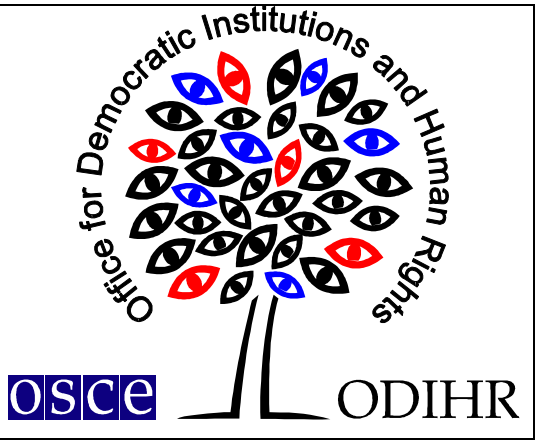
Warsaw, 18 November 2009 Opinion-Nr.: JUD-ARM/147/2009 (AT) www.legislationline.org	

Opinion

On the Draft Law of the Republic of Armenia on Introduction of Changes and Amendments in the Republic of Armenia's Judicial Code

based on an English translation of the draft law provided by the OSCE Office in Yerevan.

This Opinion has benefited from the contribution made by Professor Karoly Bard, Pro-Rector for Hungarian and EU Affairs and Chair of the Human Rights Program of the Central European University in Budapest, Hungary

Aleje Ujazdowskie 19 PL-00-557 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

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1. INTRODUCTION

1. *In 2009, the Armenian Ministry of Justice developed and circulated a draft Law on the Introduction of Changes and Amendments in the Republic of Armenia's Judicial Code (hereinafter "the Draft"). The Draft was sent to various institutions and courts in Armenia, including the Armenian Cassation Court.*

2. *On 3 October 2009, the Chairman of the Cassation Court sent a letter to the Head of the OSCE Centre in Yerevan, in which he asked the OSCE to provide legal expertise on the contents of the Draft, which he enclosed. In particular, the Chairman of the Cassation Court expressed his concern that certain provisions of the Draft could run counter to the principles of independence of the judiciary and the separation of powers.*

3. *The OSCE Centre in Yerevan thereupon forwarded the request for legal expertise to the OSCE ODIHR. This Opinion is provided as a response thereto.*

2. SCOPE OF REVIEW

4. The scope of the Opinion covers only the above-mentioned draft Law on the Introduction of Changes and Amendments in the Republic of Armenia's Judicial Code, which was submitted for review. Therefore, the Opinion does not constitute a full and comprehensive review of all framework legislation on the judiciary in the Republic of Armenia. Instead, it focuses on the planned amendments to the Armenian Judicial Code (hereinafter "the Judicial Code" or "the Code") and its impact on the independence of the judiciary and the separation of powers.

5. The Opinion is based on an unofficial translation of the Draft. Errors from translation may result.

6. In view of the above, the OSCE ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the Draft that the OSCE ODIHR may make in the future.

3. EXECUTIVE SUMMARY

7. In order to ensure the compliance of the Draft with international standards and obligations to which the Republic of Armenia is signatory and has committed, it is recommended as follows:

   A. To specify the types (categories) of decisions that will not be published according to Article 68 of the Judicial Code as created by Article 1 of the Draft; [par. 12]
   B. To introduce, as an alternative to Article 2 of the Draft, a provision prohibiting members of the Judicial Council from taking part in any

discussions or decisions concerning or affecting close relatives; [par. 14]

C. To include definitions of the terms "relatives", "family members" and "close relatives" in the Draft or that reference is made to relevant definitions in other laws; [par. 15]
D. To amend Article 6 of the Draft so that in exceptional cases, judges who are defendants in disciplinary hearings may request that hearings be held in camera; [par. 21]
E. In the case that Article 9 of the Draft is adopted to allow the Minister of Justice to request the initiation of disciplinary proceedings, it is recommended for the Code to ensure that the decision on this is left to a judicial body. The Code may also allow the Minister of Justice to open a disciplinary case, but ensure that a judicial body carry out the investigation and decide on the sanctions. [par. 27, 28, 29]

4. ANALYSIS AND RECOMMENDATIONS

8. The independence of the judiciary and the separation of powers are two principles that form the cornerstone of judicial process in democratic states. Both principles together ensure that the administration of justice is concluded in a consistent, neutral and uniform way and that other interests not connected to justice and the rule of law are barred from exercising undue influence on the judiciary.

