

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

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**ON THE CASE OF CONFORMITY OF PART 10 OF ARTICLE 115.2 AND PART 5 OF  
ARTICLE 117 OF THE JUDICIAL CODE OF THE REPUBLIC OF ARMENIA WITH  
THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE  
APPLICATIONS OF THE “EUROPE IN LAW ASSOCIATION” HUMAN RIGHTS  
NON-GOVERNMENTAL ORGANIZATION**

**Yerevan**

**20 June 2017**

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (Chairman), K. Balayan, A. Gyulumyan, F. Tokhyan A. Tunyan, A. Khachatryan, V. Hovhannisyan, H. Nazaryan, A. Petrosyan (Rapporteur),

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

T. Yegoryan, representative of the Applicant,

respondent: V. Danielyan, official representative of the RA National Assembly, Chief Specialist of the Department of Legal Consultation of the RA National Assembly Staff,

pursuant to Point 1 of Article 100, Point 6 of Part 1 of Article 101 of the Constitution of the Republic of Armenia (with amendments of 2005), Articles 25, 38 and 69 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a public hearing by a written procedure the Case on conformity of Part 10 of Article 115.2 and Part 5 of Article 117 of the Judicial Code of the Republic of Armenia with the

Constitution of the Republic of Armenia on the basis of the Applications of the “Europe in Law Association” Human Rights Non-Governmental Organization.

The Case was initiated on the basis of the Application submitted to the RA Constitutional Court by the “Europe in Law Association” Human Rights Non-Governmental Organization on 15 March 2017.

By the Procedural Decision PDCC-24 of April 4, 2017, the RA Constitutional Court decided to unite the Case on conformity of Part 10 of Article 115.2 and Part 5 of Article 117 of the RA Judicial Code with the Constitution of the Republic of Armenia on the basis of the Application of the “Europe in Law Association” Human Rights Non-Governmental Organization and the Case on conformity of Part 5 of Article 117 of the RA Judicial Code with the Constitution of the Republic of Armenia on the basis of the Application of the “Europe in Law Association” Human Rights Non-Governmental Organization, and consider the Cases in one session of the Court.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied of the RA Judicial Code and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

**1.** The RA Judicial Code was adopted by the RA National Assembly on February 21, 2007, signed by the RA President on April 7, 2007, and came into force on May 18, 2007.

The challenged Part 10 of Article 115.2 of the RA Judicial Code, titled “Qualification Written Test”, prescribes:

“10. The results of psychological testing are only of consultative value, are not subject to publication and are provided only to members of the Council of Justice after an interview in the Council before the final discussion. The results of psychological testing, the list of candidatures of judges after approval by the President of the Republic are subject to elimination.”

Article 115.2 of the RA Judicial Code was supplemented by the RA Law HO-90-N of 20 June 2013, and was outlined in the current version by the RA Law HO-47-N of 10 June 2014.

The challenged Part 5 of Article 117 of the RA Judicial Code, titled “Composing and approving of the list of the candidature of judges”, states:

“5. The persons participating in the interview in the Council of Justice enjoy the right to appeal and receive a report within a week after the voting results in the Council of Justice in accordance with Part 4 of this article.”

Article 117 of the RA Judicial Code in the current version was set out in the Code by the RA Law HO-90-N of June 20, 2013 and the RA Law HO-47-N of 10 June 2014.

**2.** The procedural background of the joint Case is the following:

a) On January 27, 2015, “Europe in Law Association” Human Rights Non-Governmental Organization appealed to the RA Council of Justice with a request to provide the opinion and individual opinions of the members of the RA Council of Justice regarding each participant on the verbal examination of the qualification examination conducted to fill the list of candidates for the RA judge of 10-12 December 2014 and 26 January 2015. The Applicant also asked to clarify the criteria for evaluation at this stage and to provide a questionnaire for participants at the interview phase, psychological tests and their results, evaluation of the interview for individual members of the Council of Justice, as well as all other competitive documents.

With the written response of February 11, 2015 the RA Council of Justice rejected to provide the requested information.

