



PROTECTION OF RIGHTS WITHOUT BORDERS NON-GOVERNMENTAL
ORGANIZATION

Protection of Rights without Borders NGO

Study

On Making Amendments and Supplements in Separate

Provisions of the Republic of Armenia Draft

Constitutional Law on Judicial Code



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The Republic of Armenia Government circulated the draft law¹ on “Making Amendments and Supplements to the RA Constitutional Law on Judicial Code” (hereinafter referred as the Draft Law), which was adopted by the RA National Assembly in first reading.

The current document is directed towards the study of some of the regulations recommended by the Draft Law, as well as recommendations directed towards their improvement.

Involvement of Non-Government Organizations in the Composition of Commissions

It is recommended by Article 13 of the Draft Law to make amendments and supplements in Article 77 of the Draft Law to establish a commission on ethics and disciplinary issues, an evaluation commission on the activities of the judges and a commission for education issues respectively. Two prominent lawyers shall be included in each commission.

Thus, the relevant non-governmental organizations shall nominate the non-judge members in the ethics and disciplinary commission, as well as in the education commission.

A prominent lawyer, with high professional qualifications and with an academic degree or with more than 5 years of professional working experience, who is not a member of any political party, is not a convicted for a crime, can be nominated as a member of the mentioned commissions.

The requirements presented to a non-judge member of the commission on the evaluation of judge activities are as follows: prominent lawyer with high professional qualification, who has an academic degree in law and respectively 5 years of professional working experience in the relevant sector.

We consider, that the requirements presented to the lawyer professionals to be included in the commissions for the evaluation of the judge activities shall be stricter. Having 5 years of professional working experience in the relevant field is a very low threshold in terms of including professional and prominent lawyers in the mentioned commissions. Moreover, the requirement of high professional qualification is vague and their evaluation criteria are not clear as well.

The requirements of having higher professional qualifications are uncertain and their evaluation criteria are not clear as well. It is also problematic, that **the requirement of not being a member of a political party** in case of a non-judge member of the evaluation commission of judges’ activities.

¹ http://parliament.am/committee_docs7/Legal/K-428-K-428-12_DR2_nakhagits.pdf



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It is prescribed by the same article of the draft law, that the non-governmental organizations, *the objectives of which are the human rights protection or the activities directed to increase of public accountability of the judiciary and the organizations who have conducted similar activities*, can nominate the judge members for the ethics and disciplinary commission, as well as for the commission on education issues.

Though, the engagement of the non-governmental organizations is welcoming, the requirements are problematic. Particularly, the objective of the majority of registered and acting non-governmental organizations in the Republic of Armenia is the human rights protection, but the latter do not carry out any activity related to the judiciary. Therefore, taking into consideration the importance of the issues granted to the sector and the authorities of the commissions, it is also necessary to define additional realistic requirement criteria for the non-governmental organization, which will enable to engage more professional non-governmental organizations and their representatives.

Recommendation

- Define additional high standards for the non-judge members of the commissions and for the NGOs presenting their nominations.

Qualification check of the judge candidates

Within the period of 2018-2019, the Organization conducted qualification check of the judge candidates during the oral and written stage of the qualification exams, as well as monitoring of the mentioned oral and written exams, the outcomes of which were presented in the relevant reports². The latter recorded a number of content related and procedural problems, to which, a solution was not presented by the Draft Law.

Particularly, a number of concerns were raised related to the election of the evaluation commissions, as well as the requirements to be presented to the latter. Although, it is prescribed by Article 24 of the Draft Law, a demand to get high or good assessment by the latest results of the assessment, we find that it is not sufficient and does not reflect the solution to the current problems in practice.

Accordingly, the requirements for professional abilities skills to be presented to the members of the commissions shall have more clear definition by the relevant legislation, so that the latter are more

² <http://prwb.am/new/wp-content/uploads/2019/06/%D4%B6%D5%A5%D5%AF%D5%B8%D6%82%D5%B5%D6%81-%D5%B0%D5%A1%D5%B7%D5%BE%D5%A5%D5%BF%D5%BE%D5%B8%D6%82%D5%A9%D5%B5%D5%B8%D6%82%D5%B6.pdf>



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concrete, predictable and based on which it will be possible to establish a commission with more competitive members.