9. On an international level, the independence of the judiciary has been laid down in various human rights instruments, including the Universal Declaration of Human Rights[1] (Article 10) and the International Covenant on Civil and Political Rights[2] (hereinafter "the ICCPR") (Article 14). For most European countries, the independence of the judiciary has become an additionally binding principle after they acceded to the European Convention on Human Rights[3] (hereinafter "the ECHR") (Article 6). The OSCE participating States have committed to ensuring the independence of the judiciary in the Copenhagen Document[4] (1990), the Moscow Document[5] (1991) and the Istanbul Document[6] (1999).

[1] The Universal Declaration of Human Rights was adopted and proclaimed by the UN General Assembly on 10 December 1948: http://www.un.org/en/documents/udhr/
[2] The International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976: http://www.hrweb.org/legal/cpr.html. The Republic of Armenia ratified the ICCPR on 23 June 1993.
[3] The European Convention on Human Rights and Fundamental Freedoms was adopted by the Council of Europe on 4 November 1950 and ratified by the Republic of Armenia on 26 April 2002: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf
[4] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, par. 5
[5] Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991, III, pars. 19 and 20
[6] Istanbul Document, Istanbul, 19 November 1999, Charter for European Security: IV. Our Common Instruments, par. 45

10. At the same time, a complete separation of the judicial power is not possible in practice[7]: In many countries, the Executive Government appoints judges. The legislature provides for their salaries and pensions. It funds the activities of the courts. In such a situation, it remains important to ensure that the judiciary maintains the necessary subjective and objective independence to ensure the proper administration of justice.

11. According to the European Court of Human Rights' case law, when considering the independence of a decision-making body from the executive, it is necessary to have regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body displays an "appearance of independence"[8]. The ensuing discussion of the provisions of the Draft will thus also focus on whether they will have any influence on the Armenian judiciary's appearance of independence. Relevant provisions will for the most part be discussed in chronological order.

12. Article 1 of the Draft reformulates the current Article 67 of the Judicial Code into a new Article 68 dealing with the publication of judicial acts. This provision is important in that it guarantees the community's right to information and significantly contributes to legal certainty by providing individuals and legal entities with information on how law is applied by the courts. The current Article 67 merely states that all substantive acts (presumably these are decisions on the merits of a case) of the Cassation Court shall be published in the Official Journal of the Republic of Armenia and on the website of the judiciary. The new Article 68, as created by the Draft, provides for exceptions to this rule in cases stipulated by law. While the envisaged amendment of the Code is progressive, it is difficult to assess its practical relevance without knowing which types (categories) of decisions will not be published under the law to be adopted. It is thus recommended to specify the types (categories) of decisions that will not be published in the wording of Article 68 as created by Article 1 of the Draft.

13. Article 2 of the Draft amends Article 98 of the Judicial Code which establishes the requirements for becoming a member of the Justice Council. According to Article 95 of the Constitution of the Republic of Armenia[9] (hereinafter, "the Constitution"), the Justice Council proposes judges to the President, nominates chairmen of courts and institutes disciplinary proceedings against judges. Article 94.1. of the Constitution states that the Judicial Council shall be composed of nine judges elected by the General Assembly of Judges, two legal scholars appointed by the President of the Republic and two legal scholars appointed by the National Assembly.

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[7] See the speech of the Hon Justice Michael Kirby AC CMG at the Hong Kong Conference (12-14 June 1998) of the International Bar Association's Human Rights Institute on the Independence of the Judiciary – Basic Principle, New Challenges: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_abahk.htm

[8] See, instead of others, the Court's judgment in the case of *Lauko v. Slovakia* of 2 September 1998, no. 4/1998/907/1119, par. 63.