“Europe in Law Association” Human Rights Non-Governmental Organization appealed to the RA Administrative Court against the RA Council of Justice with the requirement to be provided with information. By the Judgment of October 19, 2015 of the RA Administrative Court, the above-mentioned claim on the case ՎԴ/0774/05/15 was rejected. By the Decision of 27 April, 2016, the RA Administrative Court of Appeal rejected the appeal, and the Judgment of October 19, 2015 of the RA Administrative Court was unchanged. A cassation appeal was lodged against the mentioned Decision,. The adoption of the cassation appeal to the proceedings was rejected by the Decision the RA Court of Cassation of August 17, 2016;

b) On February 23, 2015, “Europe in Law Association” Human Rights Non-Governmental Organization appealed to the RA Council of Justice with a request to provide a copy of the Decision Number ԱԽ-2-Ռ-5 of January 26, 2015 of the RA Council of Justice on “Composing and approving of the list of the candidature of judges”, the results of voting, which took place after the final discussion of the results of the oral phase of the qualification examination conducted on January 26, 2015, with a view to completing the list of candidates for judges, in particular how many votes for and how many votes against each of the candidates received and the dissenting opinions of the members of the RA Council of Justice, if there are any. At the same time the Applicant asked to explain how and by whom the psychological tests specified in

Article 115.2 of the RA Judicial Code are compiled, how and by whom are assessed, how the constituent psychological test is selected, on what issues and on the basis of which materials psychological tests are compiled.

By the written response of March 5, 2015, the RA Council of Justice rejected to provide the requested information.

“Europe in Law Association” Human Rights Non-Governmental Organization filed a claim to the RA Administrative Court against the RA Council of Justice with the demand to oblige the RA Council of Justice to provided information. The above-mentioned claim on the case ՎԳ/1169/05/15 was rejected by the Judgment of October 19, 2015 of the RA Administrative Court. An appeal was lodged against the abovementioned Judgment. The appeal was rejected by the Judgment of April 27, 2016 of the RA Administrative Court of Appeal, and the Judgment of October 19, 2015 of the RA Administrative Court was unchanged. A cassation appeal was filed against the given Decision. By the Judgment of August 17, 2016 of the RA Court of Cassation, the proceeding of the cassation appeal was rejected.

**3.** The Applicant finds that Part 10 of Article 115.2 and Part 5 of Article 117 of the RA Judicial Code contradict Articles 31, 34, 42, 78, 79, 80 and 81 of the RA Constitution.

The Applicant finds that the refusal to provide information on the results of voting conducted after the final discussion of the results and the interview in the Council of Justice does not pursue any legitimate aim.

The Applicant also notes that the challenged provisions do not meet the requirement of legal certainty, since they do not contain precise regulations regarding the discretion in providing any information or refusal to provide it, the grounds for refusal, hence they lead to interpretation and application inconsistent with the RA Constitution.

The Applicant claims that “... the results of the voting that took place after the final discussion of the results of the oral examination stage, in particular, information on how many for and against votes each candidate has received, although they concern members of the Council of Justice and participants in the interview, but they cannot be considered as components of the personal life of the latter and be protected within the framework of the right to respect for private life, since they mainly relate to activities carried out in the sphere of public power, and are conditioned by processes, which are the subject of a dispute between these persons, processed in connection

with the positions held by them, by the decisions adopted by them and performed activities and/or, in the part of the participants in the competition, their applications for participation in this process and they cannot go beyond public control and, at the expense of the public resource, to be considered in the sphere of private life.”

Concerning his arguments, the Applicant refers to a number of judgments adopted by the European Court of Human Rights.

The Applicant also finds that the prohibition of disclosing the results of psychological testing as prescribed in Part 10 of Article 115.2 of the RA Judicial Code, as well as the requirement to destroy the results of testing, do not follow from the need to control the process of appointing judges, including public control, and also from the constitutional principle of proportionality of restricting the right to freedom of expression, including the search and dissemination of information.

