



## *Constitutional Grounds for Judicial Independence as a Guarantee for Proper Administration of Justice (Comparative Legal Analysis). The Armenian Experience*

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### Abstract

The article reveals the constitutional grounds of judicial independence within the context of recent constitutional reforms in the Republic of Armenia. It discusses the issues of cooperation of the judicial, executive and legislative powers in the frames of the new parliamentary form of government. In particular, the article discusses the issue of the role of the legislative body of the Republic of Armenia in formation of the judiciary. It also turns to the issues of the internal and external independence of the Supreme Judicial Council which is itself responsible for the independence of the judiciary and the appointment of judges. As a conclusion, the article outlines the advantages and disadvantages of the current and new constitutional regulations.

**Keywords:** appointment of judges; Supreme Judicial Council; judge member; judicial independence; non-judge member.

### Introduction: constitutional reforms

During the entire history of the constitutional reforms in the Republic of Armenia, particularly in its two main stages (1995-2005 and 2005-2015), the focus was on such fundamental issues as to ensure the constitutional guarantees of the independence of the judiciary and its integrity, a clear functional relationship between the judicial authorities and to substantially strengthen the counterbalancing role of the judiciary in line with the standards of the rule of law in relation to other branches of state power.<sup>2</sup>

### Background information and the reasons for improving the independence of the judiciary

The Constitution of the Republic of Armenia adopted in 1995 played a significant role in the establishment of democracy in the Republic of Armenia, strengthening the basis of a rule of-law State, finding constitutional solutions in crisis situations, gradual development of the institutions of the State power, and prescribing the constitutional safeguards for the protection of human rights.

However, over time certain issues have arisen which led to the necessity for constitutional reforms. In particular, new conceptual approaches were required for ensuring constitutional safeguards for the independence and integral entirety of the judicial power. The reforms were to be directed at strengthening the constitutional safeguards for the independence of judicial power, establishing administrative justice, ensuring clear functional interrelations among the institutions administering judicial power. There was a need for a Justice Council to guarantee the self-governance of the judicial power in compliance with international legal standards and to be formed on the basis of new principles. The system of constitutional justice was to become more operative and efficient by completing the list of objects and subjects subject to constitutional supervision and establishing efficient guarantees for the protection of fundamental rights as well as the required procedural preconditions for ensuring the supremacy of the Constitution.

The constitutional reforms carried out as a result of the referendum held in the Republic of Armenia on 27 November 2005, having achieved some progress in terms of integral solutions with regard to the above-mentioned issues, contained also a number of incomplete solutions which currently need to be resolved and have completed the integral solutions. They, in particular, concern the following issues requiring fundamentally new approaches: the recent history of constitutional developments in the Republic of Armenia have shown that, due to objective and subjective reasons, the development of independent statehood has still not reached a milestone where one could claim that democracy stands on firm ground, human rights are safely protected, an effective system of government is in place, and the courts are independent and impartial.

And one of the issues that has become very urgent and required conceptually new approaches at the level of constitutional solutions is to ensure that the balancing role of the judiciary vis-à-vis other branches of power should be safeguarded constitutionally in line with the standards of the rule of law.

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<sup>2</sup> See Concept of the Constitutional Reforms of the Republic of Armenia developed by the Specialized Commission on Constitutional Reforms adjacent to the President of the Republic of Armenia and approved by the President of the Republic of Armenia on March 14, 2015, Yerevan, pp. 4-5, (Հայաստանի Հանրապետության Հանրապետության նախագահի կողմից 2015 թվականի մարտի 14-ին հավանություն արժանացած, Երևան, էջեր 4-5).

## Changes in the legal framework for the Judicial Organization

The introduction of the parliamentary form of government serves as a legal basis for a modification of the relationships not only of the legislative and the executive branch of state power, but of the legislative and judicial branches as well. In particular, it has led to the commencement of the role of the legislative power in the organization of the judiciary. But the legal basis for the organization and functioning of the judicial power within the framework of the so-called new constitutional model of separation of powers has been enshrined given the special role of this branch of power. It is well-known that within the system of checks and balances, the judicial power is characterized not only by the function of justice but also by the legal capacity to influence the decisions of the legislative and executive authorities and to balance them.<sup>3</sup> Judicial power bears the burden to prevent the establishment of an authoritarian system of government and management of a democratic society in case the legislature initiates anti-constitutional laws and the executive power undertakes their exercise.<sup>4</sup>

