

EUROPE IN LAW ASSOCIATION, NGO



**PUBLIC
OVERSIGHT
OVER THE PROCESS
OF ELECTION
OF JUDGES AT THE
CONSTITUTIONAL
COURT OF THE
REPUBLIC
OF ARMENIA**

PRELIMINARY REPORT

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P R E L I M I N A R Y R E P O R T



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BACKGROUND

Since April 2018 the NGO Europe in Law Association (hereinafter: also the ELA) has been monitoring the process of election of judges at the Constitutional Court of the Republic of Armenia in the framework of its efforts directed at strengthening the Armenian judiciary and contributing to judicial reform.

The monitoring methodology implies study of the publications, including statements, interviews, speeches, etc. that the stakeholders of the election process have made since April 2018 and their assessment in the light of the standards of openness, transparency, objectiveness and fairness of the process.

The Constitutional Court of Armenia is the sole judicial instance administering constitutional justice and adjudicating on the disputes related to election results. It consists of 9 judges. Under the amended RA Constitution (adopted on 6 December 2015), the nominations for the position of the judges at the RA Constitutional Court are made by three bodies, namely the RA President, the

General Assembly of Judges and the Government,¹ consecutively. In order to be elected as a judge at the RA Constitutional Court, the candidate must be a national of Armenia solely, be 40 and more, have a university degree, possess high personal and professional qualities, including at least 15 years of professional experience².

ON THE NOMINATION OF THE CANDIDATE FOR THE JUDGE AT THE CONSTITUTIONAL COURT BY THE RA PRESIDENT

After Gagik Harutyunyan, had left his office as the President of the Constitutional Court in March 2018 with a view to being elected as member of the newly-created Highest Judicial Council, it was the turn of the President of Armenia to make a nomination for the vacancy of a judge at the RA Constitutional Court.

On 26 April 2018 President Sargsyan nominated Mr Emil Babayan to the Parliament for the position of a judge at the RA Constitutional Court. The ELA joined by around 30 other prominent civil society organisations criticized this nomination, relying on the lack of transparency and openness of the process of nomination and calling on the President to recall this nomination and to nominate a candidate to this important highest judicial position through an open, transparent and fair procedure. Alternatively, the civil society organisations called on the Armenian legislature not to vote for the presidential nominee should the latter decide not to recall the nomination³. In addition to the problematic procedure

1 RA Constitution, Article 213

2 RA Constitution, Article 165(1)

3 http://www.ela.am/index.php?route=news/article&news_id=172

of nomination, ELA saw a problem in the compliance of the CV of the above nominee with the constitutional requirements for the position of the judge at the Constitutional Court of Armenia⁴.

Despite the fact that President Sargsyan failed to recall Emil Babayan's candidature, the latter did not get the 3/5 of the votes in the parliament on 4 May 2018 to be nominated as judge at the RA Constitutional Court. The stated reason for non-election, according to various parliamentarians was the failure to nominate the candidate through an open, transparent and fair procedure⁵. Under the Armenian law on the Rules of Procedure of the National Assembly, the new candidate had to be nominated by the competent body within 10 days following the first voting (Article 141(8)).

On May 13, 112 practicing lawyers and 25 civil society organisations issued a statement calling on the President to establish a consultative commission composed of highly reputable legal specialists to nominate a candidate for the position of a judge at the RA Constitutional Court through an open, transparent, objective and fair procedure⁶.

On 18 May 2018, President Sargsyan in response to the concerns and recommendations expressed by civil society organisations and lawyers, declared that on 17 May 2018 he had written to Ara Babloyan, Speaker of the National Assembly informing the latter that he would resort to a consultative procedure in the selection and nomination of the most deserving candidate for the position of a judge at the Constitutional Court of the Republic of Armenia

4 <https://www.youtube.com/watch?v=GZXafXzY0wY>

5 <https://www.azatutyun.am/a/29208084.html>

6 http://www.ela.am/index.php?route=news%2Farticle&news_id=173

to the Armenian parliament⁷. This was very much appreciated by the civil society and specialist legal community⁸.

On 20 May 2018, more than 200 practicing lawyers recommended the candidature of Mr Vahe Grigoryan, a practicing lawyer and a member of the Armenian Bar to the RA President⁹. On 21 May 2018, 2 members of the Armenian Bar reported about pressure on certain lawyers that had recommended Mr Vahe Grigoryan by individuals from the circles close to Mr Hrayr Tovmasyan, the incumbent President of the RA Constitutional Court¹⁰. This resulted in one lawyer recalling her signature from the list. ELA expressed serious concerns about such phenomena and called on the concerned parties to stop all types of pressure on the members of the Armenian bar.

