Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF CLAUSE 2 OF PART 6 OF ARTICLE 142 AND PART 7 OF ARTICLE 155 OF THE CONSTITUTIONAL LAW OF THE REPUBLIC OF ARMENIA ON JUDICIAL CODE WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF ARAIK MELKUMYAN

Yerevan 15 November 2019

The Constitutional Court composed of H. Tovmasyan (Chairman), **A**. Gyulumyan, A. Dilanyan (Rapporteur), F. Tokhyan, A. Tunyan, H. Nazaryan, A. Petrosyan,

with the participation (in the framework of the written procedure) of**:**

the applicant: A. Melkumyan,

the respondent: K. Movsisyan, representative of the RA National Assembly, Head of the Legal Support and Service Division of the RA National Assembly Staff,

pursuant to clause 1 of article 168, clause 8 part 1 of article 169 of the Constitution, as well as articles 22 and 69 of the constitutional law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of clause 2 of part 6 of article 142 and part 7 of article 155 of the Constitutional Law of the Republic of Armenia on Judicial Code with the Constitution of the Republic of Armenia on the basis of the application of Araik Melkumyan.

The Constitutional Law Judicial Code of the Republic of Armenia (hereinafter – the Code) was adopted by the National Assembly on 7 February 2018, signed by the President of the Republic on 10 February 2018 and entered into force on 9 April 2018.

According to clause 2 of part 6 of article 142 of the Code, is the commission of such an act that incompatible with the position of a judge is a significant disciplinary violation.

According to part 7 of article 155 of the Code, the decision of the Supreme Judicial Council on bringing a judge to disciplinary liability enters into force from the moment of promulgation and is final.

The case was initiated on the basis of the application of Arayik Melkumyan submitted to the Constitutional Court on May 15, 2019.

Having studied the application, the written explanations of the parties, as well as other documents available in the case, the Constitutional Court ESTABLISHED:

1. Applicant's arguments

The applicant, referring to article 79, part 1 of article 81, part 5 of article 164, article 164 of the Constitution and article 142 of the constitutional law "Judicial Code of the Republic of Armenia", states that the Constitution, among other reasons, prescribed the following two separate cases of termination of powers of a judge: violation of incompatibility requirements and the commission of a significant disciplinary violation. The legislator noted the term "incompatible with the position" as a case of significant disciplinary violation, and not the term "incompatible with the status".

According to the applicant, the term "incompatible with the position of a judge" should be interpreted as behavioral incompatibility, the commission of such a violation of the rules of conduct that is incompatible with the position of judge. Meanwhile, in these circumstances, the Supreme Judicial Council identified the mistake made by the judge and incompatibility with the position of judge and determined a separate ground for the termination of powers. The applicant also notes that in disciplinary cases initiated by judges Araik Melkumyan and Ruben Apinyan for the same act, the Supreme Judicial Council provided controversy interpretations.

Referring to Articles 61, 79 and 81 of the Constitution, part 7 of article 155 of the Code, articles 6 and 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms, the applicant claims that the right to appeal judicial acts is an important part of the effective remedy. Considering that in this case, part 7 of article 155 of the Code does not provide a possibility to appeal the decision of the Supreme Judicial Council, the applicant considers that this article contradicts article 61 of the Constitution.

2. **Respondent's arguments**

The respondent, referring to Articles 162, 163, 164 of the Constitution, Articles 67, 69 and 70 of the Constitutional Law "The Judicial Code of the Republic of Armenia", notes that the aim of the rules of conduct of a judge is to ensure, by observing these rules, the independence and impartiality of the court, as well as building confidence and respect to court.

The respondent claims that he shares the position expressed in the decision of the Supreme Judicial Council of February 14, 2019 SJC-8-V-K-04 regarding the recognition of clause 2 of part 6 of article 142 of the Constitutional Law "Judicial Code of the Republic of Armenia" as contradicting the requirements of the Constitution.

Turning to the issue of constitutionality of part 7 of article 155 of the Code, the respondent considers that appealing against decisions of the Supreme Judicial Council in courts will reduce its role and significance in the judiciary, moreover, the existence of this institution as a collegial body that guarantees the independence of courts and judges becomes illogical.

Based on the foregoing, the respondent considers that paragraph 2 of part 6 of article 142 and part 7 of article 155 of the Constitutional Law "Judicial Code of the Republic of Armenia" comply with the requirements of the Constitution.

3. Circumstances to be established within the framework of the case

In order to determine the constitutionality of the provisions challenged in the present case, the Constitutional Court considers it necessary, in particular, to address the following issues:

1. Does clause 2, part 6, clause 142 of the Code restrict the person's right to join the public service established by clause 49 of the Constitution, and in case of restriction does this comply with the principle of certainty of restriction of fundamental rights and freedoms?
2. Does the fact that the decisions of the Supreme Judicial Council (SJC) on the issue of disciplinary proceedings against a judge[1] are final and incontrovertible (part 7 of article 155 of the Code) and violate a person's right to an effective judicial defense and a fair trial?
Based on the foregoing, the Constitutional Court assesses the constitutionality of the provisions challenged in the present case from the point of view of Article 49, part 1 of Article 61 and Article 79, which are interconnected with Article 78 of the Constitution by taking into account parts 5 and 9 of Article 164, part 8 of Article 166 and Article 175 of the Constitution.

4. Legal positions of the Constitutional Court

4.1. According to the first sentence of Article 49 of the Constitution, every citizen shall have the right to join the public service on general grounds. Moreover, this fundamental right, within the framework of its constitutional wording, is not subject to any restriction; however, its regulating details shall be prescribed by law subtleties (second sentence of Article 49 of the Constitution).

The Constitutional Court considers that it follows from the wording of Article 49 of the Constitution that at the constitutional level the right to enter the public service is guaranteed only for the citizens of the Republic of Armenia, and the legislator is obliged to provide general grounds for the realization of this right, excluding any discrimination.

On the other hand, the mechanisms for the implementation of the fundamental right to enter the public service on general grounds may differ significantly from each other depending on the characteristics of the public position and the type of public service.