**4.** Objecting to the arguments of the Applicant, the Respondent finds that Part 10 of Article 115.2 of the RA Judicial Code is in conformity with the RA Constitution.

Referring in particular to the legal regulations of Articles 1, 31, 34, 42, 78, 79, 80 and 81 of the RA Constitution, Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 3, 4 and 5 of the RA Law on Protection of Personal Data, Article 8 of the RA Law on Freedom of Information, as well as the legal positions expressed in the Decisions DCC-278, DCC -997, DCC -1010 and DCC -1234 of the RA Constitutional Court, the Respondent states that the right of person to privacy, including the right to protect information relating to him/her and the right to freedom of expression, including the right to receive and disseminate information, are not absolute and are subject to lawful limitations. According to the Respondent, the prohibition on disclosure of the results of psychological testing of judges is clearly stipulated in the RA Judicial Code, it pursues a legitimate goal not only to protect the right to privacy of judges as individuals, but also to create objective prerequisites for the proper implementation of their professional activities.

The Respondent states that the legislator has found a reasonable ratio between the two constitutional values: the right to privacy and the right to receive and disseminate information, which is envisaged by the above-mentioned legal regulations.

According to the Respondent, the Applicant's claim that the challenged provisions do not correspond to the principle of legal certainty in the context of their interpretations in judicial practice are groundless, since Part 10 of Article 115.2 of the RA Judicial Code provides a clear prohibition on disclosure of the information under discussion, namely, making it available to third parties. The Respondent believes that in the present Case only the general prohibition on the disclosure of information prescribed in Part 10 of Article 115.2 of the RA Judicial Code has been applied to the Applicant, and not the exception prescribed in Part 5 of Article 117 of the same Code on providing this information to the person who participated in the interview.

Considering the above-mentioned, the Respondent refrains from giving a legal assessment to the constitutionality of Part 5 of Article 117 of the RA Judicial Code.

**5.** In the framework of the issue of constitutionality raised in this Case, considering the requirements of Part 7 of Article 68 of the RA Law on the Constitutional Court, the Constitutional Court considers it necessary, in particular, to establish and assess:

a) on the one hand, to what extent the challenged provisions relate to the rights of a person to privacy, the protection of personal data, and, on the other hand, to what extent they relate to the compatibility requirements for a person publicly performing his/her functions and in a democratic society may be subject to public scrutiny under the implementation of the constitutional right to freedom of expression, including the right to seek, receive and disseminate information?

b) whether the challenged provisions meet the requirement of the constitutional principles of proportionality and legal certainty, in particular, from the point of view of necessity, proportionality and sufficient certainty of the means chosen for providing information or limiting the refusal to provide it.

Based on Article 19 of the RA Law on the Constitutional Court, not limiting itself to the Applicant's position, the Constitutional Court considers it necessary to examine the provisions challenged in this Case also in the context of the democratic and rule of law state stipulated in Article 1 of the RA Constitution, as well as in the context of the formation of civil society, considering public control by non-governmental organizations in the life of the state and society. At the same time, in assessing the provisions of the RA Judicial Code challenged in this Case, the Constitutional Court considers it necessary also to take into account new approaches to the

formation of the judiciary, enshrined in the constitutional amendments of 2015. According to them, in particular, Chapter 7 of the RA Constitution, titled “Courts and the Supreme Judicial Council,” in the issue of formation of the judiciary in a discretionary aspect, particular importance is given to the institutions of competition and public control.

**6.** The Constitutional Court states that according to Part 1 of Article 42 of the RA Constitution, the right to freedom of expression also includes the freedom to search, receive and disseminate information. In this context, the Constitutional Court reaffirms its legal position, expressed by the Decision DCC-1010 of 6 March 2012, according to which: “... The accessibility of public information is one of the essential prerequisites for democracy and transparency of public administration responsible to the society. The democratic control exercised through public opinion stimulates transparency of the actions of state power and promotes accountability of activity of state bodies and officials.”

The Constitutional Court considers it necessary also to note that this constitutional right is not an absolute right and it can be limited on the grounds and in the order prescribed by Part 3 of Article 42 of the RA Constitution.

