ASSESSING ARMENIA'S "COURT CRISIS"

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Summary

After nearly a year of simmering tension and sporadic confrontation between the Armenian government and the country's Constitutional Court, the parliament adopted legislation on 22 June that would enforce term limits for the court's nine judges. In a vote of 89-0, with two opposition parties defiantly boycotting the special session, the new legislation will effectively remove three of sitting judges, force the selection by parliament of a new chairman to replace current chairman Hrayr Tovmasyan, and require another two justices to step down by 2022. Although the legislative initiative represents a compromise alternative to the government's previous plan to hold a national referendum on constitutional amendments in April, the process effectively bypasses the current Constitutional Court. More broadly, however, the move to alter the composition of the Court raises some concerns over the rule of law and the stated goal of forging judicial independence.

I. Armenia's "Court Crisis"

In what began as a move to reform the Constitutional Court as the sole remaining legacy institution from the old governmental system, Armenian Prime Minister Nikol Pashinyan spearheaded a deepening conflict with the Court that quickly devolved into a personal confrontation targeting the court's Chief Justice or chairman, Hrayr Tovmasyan. Just prior to the onset of the COVID-19 pandemic, this "court crisis" standoff was seemingly headed for a conclusion with a decision by the Armenian parliament in early February to hold a national referendum to force the removal of seven judges appointed to the nine-member constitutional court by the previous government. Originally set for 5 April, that planned referendum sought to reform and reconstitute the Constitutional Court as the last legacy holdover institution from the old system. And although the legal basis for the referendum sparked controversy, the more serious concern was over a process that attempted to bypass the constitutional process with a direct appeal to the people.[1]

Crafting a Compromise. But as the planned referendum was suspended due to the introduction of a state of emergency in response to the pandemic, the pro-government majority in parliament later canceled the referendum outright, moving instead to implement an alternative legislative compromise. Although the new alternative plan reflects the same objective of changing the composition of the Constitutional Court and removing the seven holdover judges, it does represent a compromise in both the method and the more gradual timing of the move.

[1] Stepanian, Ruzanna, "Referendum on Armenian Constitutional Court Scheduled for April 5," Radio Free Europe/Radio Liberty (RFE/RL) Armenian Service, 10 February 2020. https://www.azatutyun.am/a/30426786.html

More specifically, instead of leveraging the "popular will" from a constitutional referendum, the new plan envisioned a role for the parliament to initiate and enact legislative changes to the composition and structure of the court, while relying on the "political cover" or "justification" of the technical and legal expertise of the Council of Europe's Venice Commission and other relevant international organizations and actors. [2]

Planned Judicial Term Limits. Under the terms of this new attempt, the pro-government bloc adopted a legislative compromise involving a less direct and more gradual change to the court's composition, enforcing 12-year term limits on the judges that would be applied retroactively, thereby, forcing the removal of three judges that were appointed in the mid-1990s, with another two justices compelled to step down by 2022. The move would also seek the removal of Hrayr Tovmasyan as chairman, to be replaced by a parliamentary appointee, although Tovmasyan would remain on the Court.

In practical terms, the government's legislative plan is focused on removing Tovmasyan as Court Chairman, while seeking to garner a working majority of new judges less tainted by service under the old government to offset the power and negate the position of the legacy judges inherited from the past. This would result in the immediate removal of three of the longest-serving judges, Constitutional Court Vice-Chair Alvina Gyulumyan, the only justice to have been re-appointed, first in 1996 and again in 2014, Hrant Nazaryan, a sitting judge since 1996, and Feliks Tokhyan, first appointed in 1997. Two other judges, Ashot Khachatryan and Arevik Petrosyan, both appointed in 2010, would also be required to step down in 2022.

Technically, the term limits on judicial tenure for the Constitutional Court were already in place, as enacted by constitutional amendments that came into force as part of the 2015 constitutional referendum, and which also transformed Armenia from a semi-presidential to a parliamentary system. The terms limits were not, however, applicable to any sitting judge prior to those changes, and specifically allowed the Constitutional Court judges to continue serving until reaching retirement age. The legislation, therefore, specifically annulled this clause.[3]