In addition, *the fundamental right to enter public service on general grounds also includes the right of a person to hold the position on a general basis,* which, in turn, implies a prohibition of dismissal from public service on the grounds not provided by law, as well as arbitrarily.

For the persons holding the position of judge, insofar as this concerns the judge as the holder of the basic right to enter the public service, there is an additional *constitutional*

[1] In the scopes of this case, the term "judge" refers to judges of courts of general jurisdiction and specialized courts

guarantee of immutability, derived from the fundamental principle of the rule of law, the details of which should be prescribed exclusively by the constitutional law Judicial Code (part 8 of article 166 of the Constitution, interrelated with part 11 of article 164 of the Constitution).

The main guarantees for **the consistency of tenure of a judge** are established at the constitutional level: the grounds for terminating and suspension of a judge's powers are exhaustively established by the Constitution, the Constitution also establishes the competent authorities dealing with the termination of a judge's powers (part 9 of article 164 of the Constitution). In addition, by virtue of the Constitution, *the grounds and procedure for bringing a judge to disciplinary liability shall not be established by ordinary, but exclusively by constitutional law*, in this case by the Judicial Code (part 5 of article 164 of the Constitution).

The Constitutional Court considers that the general content of the above-mentioned regulations established by the Constitution is the following:

1) every citizen of the Republic of Armenia, entering the public service on general grounds, also shall have the right to hold the office and not to leave his/her post arbitrarily;

2) *a citizen holding a judge's position*, in addition to the general right to hold the office, *receives ad hoc guarantee* in the form of immutability, guaranteeing the consistency of tenure;

3)a citizen may resign from a judge position or be suspended from the office exclusively on the grounds provided for by the Constitution, in the manner established by the Constitution by the means of a special procedure established by the Constitutional Law;

4) in the course of interpretation of the grounds established by the Constitution for the completion or termination of the powers of a judge which shall be specified in the Constitutional Law, the legislator should show restraint and, through legislative regulations, not replace the systemic logic of the Constitution, namely, do not unnecessarily expand the legislative possibility of applying these grounds and prevent arbitrary interpretation, guarantee compliance with all requirements of justice in the course of their application, including appropriate procedural provisions on the termination of powers of a judge.

The Constitutional Court states that in all cases when the powers of a judge are terminated, this applies not only to the status of a judge, but also to his/her fundamental right as a citizen of the Republic of Armenia to enter the public service: s/he is deprived of the right to continue to hold office, therefore, his/her right is limited.

4.2. One of the grounds for terminating the powers of a judge, that is, the forced termination based on the decision of a state body - the Supreme Judicial Council, ad hoc prescribed in the Constitution, i*s a significant disciplinary violation* (part 9 of article 164 of the Constitution). According to part 6 of Article 142 of the Code, a significant disciplinary violation is the commission of a disciplinary offense by a judge who has two reprimands or one severe reprimand, or *if a judge commits such an action that is incompatible with the position of a judge.* According to the systemic logic of the Code, the termination of a judge's powers as a result of disciplinary proceedings is one of the penalties imposed by the decision of the Supreme Judicial Council, therefore, the distinction between a significant disciplinary violation and a non-material violation and the imposition of a corresponding penalty are carried out within the same proceedings for bringing a judge to disciplinary liability.

The legislator qualifies as a significant disciplinary violation, in one case, the commission of any other disciplinary violation in the case of specific penalties for non-essential disciplinary violations, that is, *a certain combination of disciplinary violations, mainly by their quantity,* in another case, *the nature of one particular disciplinary violation,* that is, "commission of such an action by a judge which is incompatible with the position of a judge. "

The Constitutional Court considers that the mentioned provision, which contains vague legal concepts, suggests that it is up to the law enforcement body, the Supreme Judicial Council, to decide which particular action of a judge is incompatible with the position of a judge. This means that, firstly, it is necessary to interpret whether "the commission of misconduct by a judge" includes inaction, in addition, it is necessary to establish which action is incompatible with the position of a judge.

4.3. Given the fact that the issue of constitutionality concerns the conformity of interference on such grounds with a judge's performance of his/her duties, namely the restriction on this basis of his/her fundamental right, the certainty requirement established by Article 79 of the Constitution, the Constitutional Court considers it necessary to refer to the relevant legal positions expressed in its previous decisions.

Accordingly, in particular:

1) "... the law must also comply with the legal position expressed in a number of judgments of the European Court on Human Rights, according to which any legal norm cannot be considered a

“law ”, if it does not comply with the principle of legal certainty (res judicata), i.e. is not formulated clearly enough to allow a person to regulate his/her behavior ”(DCC-630);

2) “...the principle of the rule of law, inter alia, also requires the existence of a legal law. The latter should be sufficiently accessible so that legal entities have the possibility in the relevant circumstances to decide which legal rules apply in this case. A norm cannot be considered a “law” if it is not formulated with a sufficient degree of accuracy that would allow individuals and legal entities to regulate their behavior in accordance with it; they should be able to foresee the consequences that may arise as a result of this action.

An important factor for assessing the predictability of the law is the fact of the presence or absence of contradictions between the various regulations governing these relations ”(DCC-753);

3) “... the Constitutional Court considers that in the absence of significant differences between the offenses specified in Article 63 of the Judicial Code of the Republic of Armenia and Article 314.1 of the Criminal Procedure Code of the Republic of Armenia and the corpus delicti specified in the challenged norm, the person is unable to foresee the legal consequences of his/her behavior that does not proceed from the principles of predictability and certainty of the law ”(DCC-851);

“The Constitutional Court states that in a rule of law state, within the framework of the recognized principle of the rule of law, the legal regulations enshrined in the law should make the legitimate expectations predictable for a person. According to the fundamental approach on the basis of legal regulations and law enforcement practice, the principle of protecting the law of legitimate expectations is one of the integral elements of the rule of law and guaranteeing the rule of law ”(DCC -1148);

“The rule of law is one of the most important features of the legal state enshrined in Article 1 of the Constitution of the Republic of Armenia, one of the main requirements of which is the principle of legal certainty, regulation of legal relations exclusively by such laws that meet certain qualitative characteristics, i.e. are distinct, predictable, accessible” (DCC - 1270);

“In the context of a number of other decisions (DCC - 630, DCC -1142), referring to the principle of legal certainty, the Constitutional Court considered that this principle is necessary so that participants in the relevant relations could reasonably anticipate the consequences of their behavior and be confident in their officially recognized status and acquired rights and obligations (DCC - 1439);

According to article 79 of the Constitution, when restricting basic rights and freedoms, laws must define the grounds and extent of restrictions, be sufficiently certain to enable the holders and addressees of these rights and freedoms to display appropriate conduct.

