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(VENICE COMMISSION)

ARMENIA

DRAFT OPINION

**ON THREE LEGAL QUESTIONS IN THE CONTEXT OF DRAFT
CONSTITUTIONAL AMENDMENTS CONCERNING THE MANDATE OF
THE JUDGES OF THE CONSTITUTIONAL COURT**

on the basis of comments by

Mr Philip DIMITROV (Member, Bulgaria)

Mr Michael FRENDO (Member, Malta)

Mr Christoph GRABENWARTER (Member, Austria)

Mr Eirik HOLMØYVIK (Substitute member, Norway)

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I. Introduction

1. By letter of 12 May 2020, the Minister of Justice of the Republic of Armenia, Mr Rustam Badasyan requested an opinion of the Venice Commission on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court (CDL-REF(2020)025).

2. Mr Dimitrov, Mr Frenco, Mr Grabenwarter and Mr Holmøyvik acted as rapporteurs for this opinion.

3. On 25-27 May 2020, the rapporteurs and the Secretariat of the Venice Commission, held a series of videoconference meetings with the representatives of the Constitutional Court, of three parliamentary factions including the opposition, with the Chairperson of the State and Legal Committee of the Parliament, with the Minister of Justice and the diplomatic community in Yerevan as well as representatives of civil society organisations. The Venice Commission is grateful to the authorities and the Council of Europe Office in Yerevan for the organisation of the meetings.

4. *This opinion was drafted on the basis of comments by the rapporteurs and the results of the video-conference meetings. It was adopted by the Venice Commission on....., through a written procedure which replaced the ... Plenary session in Venice, due to the COVID-19 disease.*

II. Legal and factual background

A. Legal background

5. The Constitution of the Republic of Armenia adopted upon a referendum on 5 July 1995 has undergone two major reform processes over the past 25 years, including the amendments introduced through a referendum on 27 November 2005 and the amendments introduced through a referendum on 6 December 2015. The Venice Commission provided a number of opinions concerning both reforms.¹

6. The constitutional provisions pertaining to the composition of the Constitutional Court have also been significantly amended through the constitutional amendments, concerning in particular the appointing authorities and the term of office of the judges of the Constitutional Court. According to Article 99 of 1995 Constitution (before the 2005 amendments), “[t]he Constitutional Court shall be composed of nine members, five of whom shall be appointed by the National Assembly and four by the President of the Republic”. Under Article 96, a member of the Constitutional Court could hold office until the age of seventy.

7. The 2005 constitutional amendments introduced some changes to the appointment procedure and the term of office of the judges of the Constitutional Court. According to Article 99 (as results

¹ See, CDL-AD(2005)025 Final Opinion on constitutional reform in the Republic of Armenia, adopted by the Venice Commission at its 64th Plenary Session (21-22 October 2005) ; CDL-PI(2015)015 Preliminary Opinion on the draft amendments to Chapters 1 to 7 and 10 of the Constitution of the Republic of Armenia; CDL-PI(2015)019 Second Preliminary Opinion on the Draft Amendments, in particular to Chapters 8, 9, 11 to 16, of the Constitution of Armenia; CDL-AD(2015)037 First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia endorsed by the Venice Commission at its 104th Plenary Session (23-24 October 2015) and CDL-AD(2015)038 Second Opinion on the Draft Amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16) of the Republic of Armenia endorsed by the Venice Commission at its 104th Plenary Session (23-24 October 2015).

from the 2005 amendments), the Constitutional Court is composed of nine members. Four members were appointed by the President of the Republic (Article 55(10)) and five members were appointed by the National Assembly upon recommendation of the Chairperson of the National Assembly (Article 83(1)). According to Article 96, “[j]udges and members of the Constitutional Court shall serve the office until attaining the age of sixty-five”.

8. Significant modifications have been brought to the appointment procedure, appointing authorities and the term of office of the judges of the Constitutional Court by the 2015 amendments which introduced the new Chapter 7 “Courts and the Supreme Judicial Council” including detailed provisions on the Constitutional Court. According to Article 166(1) of Chapter 7 of the Constitution, judges of the Constitutional Court shall be elected by the National Assembly for a term of twelve years, by at least three fifths of votes of the total number of Deputies. The Constitutional Court shall be composed of nine judges, of which three judges shall be elected upon recommendation of the President of the Republic, three judges shall be elected upon recommendation of the Government, and three judges upon recommendation of the General Assembly of Judges. The General Assembly may nominate only judges. The same person may be elected as a judge of the Constitutional Court only once.

9. In its 2015 Second Opinion on the draft amendments to the Constitution of the Republic of Armenia, the Venice Commission considered that the introduction of the new requirement of a qualified majority of at least three-fifths of the total number of votes of the parliamentarians for the election of Constitutional Court judges was highly welcome.² This amendment indeed followed a previous recommendation of the Commission in its first opinion on the draft constitutional amendments³. The Commission considered that with the requirement of qualified majority for the appointment of constitutional court judges, both the majority and the opposition will propose highly qualified candidates which are acceptable for the other side.⁴ Lastly, concerning the term of office and the retirement age of the judges of the Constitutional Court, the Commission considered in the first opinion that the provision in Article 166 which provides that the judges of the Constitutional Court shall serve in office for 12 years until reaching the age of 70 and may not be re-elected to the office of Constitutional Court judge is in line with European practice.⁵

10. The constitutional provisions related to the election of the Chairperson of the Constitutional Court were also considerably revised through the constitutional amendments. Under the 1995 Constitution prior to the 2005 amendments, the Chairperson of the Constitutional Court is appointed by the National Assembly from among the members of the Court (Article 83(2)). If within thirty days of the formation of the Constitutional Court the National Assembly fails to appoint the Chairperson, he/she shall then be appointed by the President of the Republic (Articles 83(2) and 55(10)). This method of appointment of the Chairperson of the Court was generally maintained in 2005, with the difference that in the 2005 version, the National Assembly appoints the Chairperson from among members of the Court “upon the recommendation of the Chairperson of the National Assembly”, within a thirty-day period after the position of the Chairperson of the Constitutional Court becomes vacant (2005 version of Article 83(2)).

11. The 2015 amendments completely modified the method of appointment of the Chairperson and excluded the National Assembly from the appointment procedure. Under new Article 166(2), the Constitutional Court shall elect the Chairperson and Deputy Chairperson of the Court from among its members. Another important difference concerns the term of office of the Chairperson of the Constitutional Court. The 1995 and 2005 versions of the Constitution did not provide for

² CDL-AD(2015)038, para. 49.

³ CDL-AD(2015)037, para. 162.