II. Advisory Responses from the "Venice Commission"

After a formal request submitted to the Council of Europe's Venice Commission on 12 May by Justice Minister Rustam Badasyan seeking an advisory opinion on legal questions, the responses were received on 22 June, generally endorsing the intent of the legislation, but also expressing some concern over the process and the timing. More specifically, the Venice Commission supported the application of the 12-year term limits, which would remove judges who exceeded the term limit, while ensuring that others would continue their terms until meeting the 12-year threshold. But the advisory opinion also expressed concerns over the potential negative implications from imposing retroactive terms limits, noting that such changes could "affect the independence of judges" and stressing that "international standards of judicial independence explicitly guarantee security of tenure until the mandatory retirement age or the expiry of the term office."[4]

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[2] Nalbandian, Naira, "Parliament Majority Seeks Power to Cancel Constitutional Referendum," Radio Free Europe/Radio Liberty (RFE/RL) Armenian Service, 27 May 2020. https://www.azatutyun.am/a/30637597.html

[3] Nalbandian, Naira, "Armenian Parliament Votes to Replace Constitutional Court Judges," Radio Free Europe/Radio Liberty (RFE/RL) Armenian Service, 22 June 2020. https://www.azatutyun.am/a/30684602.html

[4] "Armenia. Opinion on Three Legal Questions in the Context of Draft Constitutional Amendments Concerning the Mandate of the Judges of the Constitutional Court," European Commission for Democracy through Law (Venice Commission), CDL-AD(2020)016, Opinion No. 988/2020, Strasburg, 22 June 2020. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)016-e

In legal terms, this link between security of tenure and judicial independence is especially important, and is widely held as "an essential guarantee" of judicial independence, as "irremovability is designed to shield the constitutional court judges" from undue influence or pressure from "the political majority of the day," whereas "it would be unacceptable if each new government could replace sitting judges with newly elected ones of their choice."[5] Despite those concerns, the Venice Commission nevertheless endorsed the planned term limits as "common in many constitutional systems as far as constitutional court judges are concerned" and agreed that a "term of twelve years is fully in line with European standards."

Fully backing the advisory opinion, the Secretary General of the Council of Europe called on the Armenian authorities to adhere to the Venice Commission recommendations, pointing to the suggestion that "although judges whose twelve-year term has not yet expired should continue to serve until the end of that term" and other "judges who have been in office for twelve years before being replaced should be able to take advantage of the new transition period" and expressing regret "that the changes…..do not provide for such a transitional period." The Secretary General's statement further criticized the timing of the 22 June vote by parliament for coming "on the same day that the opinion of the Venice Commission was adopted."[6]

Concerns over Process & Urgency. The concern over the urgency of the process led the Venice Commission to call for a "transitional period which would allow for a gradual change in the composition of the Court in order to avoid any abrupt and immediate change endangering the independence" of the court. More notably, the findings of the Venice Commission specifically stressed that, according to Armenian law, the parliament must submit the constitutional changes to the Constitutional Court itself for review and approval prior to the implementation of the legislation.[7] The Armenian government dismissed that requirement, however, as Justice Minister Rustam Badasyan argued that there "would be an obvious, direct conflict of interest" in submitting the legislation to the Constitutional Court for "approval" and adding that any transitional period would be problematic as it would extend the tenure of most judges beyond the 12-year limit that applies to them and their other more recently appointed colleagues.[8]

Impact & Implications. Overall, the impact of the Venice Commission's findings is rather limited, however, due to the non-binding and advisory nature of its recommendations and because of the timing of the release of the opinion on the same day as the parliament's vote on the legislation in question. In fact, the timing of the vote only tended to suggest that the Armenian government's request for expertise and advice from the Venice Commission was more of an afterthought than a sincere objective to guide the legislative process, as most deputies did not even have adequate time to read the recommendations prior to the vote. And given the justified legal concerns expressed by the Venice Commission over the decision to violate the standing legal requirement to submit the legislation to the Constitutional Court for judicial review, the findings' overall endorsement of the government's plan was somewhat diluted and diminished as potential political "cover" for the government to rely on as justification for the legislation.

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[5] "Joint Opinion on the Amendments to the Judicial Code and Some other Laws," European Commission for Democracy through Law (Venice Commission), CDL-AD (2019)024, adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019).

[6] Harutyunyan, Sargis, "ԵԽ գլխավոր քարտուղարը կոչ է արել Հայաստանի իշխանություններին առաջնորդվել Վենետիկի հանձնաժողովի հանձնարարականներով" ("The Secretary General of the Council of Europe called on the Armenian authorities to follow the instructions of the Venice Commission"), Radio Free Europe/Radio Liberty (RFE/RL) Armenian Service, 22 June 2020. https://www.azatutyun.am/a/30684659.html

[7] Venice Commission Advisory Opinion on Armenia.