Positions regarding the principle of legal certainty are enshrined in a number of decisions of the Constitutional Court, in particular, in the Decisions DCC-630, DCC-753, DCC-1270, from which it follows that the Constitutional Court considers the principle of legal certainty as one of the main requirements for the rule of law, which is the most important feature of the rule of law established by Article 1 of the Constitution, and the mentioned constitutional principle applies to all laws, regardless of whether they are endowed with the ability to restrict fundamental law or regulate the implementation of fundamental law (DCC -1357).

Referring to the principle of legal certainty, the Constitutional Court in its decisions expressed legal positions that, in particular, any legal norm cannot be considered a "law" if it is not formulated distinctly enough to allow a person to regulate his/her behavior (DCC-630), the law should be sufficiently accessible so that legal entities have the opportunity to determine, in appropriate circumstances, which legal rules apply in this case (DCC-753), the concepts used in legislation should be accurate, defined and not lead to controversy interpretation or confusion (DCC-1176, DCC-1449);

"... The Constitutional Court considers that the principle of legal certainty implies both the availability of as precise legal regulation as possible and ensuring its predictability. In particular, the wording of legal regulation should give a person not only the opportunity to shape their behavior in accordance with it, but also the ability to foresee what the actions of public authorities can be and what consequences the application of this legal regulation will entail.

... The Constitutional Court considers that, along with the provision of the requirement of certainty of the law, it is impossible to provide for the regulation of all issues exclusively by the law, for this reason a clear interpretation of the law by the courts is especially important.

The Constitutional Court confirms the legal position expressed by it in the Decision DCC-1270 of 05.03.2016 that "even with the most precise wording of the legal norm, judicial interpretation is not excluded. The need to clarify legal norms and bring them in line with changing circumstances and developing social relations always exists. Therefore, *the certainty and clarity of legislative regulations cannot be absolutized, even a lack of clarity can be supplemented by court interpretations.*" The foregoing is also confirmed by the legal positions of

the European Court of Human Rights, in particular, in the Decision in the case of Busuioc v. Moldova (Case of Busuioc v. Moldova, application no. 61513/00, 21/12/2004) where the court found that "... although certainty wording is highly desirable, excessive rigidity must be avoided, as law must have the ability to follow changing circumstances. Therefore, many laws use terms that are more or less vague. Their interpretation and application is the task of judicial practice "(DCC-1452, emphasized by the Constitutional Court).

"The Constitutional Court in its Decision DCC - 1213 of June 9, 2015 prescribed that "... the legal regulations enshrined in the law as part of the recognition of the rule of law should make legitimate expectations for a person predictable. In addition, the principle of legal certainty, being one of the fundamental principles of the rule of law, also implies that the actions of all subjects of legal relations, including those in power, must be predictable and legal" (DCC-1475).

Confirming and developing its legal positions, the Constitutional Court finds that:

1) *legal certainty is also an important element of legal security,* which, inter alia, ensures trust in public authorities and their institutions;

2) in a rule of law state through exclusively defined, predictable, clear, accessible to all legislative regulations, protection of confidence in the continued existence of the current law and order should be guaranteed;

3) the principle of certainty was reflected not only in Article 79 of the Constitution as a content requirement for laws restricting fundamental rights and freedoms, but also as a fundamental element of the principle of legality, according to which the rules authorizing the adoption of by-laws and regulations must meet the requirements of legal certainty (second sentence of part 2 of article 6 of the Constitution);

4) violation by the public authority of the principle of certainty directly affects the principle of the rule of law and significantly reduces the degree of rule of law state;

5) the clarity, predictability and accessibility of laws restricting fundamental rights or freedoms are directly proportional to the degree of restriction of fundamental rights: **the more intense this restriction is, the more clear, predictable and accessible the wording of these laws should be,** so as not to create ambiguities in relation to the content and availability for individuals, prohibitions, other restrictions or duties assigned to them;

6) given the number of essential issues and the inability to respond to all situations in a rulemaking manner, the requirement of certain legislative and subordinate regulations does not exclude the consolidation of vague legal concepts in laws and subordinate regulatory legal acts, but this must necessarily be accompanied by an equivalent interpretation of such concepts, and in identical cases, by uniform interpretation, without which it is impossible to ascertain the predictability of these provisions;

7) the interference with the right of guarantees of the immutability of public officials to continue to hold office should be more clearly regulated: all its grounds, procedures, as well as competent public authorities and their powers should be established by law, and in the case of judges, by constitutional law.

4.3. The European Court of Human Rights, referring to the term "violation of the oath", noted that the text of the oath of a judge provides unlimited possibilities for the interpretation of the term, giving the disciplinary body wide discretion.

The European Court of Human Rights, while acknowledging that the adoption of high-precision laws in some areas is very problematic and that some flexibility is necessary, nevertheless noted that in this case t**here are no signs that at the time of the consideration of the applicant's case there were any principles and practice allowing accurate and consistent interpretation of the concept of "violation of the oath"**, in addition, national legislation did not provide for the appropriate gradation of sanctions for disciplinary offenses, as well as rules ensuring their application in accordance with the principle of proportionality, stating that there were only three types of disciplinary offenses disciplinary sanctions: reprimand, demotion and dismissal. These three types of sanctions left little room for proportional disciplinary action against a judge, **resulting in the authorities having limited ability to strike a balance between competing public and personal interests in the light of each case**.