⁴ *Ibid.*

⁵ CDL-AD(2015)037, para. 165.

any specific term limit for the office of the Chairperson and therefore, the general provision concerning the retirement age for judges and members of the Court applied to the office of the Chairperson. Now, the Chairperson is elected for a term of six years, without the right to be re-elected. In its 2015 opinion, the Commission considered that this model of election of the Chairperson of the Court constitutes a good safeguard for the independence of the Court.⁶

12. While these major amendments were introduced by the 2015 amendments, transitional Article 213 of Chapter 16 (Final and Transitional provisions) of the Constitution provides that “*the Chairperson and members of the Constitutional Court appointed prior to the entry into force of Chapter 7 of the Constitution shall continue holding office until the expiry of the term of their powers specified in the Constitution with the amendments of 2005.*” and “[a]fter entry into force of Chapter 7 of the Constitution, the nominations for vacant positions of judges of the Constitutional Court shall be made successively by the President of the Republic, the General Assembly of Judges, and the Government.” A similar transitional provision also existed in the 2005 Constitution (Article 117(13)).

13. According to transitional Article 209(6), Chapter 7 of the 2015 Constitution (covering the provisions related to the appointment of judges and the Chairperson of the Constitutional Court) “*shall enter into force on the day the newly-elected President of the Republic assumes office. Therefore, the relevant provisions of the Constitution with the amendments of 2005 shall continue having effect.*” President Sarkissian was elected on 2 March 2018 and took office on 9 April 2018. Therefore, for the appointments made to the Constitutional Court (including judges and the Chairperson) before 9 April 2018, the relevant provisions of the 2005 version of the Constitution applied. The new provisions resulting from the 2015 amendments apply only to appointments made after that date.

B. Factual background

14. The events of the spring of 2018 which are referred to in Armenia as the “velvet revolution” led to a peaceful overturn of the previous government, and the appointment of the former opposition leader Nikol Pashinyan as a Prime Minister in May 2018. As a result of the legislative elections on 9 December 2018, “My Step” alliance supporting Mr Pashinyan obtained 88 out of 132 seats in the National Assembly (which is a constitutional majority), while the former governing Republican Party did not receive any seats.

15. Before the “velvet revolution”, on 5 March 2018, the former Chairperson of the Constitutional Court, Mr Gagik Harutyunyan, resigned, three weeks before the entry into force of the 2015 constitutional amendments and shortly before reaching the retirement age of seventy. As a consequence, Mr Hrayr Tovmasyan was elected as Chairperson by the Parliament on 21 March 2018 under the provisions of the 2005 Constitution, until the retirement age of sixty-five. Mr Tovmasyan, who was the Minister of Justice between December 2010 and September 2013, was a member of the National Assembly from the Republican Party since April 2017, until shortly before his election as the Chairperson of the Constitutional Court.

16. Currently, among the nine judges of the Constitutional Court, two judges have been appointed according to the 2015 provisions⁷, while the remaining seven were elected prior to 9 April 2018, according to the 1995 and 2005 provisions.

17. On 6 September 2019, the Minister of Justice requested the Venice Commission to prepare an opinion on a “Judicial Reform Package”. One of the amendments contained in the Package was related to the Law on the Constitutional Court and introduced the possibility for Constitutional

⁶ CDL-AD(2015)037, para. 166.

⁷ Mr Arman Dilanyan appointed on 13 September 2018 and Mr Vahe Grigoryan, appointed on 18 June 2019.

Court judges whose mandate is until retirement, to resign before the end of the mandate with several advantages, if they so wished. The authorities invoked the implementation of the Constitution as revised in 2015 in a post-revolutionary context and considered that the shift from the life-time tenure of constitutional justices to the fixed-term mandate should be applied immediately.

18. In their Joint Opinion adopted in October 2019,⁸ the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law of the Council of Europe considered that all justices of the Constitutional Court should enjoy the same status, irrespective of whether they were appointed before or after the 2015 revision of the Constitution (para. 60). They further stated that as a matter of principle, where the early retirement scheme remains truly voluntary, i.e. excludes any undue (political or personal) pressure on the judges concerned, and when it is not designed to influence the outcome of pending cases, there are no standards that would lead the Venice Commission to oppose such a scheme.

19. The relevant amendments⁹, entered into force on 11 December 2019 and provided a term of two months for the judges to accept the early retirement. None of them accepted this offer.

20. In early February 2020, the ruling majority prepared constitutional amendments to transitional Article 213 according to which the office of the Chairperson and judges of the Constitutional Court who were appointed prior to the entry into force of Chapter 7 of the 2015 Constitution shall cease (seven judges including the Chairperson).¹⁰ An explanatory note attached to those initial draft amendments states in particular that *“with the current composition of the Constitutional Court, there is a substantial difference between the terms of office of judges appointed under the provisions of Chapter 7 of the 2015 version of the Constitution and the terms of office of previously appointed judges. While the newly appointed judges will serve for 12 years, the previously appointed members appointed under the provisions of the 1995 version of the Constitution (2 judges) will serve until the age of 70, and those appointed under the provisions of the 2005 version of the Constitution (5 judges) until the age of 65.”* According to the explanatory note, the purpose of this amendment is to ensure the constitutionality of the composition of the Constitutional Court under Chapter 7 of the 2015 Constitution and to remedy to the lack of confidence by both public and other branches of power in the current formation of the Constitutional Court.

21. The Constitution provides in its Articles 168(2) and 169(2) that constitutional amendments have to be submitted to the Constitutional Court for review of their compliance with the Constitution.¹¹ Also in early February, the ruling majority prepared amendments to the Law on

⁸ CDL-AD(2019)024 Joint Opinion on the Amendments to the Judicial Code and Some other Laws, adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019).

⁹ Article 88. Final part and transitional provisions of the Law on the Constitutional Court:

“4. As provided for by Article 213 of the Constitution, the person having been appointed to the position of member of the Constitutional Court prior to entry into force of Chapter 7 of the Constitution and having held the position of judge of the Constitutional Court for at least twelve years after entry into force of this Law, regardless the age may be granted a pension in the manner and amount prescribed by the Law of the Republic of Armenia “On social guarantees for persons having held state offices” on the grounds provided for by part 2 of Article 10 and clause 4 of part 2 of Article 12 of this Law, where he or she has submitted to the National Assembly an application on the resignation with regard to termination of powers for the purpose of going on pension and has not withdrawn it within one week after the submission, as well as on the basis where his or her powers were terminated or suspended upon a civil judgment of the court having entered into legal force, as having no active legal capacity.”

¹⁰ Draft Constitutional Amendments to the Constitution (P-469-05.02.2020-PI-01/0).