On 1 June 2018, in a written response to the query from the media outlet "Liberty," the President informed that he was going to apply to the RA Constitutional Court to seek a decision on the constitutionality of paragraphs 3 and 8 of Article 141 of the RA Constitutional Law on the Rules of Procedure of the National Assembly prescribing a 10-day time-limit for the nomination of a new candidate by the the competent body to the National Assembly once the candidate nominated by the former does not get the required number of votes in the parliament. In addition to this, the President informed that he had decreed the establishment of a temporary working group to provide him with opinions on the

7 <https://www.aysor.am/am/news/2018/05/17/>

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8 <https://www.youtube.com/watch?v=nmiPO4e8X0s>

9 <http://www.ilur.am/news/view/68249.html>

10 http://www.ela.am/index.php?route=news%2Farticle&news_id=177

candidates for the position of a judge at the RA Constitutional Court, which he would take note of in making a nomination to the RA National Assembly.¹¹ However, it was not until 11 June 2018 that the President adopted an order authorizing the establishment of the working group and establishing the procedure for applying for the position of the judge at the RA Constitutional Court and for providing opinions to the RA President by the members of the working group¹².

Despite the fact that on 18 May 2018 the RA President announced publicly about his intention to nominate the candidate through a consultative procedure, he failed for quite a while to take any steps in the direction of fulfilling his promise. On 5 May 2018, ELA expressed concerns about the fact that there still was a vacancy for the position of the judge at the RA Constitutional Court and that within a month following the failure by the presidential nominee to succeed in the parliament, the President took no active and visible steps to nominate a new candidate.¹³

On 18 June 2018, the President adopted another order approving the composition of the consultative working group¹⁴. The temporary consultative working group was thus composed of:

1. Emil Tarasyan, representative of the RA President and head of the working group;
2. Gevorg Danielyan, representative of the Highest Judicial Council (upon consent);

11 <https://www.azatutyun.am/a/29265639.html?nocache=1>

12 <http://www.president.am/hy/Directives/item/4579/>

13 http://www.ela.am/index.php?route=news%2Farticle&news_id=181

14 <http://www.president.am/hy/Directives/item/4594/>

3. Nina Pirumyan, representative of the Human Rights Defender (upon consent);
4. Anna Vardapetyan, representative of the Minister of Justice (upon consent);
5. Samvel Dilbandyan, representative of Yerevan State University (upon consent);
6. Anahit Manasyan, representative of the Academy of Justice (upon consent);
7. Levon Gevorgyan, representative of the American University in Armenia (upon consent);
8. Karin Hovsepian, representative of the French University in Armenia (upon consent);
9. Aram Vardevanyan, representative of the Armenian-Russian (Slavonik) university (upon consent);
10. Taron Simonyan, representative of the Bar Chamber of the Republic of Armenia (upon consent);
11. Vahe Yengibaryan, representative of the Union of Judges of the Republic of Armenia, NGO (upon consent);
12. Zorayr Harutyunyan, representative of the President of Armenia, barrister (upon consent).

The interviews of the applicants for the candidacy of the judge at the Constitutional Court of Armenia were appointed on 7 July 2018 at the building of the Presidential administration.

On 2 July 2018, the list of the applicants was publicized. It thus became known that there were 5 applicants for this candidacy: Mr Arthur Vagharshyan, Head of the Chair of State and Law Theory at YSU; Mr Ishkhan Nazaryan, ex chief of staff of the RA Council of Justice; Mr Babken Sahradyan, barrister, Mr Vahe Grigoryan, barrister. The fifth applicant was stated not to have given his

consent to the President to disclose his identity until the process of interviews.

On 7 July 2018, ELA made a statement¹⁵ expressing a number of reservations in respect of the composition and functions of the working group created by the President. It was stated that the working group had not been created through an open procedure. The principles and criteria on the basis of which individual members of the working group were selected were not clear. Neither were the principles for the selection of the universities and their representatives included in the working group. It was not clear why the NGO Union of the Judges of the Republic of Armenia and its representative were chosen from among all the civil society organisations operating in Armenia. The criteria underlying the choice of the representative of the Armenian Bar Chamber and the appointment of the barrister Zorayr Harutyunyan as the President's representative were unclear either. It was not clear why the President had two representatives in the working group while the rest of the institutions had only one each. One of the members of the working group, Samvel Dilbandyan was the partner of one of the applicants. Two other members, Levon Gevorgyan and Zorayr Harutyunyan recommended another applicant for this position. Another applicant was the university teacher of the majority of the working groups members in the university. The age of 7 members of the working group was below 40 and they did not meet the requirements established by the RA Constitution for the judge at the RA Constitutional Court. In addition to this, none of the members of the working group had any experience in the selection of candidates to highest judicial positions.