The correlation of the mentioned constitutional value with other constitutional values - in particular, with the right to inviolability of private life enshrined in Article 31 of the RA Constitution and the right to protection personal data, enshrined in Article 34 of the RA Constitution - determines the nature of its possible limitations.

**Considering this circumstance, the legislator is obliged to base the legal regulation of the assessment of the qualification examination of candidates for the position of a judge and their suitability for the performance of a public function such information, which, on the one hand, will be considered necessary for holding a competition and making a choice, on the other hand, the characteristics of the candidates taking public legal responsibility will be available to the public and will increase public confidence in the person taking state power.**

Guided by considerations of ensuring public control over public administration and local self-government, transparency of public authorities, accountable activities, public legal responsibility, the Constitutional Court finds that in the documents submitted by the Applicant before the compilation and approval of the list of candidates for judges, documents compiled/received by

the applicant, information, the results of the processes under consideration (information about them), taking into account **the limitations enshrined by the RA Constitution**, should be open and transparent. They should relate not to personal life, manifested in the interpersonal relations of candidates, but qualities that assess their suitability to carry publicly-legal responsibility. Therefore, such data should be included in the personal file of the applicant, in the future the person included in the list of candidacies for judges, they should be granted to applicants, third parties, including non-governmental organizations with appropriate statutory competence.

The Constitutional Court finds that this approach should be of great importance from the point of view of developing a new constitutional law “Judicial Code“ and the consistent implementation of the provisions of the RA Constitution /with amendments of 2015/.

**7.** Analyzing the relevant legal regulations of the current RA Judicial Code, the RA Constitutional Court, in particular, states that the circumstances according to which the results of psychological testing are not subject to disclosure to third parties, as well as to destruction, must also be rethought in the context of constitutional principles of legal certainty and proportionality, taking into account the above legal positions.

According to the existing legal regulations:

- the results of psychological testing are only of consultative value (Part 10 of Article 115.2);
- the results of psychological testing are not subject to disclosure and are provided only to members of the Council of Justice after the interview at the Council before the final discussion (Part 10 of Article 115.2);
- the results of psychological testing, the list of candidacies of judges after approval by the President of the Republic of Armenia shall be subject to destruction (Part 10 of Article 115.2);
- participation in the psychological testing of the applicant, who got passing scores on the results of the qualification written examination, is mandatory (Part 9 of Article 115.2);
- the provision on providing the applicant with the results of psychological testing is not directly enshrined;
- the appeal of the results of psychological testing is not established;
- the provision on providing the results of psychological testing approving the list of candidatures of judges to the subject, namely, to the President of the Republic of Armenia, is not directly enshrined;

- criteria for assessing psychological testing are not fully established.

Taking into consideration these circumstances, the Constitutional Court also states that psychological testing is aimed at testing the sense of responsibility, self-control, moderate use of authority (influence) and other non-professional qualities necessary for the judge's work (Part 9 of Article 115.2). According to the legal regulations of the RA Judicial Code, the purpose of the interview in the Council of Justice is not only to assess the professional experience of the applicant, but also to assess certain personal qualities necessary for the exercise of state-power responsibility (in particular, Part 1 of Article 116.1).

The Constitutional Court states that without the results of psychological testing, the Council of Justice cannot fully implement its constitutional function envisaged by Part 1 of Article 95 of the RA Constitution (with amendments of 2005) to compile a list of candidatures of judges and submit it to the President of the Republic for approval. With regard to the results of psychological testing, which relate to the quality of applicants' public legal responsibility, the Constitutional Court finds that the failure to submit them to third parties, at least in the part of those candidates who are included in the list of candidacies of judges, including non-governmental organizations that have an appropriate statutory goal, does not pursue a legitimate aim. The provision of such information is necessary and is aimed at ensuring the effectiveness of public control over the formation of the judiciary, increasing public confidence in the institutions of public authority, the role of civil society and, in particular, of non-governmental organizations.