[9] The Constitution of the Republic of Armenia (with amendments), adopted on 5 July 1995

14. Article 2 adds a third paragraph to Article 98 whereby a person whose close relative works as a judge may not be an academic member of the Council. As a consequence of this, Article 4 of the Draft amends Article 102 of the Code to the effect that in such a case, the membership of an academic member of the Council shall be considered terminated. Ideally, provisions aiming at avoiding a conflict of interest or incompatibility should be extended to all members of the Council, not only its academic members. This, however, would exclude a disproportionately high number of judges from membership in the Council. At the same time, a family relationship with a judge should not *a priori* prevent a worthy individual from becoming a member of the Judicial Council. Thus, as an alternative to the amendment suggested by Article 2, it is recommended to introduce to the Draft a provision prohibiting any member of the Council from taking part in any discussions or decisions concerning or affecting his/her close relatives.

15. Furthermore, it appears problematic that there is no definition of "close relatives" in the Judicial Code and in the Draft. In Article 95 of the Code on what kind of gifts the judge may and may not accept, the terms "relative" and "family members" are used, but also this provision does not include a definition of who qualifies as a family member or relative. Therefore, it is recommended that definitions of the terms "relatives", "family members" and "close relatives" are included in the Code through the Draft or that reference is made to relevant provisions of other laws (Civil Code, Criminal Code, Code of Criminal Procedure, etc.) where such terms are defined.

16. Article 3 of the Draft amends Article 99 of the Code on the procedure of electing judges to the Judicial Council. Contrary to the current text of the Code, the amended provision would now imply that a judge who discontinues his/her activity as a judge after the court he/she has served on ceases to exist may not retain his/her membership in the Justice Council. Such a provision appears reasonable since it is aimed at maintaining a proportionate balance of judges and non-judges within the Council as envisaged by the legislator.

17. Article 5 of the Draft amends Article 103 of the Code on the "term of powers" of members of the Justice Council to the effect that "the powers of [a] judge shall be discontinued during the entire course of the implementation of the powers of the Justice Council member". If understood correctly, this means that while they are members of the Justice Council, judges may not exercise judicial functions. In this context, it should be noted that there is no international common standard addressing this issue. In some countries, judges who are members of such a council may continue their work as judges, in other states such as Belgium they may not be appointed to a leading position in the judiciary or the prosecution service[10]. Thus, the solution envisaged in the Draft does not raise any concerns in light of international standards.

18. Article 6 of the Draft amends Article 109 on the procedure of examining (disciplinary) matters in the Justice Council to the effect that all sessions of the

[10] See the paper prepared by *Martine Valdes-Boulouque* on the Judicial Service Commissions in Council of Europe member states prepared for the Consultative Council of European Judges, CCJE(2007) 3, Strasbourg, 19 March 2007

Council shall be closed except in cases involving disciplinary sanctions against judges. The current version of Article 109 states that, additionally, disciplinary proceedings against judges will proceed in camera, unless the judge concerned demands a public hearing. This reflects the view that publicity is a right exclusively vested in defendants and that it is therefore for them to decide whether to make use of this right or waive it. International documents on judicial independence do not provide clear guidance on the public nature of disciplinary proceedings. The 1985 UN Principles on the Independence of the Judiciary[11] take a cautious approach when stating that the examination of such matters at their initial stage shall be kept confidential, unless otherwise requested by the judge. While the Council of Europe recommendation of 1994[12] invokes the due process rights set forth in the ECHR that should be provided for in disciplinary proceedings, it merely refers to the right to be heard within a reasonable time and the right to answer any charges.

19. The fair trial rights guaranteed by Article 6 of the ECHR (and the equivalent provisions in Article 14 of the ICCPR) apply to proceedings involving the determination of civil rights and obligations or criminal charges against individuals. Recent jurisprudence of the ECtHR indicates that if there is a national judicial council that constitutes an independent and impartial tribunal established by law[13], disciplinary proceedings against judges are covered by Article 6[14]. Article 6 states that everyone is entitled to a public hearing but adds that the press and the public may be excluded from all or part of a trial "in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice".