It is prescribed by Article 25 of the Draft Law, that the member of the evaluation commission shall be ensured with the relevant evaluation criteria thresholds[...].

While issuing an assessment, the member of the Commission take into consideration the characteristics prescribed by Article 103 of the given Code, to which the assessment criteria defined by the Supreme Judicial Council shall correspond.

The suggested regulation does not define the obligation of the members of the commission to justify and reason the concrete assessment pointed out by the response of the candidate, which leads to arbitrary assessment in practice. Moreover, the assessment criteria and the general criteria are not defined by the Supreme Judicial Council, the latter does not contain explanation or concrete indicators, based on which it will be possible to predict the assessment of a response in a given concrete situation. As a result, the principal and the reasons for decreasing the points of a concrete written work are also vague. This also leads to the inefficiency of the appealing the content related part of the work.

It is recommended by the draft law to establish an appealing order of the written works by the Appealing Commission. Though the establishment of appealing can be assessed positive, nevertheless, the presented recommended regulation, according to which, the Appealing Commission can partially or completely reject or satisfy the appeal presented against the outcomes of the examination is problematic, since the latter also does not prescribe the obligation of the Appealing Commission to make a reasoned decision.

In such conditions, the candidate will be deprived from the possibility from receiving a grounded decision made on his/her exam work and exam assessment.

It is recommended by the Draft Law to restrict the judicial appealing of the written exam exclusively *by procedural questions*, if the latter have been appealed to the Appealing Commission. Such regulation essentially restricts the possibility for the protection of the candidate's rights, particularly in the conditions of the failure to define an obligation to file a grounded reason in regard to the assessment and the appeal to the Appealing Commissions.

It is recommended by the Draft Law to define **an open voting order** for the judge candidates by the Supreme Judicial Council. Though, it is attempted by the Draft Law to define the circumstances while assessing the candidate by the Supreme Judicial Council (results of the qualification check, results of



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the psychological test and the consultative conclusion on the integrity check provided by the Corruption Prevention Commission), the assessment of the judge candidates by the Supreme Judicial Council is left to the inner conviction of each Council member, which assumes a lack of reasoning for the voting procedure. As a result, the assessment is unpredictable and the reasons for the given assessment is vague for the candidate,

Recommendations

- Define strict, at the same time realistic requirements for the candidates of member of the commission, by being consistent with the professional skills, abilities, as well as sectorial knowledge of the given nominee.
- Define by the relevant code the demand to present content related comments and justification of the assessment for written exam work by the members of the Evaluation Commission
- Define in legislative level the obligation to make a grounded decision on the appeal presented by the candidate.
- Eliminate the restrictions for the judicial appealing of the written qualification check
- Prescribe at legislative level a demand to present reasoning on the voting of the judge candidate by the Supreme Judicial Council.

The Disciplinary Liability of the Judges

The Grounds for Disciplinary Sanctioning

It is prescribed by the Draft Law to make amendments in Article 142 of the Code to change the grounds for subjecting the judges to disciplinary sanctioning. It is necessary to fact, that the recommended grounds do not satisfy the requirements of the legal certainty and clearness. As it was recorded by the Venice Commission, the legal relations of subjecting a judge to disciplinary sanctioning shall have clear definition. The lack of clearly defined rules is dangerous, since in case of violating the disciplinary legal regulation, an arbitrary persecution against the judges may start.



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Particularly, it was recommended to transfer the obvious and gross violation of the material and procedural right with the material and judicial right: violation made by gross negligence.

In this regard, it is necessary to mention, that the Venice Commission recorded by its Opinion on “The Changes in the RA Judicial Code” dated 14.10.2019, CDL-AD(2019)024, that “it is better to record, that the breach of the material and procedural norm shall not only be considered reasonably but shall be obvious. Therefore, the difference between the general violation and a gross negligence is essential, but the law shall be cited in a way, that obvious mistakes for each lawyer can be a subject to disciplinary sanctioning. It is unacceptable to transform the evidence of the violation into disciplinary reliability. Such regulation, in practice, can lead to the arbitrary application of disciplinary sanctioning”³.