¹¹ Article 168 Powers of the Constitutional Court (2) prior to the adoption of draft amendments to the Constitution, as well as draft legal acts put to referendum, determine the compliance thereof with the Constitution;
Article 169 Applying to the Constitutional Court

the Constitutional Court, to the Law on Referendum and to the Law on rules of the procedure of the National Assembly that would remove the relevant provisions providing for obligatory constitutional review of constitutional amendments by the Constitutional Court, without however amending the relevant provisions of the Constitution (i.e. Articles 168(2) and 169(2)). Those legislative amendments have not been voted by the Parliament.

22. On 6 February 2020, the draft constitutional amendments to transitional Article 213 were debated at an extraordinary session of the National Assembly. It should be noted that Article 202 of the Constitution ("Adoption of and Amendment to the Constitution"), first paragraph, provides a list of constitutional provisions which can be amended only through referendum.¹² According to paragraph 2 of the same provision, amendments to other Articles of the Constitution¹³ shall be adopted by the National Assembly, by at least two thirds of votes of the total number of Deputies. Under paragraph 3, "in case the National Assembly does not adopt the draft of the amendments to the Constitution provided for in part 2 of this Article, it may be put to referendum upon the decision adopted by at least three fifths of votes of the total number of Deputies." It appears that during the extraordinary session of the National Assembly on 6 February, although the ruling party had sufficient majority to adopt this constitutional amendment immediately (i.e. with two thirds majority), the draft amendment failed to receive at first reading sufficient number of votes and the parliament decided to put the constitutional amendment to referendum with three fifths of votes of the total number of the deputies according to Article 202(3) of the Constitution. According to a number of interlocutors met by the delegation, the aim of the ruling majority was also to bypass the prior constitutional review by the Constitutional Court. It was argued by the ruling majority that in case the Constitutional Court is called upon to review the constitutionality of the amendment concerning the mandate of the Court's judges, there would be a conflict of interest which would prevent those judges from reviewing the constitutional amendment.

23. The bill on holding the referendum on 5 April was approved by Presidential decree on 9 February, but the referendum was postponed due to the declaration of state of emergency to deal with the COVID 19 pandemic.

24. The Venice Commission was informed that on 25 May, the standing committee on legal affairs of the National Assembly approved some new draft amendments to the Law on Referendum, to the Law on the Constitutional Court and to the Law on Rules of the procedure of the National Assembly. It appears in particular that the draft amendments give the National Assembly the power to declare null and void an already appointed referendum (on constitutional amendments) which was postponed due to martial law or a state of emergency. Moreover, the scope of the review of constitutional amendments by the Constitutional Court will be limited to control of compliance of constitutional amendments with the unamendable provisions of the Constitution.¹⁴ Also, the Constitutional Court should imperatively exercise this review within fifteen days after the submission of the application. On 3 June 2020, the National Assembly adopted at the second reading the amendments to the Law on Referendum.

2. The National Assembly shall, in the cases prescribed by point 2 of Article 168 of the Constitution, apply to the Constitutional Court in respect of amendments to the Constitution, membership in supranational international organisations, or territorial changes. The authorised representative of a popular initiative shall apply to the Constitutional Court with regard to the issue of a draft law put to referendum upon popular initiative.

¹² i.e. Chapters 1-3, 7, 10 and 15 of the Constitution, as well as Article 88, first sentence of part 3 of Article 89, part 1 of Article 90, part 2 of Article 103, Articles 108, 115, 119-120, 123-125, 146, 149 and 155, and part 4 of Article 200 of the Constitution shall be adopted only through a referendum.

¹³ Including therefore transitional Article 213.

¹⁴ According to Article 203 of the Constitution, "Articles 1, 2, 3 and 203 of the Constitution shall not be subject to amendment."

III. Specific questions and explanations by the authorities

25. In view of the legal context as previously described, the authorities conclude, in a background information paper attached to the questions (CDL-REF(2020)025), that the transitional provisions of the current Constitution had not, in any way, secured the new model of formation of the Constitutional Court which has not yet fully been brought to life. For the authorities, the cardinal problem of the crisis concerning the Constitutional Court is the obvious difference between the status of the Chairperson and of the judges of the Constitutional Court appointed before and after the entry into force of Chapter 7 of the Constitution, in terms of the procedure for appointment, the appointing authorities and their terms of office. Observing that 5 years after the adoption of the amendments to the Constitution, only two judges of the Court were elected in compliance with the new procedure, they come to the conclusion that the way in which transitional provisions were implemented has had the effect of postponing the full implementation of the provisions on the composition of the Court for an exceptionally long period of time.

26. The authorities request therefore the opinion of the Venice Commission on the following questions and explanations:

“

1. *In the current situation, which is the best way to fully bring to life the new model of the Constitutional Court, prescribed by the Constitution (amended in 2015)?*

One of the possible options could be to enact the amended Constitution in regards to the Members of the Constitutional Court elected before the new Constitution. Particularly, those Members of the Court who have been served for 12 years before the moment of entry into force of the 7th Chapter (Courts and the Supreme Judicial Council) of the new Constitution (April 9, 2018) will end their term and those who have not expired the 12-years term will continue respectively until the end of their 12-years term.

What concerns the Chairperson of the Court, his mandate as the Chairperson should be ceased and the new Chairperson should be elected by his/her peers for 6-years single term according to the procedure prescribed by the new Constitution. This solution will comply with the logic of short term of office set for in the new Constitution (Article 215) for the Chairperson of the Constitutional Court as well as the Chairpersons of ordinary courts.

These can be ensured through amending the transitional provisions of the Constitution (Article 213) having in mind that these provisions aimed at swift and full enactment of the changes to the Constitution.

2. *In terms of best European standards would it be deemed acceptable defining the scope and relatively short deadline for the Court's ex-ante constitutional review to the extent of compliance of the amendments with non-amendable articles of the Constitution?*

The Constitutional law on the Constitutional Court does not provide for the clear scope of Court's review in the case of Constitutional amendments which evidently creates a lot of ambiguity. To ensure the legal certainty, firstly the scope of the Court's review can be defined as for ensuring the compliance of the amendments with non-amendable articles of the Constitution during relatively short period of time (10 days for instance).

And secondly, the defined scope of the Court's review will enable the Parliament to have clear standing while voting on the amendments to the Constitution after receiving the Court's opinion on the proposed amendments.

3. *Shouldn't the Parliament have the power to abandon the earlier appointed referendum which was suspended due to emergency situation caused by the pandemic?*

The Constitutional Law on Referendum provides that the announced referendum which wasn't conducted due to the emergency situation, should be resumed when the emergency is lifted. The law doesn't provide for the possibility to call off the referendum which was announced before the emergency.

We do believe that for the sake of public health and security the Parliament should have the power to revoke its decision on conducting the referendum which was announced earlier and then suspended due to the emergency caused by pandemic."

