



Strasbourg, 1 February 2022

**CDL-REF(2022)003**

**Opinion No. 1074 / 2021**

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**ARMENIA**

**CONSTITUTIONAL LAW**

**ON MAKING AMENDMENTS TO THE CONSTITUTIONAL LAW  
"ON THE JUDICIAL CODE"  
AND THE CONSTITUTIONAL LAW ON THE CONSTITUTIONAL  
COURT  
AND THE EXPLANATORY MEMORANDUM TO BOTH TEXTS**

**CONSTITUTIONAL LAW  
OF THE REPUBLIC OF ARMENIA**

**ON MAKING AMENDMENTS TO THE CONSTITUTIONAL LAW "ON THE JUDICIAL CODE  
OF THE REPUBLIC OF ARMENIA"**

**Article 1.** Point 1 of part 3 of article 86 of the Constitutional Law "On the Judicial code of the Republic of Armenia" of 7 February 2018 (hereinafter referred to as "the Law"), shall be redrafted as follows:

"1) he or she violates incompatibility requirements. A violation of the incompatibility requirements provided for in this paragraph shall also be considered the fact of 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 which the Republic of Armenia is a party came into force."

**Article 2.** Point 1 of part 2 of article 159 of the Law shall be redrafted as follows:

"has violated the incompatibility requirements. A violation of the incompatibility requirements provided for in this paragraph shall also be considered the fact of 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 which the Republic of Armenia is a party came into force."

**Article 3.** Final part and Transitional provisions

1. This law shall enter into force on the day following its official publication.
2. This law shall also apply to the incompatibility requirements existing at the time of entry into force.

**CONSTITUTIONAL LAW  
OF THE REPUBLIC OF ARMENIA**

**ON MAKING AMENDMENTS TO THE CONSTITUTIONAL LAW "ON THE  
CONSTITUTIONAL COURT"**

**Article 1.** Point 1 of part 2 of article 12 of the Constitutional Law "On the constitutional court" of 17 January 2018 shall be redrafted as follows:

"1) has violated the incompatibility requirements defined by the Constitution and by the same law. A violation of the incompatibility requirements provided for in this paragraph shall also be considered the fact of 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 which the Republic of Armenia is a party came into force."

**Article 2.** Final part and Transitional provisions

1. This law shall enter into force on the day following its official publication.
2. This law shall also apply to the incompatibility requirements existing at the time of entry into force.

## **JUSTIFICATION 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**

### **The need for the adoption of legal acts:**

Adoption of the package of draft law "On Making Amendments to the Constitutional Law on the Judicial Code of the Republic of Armenia" and related draft laws (hereinafter referred to as the "Draft Package") is caused by the need of clarification of the grounds provided by law for termination of the powers and disciplinary liability of judges.

### **Link with the strategic documents: Transformation Strategy of Armenia 2050, Government 2021-2026 Program, Anti-corruption strategy of the Republic of Armenia and implementation action plan for 2019-2022:**

Annex 2 of the Decision N 1441-N of the Government of the Republic of Armenia of October 10, 2019 "On approving the Strategy of Judicial and Legal Reforms of the Republic of Armenia for 2019-2023 and the resulting action plans" provides an action aimed at the introduction of grounds and procedures for disciplinary liability of judges and members of Supreme Judicial Council in line with international standards.

### **Current situation and the issue:**

At present, the incompatibility requirements of judges, including judges of the Constitutional Court, and the legislative mechanisms of disciplinary liability are unclear, and there are also gaps in regulations.

At the same time pursuant to Article 164, part 6 of the Constitution the Law on the Constitutional Court and The Judicial Code may establish additional incompatibility requirements for judges. As it follows from the article, additional requirements for the incompatibility of judges may be laid down also in the law.

Currently, in accordance with the provisions of the Constitutional Law "On the Judicial Code of the Republic of Armenia" (hereinafter referred to as the Law), the basis for termination of the powers of a member of the Supreme Judicial Council and a judge – is also the violation of incompatibility requirements. According to the provisions of the Law on the Constitutional Court, the powers of judges of the Constitutional Court are also terminated on the grounds of violation of incompatibility requirements. At the same time, according to Article 142, part 1 of the Law, one of the grounds for subjecting a judge to disciplinary liability is a violation of the provisions of substantive or procedural law while administering justice or exercising, as a court, other powers provided for by law, which was committed intentionally or with a gross negligence. And according to part 6 of the same article, the above-mentioned violation is considered as a significant disciplinary violation, if it led to a fundamental violation of human rights and (or) freedoms enshrined in the Constitution or international treaties ratified by the Republic of Armenia or discredited the judiciary. However, the above-mentioned regulation is uncertain, in particular, it is not clear how the fact of violation of the provision of substantive or procedural law is being considered as asserted.