As a result, the Court concluded that the absence of any principles and practices for an accurate and consistent interpretation of such misconduct as "violation of the oath", as well as the lack of proper legal guarantees, made it impossible to predict the consequences of applying the relevant provisions of national law, which suggests that almost any misconduct of a judge committed at any time during his career can be interpreted, at the request of the disciplinary body, as a sufficient factual basis for a disciplinary charge of "violation of the oath" and lead to

the removal of the judge from office (***OLEKSANDR VOLKOV v. UKRAINE, Judgment of 9 January 2013*).**

In its other judgment, the European Court of Human Rights noted that the scope of the concept of "predictability" largely depends on the content of the tool in question, on the area for which it is intended, and those to whom it is addressed ***(Gorzelik and Others v. Poland, Judgment of 17 February 2004).***

The European Commission "For Democracy through Law" (Venice Commission) in a number of its opinions addressed the issue of bringing a judge to disciplinary action.

Thus, the Venice Commission believes that the legislation governing **legal relations related to the disciplinary responsibility of a judge and with bodies taking a disciplinary decision should be clearly formulated.** Countries often face difficulties when the basis for disciplinary action is not sufficiently specific. The absence of clearly defined rules is dangerous, because in the case of disciplinary offenses, arbitrariness may begin in connection with the prosecution of judges. For this reason, the Consultative Council of European Judges (CCJE) of the Council of Europe, in its Opinion No. 1 of 2001 on the Independence of the Judiciary, recommended to set standards that define not just the conduct which may lead to removal from office of a judge, but also all conduct which may lead to any disciplinary steps or change in status(CDL-AD (2007) 009, par. 6). .

According to the Venice Commission, With respect to foreseeability, the European Court of Human Rights has developed criteria, over the years, for deciding whether interference with a right is provided for by law and concluded that it is not sufficient that a legal regulation exist, but that it be precise and its consequences foreseeable for those concerned.(CDL-AD (2007) 009, para.15). These requirements are applicable to disciplinary proceedings because here too, it must be clear which actions are susceptible to disciplinary responsibility. In one of its conclusions, stating that **the violations of the law are so broadly formulated that they can cover a wide variety of judicial behaviors encountered during the trial**, which in fact constitutes a threat to the principle of the independence of judges, the Venice Commission instead proposed to clearly limit the disciplinary responsibility of a judge. The Commission emphasized that the purpose of this principle is to ensure that judges are free from outside influence when deciding a case on the basis of the law and do not have to fear any consequences

for performing their duties except for the (criminal) case of distortion of justice. (CDL-AD (2007) 009, para. 17).

According to the Venice Commission, the aim of disciplinary rules for judges is to secure the authority of the courts, not to secure the correct application of the law, which is the task of the appeals procedure. Dismissal as an almost automatic sanction for "violations of the law" is contrary to the core concept of judicial independence. According to this principle, the law should clearly set out that the sanction of dismissal is the most serious sanction which is to be applied only in the most extreme cases and as a last resort. The disciplinary panel should be aware that all its decisions must pass the test of proportionality, as developed in **the case-law of the European Court of Human Rights (**CDL-AD (2007) 009, para. 29).

The Commission expressed the view that admittedly, some of the grounds for bringing the judge to a disciplinary liability are formulated in a rather vague manner: "discrediting the judiciary" or "decreasing the public confidence in the independence and impartiality of the judiciary" .

However, to a certain degree it is unavoidable that a legislator uses open-ended formulas in order to ensure the necessary flexibility. That was previously recognised by the Venice Commission. Where the legislator uses such formulas, it is particularly important which body is assigned with their interpretation and application in practice. In Armenia this task is assigned to the SJC, which enjoys sufficient institutional independence and offers basic guarantees of fair trial (see Chapter 14 of the JC). It is also important that the disciplinary liability may only be engaged for violations of rules of judicial conduct, not the more imprecise notion of "rules of ethics" (see Article 68 (3) of the JC). So, it is possible to leave further development and concretisation of those open-ended standards to the SJC, provided that it follows other precepts of the law (**related to the intent or gross negligence by the judge, to the material consequences of the breach,** etc.).(CDL-AD(2019) 024, para. 40).

Admittedly, some of the grounds for bringing the judge to a disciplinary liability are formulated in a rather vague manner: "discrediting the judiciary" or "decreasing the public confidence in the independence and impartiality of the judiciary"

Touching upon one of the draft of Judicial Code of the Republic of Armenia, the Commission stated that Article 155 § 6 describes what constitutes a "gross disciplinary violation". This threshold may be reached (1) if the judge commits a certain number of less

serious violations,80 or (2) if the judge commits an “act which dishonours the judiciary” or an act which “is incompatible with the position of a judge”. Again, the Venice Commission observes here a certain parallelism: under Article 60 § 1 an act “undermining the high reputation of the judiciary” is characterised as ground for disciplinary liability, but not necessarily as a “gross disciplinary violation”. The interrelation between Article 60 § 1 and Article 155 § 6 should be clarified: it seems that the same type of violation may lead to a less severe disciplinary sanction (such as a warning, for example), or be qualified as a “gross violation” independently from the record of the previous violations and thus lead directly to the termination of the status of a judge. In principle, such model is acceptable, but the disciplinary bodies should be aware that not every “act which dishonours the judiciary” or and act which “is incompatible with the position of a judge” necessarily amounts to a gross violation; the principle of proportionality should always apply (Article 138 § 2 of the Draft Code). This should be explicitly indicated in the Draft Code. (CDL-AD(2017) 019, para. 157).

4.5. The Constitutional Court states that the model of disciplining a judge adopted by the Republic of Armenia also did not stand aside from partially general wording of the rules establishing grounds for disciplinary liability.

Although the Code regulates in detail the procedures for bringing a judge to disciplinary responsibility, as well as the functions and powers of the competent authorities, nevertheless, the legislator used vague legal concepts to determine a significant disciplinary offense, with regard to which the Supreme Judicial Council has a wide freedom of assessment.

In the context of the impugned provisions, the Constitutional Court at this stage does not consider it necessary to refer to the entire disciplinary system associated with the impugned provisions, taking into account, inter alia, the work planned in order to improve the Code, especially on this issue, during which it is also necessary to take into account best international experience.