IV. Analysis

- A. **First question: *In the current situation, which is the best way to fully bring to life the new model of the Constitutional Court, prescribed by the Constitution (amended in 2015)?***

1. Applicable international standards and previous opinions

27. The guiding principles for the assessment of the first question are the independence of the courts and their members, avoiding any unnecessary hierarchy or inequality between the judges, and the trust in the institution.

28. In the past, the Venice Commission has repeatedly been critical of changes to the retirement age or term of office of judges, even as part of a general reform of the judiciary, in particular if such changes were made in haste and without convincing justification.¹⁵ Retroactive changes to the retirement age or term of office of judges affect the independence of judges and may, dependent on the number of judges affected, also have negative effects on the efficiency of a court. This is why international standards of judicial independence explicitly guarantee security of tenure until the mandatory retirement age or the expiry of the term office, and at the same time limit the grounds for dismissal to incapacity or professional misconduct.¹⁶ The European Court of Human Rights (hereinafter "ECtHR") has repeatedly emphasised the close link between judges' terms of office and their independence.¹⁷ Indeed, the security of tenure of judges is a universally recognised principle in all jurisdictions respecting the rule of law, and for which exceptions require compelling reasons.¹⁸ In *Baka v. Hungary*, the ECtHR addressed the issue of retroactive reduction of a judge's term of office:

"Furthermore, although the applicant remained in office as judge and president of a civil division of the new *Kúria*, he was removed from the office of President of the Supreme Court three and a half years before the end of the fixed term applicable under the legislation in force

¹⁵ See CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, paras. 102-110; CDL-AD(2017)031, Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, paras. 44-52.

¹⁶ See the 1985 UN Basic Principles on the Independence of the Judiciary, art. 12, 18, and 20; General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights, paras. 19-20; the 1998 European Charter on the Statute for Judges, para. 7.1; Committee of Ministers of the Council of Europe Recommendation CM/Rec (2010)12, paras. 49-50; Opinion no. 1 (2001) of the Consultative Council of European Judges, paras. 57 and 59; CDL-AD(2016)007, Rule of Law Checklist, E.1.a.ii.

¹⁷ See *Campbell and Fell v. the United Kingdom*, nos. 7819/77; 7878/77, par. 80; *Fruni v. Slovakia*, no. 8014/07, par. 145; *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, par. 53.

¹⁸ For persuasive authority, see the Court of Justice of the European Union in the Grand Chamber judgement of 24 June 2019 in case C-619/18, par. 75-79.

at the time of his election. This can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which – according to the Court’s case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence [...].”¹⁹

29. It is on this backdrop that the Venice Commission in its October 2019 opinion underscored the link between security of tenure and judicial independence:

“The Venice Commission wishes to underscore that the security of tenure of constitutional court judges is an essential guarantee of their independence. Irremovability is designed to shield the constitutional court judges from influence from the political majority of the day. It would be unacceptable if each new government could replace sitting judges with newly elected ones of their choice.”²⁰

30. That opinion sets out in clear terms what is the purpose of the irremovability of judges, namely that judges, constitutional judges included, are not to be replaced when a new government takes office. Having been appointed under a previous government is simply not a compelling reason for replacing a judge.

31. In recent opinions, the Venice Commission has stressed the importance of the stability of the judicial system for its independence.²¹ Trust in the judiciary requires a stable legal framework, and while judicial reforms are sometimes required to increase public confidence in the judicial system, “persistent institutional instability where reforms follow changes in political power may also be harmful for the public trust in the judiciary as an independent and impartial institution”.²²

2. The proposed amendments to transitional Article 213

a. Concerning the judges of the Constitutional Court

32. The process of constitutional development in Armenia during the last 25 years shows a continued struggle for the improvement of democratic standards and the promotion of the rule of law. This process was accompanied by regular recommendations from the Venice Commission and it was not free from political conflicts. In these circumstances, the concern for the independence of the sitting judges may be even more pronounced when compared to systems where there is a long-standing undisputed culture of the rule of law.

33. Indeed, Chapter 7 (Courts and the Supreme Judicial Council) of the Constitution introduced by the 2015 amendments includes a number of provisions which are deemed to establish the highest level of independence and impartiality possible in a democratic system governed by the rule of law, concerning especially the status and procedure for election and appointment of judges (in particular Articles 164 – 167).

34. Regarding specifically the judges of the Constitutional Court, the introduction of the new requirement of a qualified majority of three-fifths of the total number of votes for their election by

¹⁹ *Baka v. Hungary*, 20261/12, par. 172.

²⁰ CDL-AD(2019)024, par. 58.

²¹ See CDL-AD(2019)027, Ukraine – Opinion on Amendments to the Legal Framework Governing the Supreme Court and Judicial Governance Bodies, par. 13-16; CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, par. 14.

²² CDL-AD(2019)027, Ukraine – Opinion on Amendments to the Legal Framework Governing the Supreme Court and Judicial Governance Bodies, par. 13. See also CCJE - BU(2017)11, Bureau of the Consultative Council of European Judges (CCJE), Report on judicial independence and impartiality in the Council of Europe member States in 2017, par. 7: “Public trust in judges may be undermined not only in cases of real, existing and convincingly established infringements, but also where there are sufficient reasons to cast doubt on judicial independence and impartiality” .

parliament is aimed at ensuring that the ruling majority is not in a position to control the appointments. It thus shields the constitutional judges from the influence of the political majority. In addition, the exclusion of the possibility of re-election (new Article 166 (1)) undoubtedly contributes to the independence of the judges. While there are systems which provide for the possibility of re-election of judges, as in the case of the constitutional court (*Staatsgerichtshof*) of Liechtenstein (Article 105 by reference to Article 102(2) of the Constitution of Liechtenstein) or of the Court of Justice of the European Union, the European standard is that the terms of constitutional judges are not renewable and re-election is excluded.

35. On the other hand, limitations of terms are common in many constitutional systems as far as constitutional court judges are concerned (as opposed to ordinary judges in civil and criminal courts where the function of the judge is only limited with the retirement age). A term of twelve years is fully in line with European standards. Undeniably, such a limited term allows the regular and partial renewal of the composition of the Court, ensuring to achieve a degree of heterogeneity and pluralism and greater balance in representation. It allows a changing parliamentary majority to elect judges of one tendency or another and better reflects the changing political and societal views of the society.

36. In parallel to major and positive developments in Armenia, the 2015 amendments secured the tenure of the sitting judges of the Constitutional Court by maintaining their initial terms of appointment. It therefore guaranteed the continuation of holding office by those judges until the retirement age without being limited in their mandate by the newly introduced twelve-year term (Transitional Article 213). Consequently, the reform of the Constitutional Court and the introduction of a fixed-term mandate by the 2015 amendments did not result in the immediate and abrupt dismissal of the judges of the Constitutional Court.