### **The nature of the proposed regulation:**

Considering that the incompatibility requirements of judges may be established by law in accordance with the Constitution, the package of the drafts proposes to establish an additional incompatibility requirement as a ground for termination of the powers of judges of the Constitutional Court, members of the Supreme Judicial Council and other judges: a violation of the incompatibility requirements provided for in this paragraph shall also be considered the fact of 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 which the Republic of Armenia is a party came into force.

At the same time, given the fact that the review of judicial acts, especially the decision-making by international courts, is a time-consuming process, the draft package envisages giving retroactive effect to this regulation.

Strict observance of the ban on retroactivity refers to criminal law, while practice shows that other branches of law do not rule out circumvention of that prohibition due to certain circumstances. Such a need arises mainly from the legitimate goals of public policy<sup>1</sup>.

Thus, in the case law, certain criteria have been singled out, the existence of which allows to give a retrospective effect to this or that regulation of the law.

In American jurisprudence, one of the cases indicated that the retroactivity is acceptable if it is aimed at achieving the legitimate goals of the legislature<sup>2</sup>.

In English jurisprudence<sup>3</sup>, as in ECtHR case law<sup>4</sup>, the public interest is considered to be a fair criterion for the retroactivity to be lawful and justified.

In addition, the courts also consider the existence of a reliance interest of the parties of the legal relationship and the fact that the certain legal relationship was previously regulated.

The ECtHR also addressed the issue of retroactivity in the context of disciplinary proceedings in other countries as part of judicial reform. Thus, in the case of 15227/19 (case of Xhoxhaj v. Albania), referring to the examination of previously accumulated property of judges, the ECHR noted that the process of valuation of personal or family property accumulated during a judge's professional life (...) does not contradict Article 6 of the ECHR, from the point of view of alleged violation of the principle of legal certainty.

Thus, we see that in exceptional cases, a retroactivity due to public interest may be considered permissible.

The regulation proposed by the draft, that is, the violation of the incompatibility requirements provided for in this paragraph shall also be considered the fact of 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, sets a high standard as a ground for termination of powers. As such only the fact of **deliberate violation** is considered. Such a statement is a guarantee that the judge's action will be evaluated not for his or her assessments of the facts and evidence of the case, but for his or her attitude towards human rights as an important indicator of morality. And taking into account the nature of the alleged violation, the draft envisages it as a separate ground for termination of powers.

### **On the need for financial resources and expected changes in the state budget revenues and expenditures in connection with the adoption of the drafts:**

With the adoption of the drafts, no changes in the revenues and expenditures of the state budget of the Republic of Armenia are expected.

### **Institutions and persons involved in the drafting:**

The drafts were developed by the Ministry of Justice of the Republic of Armenia.

### **Expected result:**

Clarification of the incompatibility requirements for judges as a basis for termination of powers.

---

<sup>1</sup> Kryvoi, Y. and Matos, S., 2021. Non-Retroactivity as a General Principle of Law. Utrecht Law Review, 17(1), pp. 46–58. DOI: <http://doi.org/10.36633/ulr.604>:

<sup>2</sup> Pension Benefit Guaranty Corp. v R.A. Gray & Co., 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 [1984]; United States v Northeastern Pharmaceutical & Chemical Co Inc., 810 F.2d 726 [1983], <https://www.law.cornell.edu/supremecourt/text/467/717>:

<sup>3</sup> R v HMRC ex p Huitson [2010] EWHC 97 [76]–[97], appealed in R (Huitson) v HMRC, [2011] EWCA 893 [47]–[73], <https://www.bailii.org/ew/cases/EWCA/Civ/2011/893.html>:

<sup>4</sup> CASE OF THE NATIONAL & PROVINCIAL BUILDING SOCIETY, THE LEEDS PERMANENT BUILDING SOCIETY AND THE YORKSHIRE BUILDING SOCIETY v. THE UNITED KINGDOM (117/1996/736/933-935), <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22National%20and%20Provincial%20Building%20Society%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-58109%22%5D%7D>