Nevertheless, the Constitutional Court considers it necessary to draw the attention of the subjects of legislative initiative to the fact that the powers of, on the one hand, the Court of Appeal and the Court of Cassation, and, on the other hand, the Supreme Judicial Council are clearly distributed in the Code in connection with the assessment of a violation of substantive or procedural law.

As for paragraph 2 of part 6 of Article 142 of the Code, the Constitutional Court attaches great importance not only to assessing the constitutionality of vague legal concepts used by the legislator in this paragraph, but also the fact that they are the basis for the formation of conflicting practices of the law enforcement body - the Supreme Judicial Council, as claims by the applicant party.

The Constitutional Court has repeatedly noted that “discrimination occurs when, within the framework of the same legal status, a differentiated approach is taken with respect to a person or persons, in particular, they are deprived of certain rights or these rights are limited or they receive privileges” (DCC - 1224). Meanwhile, as a result of studying another case to which the applicant refers, it becomes clear that his actual circumstances differ from the actual circumstances of the applicant’s case, therefore, the qualifications of the acts also differ, and the Supreme Judicial Council is competent to qualify the acts committed by the judges during the disciplinary proceedings. In view of the foregoing, the Constitutional Court states that the applicant’s concerns regarding discrimination concern the lawfulness of the decision made by the Supreme Judicial Council.

At the same time, the Constitutional Court states that paragraph 2 of part 6 of article 142 of the Code does not clearly distinguish whether a judge’s commission of an act incompatible with a judge’s position is such a gross or gross violation by a judge of material or procedural rules that makes his continued stay impossible position, or it is a violation of the rules of conduct of a judge.

Without addressing at this stage, for the above reasons, to the question of the clear separation of the rules of conduct of judges and the violation of substantive and procedural rules, the Constitutional Court considers that, on the basis of the aforementioned contested provision, in fact, it is possible to terminate the powers of a judge in the event of any manifestation of his behavior, even if such manifestations as, for example, failure by a judge to undergo mandatory retraining. Comparing the contested provision with paragraph 1 of the same part of the mentioned article, it becomes clear that the legislator has chosen a disproportionate decision: in one case, *only a combination of different disciplinary violations leads to the termination of the powers of a judge,* in the other case, *any disciplinary violation can be considered incompatible with the position of a judge.* According to the Constitutional Court, **this can lead to**

disproportionate interference in the affairs of a judge during his further tenure, which jeopardizes the principle of independence of judges.

On the other hand, the Supreme Judicial Council itself decides on the termination of the powers of judges, and the Supreme Judicial Council, in accordance with Article 173 of the Constitution, is an independent state body that guarantees the independence of courts and judges, therefore, by virtue of its law enforcement practice, it can block the arbitrary application of the said provision, securing more specific criteria based on the law. However, at present they still have not received sufficiently detailed consolidation, and this jeopardizes the principle of proportionality in the issue of terminating the powers of a judge as the most intense interference with the basic right of a judge, not connected with his further tenure.

In addition, the non-appealability of the decisions of the Supreme Judicial Council was to predetermine the most accurate formulation of all the grounds for bringing a judge to disciplinary liability, especially the grounds entailing the termination of his/her powers, which the legislator did not do.

At the same time, the range of disciplinary sanctions is not properly delineated, which creates disproportionate opportunities for the application of the most stringent disciplinary sanction. Consequently, the Supreme Judicial Council does not have an appropriate legal basis for applying the more personalized disciplinary sanctions arising from the principle of proportionality in cases where the disciplinary offense committed by a judge does not deserve effective counteraction by applying other disciplinary sanctions, however, on the other hand, there is no termination of his authority all necessary prerequisites.

The Constitutional Court states that the subjects of legislative initiative should initiate the introduction of a more differentiated system of disciplinary sanctions, allowing them to be more personalized, in order to be able in each case to balance all cases of conflict of public and private interests.

In view of the foregoing, the Constitutional Court considers that paragraph 2 of part 6 of article 142 of the Code contradicts article 79 of the Constitution, which is interconnected with article 78 of the Constitution, insofar as, due to fuzzy wording, it does not create the necessary conditions for terminating the powers of a judge on this basis as a guarantee of proportionality of the most intense restriction the right, as a private person, to further stay in office, which is

guaranteed by the immutability of a judge, derived from the fundamental right enshrined in Section 49 of the Constitution.

4.6. The applicant also disputes the conformity of paragraph 7 of Article 155 of the Code with the Constitution.

The Constitutional Court states that within the framework of paragraph 8 of part 1 of article 169 of the Constitution, it is necessary to establish the issue of violation of the right to effective judicial protection, as enshrined in part 1 of article 61 of the Constitution, taking into account the particular status of the Supreme Judicial Council.

The Constitutional Court once again states that the possibility of judicial appeal is an important component of the right to judicial protection (see, for example, Decision DCC-936).

Nevertheless, in view of the foregoing, there are cases which, by their nature, subjective composition and other grounds, have a number of features, therefore, the realization of the right to judicial protection and the right to appeal, which is its element, may have some differences, including those due to feature of these cases in terms of limiting this right.

The European Court of Human Rights, referring its decisions to the right to judicial protection and the right to a fair trial, noted that the right to a fair trial guaranteed by paragraph 1 of Article 6 of the Convention, of which the right to access the court is a private element, is not an absolute right and may be subject to certain restrictions. States enjoy discretion in this regard. Nevertheless, the right of access to a court cannot be limited to such an extent that its essence is distorted. The restrictions correspond to paragraph 1 of Article 6 of the Convention if they pursue a legal purpose and if there is a fair balance between the measures applied and the aim pursued (Golder v. United Kingdom, 21 Feb. 1975; Fayed v. United Kingdom, 25 Aug. 1994; Ashingdane v. United Kingdom, 28 May 1985; Garcia Manibardo v. Spain (15 Feb. 2000), 29.06.2000; Bellet v. France, 20 Nov. 1995; Philis v. Greece, 27 Aug. 1991; Tolstoy Miloslavsky v. United Kingdom, 23 Jun. 1995). The Convention for the Protection of Human Rights and Fundamental Freedoms does not oblige Contracting States to create courts of appeal or cassation, but if they have already been created, it is necessary to ensure that the parties concerned enjoy the basic guarantees of a fair trial provided for in Article 6 of the Convention." (Delcourt v. Belgium, 2689/65, 17 January 1970; Toth v. Austria, 11894/85, 12 December 1991; Platakou v. Greece, 38460/97, 11 January 2001). "The court recognizes the interest of the state in controlling access to the court when it comes to a specific group of issues. Nevertheless, the task of the