The legal basis for the regulation of the fundamental issues of the judiciary in the context of recent constitutional reforms has been introduced given the fact that in the constitutional system of separation and balance of powers the judiciary has a balancing or stabilizing role and that the primary precondition for the realization of such a mission is the protection of the judicial power from any unlawful influence or interference: only the judiciary that is granted with functional, institutional, material and social independence may serve as the guarantor of the rule of law, effective justice and fair trial in the country.<sup>5</sup>

### Supreme Judicial Council

In conformity with the aim of establishing an independent, separate and accountable judicial power, the paramount conceptual issues that have been solved within the constitutional reforms are the clarification of the legal grounds of the status, organization and operation of the Supreme Judicial Council (successor of the current Council of Justice) as a guarantor of the independence of the judiciary.

### The status of the Supreme Judicial Council

The independence of the judiciary is not merely a declaratory provision, and its implementation requires the existence of appropriate safeguards. Among these safeguards, the most prominent is the existence of a guarantor of the independence of the judiciary as an independent state body, such as the Council of Justice of the Republic of Armenia in the context of the current legislative regulation, and its successor – the Supreme Judicial Council in the light of constitutional regulations with amendments of December 6, 2015.

As the European Commission For Democracy Through Law (Venice Commission) has already noted: 'Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems - sometimes as an integral part of their Constitution - as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State. (...)'.<sup>6</sup>

According to Article 164 of the Constitution with amendments of 6 December 2015: 'The Supreme Judicial Council is an independent state body that guarantees the independence of the courts and judges'. Previously this mission belonged to the Council of Justice, but there was no direct constitutional reference to the status of this body. The afore mentioned constitutional provision explicitly states that the constitutional mission of the Supreme Judicial Council is to guarantee the independence of the judiciary. The existence of such a regulation is of high importance as it serves a guiding rule for the definition of the liabilities of the Supreme Judicial Council. The main liabilities of the Supreme Judicial Council are stipulated in Article 175 of the Constitution with amendments of 6 December 2015 which are following:

1. Draw up and approve the lists of candidates for judges, including candidates subject to promotion;
2. Propose to the President of the Republic the candidates for judges subject to appointment, including those subject to appointment by way of promotion;
3. Propose to the President of the Republic the candidates for chairpersons of courts and the candidates for chairpersons of chambers of the Court of Cassation, subject to appointment;
4. Propose to the National Assembly the candidates for judges and for Chairperson of the Court of Cassation;
5. Decide on the issue of secondment of judges to another court;

3 See V. Savitsky, *Organization of the Judiciary in the Russian Federation*, Moscow, Russian Academy of Sciences, Institute of State and Law, 1996, p. 29 (Савицкий, В.М. Организация судебной власти в Российской Федерации: учеб. пособие для вузов / В.М. Савицкий; Рос. акад. наук, Ин-т гос. и права, Акад. правовой ун-т. - М.: Бек, 1996, с. 29).

4 See M.V. Buglai, *Constitutional Law of the Russian Federation: Textbook for Universities*, 2002, p. 361 accessed at [http://www.webnomos.ru/images/PRAVO/UCHEBNIK/KONSTIT\\_pr\\_BAGLAY\\_uheb.pdf](http://www.webnomos.ru/images/PRAVO/UCHEBNIK/KONSTIT_pr_BAGLAY_uheb.pdf) on 30 October 2017 (Баглай М. В. Конституционное право Российской Федерации: Учебник для вузов. - 3-е изд., изм. и доп.-М.: Издательство НОРМА (Издательская группа НОРМА-ИНФРА•М), 2002, с. 361).

5 See G. Danielyan, V. Ayvazyan, A. Manasyan, *supra* note 3, pp. 159-160.

6 See European Commission For Democracy Through Law (Venice Commission), *Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania*, 1998, CDL-INF(1998)009, §5, Strasbourg, France, accessed at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(1998\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1998)009-e) on 24 November 2017.

6. Decide on giving consent for initiating criminal prosecution against a judge or depriving him or her of liberty with respect to the exercise of his or her powers;
7. Decide on the issue of subjecting a judge to disciplinary liability;
8. Decide on the issue of terminating the powers of judges;
9. Approve its estimate of expenditures as well as those of the courts, and submit them to the Government, in order to include them in the Draft State Budget as prescribed by law;
10. Form its staff in accordance with law.