[8] Mejlumyan, Ani, "Armenia moves again to remove old judges," EurasiaNet, 23 June 2020. https://eurasianet.org/armenia-moves-again-to-remove-old-judges

III. The Outlook & What Comes Next

Resisting Reform. Now that the parliament has adopted the legislation and it was signed by the Armenian president, the immediate outlook of the reform centers as much on the political repercussions as on the legal implications. Naturally, the Constitutional Court responded harshly to the legislation, reflecting frustration with being bypassed in the process and recording their fulmination with being personally targeted. Clearly, such criticism was expected. For example, both the initial plan for a national referendum on constitutional amendments and this legislative alternative are in direct violation of the law by subverting and ignoring the requirement for consulting the Constitutional Court in the review process. Regarding the second criticism of personal attack, Court Chairman Tovmasyan and others have clearly been targeted throughout much of the nearly year-long confrontation between the court and the government. And just as Tovmasyan and his colleagues have repeatedly resisted both pressure and inducements, such as an offer of graceful early retirement, this confrontation has devolved into a personal clash with Prime Minister Pashinyan and his team.

An Indignant Court is Not an Independent Court. Nevertheless, the government also has a justified argument that sees the Constitutional Court as an institutional legacy from the previous government. For the government, Armenia's Velvet Revolution of 2018 remains unfinished and incomplete, as corruption cases proceed, other reforms accelerate, and former leaders still face criminal investigations on suspicion of past crimes and abuses of power. In addition, there is also merit in the government's view of the Court as a willing and complicit partner in the past practices of tainted elections and political corruption under the old system of governance. Although it is difficult to demonstrate legally actionable cases of the Court impeding reform, its legacy of political subservience to past governments does necessitate reform. In that context, the Court's opposition to the government does not necessarily mean that it is legitimately independent.

The Court's Coming Counterattack. The next stage of this confrontation will begin with legal challenges to the implementation of the Court reform and contesting the forced removal of the three longest-serving judges. For Court Vice-Chair Alvina Gyulumyan, for example, there is a question of legal interpretation over her tenure. Specifically, as her first tenure on the Constitutional Court ran from 1996-2003, she argues that it is not relevant to the calculation of the 12-year limit, with only her second appointment in October 2014 eligible, thereby contending that her tenure should not end until 2026.[9] The legal issue at hand is over the correct constitutional interpretation of at least two competing clauses in two different constitutions. And with another legal challenge expected from a second affected judge, Felix Tokhyan, there is also a question over venue and jurisdiction given the fact that it is the Constitutional Court itself that is empowered to rule on these legal matters.

A Parting Shot. Beyond the coming legal challenges, the most visible "counter-attack" coming from the Constitution Court will start with a powerful "parting shot" on 7 July, with a Court hearing devoted to the ongoing trial of former President Robert Kocharian.[10] Ironically, the Court accepted the motion for the hearing on 22 June, the same day as the parliament voted to reconstitute and restructure the composition of the Constitutional Court, adding to the urgency of the outcome of the contested membership of the Court.

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[9] Sargsyan, Lusine, "Understanding Armenia's Constitutional Court," EVN Report, 23 February 2020. https://www.evnreport.com/politics/understanding-armenia-s-constitutional-court and Khulian, Artak, "High Court Judges Question Legality of Constitutional Changes," Radio Free Europe/Radio Liberty (RFE/RL) Armenian Service, 23 June 2020. https://www.azatutyun.am/a/30686454.html

[10] Mkrtchian, Anush, "Constitutional Court Schedules First Hearing on Kocharian Case," Radio Free Europe/Radio Liberty (RFE/RL) Armenian Service, 23 June 2020. https://www.azatutyun.am/a/30686894.html

IV. The Kocharian Case

Against that backdrop, the 7 July Constitutional Court hearing is significant for several reasons well beyond the limited legal confines of judicial review. First, the legal implications from this particular hearing are profound, as the Constitutional Court will review the "legality" of the criminal charges that serve as the centerpiece of the ongoing trial of former President Kocharian. More specifically, Kocharian is charged under a section of the Criminal Code pertaining to the attempted "overthrow of the constitutional order" stemming from his actions and orders during the post-election deadly crackdown on protesters in 2008. As an inherently politicized case that is already difficult to understand and even harder to prosecute due to the murky questions of presidential immunity and national security arguments, the hearing will also question the relevance of the seeming contradiction between criminal charges that stem from the Criminal Code that was enacted in 2009 for crimes committed in 2008.