Contracting States, in particular the competent national legislature, and not the Court, is to clearly define those areas of public service, including the exercise of discretion inherent in state sovereignty, where the interests of the individual must be subordinated. If the national system blocks access to the court, the Court will confirm that the dispute is indeed of such a nature that the application of the exclusion to the guarantees provided for in Article 6 is justified. If the dispute is not so, there are no problems, then paragraph 1 of Article 6 will apply. (CASE OF OLUJIĆ v. CROATIA, Application no. 22330/05, JUDGMENT 5 February 2009, FINAL 05/05/2009).

The Constitutional Court in Decision DCC-719, referring to the legal positions set forth in a number of its judgments on access to justice and the effectiveness of justice in connection with the need to fulfill obligations undertaken by the Republic of Armenia to the Council of Europe, "at the same time emphasized the importance of certain consequences arising from of these obligations of domestic discretion in relation to legislative restrictions on the right of access to justice and, especially, the right to appeal in court. "

Thus, the Constitutional Court states that effective judicial protection, as a general rule, among other things, presupposes the existence of a hierarchy of judicial instances in the state and the possibility of judicial defense for each in each of these instances. At the same time, in some cases, states may deviate from the general rule and guarantee the right to judicial protection in these cases within the framework of one court (judicial instance).

In the Republic of Armenia, cases on bringing judges to disciplinary liability and termination of their powers are of this type. The issues related to bringing judges to disciplinary responsibility and the termination of their powers are decided by the Supreme Judicial Council, which acts as a court in these cases, and the decisions made by which enter into force from the moment of their publication and are final.

In the context of the current constitutional regulations, the provision of the classic version of the appeal of the decisions of the Supreme Judicial Council on bringing a judge to disciplinary liability in practice can cause a number of problems both in terms of applicability and in terms of effectiveness. In addition, in the matter of ensuring the functional efficiency of the judicial system, such regulation would not follow from the constitutional status and mission of the Supreme Judicial Council as an independent state body.

The Constitutional Court, at one time assessing the constitutionality of the competence of the Council of Justice to issue a final act in cases when it acted as a court, noted that "an important methodological fact is that this body, which consists mainly of active judges, as well as scholars - lawyers, within the framework of their constitutional competence and if there are **grounds established by law, evaluates how much the authorized official to fulfill the duties of a judge is loyal to the oath and how he performs the official duties.**

The Constitutional Court considers that this system is integral in the issue of guaranteeing the performance of its functions from the point of view of ensuring intra-system stability and efficiency. **It does not go beyond the exercise of the constitutional function of assessing the performance by a judge of his/her official duties and his/her professional suitability, which is the exclusive competence of this body.** Granting control powers to the courts in this matter would make on the whole senseless the existence of the Council of Justice as an independent and independent body in the judicial system, vested with the competence provided by the Constitution exclusively to it." (DCC-1063).

Reaffirming the legal position expressed in the aforementioned Judgment and in addition to it, the Constitutional Court states that, given the functional role of the Supreme Judicial Council as an independent state body in ensuring the independence of courts and judges, as well as the constitutional functions of other courts included in the judicial system, Under the current constitutional regulations, there is no legal possibility to review the decisions of this body on disciplining a judge in any judicial authority of the Republic of Armenia. **By virtue of Article 175 of the Constitution, the Supreme Judicial Council has the exclusive right to decide on the issue of bringing a judge to disciplinary liability.** If, in such circumstances, a court of any of the instances operating in the Republic of Armenia revises the decision of the Supreme Judicial Council on disciplining a judge, and as a result issues a new judicial act, for example, repeals and amends the decision of the Supreme Judicial Council acting as a court, then in the end, it turns out that the court of this instance decided the issue of bringing the judge to disciplinary liability.

Thus, in the light of the foregoing, the Constitutional Court states that in the context of the current constitutional and legal regulations, there is no legal possibility to appeal the decisions of the Supreme Judicial Council on disciplining a judge in any of the courts operating in the Republic of Armenia, since this contradicts the status of the Supreme judicial council as an

independent constitutional body. In addition, the review of these decisions, that is, the resolution of the issue of bringing a judge to disciplinary liability, goes beyond the constitutional functions of the courts of the Republic of Armenia.

The Constitutional Court in the present case, mutatis mutandis, also considers acceptable the legal position expressed in Decision DCC-1063, according to which "... an appeal in court of such decisions outside the legislative framework in the conditions of the current judicial system provided for by the Constitution of the Republic of Armenia may be interconnected with the provisions of part 1 Article 92 of the RA Constitution. This is due to the fact that the Judicial Council mainly consists of acting judges from various parts of the judicial system of the Republic of Armenia, including the Court of Cassation of the Republic of Armenia. Under such conditions, such a court is not provided for in the system of courts of general jurisdiction and specialized courts, the status of judges of which will be higher than the status of judges of the Court of Cassation of the Republic of Armenia. In this regard, the Constitutional Court considers it necessary to recall also paragraph 5 of the Decree of November 28, 2007 DCC-719, where the Constitutional Court considered unacceptable the possibility for a judge, at one or lower state-power level, to consider applications to challenge the actions (inaction) of the chairman the same court or higher judges. The Constitutional Court considers that such a position is equally applicable to decisions of the Council of Justice that are the subject of consideration. "

4.7. Considering the ban on appealing against decisions of the Supreme Judicial Council on disciplining a judge, the Constitutional Court considers it necessary to establish whether the existing legal regulations provide for sufficient guarantees under which the rights of a person to judicial protection and a fair trial can be ensured. This issue should be considered in the context of the constitutional status of the Supreme Judicial Council, the formation procedure, principles and procedures of the Supreme Judicial Council.