37. The provision of transitional Article 213 is neither a novelty of the 2015 amendments nor has an exceptional character. A similar transitional provision also existed in the 2005 Constitution (Article 117(13)).²³ Moreover, the same guarantee is also provided in transitional Article 215²⁴ of the 2015 Constitution for judges appointed prior to the entry into force of Chapter 7, including judges of the Court of Cassation, whose appointment procedure underwent important changes with the relevant amendments.²⁵

38. While the introduction of a limited term for constitutional judges cannot be ruled out and on the contrary is commendable, the Commission is of the view that, in principle, a transitional period allowing for a gradual change in the composition of the Court, which prevents such limitation from being used, or from being perceived to be used, as a means at the disposal of the political majority to change the composition of the Court, is appropriate. Such a transitional measure serves to debunk the sense that the limitation of the term of office of the judges is in fact linked to the actions carried out by those judges in the performance of their judicial office being disliked by the ruling majority. Moreover, provisions introducing fixed-term mandate for judges that result in their immediate removal from office, without a transitional period to protect their confidence in their security of tenure, do not comply with the principle of irremovability of judges.

²³ Article 117(13) incumbent members of the Constitutional Court shall continue to hold the office until attaining the age of seventy.

²⁴ Article 215(1): "The judges appointed prior to the entry into force of Chapter 7 of the Constitution shall continue holding office until the expiry of the term of their powers, specified in the Constitution with the amendments of 2005".

²⁵ Whereas, before the 2015 amendments, the judges of the Court of cassation are appointed by the President of the Republic upon the recommendation of the Council of Justice (Article 55(11)), after the 2015 amendments, they are appointed by the President of the Republic upon recommendation of the National Assembly which elect the candidates by at least three fifths of votes of the total number of Deputies, from among the three candidates nominated by the Supreme Judicial Council for each seat of a judge (Article 166(3)).

39. For the Venice Commission, the irremovability of judges constitutes an essential element of the independence of the judiciary. Considering the importance placed on security of tenure of judges by both “hard law” and “soft law” international standards, and having regard in particular to the growing importance of safeguarding the independence of the judiciary, including the Constitutional Court, it appears that the ideal way of bringing to life the new model of the Constitutional Court is to comply with the transitional rules and to allow for a gradual introduction of the new terms of office through normal attrition and truly voluntary departures. Therefore, the Commission sees no real need to amend the transitional Article 213.

40. For the same reasons, the Commission welcomes that the initial draft amendments to transitional Article 213 of the Constitution, which were planned to be put to referendum on 5 April 2020 and which entailed the dismissal of all the 7 judges (including the Chairperson) appointed before the entry into force of the 2015 amendments, are now abandoned. Under the initial draft constitutional amendments, judges appointed before 9 April 2018 – including those that had not yet served the full 12 years term according to the 2015 amendments – would be dismissed. For the Venice Commission, this outcome would effectively amount to a lustration of the Constitutional Court, leaving only the members appointed by the current majority. Such a blanket measure, without transitional arrangements, could hardly be justified by the aim of “standardising” the judges’ term of office and would contradict international standards. In the light of the case law of the ECtHR, this would amount to a violation of Article 6 ECHR.

41. The current request by the authorities suggests a less intrusive approach compared to the initial draft amendments. Accordingly, by an amendment to transitional Article 213, the new terms of office introduced in 2015 (twelve years) could take effect for all judges, including the judges appointed before the entry into force of 2015 amendments. This would mean that judges having already served 12 years would be dismissed, while judges who had been appointed before 9 April 2018 but who had served less than 12 years would stay in office until they had served a total of 12 years. Two sitting judges are already in office for more than twelve years, one judge is serving a second term, but this second term has not yet reached the twelve years limit.

42. In their request and during the meetings with the delegation, the authorities put forth a number of arguments in favour of such an approach: first, the transitional provisions did not, in any way, secure the new model of formation of Constitutional Court in the transitional stage. As a result, the new model provided by the Constitution in force has not yet been fully brought to life. The amendments were adopted in 2015 and entered into force in 2018. Yet, under the current transitional Article 213, their final implementation would only be possible after an extraordinarily long period of time, as the acting Chairperson would attain the retirement age in 2035 and one other member in 2037, i.e. more than 20 years after the adoption of the amendments.

43. Another problem, according to the authorities, is the obvious difference between the status of the judges appointed before the entry into force of the 2015 amendments, and judges elected or to be elected thereafter, in terms of the appointment procedure, appointing authorities and the terms of office. The authorities underlined in this respect that there are currently three different categories of judges in the Constitutional Court: those appointed under the Constitution of 1995, who may hold office until attaining the age of seventy; those appointed after the 2005 amendments, who would be sitting at the court until attaining the age of sixty-five; and those appointed after the entry into force of the 2015 amendments, who may hold office for a total of twelve years. For the authorities, a striking example of this difference in status among judges is the fact that the newly elected judges (2 judges in total), during their twelve-years term of office, will not be able to run for the office of the Chairperson of the Court under the rules of the Constitution in force.

44. The authorities underscore that in order to remedy the public distrust in the Constitutional Court, which is an urgent need in Armenia, the composition of this institution should reflect as soon as possible the current provisions, which guarantee high standards concerning the

independence of the Constitutional Court. They also stress that the current crisis around the Constitutional Court presents serious challenges for ensuring the “democracy guaranteed by the Constitution, as well as sufficient qualities for a state governed by the rule of law”.

45. The Venice Commission reiterates that Chapter 7 of the Constitution introduced by the 2015 amendments is aimed at establishing the highest level of independence and impartiality possible in a democratic system governed by the rule of law, concerning particularly the status and procedure for election of constitutional judges. The requirement of a qualified majority of three-fifths in parliament for their election, and the exclusion of the possibility of their re-election, are undoubtedly important safeguards that guarantee the independence of constitutional judges. In particular, those safeguards are aimed at ensuring that the ruling majority of the day is not in a position to control the appointments and as a result, has not the ultimate authority on the composition of the Constitutional Court.

46. The introduction of a limited term of office for constitutional judges, as previously stated, is also perfectly in line with European standards in that it achieves a greater balance in representation within the Court.

47. It should also be observed that the purpose of the current majority is not to alter these high democratic standards, by reversing and stepping back from the achievements of the 2015 reform and by introducing rules that would allow the majority to control the appointments. It appears, on the contrary, that the authorities' objective is to ensure that the new provisions produce their effects and the composition of the Court reflects the democratic standards introduced by those provisions as soon as possible. This is a legitimate aim.