The interpretation of new constitutional regulation of the powers of the Supreme Judicial Council of Republic of Armenia leads to the conclusion that the latter is entrusted with the liabilities which are directly related to the independence of the judiciary (e.g. to select judges, to terminate their powers, to subject the judges to disciplinary liability and so on). Most of them are identical with previous liabilities of the Council of Justice. But the new list of the liabilities of the Supreme Council of Justice which also include the authority to approve the costs of its own expenditures, including the courts, and submit them to the Government for inclusion in the Draft State Budget (Article 175(1)(9) of the Constitution with amendments of 6 December 2015). Given that the independence of the judiciary is closely related to proper funding, it is quite legitimate to delegate this authority to the Supreme Judicial Council. The Venice Commission's position on this issue is that the Supreme Judicial Council may be a representative of the judiciary in the budgetary process by formulating a budget draft and submitting a proposal to the competent authority.<sup>7</sup>

The list of the liabilities of the Supreme Judicial Council enshrined in the RA Constitution is not exhaustive and the Article 175(4) of the Constitution provides that other authorities of this body could be stipulated in the RA Judicial Code. The latter constitutional provision has led to a lot of debates whether the authorities provided by law should strictly derive from the constitutional mission of the Supreme Judicial Council to provide the independence of the judiciary or they may include some court management or administrative issues. The regulation of this issues in the New Judicial Code of the Republic of Armenia adopted by the RA National Assembly on February 8, 2018 which came into force on March 1, 2018 the liabilities of the Supreme Judicial Code include a range of issues which are not connected with the constitutional mission of this body or are the result of a very broad interpretation of the judicial independence. In particular, the Supreme Judicial Council has the authorities to approve the rules of relationship of courts with the mass media, the rules for submission of documents to the court, classification of cases and other rules of court management, define description of sample furnishings of the courtroom and the judges' office, define the procedure of evaluation of the judicial servants' performance, its criteria and the form of characteristics, establish the procedure for allocating uniforms to court bailiffs and so on (Article 89 of the RA Judicial Code).

Of course, it should be noted that although the protection of the independence of the judiciary is a common purpose for the vast majority of the judiciary councils, they address this issue in different manner. In many countries, the key task of the establishment of councils is the protection of the judiciary from the supremacy of executive, legislative and political power. In some other countries, councils address the issue of securing the internal independence of the judiciary. In many countries, the concern is the material resources that judges spend on organizational (administrative) issues, so the management functions are transferred to councils.<sup>8</sup> It should be noted, however, that the justification for the judicial councils to have administrative functions is the promotion of the independence of the judiciary and the exclusion of external interference into internal affairs of the judiciary. And besides, the existence of constitutional grounds for the organization and operation of judicial councils is typical for the countries of the first model. Therefore, we believe that the Supreme Judicial Council should have been vested with powers strictly deriving from his status of a constitutional guarantor of judicial independence which is necessary and sufficient for the realization of its constitutional mission. Providing the Supreme Judicial Council with excessive powers that are not directly related to the guarantee function of judicial independence can endanger the latter's possibility to effectively carry out its main constitutional function

### **The composition of the Supreme Judicial Council**

A number of fundamental international legal instruments on the independence of the judiciary have particular reference to the issue of the composition and the procedure of formation of judicial councils.

The comparative analysis on the High Councils for Judiciary reveals that there are different models of composition of the councils, that membership to judicial councils differs from country to country and largely depends on the political motives for their creation. It

<sup>7</sup> See CDL-PI(2015)001 supra note 9.

<sup>8</sup> Generally, two main models regarding the status, the role and the liabilities of judicial councils are distinguished: the Southern European model, in which the council primarily focuses on the management of the judiciary, the main role of the judicial councils is to protect and strengthen the independence of the judiciary, and their powers are largely related to the appointment, promotion and disciplinary liability of the judges; and the Northern European model, in which the council has extended powers in the area of administration, court management and budgeting. See *Comparative analysis on the High Councils for Judiciary in the EU member states and judicial immunity*, accessed at ([http://www.justicereformukraine.eu/wp-content/uploads/2014/09/Report\\_Councils\\_eng.pdf](http://www.justicereformukraine.eu/wp-content/uploads/2014/09/Report_Councils_eng.pdf)) on 30 October 2017, See also V. Autheman, S. Elena, *Global Best Practices: Judicial Councils, Lessons Learned From Europe and Latin America*, IFES Rule of Law White Paper Series, accessed at <http://www.ifes.org/publications/global-best-practices-judicial-councils-lessons-learned-europe-and-latin-america> on 31 October 2017.