In precise legal terms, the relevant codified charge at the time of the actions in question refer to the "usurpation of state power," generally held to be more related to the crime of seizing and holding power, in contrast to the subsequently amended charge involving the "overthrow of the constitutional order." This discrepancy alone may provide the Court with the legal grounds to derail the criminal case by dismissing the charges, perhaps presenting the Court with an opportunity for revenge against the government for its forcible restructuring and dismissal of several of the same judges. Nevertheless, the hearing is limited to a review of only the relevant constitutionality of the charges, with any other considerations subject to the discretion and judgement of the trial judge and not the Constitutional Court. The hearing is also hindered by a rather ambiguous ruling from the European Court of Human Rights (ECHR) and a separate ruling from the Venice Commission that failed to either endorse or reject constitutional standing.[11]

Opposition Rallying Point. Another significant aspect of the hearing stems from the political impact of the case. The Kocharian trial has been the one successful "rallying point" for critics and political opponents of the Pashinyan government. Ironically, the former ruling Republican Party has been drawn closer to Kocharian than to his successor, their own party leader, former President Serzh Sargsyan. Largely due to Kocharian's charisma and credentials, he has emerged as the unifying force for the opposition and has been able to bring together a divergent combination of former ruling Republicans and other faded political personalities, with the addition of a few emerging political aspirants, such as former National Security chief Artur Vanetsyan.

A Disparate & Desperate Opposition. Despite the theatrics and volume of such vocal opponents, the Pashinyan government continues to consistently sidestep and sidetrack direct political challenges. This resiliency stems from more than sustained popular support but also from the absence of any serious or credible alternative to the Pashinyan government. The opposition as a whole, and the former Republicans in particular, represent a tainted past with little appeal, while even more marginal opposition parties and figures can do little more than to attack the government with no policy alternatives of their own. And a lack of any shared ideology only contributes to their irrelevance and marginalization on the current Armenian political landscape. Thus, even with Kocharian as a platform for opposition forces and figures, any such unity of purpose or lasting alliance is fragile and unsustainable, making the profoundly discredited opposition as desperate as it is disparate, posing little real challenge and even less threat to the government.

[11] Anush Mkrtchyan, "Ալումյան. Սահմանադրական փոփոխությունների միակ նպատակը ամեն գնով Քոչարյանին պատասխանատվության ենթարկելն է" ('Alumyan. The only purpose of the constitutional amendments is to hold Kocharyan accountable at all costs'), Radio Free Europe/Radio Liberty (RFE/RL) Armenian Service, 23 June 2020. https://www.azatutyun.am/a/30686311.html and Mejlumyan, Ani, "Armenia moves again to remove old judges," EurasiaNet, 23 June 2020. https://eurasianet.org/armenia-moves-again-to-remove-old-judges

Polarized Perceptions. Given the polarized nature of political discourse in Armenia, it is little surprise that the public perception of the "court crisis" is largely defined and driven by tribal loyalties. This trend of tribal loyalty is most evident in the sustained popular support for the government, comprised of a loyal base of supporters that is less interested in the deeper context or wider implications of policies and more empowered by a chance to show their support for the charismatic prime minister. These government supporters are also still eager for a sense of retribution, through corruption cases and the criminal prosecution of former officials. On the other side of this polarization, for the much smaller but very vocal defenders of the Constitutional Court, the "court crisis" is less about adhering to the rule of law or advocating on behalf of the Court itself, but rather an opportunity to inflict political damage on the government with the most relevant political issue at hand.

Views of Civil Society. At the same time, there is a notable division within Armenian civil society over the court crisis, although on a much smaller scale and involving significantly less passion or polarization. For many civic activists, the necessity to reform the Constitutional Court as the most visible holdover from the old government justifies the questionable aspects of the process. For a smaller group of civil society actors, however, the issue has sparked a rather surprisingly strident degree of criticism. For example, Avetik Ishkhanyan, a human rights activist and the head of the Armenian Helsinki Committee, has strongly criticized the government for the "destruction of the rule of law," arguing in social media posts that "in the so-called 'new Armenia' the prime minister, taking advantage of the epidemic, instructing and threatening his 88 toy-deputies, not caring about international obligations, is carrying out an unconstitutional coup."[12]