For such a legal position, it is also important that, although according to the legal regulations directly enshrined in the RA Judicial Code, the results of psychological testing are only of consultative value (Part 10 of Article 115.2), however, within the general logic of the abovementioned Code, they nevertheless are of an effective significance, as evidenced by the legal regulations of Part 1 of Article 116.1 of the RA Judicial Code.

**8.** Analyzing the legal regulation of Part 5 of Article 117 of the RA Judicial Code in the context of assessment of the legal certainty and legitimacy, the Constitutional Court, in particular, states that it is clearly prescribed that within a week after summing up the results the persons participating in the interview at the Council of Justice shall have the right to appeal and receive the report of the Council of Justice regarding them in accordance with Part 4 of the same Article.

According to Part 4 of Article 117 of the RA Judicial Code, after summing up the results at the Council of Justice for each applicant who participated in the interview, the Council compiles a report, in which, based on questionnaires filled by Council members expressed during the final discussion of opinions and dissenting opinions submitted by members of the Council of Justice regarding selected candidates, the circumstances that determine the choice of the applicant are presented in detail, and in the part of the candidates not selected as a result of the interview, the reasons for refusal of choosing them.

It follows from the analysis of Part 5 of Article 117 of the RA Judicial Code that the latter does not prescribe a direct prohibition on providing **the results of the interview** to third parties, **as in this case**, by Part 4 of Article 117 of the RA Judicial Code.

Article 8 of the RA Law on Freedom of Information, titled: “Limitations on Freedom of Information,” restricts the availability of information that contains information about a person's personal and family life. In this regard, the Constitutional Court also notes that the report provided for in Part 4 of Article 117 of the RA Judicial Code does not contain an element of the applicant's private life. Moreover, when it comes to applying for a public office. In this case, within the framework of the principle of a democratic state, the society has the right to establish public control over public authority, the process of qualification testing to replace this public office for reasons of holding it in conditions of fairness and equality and to be notified of the professional abilities of the applicant for this public office.

In view of the foregoing, the Constitutional Court finds that the RA Law on Freedom of Information also does not prescribe a prohibition on the provision of the report prescribed in Part 4 of Article 117 of the RA Judicial Code to third parties. In this aspect, from the point of view of assessing the law enforcement practice, the Constitutional Court finds that the RA Administrative Court has given a different interpretation of the norms of Part 5 of Article 117 of the RA Judicial Code, in particular, referring to Parts 3 and 6 of Article 115.1, Parts 4 and 5 of Article 117 of the RA Judicial Code, and found that it follows from the mentioned norms that the Law provides for the secret voting on the completion of the interview stage and the prohibition on the provision of the results of the interview to third persons, that is, restriction of the right to receive information is provided for by the Law.

Based on the review of the Case and governed by Point 1 of Article 100, and Article 102 of the Constitution of the Republic of Armenia (with the Amendments of 2005), Articles 63, 64 and 69 of the Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS**:

**1.** To declare Part 10 of Article 115.2 of the RA Judicial Code, in so far as the results of psychological test of applicants included in the list of judge candidates, which refer to their qualities for assuming public legal responsibility, may not be publicized, and that list is subject to destruction after the approval by the President of the Republic, contradicting Part 1 of Article 42 of the RA Constitution - in particular, provision stipulating the freedom to seek, receive and disseminate information - and void.

**2.** Part 5 of Article 117 of the RA Judicial Code is in conformity with the RA Constitution in the constitutional legal content, according to which, Part 5 of Article 117 of the RA Judicial Code does not block the right of the third person to receive the report prescribed by Part 4 of Article 117 of the RA Judicial Code in accordance with the RA Law on Freedom of Information.

**3.** Based on Part 12 of Article 69 of the RA Law on the Constitutional Court, the final judicial act adopted against the Applicant is subject to review due to new circumstances and in accordance with the procedure provided for by the law.

**4.** Pursuant to Part 2 of Article 102 of the Constitution of the Republic of Armenia (with Amendments of 2005) this Decision shall be final and effective upon publication.

**Chairman**

**G. Harutyunyan**

**20 June 2017**  
**DCC-1374**