The supplement to Paragraph 2 of Article 142 of the presented Draft Law is more problematic, according to which, *a dead is not considered a disciplinary violation, if the latter, though artificial, contains characteristics of subjecting a judge to disciplinary sanctioning prescribed by the given code, but due to its low level of importance does not make the compliance of the judge to his/her current status suspicious and did not discredit the judiciary b its essence.*

This regulation is uncertain and vague. First of all, an additional criteria for subjecting a judge to disciplinary sanctioning is prescribed, according to which *the compliance of a judge to the status of a judge and the discrediting of the judiciary* is prescribed, which are prescribed by the Draft Law as criteria for essential disciplinary violation are prescribed according to the changes of paragraph 6 of the same article.

Moreover, the wording “less importance” prescribed by the same provision is not a certain definition and the latter vests the Supreme Judicial Council with a large scope of discretion to subjectively interpret each concrete case, which is full of danger for arbitrary application of disciplinary sanctioning in practice. At the same time, the opposite situation is also very problematic, when this or that violation can be considered as a case having less importance by the body in charge of instituting a proceeding by excluding the disciplinary liability of a judge.

It is prescribed by Paragraph 6 of the same Article to change the requirements for the violation of the essential disciplinary violation, according to which essential disciplinary violation is the following:

³ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)024-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)024-e)



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1. violation of the norm to material and procedural right, which was carried out intentionally or by negligence, which led to the violation of human rights and fundamental freedoms of a person prescribed by the RA Constitution or by the international contracts ratified by the Republic of Armenia or the latter disqualifies the judiciary generally.

2. Violation of the codes of conduct by judges, which was demonstrated by the relevant articles and by the violation of the obligations of a judge and conditioned by the implementation circumstances or/and the caused outcomes is incompatible with the status of a judge.

3. Committing a violation by the judge having 2 warning and 1 strict warning.

In regard to the warding “violation of less importance” and “essential violation”, the opinion of the Venice Commission on one of the RA Draft Law on “The RA Judicial Code”, according to which “essential disciplinary violation” is prescribed by Paragraph 6 of Article 155 of the Code.

It is possible to reach this threshold, (1) if the judge commits violations of less importance nature (2) if the judge commits “an activity discrediting the judiciary” or such activity, which “is incompatible with the position of a judge”. Here, the Venice Commission notes some parallel: in a line with Paragraph 1 of Article 60, “disruption of the high reputation of the judiciary” is characterized as a ground for disciplinary sanctioning, but not an obligation as “essential disciplinary violation”.

The Venice Commission recorded, that the relations between Paragraph 1 of Article 60 and Paragraph 6 of Article 155 shall be clarified. It seems, that the same type violation can lead to a stricter disciplinary sanctioning (for example as a warning) or be qualified as “essential violation”, regardless the previous violations and in this way it directly leads to the suspension of a judge’s status. Principally, such model is acceptable, but the disciplinary bodies shall be aware, that not all “activities that discredit the judiciary” or such activities that “are incompatible with the position of a judge” unconditionally assume a gross violation: the proportionality principal shall always be applied (paragraph 2 of Article 138 of the draft law). This shall be concretely mentioned in the draft law⁴.

In regard to the disciplinary issues based on the human rights violation ground, the Venice Commission expressed the approach, that while applying a disciplinary sanction against a judge, the rule prescribed by Paragraph 9 of Article 142 of the Judicial Code shall be taken into consideration, according to which, while exercising justice or other liabilities prescribed by the relevant legislation, the interpretation of the law and the evaluation of the facts and evidence cannot themselves lead to

⁴ Venice Commission, Opinion on Draft Judicial Code of Armenia, CDL-AD(2017) 019, para. 157.



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disciplinary sanctioning. In such conditions, the interpretation on the law given by the judge and the gross or negligent violation which was considered as a ground for the disciplinary violation shall be differentiated, that is problematic in practice.

At the same time, it is necessary to mention, that according to the Draft Law, **the fundamental** violation of the human rights or/and freedoms are considered as essential disciplinary violation, which is an evaluative warding and which gives the Supreme Judicial Council a large discretion to consider the violation groundless and therefore to apply the relevant liability measure.

While referring the repetition of a number of disciplinary violations as a means to observe the activity as a disciplinary violation, it is necessary to mention, that the warding “essential violation” assumes the quality and not the quantitate characteristics of the violation.