48. The Commission acknowledges that, in context, the time period between the adoption of the amendments and their final implementation, which would take up to 20 years, is unusually and exceptionally long, and results in effectively frustrating the application of the 2015 amendments. Moreover, it recognises the legitimacy of the authorities' wish to ensure equality in status among the sitting judges of the Court, relating in particular to their term of office, and to remedy any other statutory inequalities that result from the current state of affairs. The Commission draws attention to its 2019 opinion where it expressed preference for a system where all judges of the Constitutional Court enjoyed the same status irrespective of the time of their appointment.²⁶

49. The amendment suggested in the request proposes to apply the fixed-term mandate to the sitting judges, limiting therefore their life-time mandate until retirement. The Commission considers that when compared with a measure that would entail the limitation of an already fixed-term mandate, the interference with the principle of irremovability of judges caused by the current proposal is lesser in degree, which should be borne in mind.

50. Moreover, the proposed measure aims at a standardisation of the judges' term of office, based on a general reform of the Constitutional Court, and subjects all judges to the same general rule rather than dismissing them based on a sharp cut-off point linked to the entry into force of the 2015 amendments as it was initially proposed.

51. There are therefore good arguments in favour of the new approach proposed by the Armenian authorities.

52. However, as pointed out above, any interference with the principle of irremovability of judges remains, highly problematic and should be strictly limited. A solution has to be found reconciling to the extent possible the different conflicting interests at stake. In this respect, the Commission particularly takes into consideration that the 2015 reform, with the democratic safeguards it introduced, does not leave room for the ruling majority to have the control of the Court. It also

²⁶ CDL-AD(2019)024, para. 60.

notes the legitimate need in Armenia to have the new constitutional provisions produce their effects without an excessive and unreasonable delay.

53. The Commission reiterates that the ideal way of bringing to life the new model of the Constitutional Court is in principle to comply with the transitional rules and to allow for a gradual introduction of the new terms of office through normal attrition and truly voluntary departures. However, given the circumstances in Armenia, a possible solution may be to amend the current Article 213 and provide for the renewal of the Constitutional Court while envisaging a transitional period. A transitional period would allow for a gradual change in the composition of the Court in order to avoid any abrupt and immediate change encroaching on the independence of this institution. The authorities are best placed to measure the length of this transitional period and the Commission is not in a position to propose a concrete time period. Determining the length of this period requires striking a balance between two competing public interests: on the one hand, the transitional period must reach a minimum length in relation to each individual judge's remaining term of office in order not to constitute a disproportionate interference with the principle of irremovability of judges. On the other hand, an exceptionally and unreasonably long transitional period which extends well beyond the object of its purpose, risks thwarting the implementation of the will of the constituent power as expressed in the 2015 amendments. It is therefore important to allow a gradual change over a certain period, the duration of which respects this balance and to ensure that this measure remains an exception and does not create any dangerous precedent for future governments.

b. Concerning the Chairperson of the Constitutional Court

54. As far as the position of the Chairperson of the Constitutional Court is concerned, the explanations in the request for the present opinion suggest that the mandate of the current Chairperson who was elected on 21 March 2018 under the provisions of the 2005 version of the Constitution and whose term of office as judge and as chair ends normally in 2035 should cease and the new Chairperson should be elected by his peers for a 6-years single term according to the procedure prescribed by the Constitution currently in force (Article 166(2)). The authorities consider that this solution would also comply with the logic pursued by Article 215 of the Constitution concerning the chairpersons of courts and of the court of cassation, which provides that *"the chairpersons of courts and the chairpersons of chambers of the Court of Cassation appointed prior to the entry into force of Chapter 7 of the Constitution shall continue holding office until the appointment or election of chairpersons of courts and chairpersons of chambers of the Court of Cassation under the procedure prescribed by Article 166 of the Constitution, which shall be carried out not later than within six months following the formation of the Supreme Judicial Council."* It should also be emphasised that the suggestion in the request concerns the termination of the mandate as chairperson only, not also the term of office as judge.

55. The Venice Commission recalls that there are basically two systems in Europe for the election of presidents, vice presidents and presidents of chambers or panels. In some states, such as Germany or Austria, the president and the vice-president are elected by the organs competent to elect the other judges (Government, Parliament). On the other hand, quite a number of systems, if not the majority, provide for an election of presidents by the judges of that court. Above all and inevitably, this is the case at the ECtHR and the Court of Justice of the European Union. For the present analysis, the standards of the latter group are relevant. Here the shorter terms for court presidents are acceptable, and they may even contribute to more collegiality than hierarchy among the judges. In Bosnia and Herzegovina for instance, the President of the Constitutional Court which has been established under strong international influence, is elected by secret ballot by a rotation of the judges of the court selected by the legislative authorities of the Entities, for three years (Article 84 of the Rules of the Constitutional Court of Bosnia and Herzegovina), which is even shorter than is the case in Armenia. In the Armenian case, the Chairperson of the Court under the current rules would remain in the chair for 17 years, longer than the term foreseen for judges under the new

Constitution. This risks leading to a predominant role of the Chairperson and is not conducive to collegiality among the judges.

56. Also, the Commission takes note of the authorities' claim that the election of the current Chairperson of the Constitutional Court, on 21 March 2018, under the provisions of the 2005 Constitution and only three weeks before the entry into force of the 2015 amendments, was contrary to the spirit of those amendments aiming, on the one hand, at guaranteeing more independence for the judiciary and for the Constitutional Court from parliament and on the other hand at enabling a rotation in the position of Chairman. In any case, he was elected when the new rules for the term of office had already been adopted for quite some time. His situation is therefore quite different from the situation of a Chairperson elected under the previous version of a Constitution at a time when it is not known that the term of office will be shortened.

57. In addition, shortening the term of the president does not have the same impact on the independence of a court as shortening the term of all judges and the international standards appear to provide more leeway concerning his position. They distinguish between the judicial function of judges and administrative functions. The Venice Commission has in previous opinions accepted shorter tenures for the position of court presidents, provided that the status as judge is maintained and not affected by the expiry of the term as court president.²⁷ However, in practice the separation between court administration and the exercise of judicial functions may be less clear, as illustrated by the above-mentioned Baka case. Although this case is rather different from the issue at hand, since it concerned the early termination of the six-year fixed term mandate of the President of the Supreme Court of Hungary and not the introduction of a limitation of a mandate until retirement, the ECtHR considered it problematic for judicial independence that the applicant was removed from the office of president, even though he remained a judge of that court. The Venice Commission too has been cautious of accepting the termination of the mandate as court president as part of a general reform unless compelling reasons are given.²⁸ If legitimate and compelling reasons can be established, the termination of a mandate as court president must nonetheless respect the principles of legal certainty (legitimate expectations) and proportionality.

