government must not obstruct the operation of the principle that a judge "is in the performance of his functions no-one's employee; he or she is holder of a State office. He or she is thus servant of, and answerable only to the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary".[14]

26. The Venice Commission therefore suggested that "if executive authorities are to have a decisive influence on the appointment procedure for Chairpersons, appointments should be for a fixed term and there should be a limit to possible renewals. This is important in order to reduce the influence on judges through Chairpersons, which will grow ever stronger over a longer period of time."[15] The draft amendments to the Judicial Code of the Republic of Armenia limit the term of office of court presidents and its reason is, as explained in the explanatory memorandum, a too strong role of court chairpersons in Armenia that could create a situation when court chairpersons could exercise some influence on other judges of the court. In that sense the new rules can be seen as strengthening the internal independence of the judges vis-à-vis court presidents.

27. At the same time the Venice Commission notes that the Draft Law is not applicable to the President of the Court of Cassation. There might be good reasons that the President of the Court of Cassation is excluded from the limited term-office as proposed for court presidents of courts of first instance and of courts of appeal. The Venice Commission recommends that reasons for this difference – linked to the concrete situation in Armenia – be given in order to make the need for the proposed amendments more convincing.

*Irremovability of judges and limitation to four years, reappointments*

28. Also in the light of the principle of irremovability of judges as discussed above, the Venice Commission finds it of great importance that the tasks of the court presidents are essentially administrative as follows from Article 25 of the Judicial Code. Only these administrative tasks will be terminated. As acknowledged in the explanatory memorandum, after the end of his/her term of office, a court president will keep the position as a judge of the same court. He/she should also have the possibility to accept position as a judge of another court. This is crucial and could be expressed in the Judicial Code and also in the Armenian Constitution, by making it crystal clear that the office of a judge as such is not affected when the appointment as a court president of the same judge expires as a result of the fixed-term of office.

29. The salary of the judge after leaving the position as court president is also an issue that could need consideration. Article 75 on the Judicial Code regulates this issue. The Venice Commission presumes that the provision stating that a judge has a right to supplement "for experience as a judge" includes the "experience as a court president" for the years as president so that a former court president gets a supplement for years as acting president when he/she keeps the office as a judge (see Article 75 para 5). An alternative solution

[12] Joint opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, CDL-AD(2011)012 para 26-32, Report on Judicial Appointments, CDL-AD(2007)028 para 51.
[13] The Venice Commission recommended to limit the term of office of the chairs of courts in the joint opinion on a proposal for a constitutional law on changes and amendments to the Constitution of Georgia, CDL-AD(2005)003, para 105.
[14] Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004 para 69, quoting opinion of CCJE.
[15] Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, CDL-AD (2011)012 para 42.

would be to let the court president keep his/her supplement as president after leaving that office.

30. Although the principle of irremovability of judges with regard to their adjudicating functions is upheld, given the fact that the chairpersons will keep their position as an ordinary judge after the termination of term of office as court chairpersons, their independence could still be endangered by the possibility of re-appointment. The possibility and hope to be reappointed might influence the attitude of a judge towards the executive in such a way that his/her independence and even his/her integrity could be jeopardised. Excluding any possibility of re-appointment is also a guarantee against politicization. On the other hand a short-term appointment can undermine courts presidents' possibilities to realise effective leadership and to ensure a solid and strong courts' organisation.

31. The Venice Commission finds the appointments of court presidents for a longer term without or a shorter term with the possibility of renewal in general as compatible with the principle of judicial independence. However, the proposed term of office of four years (and the reappointment for the same period) in the Armenian context appears rather short, taken into account that the procedure for election and appointment, as proposed by the Draft Law and as regulated in the Judicial Code, will take time and will most probably start already in the third year of taking up by the court presidents of their functions. This could affect the judicial work in a negative way. In order to maintain the effective operating of the judiciary and its stability, it is advisable to consult the judiciary itself on the question which length of the offices of court presidents would secure the stability of the judicial organisation and the good administration of justice the best.