Nevertheless, in case of defying such regulation, it is necessary to define a concrete deadline, within the scope of which, such violations can lead to liability for an essential violation. In other case, the judges, who committed mild disciplinary violation, especially during the first stage of the professional career, will be under constant fear of termination of their professional duties by essentially endangering their independence⁵.

Article 49 of the Draft Law prescribes an amendment to the Article 156.1, which defines an appealing mechanism to subject a judge to disciplinary sanctioning or to reject the intervention decision made on subjecting a judge to disciplinary sanctioning by defining that the appeal is examined by the Supreme Judicial Council, if an essential evidence or circumstance was detected, which had not been previously presented regardless the circumstance and which could reasonable impact the decision.

The decision made in the result of the appeal will enter into force from the moment of its publication and is considered final.

The recommended legislative regulation, essentially is not considered an appeal by the decision of the Supreme Judicial Council, but rather a review of the case by the same body in terms of new visible circumstances. The Venice Commission recorded by its opinion on the RA Constitutional Law on Judicial Code, that as a result of the appeal, the proportionality and the content shall be examined based on the same facts and evidence provided by other competent bodies. Therefore, the presented mechanism cannot replace the right to appeal of the decision in terms of proper meaning of the word⁶.

⁵ Venice Commission, Opinion on Draft Judicial Code of Armenia, CDL-AD(2017) 019, para. 158.

⁶ Venice Commission and Directorate of Human Rights and Rule of Law, Joint opinion on the amendments of Judicial Code and Some Other Laws of Armenia, para. 32.



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In this regard, it is necessary to intend an appealing opportunity for the disciplinary decisions adopted by the Supreme Judicial Council. The decisions shall be reviewed by the bodies, which are *independent and ensures all the guarantees for the judicial procedures/fair trails*⁷.

Though, as presented by the Republic of Armenia authorities, that the prohibition for appealing the decision of the Supreme Judicial Council is prescribed by the RA Constitution and the problem can be solved in the context of the constitutional reforms, the recommended version cannot be considered as proper average solution by making the appeal process effective and by violating the right of the judges to access justice.

Recommendation

- Ensure the clarity of subjecting to disciplinary liability with the exclusion of arbitrary their interpretation by the relevant agencies.
- Define reasonable deadline, within the scope of which the received disciplinary sanction can be evaluated in the scope of essential disciplinary violation
- Establish an efficient mechanism for appealing the decision made in regard to subjecting the judge to disciplinary sanctioning by the Supreme Judicial Council.

The Assessment of the Judge's Activities

The mentioned draft law presents criteria for the assessment of the judge's activities, including *the quality and the competence of the work carried out by the judge, the efficiency of the judge's work, the maintenance of the codes of conduct and ethics rules by the judge*. Moreover, it is also intended to establish criteria for the evaluation of the given circumstances, including *the ability to justify the judicial act, the ability to effectively manage the workload and work planning, to examine the cases within reasonable deadlines and adopt a judicial act, etc.*

Taking into consideration the opinion of the Consultative Council of European Judges, the evaluation of the judges' activities shall be mainly quantitative and be based on their competence,

⁷ Venice Commission Opinion on the laws on the Disciplinary Liability and evaluation of Judges of the Former Yugoslav Republic of Macedonia, No 825/2015



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including their professional skills (knowledge of the law, ability to conduct a trial, to adopt reasoned acts), personal abilities (ability to overcome the workload, decision making skills, open to new technologies), social competence (negotiation skills, respect to the parties) and leadership skill for a possible promotion⁸.

It is necessary to exclude the evaluation of the judge's activities based only on the quantitative characteristics. The Venice Commission recorded, that the regulation for the evaluation of a judge's activities shall clearly define, that the evaluation of the justice management, regulating the evaluation of the competences, such as maintenance of the maximum deadlines, following of the deadlines and other conditions, shall be taken into consideration together with the workload and with other similar circumstances⁹. It is important, that the evaluation is largely quantitative and be centered on the professional, personal and social ability of the judge. The assessment of a judge shall not be based on the content of the verdicts and decisions made by the judge. Moreover, as assessment criteria, the return of applications and the justification shall be avoided in terms of applying of the quantitative criteria¹⁰.