58. It should also be noted that presidents of Constitutional Courts or Supreme Courts enter more easily into conflict with the government, the head of state or parliamentary groups than ordinary judges. Court presidents serve in the public and in the media as the face for their court and are connected to certain decisions which may be disputed in the public debate or disliked by the government although these decisions are taken by a body of judges.²⁹

59. Against this background, the Venice Commission considers that changes in the term of office, powers and duties of the chairman of the Constitutional Court appear to be possible but require a cautious approach. It would therefore be advisable to envisage a transitional period instead of immediately terminating the mandate of the current chairperson of the court upon the entry into force of a possible amendment to Article 213.

²⁷ CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), par. 28-35.

²⁸ See CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts of Georgia, par. 97-98.

²⁹ Examples are the presidents of the supreme and constitutional courts in Poland after 2015, or the two cases where judges were successful applicants before the ECtHR, i.e. the former presidents of the Supreme Administrative Court in Liechtenstein (*Wille case Wille v. Liechtenstein*, No. 28396/95, 28 October 1999) and of the Supreme Court in Hungary (Baka case).

B. Second question: *In terms of best European standards would it be deemed acceptable defining the scope and relatively short deadline for the Court's ex-ante constitutional review to the extent of compliance of the amendments with non-amendable articles of the Constitution?*

60. Articles 168(2) and 169(2) of the Constitution of Armenia provides for constitutional review of constitutional amendments. Article 168(2) provides that the Constitutional Court, prior to the adoption of draft amendments to the Constitution, determines the compliance thereof with the Constitution. The mandatory character of this review is stated in clear terms in Article 169(2) which provides that the National Assembly *shall* in the cases prescribed by point 2 of Article 168 of the Constitution, apply to the Constitutional Court in respect of amendments to the Constitution. The Constitution does not define the criteria to be used by the Court when revising constitutional amendments.

61. The Constitutional Law on Rules of Procedure of the National Assembly provides detailed rules, in particular in its Article 86, concerning this procedure. Accordingly, prior to the adoption of the draft amendments to the Constitution in the second reading (two readings in total are necessary in the procedure of adoption of draft constitutional amendments), the draft resolution on applying to the Constitutional Court shall be put to a vote. If the decision is adopted, the Chairperson of the National Assembly shall sign this resolution within two working days and, together with the draft amendment to the Constitution debated in the second reading, shall send it to the Constitutional Court. The debate of the issue shall be interrupted until the resolution of the Constitutional Court is received. If the Constitutional Court finds that the draft amendment to the Constitution is not in compliance with the Constitution, then the draft shall be withdrawn from circulation. Otherwise, after receiving its resolution, the voting on the issue at the forthcoming regular sittings of the National Assembly shall be carried out.

62. Under Article 72, paragraph 4, of the Constitutional Law on the Constitutional Court, the Court shall adopt in this case a decision either on recognition of the draft as complying with the Constitution or on recognition of the draft as fully or partially contradicting the Constitution. Under paragraph 3 of the same provision, the Constitutional Court shall adopt a decision no later than three months after the registration of the application.

63. It follows from the above-mentioned legal provisions that the Constitution as interpreted by the current Law on the Constitutional Court and the Rules of Procedure of the National Assembly provides for an *ex-ante* mandatory and systematic review by the Constitutional Court before a proposal for constitutional amendment can be adopted. Those legal provisions do not limit the scope of review of draft constitutional amendments by the Constitutional Court. The only time-limit provided for the review is the one of three months as stated in Article 72(3) of the Law on the Constitutional Court.

64. Moreover, during the meetings with the Constitutional Court, following two specific questions raised by the Venice Commission delegation, the representatives of the Constitutional Court informed the delegation that, as to date, there is no case-law of the Court concerning the review of draft constitutional amendments and that the scope of this review is not limited, covering the non-amendable provisions of the Constitution as well as the Constitution in its entirety, including therefore also the procedural rules on adoption of draft constitutional amendments.

65. In its 2010 Report on Constitutional Amendment,³⁰ the Venice Commission distinguished substantive judicial review of constitutional amendments and purely procedural/formal review in order to check and ensure that the amendments have been adopted following the prescribed constitutional procedures. As for the procedural review, the Commission has taken the position that all constitutional systems should allow for democratic and judicial control to ensure that

³⁰ CDL-AD(2010)001 Report on Constitutional Amendment, paras. 194 *et seq.* and 225 *et seq.*

constitutional amendments have been adopted according to the prescribed constitutional procedures. This is an issue which may suitably be tried before a court and such a formal control by courts does not interfere with the sovereign rights of the constituent power, but rather serves to protect democracy.

66. As for substantive review of constitutional amendments, the Venice Commission has adopted a more cautious approach.³¹ There is no generally accepted standards in comparative constitutional law regarding the participation of constitutional courts in the constitutional amendment process. Mandatory *ex ante* review by the Constitutional Court of draft constitutional amendments is rare³² and while there are examples that the constitutional courts have made useful contributions which have improved and served as guidance for the subsequent parliamentary and public debates, there are also examples that the a priori involvement of the court has brought excessive rigidity to the amendment process and blocked the political debate.³³

67. For the Commission, substantive judicial review of constitutional amendments should only be exercised in those countries where it already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the constitutional legislator.³⁴ As long as the special requirements for constitutional amendment, such as qualified majority of the elected representatives in parliament, as well as other procedural requirements are followed and respected these are and should be a sufficient guarantee against abuse. Amendments adopted following such procedures will in general enjoy a very high degree of democratic legitimacy, which a court should be extremely reluctant to overrule.

68. The Commission has therefore a general preference for limiting the scope of review of constitutional amendments by the Constitutional Court to a purely procedural examination. It is indeed desirable, that e.g. the parliamentary minority can ask the Constitutional Court to examine whether the procedure for adopting constitutional amendments was followed. This is different from a general *ex ante* review by the Court.

69. However, if a constitution such as the Constitution of Armenia provides for such *ex ante* review, this rule obviously has to be respected. If the text of the Constitution allows it, limiting the scope of such review to a control of conformity with unamendable provisions of the Constitution is in line with the European standards. The scope of the judicial review then depends on the definition of unamendable provisions by the Constitution itself. The “unamendability” under the Constitution should be interpreted narrowly. According to Article 203 of the Constitution, only Articles 1-3 and 203 are unamendable, which on the face of it appears like a rather limited scope for judicial review of constitutional amendments. Considering the statement by the representatives of the Constitutional Court during the meetings that the scope of review of the constitutional amendments by the Constitutional Court may cover the entire Constitution, the Commission warns against an expansive interpretation by the Constitutional Court of its own review power. It would be problematic if the Constitutional Court invalidated constitutional amendments based on vague principles loosely connected with or based on a broad interpretation of the unamendable provisions in the Constitution.