32. There might be good reasons to argue that in a system that accepts re-appointments, no limitation to the number of times a court president can be re-appointed is necessary. On the other hand, as the Venice Commission previously stated, one has to keep in mind that the influence of court chairpersons will grow even stronger over a longer period of time. A limitation of the possibility of reappointment will also give an opportunity to other judges to fulfil the function of court presidents. This is not only attractive from the viewpoint of their career but it allows innovation in the administration of courts.

33. It follows from the above that the limitation of the term of office of court presidents as proposed in Armenia is not incompatible with the European standards on judicial independence, presuming that there is no conflict with the Constitution.

34. The Venice Commission draws, however, attention to the fact that the Draft Law grants totally free discretionary power to the President of Armenia for appointment or rejection of the person (judge) elected by the Council of Justice. The President is not obliged to give reasons for his decision; the only consequence of rejection of the proposal of the Council of Justice is restarting the election process.

35. The Venice Commission recognised that "discretionary power is necessary to perform a range of governmental tasks in modern, complex societies". However, "such power should not be exercised in a way that is arbitrary. Such exercise of power permits substantively unfair, unreasonable, irrational or oppressive decisions which are inconsistent with the notion of rule of law"[16]. Discretionary power granted to the President of Armenia can lead to conflict between the President and the Council of Justice, what may not only cause difficulties in proper administration of courts but it can harm citizens' trust in the independence of the Judiciary. Rethinking of the power of the President (obligation to motivate rejection, limitation of his/her right to reject the elected person on certain reasons, e.g. irregularities in election process, or

[16] Report on the Rule of Law, CDL-AD(2011)003rev para 52.

election of more than one candidate and obligation of the President to appoint one of them) may reduce either the undesirable opportunities mentioned above or the danger of politicization of the election/appointment process.

B. Second sub question – Constitutionality

36. The question of the constitutionality of national legislation with the Constitution of the Republic of Armenia, is to be answered by the Constitutional Court of the Republic of Armenia. Below, the Venice Commission will present possible viewpoints only.

37. The Venice Commission observes that the Constitution of Armenia does not include any provision on the term of office of court presidents. In many countries such provisions are absent from the Constitutions. Such an issue would be normally dealt with by ordinary legislation.

38. The only article of the Constitution of Armenia in which court presidents are mentioned is Article 55. This Article lists the powers of the President of the Republic of Armenia. Paragraph 11 of this Article stipulates that the President of the Republic of Armenia has, upon the recommendation of the Council of Justice, the exclusive authority to appoint the presidents and the judges of the Court of Cassation and its Chambers, the appeal, first instance and specialized courts (Article 55.11.a). The purpose of this Article seems to be to define the competences of the President of the Republic and not to regulate the position of court chairpersons.

39. Article 94 of the Constitution states that “the independence of courts shall be guaranteed by the Constitution and laws”. Article 96 of the Constitution provides with the rules for judges. According to this provision, they are irremovable. There are no specific rules on the irremovability of court presidents in the Constitution.

40. The Judicial Code in force does not restrict the term of office of court presidents, and in practice they have been appointed for an unlimited time and served until the expiry of their term as judge.

41. As the Venice Commission concluded with regard to the first sub question, appointing court presidents with administrative functions for a limited period of time does not violate the European standards. However there is not a single standard – in several European countries the principle is that also court presidents are irremovable.

42. It could be argued that the present provisions of the judicial Code and the practice under these provisions have established a constitutional convention, thereby complementing the – in this respect deficient – regulation in the Constitution. Such an argument would favour the conclusion that a constitutional amendment explicitly allowing for fixed-term appointments is needed for their introduction in the Judicial Code.

43. However, the question can be raised, whether the threshold for the emergence of binding constitutional conventions has been passed. Such a threshold, to be decided by the Constitutional Court, would be particularly high in a country with a relatively new written Constitution.

44. An alternative reading could be that the Constitution has left this issue to be decided at the level of the ordinary law, respecting, however, constitutional principles such as the independence of the Judiciary. While fixed-term appointments of court presidents with administrative functions do not as such threaten the principle of independent judiciary and individual judges, a constitutional amendment wouldn’t be necessary.