In the judgment of the Saghatelyan v. Armenia case, the European Court of Human Rights, referring to cases where such disputes to which Article 6 of the Convention applies, are settled by bodies other than the courts, noted that "The Convention requires at least one of the following systems: bodies with the relevant competence either satisfy the requirements of paragraph 1 of article 6 themselves or even if they do not completely satisfy, but are subject to additional control by such a judicial body, which has full competence and provides guarantees of

paragraph 1 of article 6 (see, Albert and Le Compte v. Belgium, 10 February 1983, § 29, Row A number 58)".

The European Court of Human Rights further noted that "the Court must examine whether the Council of Justice could be considered an "independent and impartial court ", as required by Article 6 § 1.

The court stated that in order to determine whether the court can be considered "independent" within the meaning of Article 6 § 1, it is necessary to take into account, inter alia, the procedure for appointing its members and their term of office, the existence of guarantees against external pressure and the issue whether the body is perceived as an independent. Regarding the issue of "impartiality", this requirement has two aspects. Firstly, the court must be subjectively free from personal prejudice or bias. Secondly, the court must be objectively impartial, that is, it must provide sufficient guarantees in order to exclude any legitimate doubts in this regard. The concepts of independence and objective impartiality are closely related and the Court often considers them together (Findlay v. The United Kingdom, February 25, 1997, § 73; Reports on decisions and judgments 1997-I; Brudnicka and Others v. Poland, application no. 54723/00, § 38, ECHR 2005-II). "

In other words, the right enshrined in the first part of Article 6 of the Convention is guaranteed not by the possibility of appealing the relevant decision and the number of relevant judicial instances, but by the status of the authority (court) making this decision. If this body does not meet the criteria of an "independent and impartial court", then the acts issued by it must be subjected to additional verification by a court that meets the specified criteria. Consequently, in cases where the case was initially considered by a body that meets the criteria for an "independent and impartial court" established by the first part of Article 6, the inability to appeal the acts issued by these bodies does not in itself constitute a violation of the right to judicial protection.

According to article 173 of the Constitution, the Supreme Judicial Council is an independent state body that guarantees the independence of courts and judges, and according to paragraphs 7 and 8 of part 1 of Article 175, the Supreme Judicial Council decides on disciplining a judge, as well as on the termination of powers of judges. Согласно части 2 той же статьи According to part 2 of the same article, the Supreme Judicial Council, in the event of

consideration of the issue of bringing a judge to disciplinary liability, as well as in other cases established by the Judicial Code, acts as a court.

The Constitution provided the Supreme Judicial Council with a decisive role in the appointment of judges (Article 175 of the Constitution). According to paragraph 4 of Article 175 of the Constitution, other powers and procedures for the activity of the Supreme Judicial Council are established by the Judicial Code.

According to article 174 of the Constitution, the Supreme Judicial Council consists of ten members. The five members of the High Judicial Council are elected by the General Assembly of Judges from among judges with at least ten years of experience as a judge. Moreover, judges from the courts of all instances should be included in the Supreme Judicial Council. In addition, a member elected by the General Assembly of Judges cannot be the chairman of the court or the chairman of the chamber of the Court of Cassation.

The National Assembly shall be elected by five members of the Supreme Judicial Council by at least three fifths of the total number of deputies from among legal scholars and other reputable lawyers who are citizens of only the Republic of Armenia, have the right to vote, have high professional qualities and have at least fifteen years of experience in the profession. A member elected by the National Assembly cannot be a judge.

Members of the Supreme Judicial Council are elected for a five-year term - without the right to re-election. The Supreme Judicial Council shall, for a period and in the manner established by the Judicial Code, elect from among its members the chairman of the Council - alternately from the members elected by the General Assembly of Judges and the National Assembly.

Guarantees ensuring the independence and impartiality of the activities of the Supreme Judicial Council are also enshrined in the Judicial Code. In particular, members of the Supreme Judicial Council who are not judges are also limited by the rules of conduct established for judges (part 2 of Article 66), for them, as well as for judges, the corresponding oath is required by the Law upon assuming office (part 2 Section 82). The Code establishes the requirements for incompatibility for members of the Supreme Judicial Council elected by the National Assembly and guarantees for their activities (Article 83).

The Code also governs in detail the procedure for the election by the General Assembly of judges-members of the Supreme Judicial Council (Article 76). Article 86 of the Code is devoted

to the regulation of relations connected with the suspension and termination of powers of members of the Supreme Judicial Council, which provides for practically the same regulation for judges in general, both in terms of grounds and procedures.

4.8. As for the guarantees provided in terms of the principles and procedures of the Supreme Judicial Council, their main source is part 2 of article 175 of the Constitution, according to which the Supreme Judicial Council, in the event of consideration of disciplinary proceedings against a judge, as well as in other cases established The Judicial Code acts **as a court in the sense** that the procedure for the formation and activities of an independent state body acting as a court must comply with the relevant characteristics characteristic of the courts.

The Constitutional Court, in relation to the term "acting as a court", referring to the Council of Justice, which operates earlier, in its Decision of December 18, 2012, DCC -1063 expressed the following position: ".... The Constitutional Court considers that the term "acting as a court" should imply **the order of activity of the Council of Justice, and not its functional role as a court administering justice**. This is also ascertained by part 1 of Article 158 of the RA Judicial Code, according to which "the norms of the Code of Administrative Procedure of the Republic of Armenia are applied to the procedure for considering cases in the Council of Justice when acting as a court, since they are inherently applicable to the consideration of cases in the Council of Justice and are not contrary to the provisions of this Code. "

The relevant provisions regarding the procedure for the High Judicial Council in cases where it acts as a court are outlined in chapter 15 of the Code. In particular, in articles 90 and 92 of the indicated chapter the organizational forms and methods of activity of the Supreme Judicial Council are established. In accordance with them, the Supreme Judicial Council carries out its activities through meetings. The sessions of the Supreme Judicial Council are open when it acts as a court, except when these hearings, by decision of the Supreme Judicial Council, are held in closed session - in order to protect the privacy of participants in proceedings, the interests of justice, as well as state security, public order or morality, or when the judge filed such a motion. In these cases, a meeting of the Supreme Judicial Council is competent in the presence of at least two-thirds of the total number of members.