¹⁵ http://www.ela.am/index.php?route=news/article&news_id=184

The ELA also expressed concerns about the procedure of conducting the interviews. No procedure regulating the conduct of interviews was established and neither were any criteria set for the selection of the candidate for the judge at the RA Constitutional Court. No order for the conduct of interviews was adopted and neither were maximum time-limits set for interviewees. The regulations failed to make it clear whether the advisory opinions provided by the working group members were to be on the professional and/or personal qualities of individual applicants or any other aspects as well. As it became clear during the interview of one of the applicants, the working group members were going to check both the personal and professional qualities of the applicants despite the fact that the majority of them themselves did not meet the constitutional requirements set for the judge at the RA Constitutional Court. It was clear that the working group was not going to provide a single opinion. Rather, the individual members of the working group were to provide individual anonymous opinions to the President on each of the applicants. Hence, there were no clear principles and criteria for the President to make a choice and the choice of the candidate was once again left upon the President's complete discretion. The ELA was not provided with copies of the documentation submitted by applicants. Considering the aforesaid, ELA expressed concerns about the level of authority, independence and impartiality of the working group and concluded that the procedure whereby individual members of the working group were to provide separate and anonymous opinions to the President in the absence of the principles and criteria for providing such opinions could not be considered as sufficient and definitive for the selection of the candidate for the position of the judge at the Constitutional Court of the Republic of Armenia.

The interviews with the 5 applicants took place on 7 July 2018. It was positive that the process was open for ELA's observation mission and 3 representatives from ELA could monitor it. However, the process itself was marred by organizational and other mistakes and irregularities. First, all applicants were invited to the interview at 10am and 4 applicants had to wait for their turn outside the room dedicated for interviews for different time-periods with the last applicant having to wait for his turn for more than 3 hours. Despite the fact that the members of the working group stated that this was not to be taken as a sign of disrespect for individual applicants or the Constitutional Court, this indeed looked disrespectful. The issue was not left unnoticed by one of the candidates. Second, following the interview with the first applicant the working group members made a break in the course of which two members of the working group were discussing the responses given to their questions by the first applicant in the balcony in the presence of another applicant. Despite the fact that this exchange was in English and assuming that the applicant in questions was not fluent in English, it was very much obvious that it was about the first applicant. One of the members of the working group clearly misconceived his role and rather than posing questions to applicants and hearing their responses on the posed questions, saw the process as a clear chance for expressing himself and sometimes even lecturing certain applicants on various issues raised in his questions. This resulted in unnecessary protraction of the process and was again disrespectful of applicants, especially considering the manner in which this was being done. There was no clear procedure and order for working group members to pose questions and the questions were given in a random order for which reason some members abused the patience of others

and either kept posing more and more questions or made lengthy introductions to their questions, while others had no chance to pose questions at all. Despite the fact that the working group members decided at the start of the interviews to limit them to 30-minute periods, this arrangement was not kept for the most part and different candidates were interviewed for different time lengths. The majority of the working group members turned to be the students of the candidate teaching at Yerevan State University, which again raised doubts about the impartiality of the working group. Two members had recommended another applicant and for this reason declared that they would pose no questions to that particular applicant. However, one of them posed questions to other applicants. The working group members with very few exceptions posed different questions to different candidates and in general failed to pose at least similar questions to all candidates, which would clearly result in having no basis for comparison when giving opinions on different candidates. However, the biggest problem was the fact that the process was essentially formal and the head of the working group made it clear time and again that the President was not bound by the opinions of the working group and enjoyed full discretion in making the final nomination. This essentially meant that even though the majority of the group members might be of a positive opinion regarding one candidate, the President could finally nominate another one. Considering the aforesaid, it is very difficult to deem this procedure as a consultative one. Neither could the procedure be considered as one enjoying high authority. Finally, during the interviews the working group members were instructed to put their names on the opinions, which was contrary to the procedure established by the President.

Despite the fact that the interviews took place on 7 July 2018 and the working group members submitted their opinions two days later, the President has so far (1 August) failed to make any nomination for this position, despite the fact that the above opinions were collected and passed to the President within three days after the interviews. Therefore, it is clear that the President is not demonstrating a sufficiently serious attitude to his competence of nominating a candidate for a judge at the RA Constitutional Court and, therefore, to the Constitutional Court in general.

Despite the fact that the President has not given any clarifications on why the process of nomination of a candidate by him takes so long, it can be inferred that he is waiting for the decision of the Constitutional Court on the constitutionality of the provisions of Article 141 (3) and (8) of the RA Constitutional Law on the Rules of Procedure of the National Assembly. The Constitutional Court, in its turn, has appointed the hearing on this case in November 2018. This creates serious doubts that the current composition of the RA Constitutional Court led by its current President is protracting the process and manifests no interest in having the existing vacancies filled in within the shortest possible timeframes.