45. The Venice Commission observes, however, that no obstacle exists to amending the Constitution, if this is considered to contribute to legal and constitutional clarity. Such an amendment could be included in the constitutional reform which is now pending in Armenia.

## V. The second question

46. As far as the second question is concerned, the proposed termination of office of court chairpersons appointed for an indefinite time by the new (amended) law, raises certain concerns.

47. As it was stated above among theoretical considerations, retroactivity of a new regulation is doubtful in general. If it affects rights ensured by or legitimate expectations based on the law before the amendment took effect, there should be compelling reasons to justify it. Moreover, the interest of maintaining the independence of the Judiciary and the good administration of justice requires that the judiciary be protected against arbitrary dismissal and interference in the exercise of the functions.

48. There is no doubt that the Draft Law will negatively affect the Court presidents, who already have been appointed until retirement. According to the proposed transitional rule of Article 10.2 of the Draft Law the chairpersons of the courts of first instance and the courts of appeal appointed prior to the entry into force of the law shall hold office until 1 January 2015.

49. It might be argued that the court presidents who have already been appointed until retirement had legitimate expectations that their past appointments will not be re-opened and terminated before their retirement age. Such expectations could originate from the provisions of the Judicial Code itself, namely Article 4 (court chairmen are judges) and Article 14.2 ("A judge shall hold office until the age of 65").

50. The dismissal of judges on such a short notice practically means that after the entry into force of the amendment elections for court chairpersons should be organised, and after the elections all the mandate of chairpersons appointed before the amendment (except the chairperson of the Court of Cassation) is terminated. This radical change could give the impression that the only reason of the transitional rule is to create the opportunity of a radical change of court chairpersons.

51. The Venice Commission observes that the principle of legal certainty with the protection of legitimate expectations and the independence of the Judiciary and the effective administration of justice – if no compelling reasons can be given – require a significantly longer period for the removal of the court presidents from their offices.

52. As far as the justification or compelling reasons for such a transitional rule are concerned, the amendments are proposed at the background of the possible estimation of the role of the court chairpersons in Armenia that could involuntarily create a situation when court chairpersons may exercise some influence on other judges of the court. The Venice Commission notes, however, that the powers of court presidents, as defined in Article 25 of the Judicial Code are essentially of an administrative character. Although the proposed reform serves the legitimate aim of avoiding any undue influence of the court presidents on other judges, it does not appear from the rationale that the need of the removal of the sitting presidents of these courts from their office is so urgent as to justify such a radical and immediate removal of court presidents from their office.

53. The Commission therefore concludes that such a radical change of chairpersons has no justification within the amendment and it does not follow from the rules of the Constitution of the Republic of Armenia. As already said, the proposed rules might give an impression that a

radical change of court persons was their only purpose. Such an appearance is necessarily contrary to the principle of the independence of the Judiciary.

54. A smoother transitional rule, e.g. termination of office after a four year period beginning with the entry in force of the amendment in case would be less disturbing.

## VI. Conclusions

55. The answers of the Venice Commission to the questions posed by the President of the National Assembly are in brief:

- The limitation of terms of office of court presidents is not incompatible with the European standards on judiciary and may be even useful in order to strengthen the internal independence of judges.
- For the assessment of the compatibility of the Draft Law with the Constitution of the Republic of Armenia, an important question is whether the present provisions of the Judicial Code and the practice under these provisions established a constitutional convention. However, the threshold for the emergence of binding constitutional conventions is particularly high in countries with relatively new constitutions.
- In order to contribute to legal and constitutional clarity, an amendment to the Constitution on fixed terms of office of court presidents could be considered. Such an amendment could be included in the pending constitutional reform.
- The proposed dismissal of sitting court presidents already on 1 January 2015 is too radical and gives too short notice. It threatens the principle of legal certainty, independence of the Judiciary and the effective administration of justice. Smoother transitional rules are required.