Decisions adopted by the Supreme Judicial Council as a court shall be taken by at least two-thirds of the votes of the total number of members of the Council in the deliberation room - by open vote. These decisions are signed by all members present at the meeting and are subject

to publication on the official website of the judiciary, with the exception of decisions containing secrets protected by law. Decisions of the Supreme Judicial Council, adopted by the court, shall also be published in the manner prescribed for the publication of by-laws of the Republic of Armenia.

A member of the Supreme Judicial Council may submit a dissenting opinion regarding the reasoning or resolution of the decision adopted by the Supreme Judicial Council as a court. If a member of the Supreme Judicial Council has a dissenting opinion, then a record is signed about it in the decision of the Supreme Judicial Council, and a dissenting opinion is signed with his/her signature to the decision (Article 94 of the Code).

The relevant guarantees and regulations that are characteristic of the procedural procedures in cases of bringing a judge to disciplinary liability are also set out in Articles 143-158 of the Code. Their separate provisions are devoted to the duty of proof (the duty to prove the existence of a judge to disciplinary liability is borne by the body that instituted the disciplinary proceedings), the presumption of innocence (Article 143 of the Code), the time limits for initiating proceedings in order to bring to disciplinary proceedings and the time limits for considering such cases (Article 144 and 150 of the Code), bodies authorized to initiate disciplinary proceedings (commission on disciplinary matters, Minister of Justice) (Article 145), motives for initiating disciplinary proceedings (Article 146 of the Code), the course of consideration of such cases, in particular the rights and obligations of a judge (his/her right to be heard, the right to get acquainted with the case materials, make extracts, receive copies of them, ask questions and give explanations, present objections, present evidence, participate in a meeting, speak in person or through a lawyer, etc.), issues of evidence research, rules for completion of examinations the refusal of the case and the announcement of the decision, the framework for the consideration of the case (the obligation to consider the case exclusively within the disciplinary violation specified in the decision on the application of the relevant application / Articles 151-153 /), the rules for the adoption and announcement of the decision on bringing the judge to disciplinary liability and the requirements to these decisions (Articles 154-155), the grounds and procedure for reviewing the decisions of the Supreme Judicial Council on the issue of bringing a judge to disciplinary liability due to newly discovered or new circumstances (Article 157), etc.

Despite the presence of the above provisions in the Code, the remaining regulations necessary for the Supreme Judicial Council to act as a court are completed in the Appendix

approved by the Decree of the Supreme Judicial Council of June 4, 2018 No. 13-Ո-24 “On the Approval of the Rules of the Supreme Judicial Council of the Republic of Armenia ”, according to paragraph 107 “at the stage of considering the issue of disciplining, the Council, acting as a court, is guided by the norms of the Code of Administrative Procedure of the Republic of Armenia as much as they are inherently applicable to the consideration of the issue of disciplinary liability in the Council". From the above provision, among other things, it follows that all the guarantees that exist when considering a case in administrative proceedings (which, for example, include the principle of clarifying the actual circumstances of the position, the rights and obligations of the parties in administrative proceedings), also apply in cases of consideration the issue of bringing a judge to disciplinary liability.

The Constitutional Court considers that the issue of finality of decisions of the Supreme Judicial Council in cases when it acts as a court can be resolved not only by interpreting the text of the relevant provisions of the Constitution, but also by means of their genealogical interpretation.

In particular, the justification for amendments to the Constitution of 2015 clearly expresses the idea that the right granted to the President of the Republic not only to terminate the powers of a judge, but also to make a final decision on his/her detention and prosecution as an accused as a result of amendments to the Constitution of 2005 was provided **only** to the Supreme Judicial Council. In addition, it was specifically emphasized in the same justifications that “the content of the powers of the (Supreme Judicial) Council is significantly different from the content of powers enshrined in the current Constitution. Thus, the Council has a decisive role in the appointment of judges, including court presidents. At the same time, the format for the partial restriction of the independent powers of the Council was chosen on the issue of appointing judges, and the format for full independence on the issue of business trips, relocation and especially the disciplinary responsibility of judges. **This is especially important from the point of view of constructing the Council as the highest disciplinary body, the decisions of which must be final and not subject to appeal ”(**highlighted by the Constitutional Court).

Thus, summarizing all of the above, in particular the analysis and excerpts regarding the powers, the procedure for the formation and principles of the Supreme Judicial Council, the Constitutional Court considers that in cases where the Supreme Judicial Council acts as a court in cases involving a judge to disciplinary liability, the Constitution and other laws provide for

procedural guarantees typical of courts, such as, for example, considering a case within a reasonable time, equality of all before the law and the court, publicity of judicial proceedings, binding judiciary acts, which are generally aimed at ensuring the exercise of the rights provided for in articles 61 and 63 Constitution.

At the same time, it should be noted that the judge brought to disciplinary responsibility is not deprived of the possibility of challenging the constitutionality of the norm applicable to him/her by the decision of the Supreme Judicial Council (which was the case in the present case), and in case of violation of the European Convention on Human Rights and Fundamental Freedoms - the possibility of applying to the European Court of Human Rights.

Based on the foregoing, the constitutional status of the Supreme Judicial Council, the procedure for its formation and principles of activity, the **Constitutional Court considers that failure to provide for judicial review of the decisions of the Supreme Judicial Council on disciplining a judge follows from the existing constitutional legal regulations and does not violate the person's right to judicial defense and fair trial.**

Based on the review of the case and governed by clause 1 of article 168, article 169 and article 170 of the Constitution, articles 63, 64 and 69 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To recognize clause 2 of part 6 of article 142 of the Constitutional Law "Judicial Code of the Republic of Armenia" as contradicting articles 78 and 79 of the Constitution and invalid.

2. Part 7 of article 155 of the Constitutional Law "Judicial Code of the Republic of Armenia" is conformity with the Constitution.

3. Pursuant to part 2 of article 170 of the Constitution this Decision is final and enters into force upon its promulgation.

CHAIRMAN **H.Tovmasyan**

15 November 2019

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