should be noted that the most successful models are those in which public figures and the members of civil society are represented.<sup>9</sup> The analysis of the structure of judicial councils of the EU Member States has revealed that non-judicial members of the councils mainly represent other fields of the legal profession: prosecutors (Bulgaria, France, Romania, Spain, Italy, Latvia, Malta, Estonia), notaries (Latvia), lawyers (Belgium, Bulgaria, Denmark, France, Malta, Ireland, Slovenia, Spain), university professors (Belgium, Bulgaria, Croatia, Slovenia, Spain). There are cases when the representatives of other professions are also included in the councils, for example, in Sweden two representatives of trade unions are members of the council.<sup>10</sup>

The study of the international experience shows that the selection of non-judicial members by the legislature is a widespread practice. For example, in Belgium the total number of members of High Council of Justice is 44, 22 of whom represent the judicial power. The 22 judicial members are elected by their peers - each linguistic college comprises at least 1 judge and 1 prosecutor. 22 non-judicial members are appointed by the Senate – each linguistic college comprises at least:

1. 4 lawyers (members of the bar for at least 10 years),
2. University or college of higher education professors having at least 10 years of professional experience and
3. 4 members who hold a university or equivalent degree as well as 10 years of relevant professional experience.<sup>11</sup>

Article 130 of the Constitution of Bulgaria states that: 'The Supreme Judicial Council shall consist of 25 members. The President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, and the Prosecutor General shall be ex officio members of the said Council. Eligibility for non-ex-officio membership of the Supreme Judicial Council shall be limited to jurists of high professional standing and moral integrity who have practiced law for at least 15 years. Eleven of the members of the Supreme Judicial Council shall be elected by the National Assembly by a majority of two thirds of the National Representatives, and eleven shall be elected by the judicial authorities'. More detailed regulations are defined by the Bulgarian law "On Judicial System", Article 17 of which stipulates that: 'The National Assembly elects 11 members of the Council from among judges, prosecutors, investigators, university professors, lawyers and other representatives of law profession. The candidacy of a member of the Council in the National Assembly may be nominated by the members of parliament. Together with the nomination, documents on the professional qualifications of the candidate, the length of the professional experience and the required scientific degree must be provided. Not later than 7 days before the parliamentary hearings, certain public non-governmental organizations, high education and scientific institutions should submit their opinions related to the candidate which should be published on the official website of the National Assembly'<sup>12</sup>. Or Article 65 of the French Constitution states that: 'The High Council for the Judiciary shall consist of a section with jurisdiction over judges and a section with jurisdiction over public prosecutors. The section with jurisdiction over judges shall be presided over by the Chief President of the Cour de cassation. It shall comprise, in addition, five judges and one public prosecutor, one Conseiller d'État appointed by the Conseil d'État and one barrister, as well as six qualified, prominent citizens who are not members of Parliament, of the Judiciary or of administration. The President of the Republic, the President of the National Assembly and the President of the Senate shall each appoint two qualified, prominent citizens'.<sup>13</sup>

According to Article 94.1 of the Constitution with amendments of 27 November 2005, the Council of Justice of the Republic of Armenia consists of 9 judges and 4 law scholars. The apparent quantitative dominance of the judicial members has led to the situation when in practice the membership of legal scholars was not a serious counterbalance. Many of the problems that have emerged in the course of the action of this body have demonstrated that the existing arrangements were not enough to effectively pursue the key objective of ensuring the independence of the judiciary, as it was often identified exclusively with the narrow inner interests of the judiciary. Besides, the independence of this body itself was under suspicion. So, the danger of corporatism and the dominance of exclusively internal interests of the judiciary were more than obvious.

This problem has probably been solved by the new constitutional regulations, which have provided equal quantitative representation of judges and non-judges (5 judges and 5 non-judges). As regards the procedure of formation of the Supreme Judicial Council, in accordance with the same regulations, the Judge members shall be elected by the General Assembly of Judges, and the non-judge members shall be elected by the National Assembly by a majority of at least three-fifths of the total number of the members of parliament from among law scholars and other prominent lawyers with high professional qualifications and professional experience of at least 15 years.