ON THE NOMINATION OF THE CANDIDATE FOR THE JUDGE AT THE CONSTITUTIONAL COURT BY THE GENERAL ASSEMBLY OF JUDGES

On 22 May 2018, the media reported about the election of the candidate for the position of a judge at the RA Constitutional Court by the General Assembly of Judges on 18 May 2018. The official news appeared on the NA website on 24 May 2018 only. There were two applicants for this position – Judge Elisaveta Danielyan from the RA Cassation Court and Judge Arman Dilanyan from the RA Administrative Court. As it became known later in answer to ELA's inquiries to both applicants and the RA Judicial Department, Judge Elisaveta Danielyan was elected by 88 votes versus 87 cast in favour of Judge Dilanyan.

In view of the fact that the second vacancy for the position of the judge at the RA Constitutional Court was to appear on 15 June 2018 once another member (after Gagik Harutyunyan) of Constitutional Court Volodya Hovhannisyan becomes 70, it was suspected that the judiciary was trying to outrun the President in nominating a candidate for the position of the judge at the Constitutional Court vacated after the departure of Mr Gagik Harutyunyan. In this light, ELA made a statement calling on the National Assembly not to

vote for the candidate nominated in violation of the constitutional procedure in a process, which absolutely lacked openness and transparency. ELA stressed the necessity for the public to be able to oversee the process of checking the personal and professional qualifications of the candidates¹⁶ However, this issue was later clarified by the response of the RA Judicial Department in answer to the inquiry made by ELA.

Incidentally, the fact that ELA had made inquiries to the RA Judicial Department was known to Ms Elisaveta Danielyan which became evident from her response to ELA's inquiries submitted to her directly. This fact was a clear manifestation of non-transparent communication between the Judicial Department and Ms Danielyan.

On 11 June 2018, ELA issued a statement expressing concerns about the nomination of Ms Elisaveta Danielyan for the position of a judge at the RA Constitutional Court to the RA parliament. In addition to criticizing the procedure for nomination, ELA was critical of the candidacy of anyone for such a high-level judicial position from the RA Cassation Court given the abundance of criticism levelled at the Cassation Court by the civil society, including the independent practicing lawyers; a number of international and domestic organization, as well as the country's Ombudsman who back in 2013 had published an ad hoc report on the state of the right to a fair trial in Armenia, in which there were serious accusations directed at the Cassation Court for their practice of establishing 'zonal' judges for "overseeing" the decisions of lower-level judges.¹⁷ ELA was also concerned about the fact that

¹⁶ http://www.ela.am/index.php?route=news%2Farticle&news_id=179

¹⁷ <http://www.ombuds.am/resources/ombudsman/uploads/files/publications/8c6ab-c664ac32d0042d7476a67b4b899.pdf>

as a judge at the RA Cassation Court Elisaveta Danielyan, besides rubberstamping the decisions of this court, made no distinctive appearance in any of the cases before this court. In particular, she never gave special/dissenting/concurring opinions on any of the cases in a period when the Cassation Court adjudicated on a number of cases that clearly raised issues of human rights violations. In some cases such violations were confirmed by the judgments of the European Court of Human Rights. ELA gave a non-exhaustive list of such cases. ELA also took note of the fact that Judge Danielyan also applied for the position of the President of the RA Cassation Court. However, she received 0 votes from the members of the Supreme Judicial Council to be nominated for the position, which essentially meant that none of the 10 members of the Supreme Judicial Council considered her qualities sufficient for this position. Considering these concerns ELA advised the parliamentarians against Ms Danielyan's candidature and called on the NA to take note of these concerns and create an opportunity for the General Assembly of Judges to select a deserving candidate by means of a transparent, open, fair and equal procedure¹⁸.

On 13 June 2018, Ms Elisaveta Danielyan made her appearance in the Armenian parliament, introduced herself and answered the questions posed by parliamentarians. Voting took place on 14 June 2018 and Ms Danielyan failed to receive the 3/5 of votes of the parliamentarians to be elected as Judge of the Constitutional Court of Armenia.

On 28 June 2018, Mr Ara Babloyan, Speaker of the RA NA announced that the General Assembly of Judges of Armenia nominated the candidacy of Mr Arman Dilanyan, Judge at the

¹⁸ http://www.ela.am/index.php?route=news/article&news_id=183

RA Administrative Court for the position of a judge at the RA Constitutional Court and that the issue of his election would be discussed by the NA on 10 September¹⁹.

The decision on nominating Judge Arman Dilanyan for this position was adopted by the General Assembly of Judges on 22 June 2018 again in a session closed for civil society members in a procedure which lacked openness and transparency.

¹⁹ http://www.parliament.am/news.php?cat_id=2&NewsID=10497&-year=2018&month=06&day=28&lang=arm