70. As to the deadline for decisions in such *ex-ante* proceedings, a balance has to be struck between effective judicial review within the scope defined by the Constitution, and the expression of the will of the constitutional legislator also in times of possible emergency. It seems adequate

³¹ See, for instance, CDL-AD(2016)009 Final Opinion on the draft constitutional amendments on the judiciary of Albania, para. 41.

³² See, for the examples, CDL-AD(2010)001, para. 194.

³³ See, CDL-AD(2015)045, Interim Opinion on the draft constitutional amendments on the judiciary of Albania, para. 20-21, CDL-AD(2010)001, para. 195.

³⁴ CDL-AD(2010)001, para. 235.

if the national legislator enjoys a certain margin of appreciation when striking this balance and a rather short deadline for the ex-ante review such as two weeks does not appear problematic, having regard also to the variety of systems in Europe in this respect.

71. One particular issue, which was mentioned during the meetings with the authorities and other stakeholders, is whether in case the Constitutional Court is called upon reviewing the constitutionality of the amendment concerning the mandate of the Court's judges, there would be a conflict of interest preventing those judges from reviewing the constitutional amendment. The Venice Commission considers that it must be ensured that the Constitutional Court as guarantor of the Constitution can function as a democratic institution and the possibility of excluding judges must not result in the inability of the Court to take a decision. Under Article 14(2) of the Law on the Constitutional Court of Armenia, a judge of the Constitutional Court may not use the authority of his/her position as a judge in his/her own interests. Accordingly, if a judge of the Court believes that s/he would have a conflict of interest in case s/he is called upon reviewing constitutionality of an amendment concerning his/her mandate, then following the rule in Article 14, s/he should disqualify himself or herself for hearing the matter according to general rules. For the Venice Commission, however, a distinction has to be made between the institutional principles of the Constitution concerning the independence of the Constitutional Court and the personal interest of the judges. In this respect, the Constitutional Court should use extensive self-restraint in order to avoid any impression of favouring the personal interest of the judges when reviewing amendments concerning the Court itself.

C. Third question: *Shouldn't the Parliament have the power to abandon the earlier appointed referendum which was suspended due to emergency situation caused by the pandemic?*

72. The Venice Commission firstly observes that Article 202 of the Constitution mentions the texts that should be amended only through referendum and does not include Article 213. Therefore, it is a matter of choice whether or not to call a referendum. Direct democracy in a complicated political situation can serve as a last resort for finding *any* solution, but it is a double edged sword, which hardly makes it most recommendable in the case of such constitutional provisions that are aimed at finding a delicate balance in readjusting of recently reformed institutions.

73. After those preliminary observations, the Venice Commission considers that it is a general principle of public law that general norms and decisions adopted by a competent public body can be annulled by a new decision of the same body following the same procedure. There are of course exceptions, such as when a decision raises legitimate expectations of the application of norms or the conferral of rights and duties in individual cases. No such exceptions apply here. On the contrary, the fact that the legality of calling a referendum on constitutional amendments not reviewed by the Constitutional Court can be questioned (cf. paras. 20, 21 and 59 et seq. above), is a strong argument in favour of revoking such a referendum.

V. Conclusions

74. In the present Opinion prepared at the request of the Ministry of Justice of the Republic of Armenia, the Venice Commission addressed three legal questions put by the Armenian authorities in the context of draft constitutional amendments. As such, this opinion does not have the intention to take a final stand on the draft constitutional amendments, but to provide the authorities with material as to the compatibility of the planned amendments concerning the mandate of the judges of the Constitutional Court with European standards in particular pertaining to the independence of the judiciary.

75. The authorities raised in this context three specific questions concerning the mandate of the sitting judges and the chairperson of the Constitutional Court, the scope of *ex-ante* constitutional review of constitutional amendments by the Constitutional Court and the time-period within which

the Constitutional Court has to finalise the review procedure, and the possibility for the Parliament to annul its earlier decision to call a referendum, which was suspended due to the emergency situation caused by the pandemic.

76. The first question suggests that by an amendment to transitional Article 213 of the Constitution, the new terms of office for judges of the Constitutional Court introduced in 2015 (twelve years) would take effect for all judges, including the judges appointed before the entry into force of 2015 amendments. As a result, judges having served 12 years would be dismissed according to the new rules, while judges appointed before the entry into force of the amendments but having served less than 12 years, would stay in office until they have served for a total of 12 years. Considering the importance placed on security of tenure of judges for safeguarding the independence of the judiciary, including the Constitutional Court, the Commission considers that in principle the ideal way of bringing to life the new model of the Constitutional Court is to comply with the transitional rules and to allow for a gradual introduction of the new terms of office through normal attrition and truly voluntary departures. It welcomes that the authorities abandoned their initial proposal to terminate with immediate effect the mandates of the judges appointed before the entry into force of the 2015.

77. However, the Commission recognises the legitimacy of the authorities' wish to ensure that the composition of the Constitutional Court reflects within a reasonable time-frame the provisions of the current Constitution, which guarantee high standards concerning the independence of the Court and their concern to ensure equal status among the constitutional judges. The Commission also finds that the time-period between the adoption of the 2015 amendments and their final implementation is unusually long and results in excessively delaying the positive outcomes of those amendments in terms of the independence of the Constitutional Court.

78. Under these exceptional circumstances, the Commission is of the view that, a possible solution aimed at reconciling the different conflicting interests at stake, may be to amend current Article 213 and provide for the renewal of the Constitutional Court while envisaging 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 this institution. The authorities are best placed to measure the length of this transitional period striking a balance among the competing public interests. What is important is to allow a gradual change over a certain period and to ensure that this measure remains an exception and does not create any dangerous precedent for future governments.

79. Concerning the chairperson of the Court, although the international standards appear to provide more leeway concerning his position, changes in the term of office of the chairperson also require a cautious approach.

80. As to the second question, the Commission notes that limiting the scope of a general ex ante review of constitutional amendments by the Constitutional Court to a control of conformity with non-amendable provisions of the Constitution is in line with the European standards. The scope of judicial review depends on the definition of unamendable provisions by the Constitution itself and the "unamendability" under the Constitution should be interpreted narrowly. The Commission warns against an expansive interpretation by the Constitutional Court of its own review power based on vague principles loosely connected with or based on a broad interpretation of the unamendable provisions in the Constitution. The Constitutional Court should in particular use extensive self-restraint and avoid any impression of favouring the personal interest of the judges when reviewing amendments concerning the Court itself. A rather short deadline for the ex-ante review does not appear to be problematic.

81. As to the third question, it is a general principle of public law that general norms and decisions adopted by a competent public body can be annulled by a new decision of the same body following the same procedure. Therefore, the Parliament should have the authority to annul its

earlier decision to call a referendum, which was suspended due to the emergency situation caused by the pandemic.

82. The Venice Commission remains at the disposal of the Armenian authorities for further assistance in this matter.

Draft-restricted