20. The wording of Article 6 clearly implies that the public nature of a trial should be the rule and that excluding the public from court hearings should only be permitted under exceptional circumstances. However, in cases where a defendant requests a private hearing, the question will arise whether a public hearing would violate his/her right to a fair hearing or his/her right to privacy

[11] U.N. Basic Principles on the Independence of the Judiciary, adopted at 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: http://www.abanet.org/rol/docs/judicial_reform_un_principles_independence_judiciary_english.pdf

[12] Recommendation No. R (94) 12 of the Council of Europe Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, adopted on 13 October 1994: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=534553&SecMode=1&DocId=514386&Usage=2

[13] See *Rolf Gustafson v. Sweden*, no. judgment of 1 July 1997, par. 45, stating that a tribunal need not be a court of law integrated with a standard judicial machinery, if other requirements apply.

[14] See *Olujic v. Croatia*, no 22330/05, judgment of 5 February 2009, pars. 31-43. See also *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007, pars. 61-62, where the ECtHR stated that if a State does not bar a public servant's access to court, then the Court will assume that Article 6 applies.

under Article 8 of the ECHR[15]. In such instances, a right to privacy claim may be outweighed by a public interest justification based on Article 8 par. 2 of the ECHR. There is also a general public interest in keeping a check on the functioning of courts[16].

21. In contrast to the ECHR and the ICCPR, the amendment proposed by Article 6 of the Draft does not envisage a closed hearing under exceptional circumstances, thereby following the general trend that gives priority to public hearings in disciplinary proceedings conducted against judges. In principle, there may be cases where the protection of the rights of the judge to private life would call for excluding the public. At the same time, it may be argued that judges exercise public functions and, as set forth in Article 89 par. 3 of the Code, must "in any activity anywhere avoid conduct that undermines the reputation of the judiciary or is inappropriate, and must also avoid leaving the impression of such conduct." It could thus be concluded that judges may not invoke their privacy rights and demand a public hearing when subjected to disciplinary proceedings. In summary, while the envisaged amendment to Article 109 of the Code is in line with general human rights standards, it is nevertheless recommended that in exceptional cases, the judge in question may request that disciplinary hearings against him/her be closed (held in camera).

22. Article 9 of the Draft amends Article 155 of the Code on how to instigate disciplinary proceedings against a judge by permitting disciplinary proceedings against a Cassation Court judge and chamber chairman to be initiated by the Minister of Justice. So far, this right was restricted to the Cassation Court Chairman and the Disciplinary Committee of the Justice Council, upon motion by the Ethics Committee of the Council of Court Chairmen. The Minister of Justice was permitted to instigate disciplinary proceedings against first instance and appellate court judges, but not against Cassation Court judges.

23. Applicable international documents do not specify who should be authorized to initiate disciplinary proceedings against judges, but focus instead on the composition of the body rendering the decision on the merit of the case and related procedural guarantees. The UN Basic Principles on the Independence of the Judiciary[17] proclaim that "it is the duty of all government and other institutions to respect and observe the independence of the judiciary" (par. 1). As for discipline and the suspension and removal of judges, the Basic Principles merely stipulate that a "charge or complaint made against a judge […] shall be processed fairly and expeditiously under an appropriate procedure. Judges shall have the right to a fair hearing." (par. 17). The Council of Europe Recommendation on the Independence, Efficiency and the

[15] David Harris, Michael O'Boyle, Ed Bates and Carla Buckley: Harris, O'Boyle & Warbrick: Law of the European Convention of Human Rights, Oxford University Press, 2nd edition, Oxford, 2009, p. 273. See also the ECtHR judgment in the case of V v the United Kingdom, 16 December 1999, pars. 85-91 (the publicity of a criminal procedure against a child).
[16] Harris, O'Boyle, Bates and Buckley: Harris, O'Boyle &Warbrick: Law on the European Convention on Human Rights, p. 273
[17] See footnote 10

Role of Judges of 1994[18] calls upon Member States to establish by law a special competent body which has the task to apply disciplinary sanctions, where they are not dealt with by a court. The Council of Europe Recommendation also stresses the importance of the observance of basic fair trial guarantees. A recent Council of Europe document still under elaboration and envisaged to replace the 1994 Recommendation[19] also limits itself to declaring that "in the event of disciplinary offences all measures which do not prejudice judicial independence should be taken".