9 See V. Autheman, S. Elena, supra note 10. See also See [https://www.hurights.or.jp/archives/other\\_documents/section1/1995/08/beijing-statement-of-principles-of-the-independence-of-the-judiciary-in-the-lawasia-region-beijing-1.html](https://www.hurights.or.jp/archives/other_documents/section1/1995/08/beijing-statement-of-principles-of-the-independence-of-the-judiciary-in-the-lawasia-region-beijing-1.html) accessed at 24 November 2017, European Commission For Democracy Through Law (Venice Commission), *Judicial Appointments*, 2007, CDL-JD(2007)001, Strasbourg, France. accessed at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JD\(2007\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JD(2007)001-e) on 24 November 2017.

10 See *Comparative analysis on the High Councils for Judiciary in the EU member states and judicial immunity*, supra note 10.

11 See Conseil Supérieur de la Justice (CSJ)–Hoge Raad voor de Justitie (HRJ) access at [https://www.ency.eu/images/stories/pdf/factsheets/hrj\\_csj\\_belgium.pdf](https://www.ency.eu/images/stories/pdf/factsheets/hrj_csj_belgium.pdf) on 31 October 2017.

12 See Bulgaria Judicial System Act (2007) access at <http://www.legislationline.org/topics/country/39/topic/9> on 31 October 2017.

13 See Organic Law on the Superior Council of the Magistracy of France (1994, amended 2017) access at <http://www.legislationline.org/topics/country/30/topic/9> on 31 October 2017.

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In order to fulfill certain constitutional regulation the RA Judicial Code enshrines that judge members of the Supreme Judicial Council shall be elected by the General Assembly according to the following groups:

1. one member from the Court of Cassation.
2. one member from Court of Appeal
3. and three members from first instance courts, at least one member from the courts of general jurisdiction from the regions.

The composition of the Supreme Judicial Council should include judges of all specifications (criminal, civil and administrative). The gender-based balance shall be taken into consideration in the election process. And the general rule is that the number of representatives of the same gender is limited to a maximum of three judges to ensure the proper gender-based representation.

A member of the Supreme Judicial Council elected by the General Assembly may be a judge with at least ten years' experience. In accordance with Judicial Code, the judges' experience shall be deemed to be the office in the position of a judge at the Constitutional Court, the international court with participation of the Republic of Armenia and the member of the Supreme Judicial Council elected by the RA National Assembly. A judge member of Supreme Judicial Council may not be the Chairman of the Court or the Chamber of the Court of Cassation. In case of such an election their powers as the Chairman of the Court or the Chamber of the Court of Cassation shall terminate.

Although Article 174 (6) of the RA Constitution enshrines that the requirement for the termination of the powers of judges during the term of office in the Supreme Judicial Council can be set by the Judicial Code, however, the solution provided by law is a different one. In particular, taking into account the extra burden of the judge as a member of the Supreme Judicial Council, 75 percent deduction of workload has been established for him/her in the Judicial Code.

What regards to non-judge members of the Supreme Judicial Council, the RA Judicial Code repeats the constitutional regulation related to the requirements for the appointment to the certain post. Professional work experience in certain meaning is the professional activity in the field of law. A person may submit certain documents on his/her being a reputable lawyer. A judge may not be elected by the National Assembly as a member of the Supreme Judicial Council. A person who has limitations (e.g. he or she has been convicted of a crime regardless of whether or not the conviction has not been discontinued or cancelled; he or she has been convicted of an intentional crime regardless of whether or not the conviction has discontinued or cancelled; he or she has a physical impairment or disease hindering his/her appointment to the position of a judge and so on) for the appointment to the post of a judge prescribed by the RA Judicial Code may not be elected by the National Assembly as a member of the Supreme Judicial Council.

The members of the Supreme Judicial Council are elected for five year term of office without the right to be re-elected. Immediately after being elected the members of the Supreme Judicial Council take an oath consequently in the National Assembly and in the General Assembly in a formal ceremony. The newly elected member of the Supreme Judicial Council shall assume his/her post from the date of expiry of the term of office of the previous member.

From the point of view of guaranteeing the independence of the Supreme Judicial Council, the constitutional regulation that states that the head of the Supreme Judicial Council is elected by the Council from its members within the term and in the manner prescribed by the Judicial Code is of high importance. Meanwhile, in the current legislative regulation, the Justice Council is presided over by the President of the Court of Cassation, which is problematic in terms of internal independence of the body. In accordance with Judicial Code the candidacy of all the members of the Supreme Judicial Code is voted by secret ballots for the post of the Chairman of the Supreme Judicial Council. The latter is elected by majority of votes of all members. The Chairman of the Supreme Judicial Council shall be elected until the end of his term of office as a member of the Supreme Judicial Council. The Chairman of the Supreme Judicial Council shall preside the sessions of the Supreme Judicial Council, sign the decisions, present the Council in relations with other bodies, etc..