Yet at the same time, there are also some more nuanced expressions of concern from civil society organizations and experts. For example, as noted journalist and Civilitas Foundation analyst Tatul Hakobyan has articulated, there are genuine questions over the basis for any assumption that the new, reconstituted Constitutional Court would be any less subservient to the government than the prior Court was to the previous leadership. These concerns further challenge the expectation that any new judges appointed to the Court will be any less bound by political loyalty or personal gratitude to the government, and thereby especially challenged to attain any real independence from Prime Minister Pashinyan or his "My Step" parliamentary bloc.[13]

V. Broader Concerns & Observations

From a broader perspective that surpasses the context of this current "court crisis," a deeper assessment reveals four main concerns and observations regarding the challenges of legal and judicial reform to come:

Process Matters as Much as Policy. One of the more polarizing elements of this year-long confrontation between the government and the Constitutional Court has been the failure of communication. Both the government and the parliament have neglected the need to better define and defend their policy objectives in reforming the Constitutional Court. In what devolved into a "court crisis" that was widely seen as little more than a personal vendetta between the Prime Minister and the Court Chairman, that lack of communication and clarification only enhanced that narrative. And in the absence of a clear and coherent articulation of the goals of this reform effort, the efforts to restructure the Court were all too easily manipulated by critics and opponents of the government in the vacuum of policy discourse or debate. This also contributed to the boycott of the vote by the parliamentary opposition parties.

[12] Mejlumyan, Ani, "Armenia moves again to remove old judges," EurasiaNet, 23 June 2020. https://eurasianet.org/armenia-moves-again-to-remove-old-judges

[13] Hakobyan, Tatul, "Ի՞նչ է կառուցվելու Սահմանադրական դատարանի տեղում" ('What will be built on the site of the Constitutional Court?'), CivilNet, 23 June 2020.

Sincere Intentions are not Sufficient Justification. A second shortcoming was the temptation by the government to appeal to a more primitive and polarizing argument that seemed to crudely rest on the basis of the premise of the "ends justifying the means." From that perspective, sincere intentions are simply not sufficient to justify or overcome the problematic violation of the legal process to bypass and exclude the Constitutional Court. Although the Court stands out as the one legacy institution from the previous government, whose complicity in past electoral fraud and political corruption warrants reform, the process was tainted by questionable timing, marked by sudden bursts of urgency after longer periods of government inattention and parliamentary inaction, and by an impulsive tendency to demonize the Court and its judges.

Moreover, there is little direct evidence of the Constitutional Court's success in blocking or impeding reforms. And to date, the Court has no history of effective institutional oversight, with a questionable capacity or commitment to balance an empowered parliament or a dominant executive. And the appointment of "popular" or "friendly" judges by the pro-government majority in parliament does little to offer any expectations of real judicial independence.

The Starting Point for Deeper Reform. Despite the symbolic significance of selecting the Constitutional Court as the starting point for a deeper effort of legal and judicial reform, even the successful implementation of measures to reconstitute and reform the composition of the Court neither guarantees judicial independence nor institutional oversight on its own. Moreover, there are other, more fundamental problems that continue to undermine the legal system even under the current government. The abuse and misuse of pre-trial detention, for example, is an unworthy continuation from past practice. The options of the pre-trial release for defendants on bail, house arrest and electronic monitoring are each standard and common practices in modern criminal justice systems. Backed by the imposition of travel bans and police supervision, the long-standing over-reliance on the use of pre-trial detention must be addressed, despite the temptation by the police and prosecutors to use such detention as coercive elements to pressure defendants, accomplices and even witnesses.

Thus, the Constitutional Court must be only the starting point for deeper reforms that focus on other important areas of neglect, beginning at the basic foundation of the judicial system, such as starting with legal education and training, essential judicial oversight, and the more practical elements of a uniform system of trial appointments, case assignments, and both the promotion and disciplining of judges, for some notable basic examples.

The Need for Long-Term Strategy. In addition to the necessity for more extensive judicial reform, there is also a need for the formulation and implementation of a longer-term strategy to strengthen the rule of law. Judicial reform on an institutional level must be matched by measures to bolster the rule of law, with linkage to leverage the synergy from other areas of reform, utilizing gains in efforts to combat corruption and enforcing regulatory standards for public health, workplace safety and environmental protection, each of which now has elevated and enhanced significance in the ongoing COVID-19 pandemic crisis.

Moreover, the momentum from Armenia's deepening engagement with the European Union, through the implementation of the Armenia-EU Comprehensive and Enhanced Partnership Agreement (CEPA), and even its membership in the Eurasian Economic Union (EaEU), offers an opportunity to embark on a more ambitious effort at legal and judicial reform that seeks greater resiliency and reciprocity based on higher standards and norms.