24. The functional independence of courts and judges means, inter alia, freedom from interference by the executive and the legislative powers. However, functional independence is not automatically and necessarily infringed if the Minister of Justice is vested with certain administrative responsibilities. The provisions on disciplinary proceedings adopted by European states indicate that there are numerous countries where the Minister of Justice is authorized to initiate disciplinary proceedings[20]. However, this is usually not the case in those states which, like the Republic of Armenia, have established independent bodies to deal with the administrative matters of courts (including disciplinary matters) as an alternative control mechanism to that of the executive. Thus, in Hungary, which has a strong independent Judicial Council, the Minister of Justice has no authority to initiate disciplinary proceedings. Instead, it is the president of the court on which the judge serves who may initiate such proceedings. In cases involving judges who have been appointed by the Judicial Council, such as presidents of county courts, only the Judicial Council may institute criminal proceedings.

25. In Bulgaria, also a country with a powerful judicial council, the Minister of Justice may institute disciplinary proceedings against judges, but the investigation is conducted by five members of the Supreme Judicial Council[21]. The approach adopted in Romania is similar in that the initiative for disciplinary action rests with the Minister of Justice (except in cases involving judges serving on the Supreme Court), but the investigation is carried out by judges. In Poland, the Minister of Justice may not institute disciplinary proceedings against judges of the Supreme Court (having jurisdiction of a Cassation Court)[22], however may only submit a request for institution of or review of disciplinary proceedings against judges of ordinary courts to the disciplinary spokesman who is a judge.[23]

26. In several countries, the relevant legislation foresees special disciplinary proceedings against judges serving on higher courts, due to the particular

[18] Principle IV par. 3 of the Recommendation, see footnote 11
[19] Revised draft recommendation with comments inserted in track changes. Group of Specialists on the Judiciary (CJ-SD-JUD), Strasbourg, 13 October 2009. CJ-S-JUD (2009) 10 rev commented.
[20] E.g. the Republic of Latvia (see Article 1 of the Judicial Disciplinary Liability Law, adopted on 27 October 1994), also the Czech Republic (see the Supreme Court's questionnaire on the liability of judges: http://www.npsjceu.org/IMG/pdf/reponse_republique_tcheque-3.pdf)
[21] See Articles 312 and 318 of the Bulgarian Judiciary System Act, SG no. 64, promulgated on 7 August 2007
[22] Chapter 5 of the Law on the Supreme Court of the Republic of Poland, 2002 Official Journal Nr 240 z 2002 r., poz. 2052
[23] Art. 114 of the Law on Courts of the republic of Poland, 2001 Official Journal Nr 01.98.poz 1070

functions performed by such courts and their competence to issue decisions that are binding on all other courts. As mentioned above, the Minister of Justice in Romania is authorized to initiate disciplinary proceedings against all judges except for Supreme Court judges. In Lithuania, there is a Court of Honour of Judges that hears actions brought against judges and a separate Court of Honour of Supreme Court Judges.

27. In light of the solutions adopted by the above legislators, the amendments proposed by Article 9 of the Draft raise certain concerns in particular since, according to Article 156 of the Code, the authority which instigated the disciplinary proceedings also carries out the investigation. This means, that following the proposed amendments to the Code the Minister of Justice would be permitted not only to instigate proceedings but also investigate the conduct of Cassation court judges. It is recommended therefore to reconsider whether the proposed amendment would not therefore confer the Minister of Justice with excessive powers. For this reason, it is further recommended that in the event that the Minister of Justice is indeed vested with the power to instigate disciplinary proceedings, the Code should ensure that the investigation is conducted by a judicial body.