In the light of guaranteeing the independence of the Supreme Judicial Council, the constitutional regulation providing that the Head of the Council is alternately elected from among its judges and its non-judge members by the terms and the procedure prescribed by the Judicial Code is of very important. Meanwhile, in accordance with the current legislative regulation, the President of the Court of Cassation convenes and presides the sessions of the Council of Judges which is problematic in terms of internal independence of this body.

In the context of the above mentioned, we can state that the new constitutional basis for the composition of the Supreme Judicial Council could serve as guarantee for internal and external independence of this body. These new regulations address existing problems and are most consistent with international legal standards.

### **The procedure for the appointment (selection) of judges**

In general, there are certain legal criteria set out in international legal instruments in relation to the procedure for the appointment of judges. Thus, for example, the international legal instruments, as a general requirement, enshrine the idea that selection and career

of judges should be based on objective criteria, merit, having regard to qualifications, integrity, ability and efficiency<sup>14</sup>, to exclude political considerations.<sup>15</sup> In accordance with principle 1.2 c of the Recommendation No. R (94) 12 of the Committee of Ministers to member states on The Independence, Efficiency and Role of Judges: 'The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules'.

In general, the international experience shows that systems of judicial appointments come in four basic configurations: 1. appointment by political institutions; 2. appointment by the judiciary itself; 3. appointment by a judicial council (which may include non-judge members); 4. selection through an electoral system.<sup>16</sup> Moreover, in the framework of the third model mentioned above, judges are appointed by judicial councils or by the political bodies upon the recommendation of judicial councils. According to the new constitutional arrangements the second type of the third model will operate in our domestic legal system. In accordance with Article 166 (7-8) of the Constitution the judges and the chairmen of the first instance courts and the court of appeal are appointed by the President of the Republic upon the suggestion of the Supreme Judicial Code. Thus, Article 166 (3) of the Constitution with amendments of 6 December 2015, prescribes that: 'The Judges of the Court of Cassation are appointed by the President of the Republic of Armenia upon the recommendation of the National Assembly and that the National Assembly selects the proposed candidate by at least three-fifths of the total number of the members of the parliament from among the three candidates nominated for each position by the Supreme Judicial Council'. Article 166 (5): 'The National Assembly elects the Chairperson of the Court of Cassation for a term of six years from among the judges of the Court of Cassation by a majority vote of the total number of the members of the parliament upon the recommendation of the Supreme Judicial Council'.

In this regard, it should be noted that the appointment of judges by the legislature is a common international practice. For example, in Moldova the chairman, the vice-presidents and the judges of the supreme court are elected by the legislative body upon the recommendation of the Council of the Magistrates (Article 116 of the Constitution). In Georgia judges of the Supreme Court are also appointed by the legislature upon the suggestion of the President (Article 90). In Latvia, Lithuania, Serbia, Slovenia judges are appointed by the legislative body. The mechanism of appointment of judges in the supreme court by the legislative body is also widespread in England and the United States.

Additionally, as an important safeguard against a possible politicization of the process, it is necessary to emphasize the legislative regulation which provides that the Judges of the Court of Cassation are elected for a certain period of time but not until the termination of the term of office. Besides, the National Assembly has no powers to terminate the powers of the judge.

Moreover, it should be stressed that within the parliamentary form of government, this regulation is a mechanism to ensure certain accountability in the context of checks and balances. In this respect, it should be noted that, even despite some concerns, the proposed procedure ensures the expression of the will of the people during the process of the election of the judges of the high judicial body through the representative body with the primary mandate of the people. Besides, the general approach is that justice should not only be conducted but should also be visible. And this idea requires each judge to be perceived as independent and impartial in the society. This is especially important for judges of the highest court of the country, and the public confidence in this regard should be a priority for every democratic state. Therefore, it is important to ensure the transparency of the procedure of the appointment of the judge of high instance courts.