Therefore, guarantees in the scope of the evaluation shall be prescribed in legislative level:

- The assessment cannot intervene the independence of the judges and hinder the right to the implementation of the official duties. The assessment of the activities of a judge shall not become a contextual review of the decisions.
- The judge, who is being evaluated, shall be vested with the right to participated in his evaluation process (right to be heard) and has a right to appeal.
- The assessment criteria should be public for all the judges and the assessment should be based on reliable and objective information¹¹.

Though the objectives for the assessment of the court activities are prescribed by the Draft Law, applying to the ethics and disciplinary commission in case of detecting obvious grounds for subjecting to disciplinary sanctioning as an outcome for the assessment of the judge's activities to discuss the issue of instituting a disciplinary proceeding against a judge is prescribed.

⁸ [CCJE, OPINION N° 17 on the evaluation of judges' work, the quality of justice and respect for judicial independence, \(2014\)](#)

⁹ Venice Commission, [Opinion on the Judicial System Act of Bulgaria, CDL-AD\(2017\)018,](#)

¹⁰ Venice Commission and Directorate of Human Rights and Rule of Law, [Joint opinion on the draft law amending and supplementing the judicial code \(evaluation system for judges\) of Armenia, CDL-AD\(2014\)007](#)

¹¹ OECD, ["Independence and integrity of the judiciary", judicial councils, other self-governance institutions and their role to ensure integrity and independence of judges, proceedings of the regional seminar <http://www.oecd.org/corruption/acn/IstanbulJune2012ExpertSeminarProceedingsEN.pdf>](#)



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We consider, that such approach contradicts the objectives and principals of independence of the judges. Particularly, the Venice Commission defined, that the objective of the consequent assessment of a judge aims at the detection of the individual needs of a judge to ensure his qualification improvement and promotion¹². The constant evaluations over the activities of a judge are important tool for the later to improve his/her work and it can serve as a ground for promotion.

According to the recommendation of Kiev, valuations of judges may be used to help judges identify aspects of their work on which they might want to improve and for purposes of possible promotion. Periodic exams for judges (attestations) that may lead to dismissal or other sanctions are not appropriate for judges with life tenure¹³.

At the same time, the Draft Law does not define an opportunity to appeal the results of the activities of the judge by the evaluation commission

Recommendations

- Exclude the possibilities to apply disciplinary sanctions against the judges based on the evaluation results of a judge's activities
- Define a possibility for the appeal in judicial order the results of evaluation of the judge's activities.

Decreasing the age censorship and professional working experience

In a line with Paragraph 1 of Article 97, the citizens having a right to election, aged between 28-60 can participate in the qualification check to be included in the list of judge candidates, if ... the latter have 5 years of professional working experience. It is recommended by Article 22 of the Draft Law to decrease the age censorship to 25 and make the years of professional working experience to 3 years.

The justifications presented in regard to the reduction of age requirement are not sufficient. In this regard, certain common approaches have already established by the international criteria, both in terms of minimum and maximum age censorship. The Venice Commission has a distinct approach in terms of the presented issue: the age censorship of the judges is one of the guarantees of the efficiency and independence of the judiciary. Though, there is no one unified approach in terms of the minimum age

¹² [*Venice Commission and the Directorate General of Human Rights and the Rule of Law, on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, CDL-AD\(2015\)007-e*](#)

¹³ [OSCE/ Kyiv Recommendations on Judicial Independence in Eastern Europe](#)



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ensorship, the selection of the minimum age censorship is directly connected with the competences and experience.

In Georgia, Ukraine the minimum age censorship is 30. In the opinion issued on Georgia, the Venice Commission touching upon the age and the professional experience of the Supreme Judicial Council highlighted the higher age censorship and longer working experience¹⁴. Logically, the same approach is applied for the candidates of all the courts of jurisdiction.

In separate countries, for example Malta, a higher age censorship is prescribed: the judicial magistrates are required to have 7 years of professional working experience and the judges 12 years of experience respectively¹⁵.

While prescribing such changes by the Draft Law, apart from the required experience and practical knowledge in terms of decision making, the importance of taking accountability shall also be taken into consideration, which is inevitably connected also with life and working experience.

Recommendation

- Define higher requirements, age related and professional experience for the judge candidates.

¹⁴ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2019\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2019)002-e)

¹⁵ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)028-e)