28. Additionally, the amended version of Article 155 would no longer distinguish between Cassation Court judges and other judges, thereby not taking into account the special competences of the former. While certain OSCE participating States have limited the influence of the executive in disciplinary cases involving judges or have made distinctions between judges and higher court judges, there are no international standards that would require this. It thus cannot be said that the planned amendment of the Code would infringe the Cassation Court judges' judicial independence. Also, it should be borne in mind that in order to allay any suspicion of "in-group bias" and enhance confidence in the judiciary, it may be beneficial to allow persons or institutions outside the judicial branch to initiate disciplinary proceedings. In this way, all parts of the judiciary will submit to outside scrutiny and will be able to maintain the appearance of independence.

29. However, it is recommended that notwithstanding which body initiates the proceedings against certain judges, it should always be the Justice Council that carries out the investigation and decides on the sanctions.

30. Nevertheless, it is possible that extending the powers of the Minister of Justice to initiating disciplinary proceedings against Cassation Court judges could be perceived as a threat to judicial independence by the public community, in light of past experiences. If this should be the case, then the proposed amendment to Article 155 could undermine the overall confidence in the administration of justice. In this case, it is recommended that the legislator follow the examples set by other countries by limiting the competences of the Minister of Justice. One way could be that the Minister of Justice be granted the right to request the initiation of disciplinary proceedings, but that the decision on instituting proceedings is rendered by a judicial body. Alternatively, the decision of the Minister of Justice to initiate disciplinary

proceedings could automatically result in the opening of the case, but the investigation would be carried out by a judicial body.

[END OF TEXT]

ANNEX 1

DRAFT

THE LAW OF THE REPUBLIC OF ARMENIA
ON INTRODUCTION OF CHANGES AND AMENDMENTS IN THE RA JUDICIAL CODE

Article 1. To formulate Article 67 of the Judicial Code of the Republic of Armenia from 21 February 2007 (hereinafter referred as "The Code") in the following edition:

"ARTICLE 68. PUBLICATION OF THE JUDICIAL ACTS

1. Substantive judicial acts are mandatory published in the official website of the judiciary of the Republic of Armenia, except the cases stipulated by the Law.
2. Substantive judicial acts of the Cassation Court are subject to mandatory publication also in the "Official Journal of the Republic of Armenia".
3. The Council of Court Chairmen shall define the procedure for publishing judicial acts in the official website of the judiciary of the Republic of Armenia".

ARTICLE 2. To add Article 98 of the Code with the following new content with Part 3:

"3. The person who has a close relative judge may not be an academic member of the Justice Council".

ARTICLE 3. Remove the words "stops exercising his judge powers due to the elimination of his court" from Part 3 of Article 99.

ARTICLE 4. To add Part 1 of Article 102 of the Code with the following new content with Paragraph 4:

"The circumstance envisaged in Part 3 of Article 98 of this Code has emerged".

ARTICLE 5. To add Part 1 of Article 103 of the Code with the following new sentence:

"The powers of the judge shall be discontinued during the entire course of the implementation of the powers of the Justice Council member".

ARTICLE 6. To formulate Part 2 of Article 109 of the Code with the following edition:

"2. The sessions of the Justice Council are closed, except the cases of imposing of a disciplinary sanction against a judge".

ARTICLE 7. Article 111 of the Law:

1) To add the words “immediately after the session” after the words “are adopted”;
2) To add Part 6 with the following content with a new sentence:

“In adopting a decision envisaged in this Part, the Justice Council member may present a special opinion which is published with the Justice Council decision”.

ARTICLE 8. To add the Code with the following content in new 111.1 Article:

“ARTICLE 111.1 THE LIMITATIONS ENVISAGED FOR THE SESSION PRESIDING PERSON DURING THE JUSTICE COUNCIL SESSIONS

1. The session presiding person has no right to ask questions to the reporters, express his/her opinion during the voting or direct the Justice Council in any other way.
2. In case of adopting decisions envisaged in Part 5 of Article 111 of this Law the session presiding person has no right to be present in the consultative room”.

ARTICLE 9. To add Part 2 of Article 155 of the Code with the following content with the new 1.1 Paragraph:

“1.1) The Minister of Justice””.

ARTICLE 10.

This Law shall come into force on the 10th day following its official publication.