It should be noted that no matter whether the sessions in the Supreme Judicial Council are held publicly or it is composed of the members elected by the National Assembly, only parliamentary debates provide the attention of the public to the issue under discussion. This means that parliament and especially the parliamentary fractions will vote for those candidates who have the greatest public confidence and good reputation because the choice of a non-trusted candidate can damage the reputation of the fraction. Besides, the decision is made by 3/5 votes of the members of parliament, which means that in the Armenian context a single parliamentary fraction is not sufficient to make a decision and that mutual consent of all powers is necessary which is also a guarantee to avoid politicization of the process.

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14 See Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, access at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> on 31 October 2017. See also The Committee of Ministers of the Council of Europe, *Recommendation No. R (94) 12 Of The Committee Of Ministers To Member States On The Independence, Efficiency And Role Of Judges (1994)* 1.2 c principle, access at <https://advokat-prnjavorac.com/legislation/Recommendation.pdf> on 31 October 2017.

15 See CDL-AD(2007)028, supra note 12, See also The Consultative Council Of European Judges, *Opinion No 1 (2001) Of The Consultative Council Of European Judges (CCJE) For The Attention Of The Committee Of Ministers Of The Council Of European Standards Concerning The Independence Of The Judiciary And The Irremovability Of Judges (Recommendation No. R (94) 12 On The Independence, Efficiency And Role Of Judges And The Relevance Of Its Standards And Any Other International Standards To Current Problems In These Fields, §17, 23*, Strasbourg France, accessed at <https://rm.coe.int/1680747830> on 24 November 2017.

16 See *Judicial Appointments and Judicial Independence*, United States Institute of Peace, 2009, access at <https://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf> on 31 October 2017.

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## The new role of the Chairmen of the Courts

In the sense of securing the internal independence of the courts, the constitutional amendment, according to which the chairpersons of the courts are elected by rotation principle for a limited term of office could serve as a strong legal framework (Article 166 (4-6) of the Constitution).

In accordance with current legislation, the chairpersons of the courts are appointed for the full term of office. And at the present time, such a settlement in the circumstances of the existence of the Council of Court Chairpersons led to excessive centralization and the neglect of the simple truth that the chairman of the court is also a judge, who should just have certain extra powers of organizational kind in order to secure the normal functioning of the court. In accordance with para. 11 of the Kyiv Recommendations: 'The role of court chairpersons should be strictly limited in the following sense: they may only assume judicial functions which are equivalent to those exercised by other members of the court. Court chairpersons must not interfere with the adjudication by other judges and shall not be involved in judicial selection. Neither shall they have a say on remuneration (...). They may have representative and administrative functions, including the control over non-judicial staff. Administrative functions require training in management capacities. Court chairpersons must not misuse their competence to distribute court facilities to exercise influence on the judges'. In this context, the necessity of guaranteeing the internal independence of the courts is also emphasized by the Venice Commission<sup>17</sup> and the Committee of Ministers of the Council of Europe.<sup>18</sup>

## Conclusion

Summarizing, we can state that the new constitutional amendments and the new Judicial Code of the RA aimed at their implementation have created a solid basis for the genuine independence of the judiciary. In particular, it refers to the balanced composition of the institutional guarantor of the independence of the judiciary such as Supreme Judicial Council, the rotation of the chairmen from non-judges and judges. These regulations are serious guarantees for the independence of this body itself which in its turn will lead to proper realization of the constitutional mission of this body.

With regard to the powers of the Supreme Judicial Council, enshrined in the RA Constitution, it is fully consistent with the status of the guarantor of the independence of the judiciary. However, the provisions of the Judicial Code related to the jurisdiction of the Supreme Judicial Council are problematic, since in many cases they are not directly related to the constitutional function of this body to guarantee the independence of the judiciary, and they are mainly aimed to provide proper management of court system.

Besides, new regulations of appointment of judges, particularly those providing certain liabilities of the RA National Assembly will make the process more transparent and help to fill the judicial system with professional judges who have been elected as a result of the public discussion process.

Nevertheless, these conclusions are mere estimations, and clear conclusions on these arrangements can only be made based on the results of their practical application.



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17 See European Commission For Democracy Through Law (Venice Commission) (2014), *Opinion on the Draft Law on introducing amendments and addenda to the judicial code of Armenia*, 2014, CDL-AD(2014)021, Strasbourg, France, accessed at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)021-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)021-e) 24 November 2017.

18 See The Committee of Ministers of the Council of Europe, *Recommendation CM/Rec (2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities*, access at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805afb78](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78) on 31 October 2017.

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