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(VENICE COMMISSION)

RUSSIAN FEDERATION

INTERIM OPINION

**ON CONSTITUTIONAL AMENDMENTS
AND THE PROCEDURE FOR THEIR ADOPTION**

**Adopted by the Venice Commission
at its 126th Plenary Session
(online, 19-20 March 2021)**

on the basis of comments by

Mr Nicos ALIVIZATOS (Member, Greece)
Ms Claire BAZY MALAURIE (Member, France)
Ms Veronika BÍLKOVÁ (Member, Czech Republic)
Mr Iain CAMERON (Member, Sweden)
Ms Monika HERMANN (Substitute Member, Germany)
Mr Martin KUIJER (Substitute Member, Netherlands)

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I. Introduction

1. By letter of 29 May 2020, Mr Michael Aastrup Jensen, Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Venice Commission on constitutional amendments and the procedure for their adoption in the Russian Federation.

2. Mr N. Alivizatos, Ms C. Bazy Malaurie, Ms V. Bílková, Mr I. Cameron, Ms M. Hermanns and Mr M. Kuijjer acted as rapporteurs for this opinion.

3. On 12-13 November 2020, the Venice Commission sent a list of questions to the Constitutional Court and the Russian authorities respectively. On 17 November 2020, the Permanent Representative of the Russian Federation with the Council of Europe informed the Venice Commission that due to the covid-19 pandemic, no meetings with the rapporteurs could be organised but that the Russian authorities were ready to reply to the written questions. For the preparation of a comprehensive opinion, a visit to Moscow would be indispensable according to the reply received by the Russian authorities also in light of the fact that some 100 implementing laws had to be taken into account when assessing the constitutional amendments. On 20 November 2020 the Bureau of the Venice Commission therefore decided to prepare an interim opinion on the basis of the written replies to the rapporteurs' list of questions.

4. On 23 November 2020 the Constitutional Court sent written replies to the questions to the Commission. In February 2021, the Commission received written replies from the State Duma, the Senate, the Ministry of Justice, the Commissioner for Human Rights and a group of experts. As the replies received converge to a large extent, this opinion refers to them as "the Replies". The Commission is grateful to the Russian authorities for their co-operation.

5. On 19 February 2021, Mr Alivizatos, Mr Cameron and Mr Kuijjer held an online meeting with Mr Andrey Klishas, Chairman of the Federation Council Committee on Constitutional Legislation and State Construction, Co-chairman of the working group on the preparation of proposals for amendments to the Constitution of the Russian Federation, Mr Leonid Slutsky – Chairman of the State Duma Committee on International Affairs, Mr Pyotr Tolstoy – Deputy Chairman of the Russian State Duma and Mr Mikhail Galperin the Russian Federation's Representative at the European Court of Human Rights, Deputy Minister of Justice of the Russian Federation. The Commission is grateful for the excellent organisation of this meeting. The rapporteurs further held a meeting with the representatives of several NGOs and wishes to thank them and the Council of Europe office in Moscow for their co-operation. Comments on the draft opinion were sent by the State Duma on 12 March 2021 and the Federation Council on 15 March 2021 (both hereinafter referred to as the "Comments").

6. On 2 March 2021, the Institute of Legislation and Comparative Law under the Government of the Russian Federation kindly provided a Thematic Commentary on the constitutional amendments.¹

7. This interim opinion was prepared in reliance of an unofficial translation of the Law of the Russian Federation amending the Constitution of the Russian Federation on improving the regulation of certain aspects of the organisation and functioning of public authority (CDL-REF(2020)066) as well as the official translation of the amended Constitution (CDL-

¹ Khabrieva T.Y., Klishas A.A., Thematic commentary to the Law of the Russian Federation Amending the Constitution of the Russian Federation of March 14, 2020 No. 1-FKZ «On improving the regulation of certain aspects of the organization and functioning of public authority», Moscow, 2021, 216 p.

REF(2021)010), kindly provided by the Constitutional Court. The translations may not accurately reflect the original version on all points.

8. This interim opinion was drafted on the basis of comments by the rapporteurs, the online meetings and the replies to the written questions and comments received. Following its examination by the Sub-Commission on Democratic Institutions (online, 18 March 2021) and an exchange of views with Mr Andrey Klishas, Chair of the Federation Council Committee on Constitutional Legislation and State Building of the Russian Federation, and with Mr Pyotr Tolstoy, Deputy Chairman of the State Duma of the Federal Assembly of the Russian Federation, it was adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021).

II. Scope of the present opinion

9. Upon request by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the Venice Commission has already assessed the amendments to Articles 79 and 125 of the Constitution in its Opinion CDL-AD(2020)009, adopted on 18 June 2020, *on the Draft Amendments to the Constitution* (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights.

10. This Opinion will therefore not cover the amendments to Articles 79 and 125 of the Constitution; in line with the request by the Parliamentary Assembly, the Venice Commission in this opinion will examine the other constitutional amendments adopted in 2020, as well as the procedural aspects of their adoption.

11. In doing so, the Commission's task is not limited to examining only those amendments which constitute innovations, or have otherwise introduced new powers or features; it will analyse also amendments which perpetuate a given power or institution, raise to constitutional status something which is already in federation law or consolidate existing practices.

III. Chronology of the preparation and adoption of the constitutional amendments

12. In his address to the Federal Assembly of the Russian Federation on 15 January 2020,² the President of the Russian Federation, Mr Vladimir Putin, proposed amending various provisions of the 1993 Constitution of the Russian Federation. By decree of the same day, he established a working group to prepare proposals for such amendments.³ On 20 January 2020, the President submitted the draft law *On improving the regulation of separate issues of organisation of the public authority* to the State Duma.⁴ Three days later, the draft passed the first reading. On 2 March 2020, the President proposed additional amendments to the Constitution.

13. The draft, with these new amendments, passed the second and third readings in the State Duma on 10 and 11 March 2020 respectively.⁵ Subsequently, the Draft law was approved by

² *Послание Президента Федеральному Собранию*, 15 января 2020 года (Presidential Address to the Federal Assembly, January 15, 2020), available at <http://kremlin.ru/events/president/news/62582>.

³ *Образована рабочая группа по подготовке предложений о внесении поправок в Конституцию* (establishment of a working group to prepare proposals for amending the Constitution, 15 January 2020), available at <http://kremlin.ru/events/president/news/62589>.

⁴ Законопроект № 885214-7, *О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти*, 20 января 2020 года (Bill No. 885214-7, *On improving regulation of certain issues of the organization and functioning of public authorities*, January 20, 2020).

⁵ Постановление Государственной Думы, *О проекте закона Российской Федерации о поправке к Конституции Российской Федерации "О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти"* (проект № 885214-7), 11 марта 2020 года (Resolution of

the Council of Federation of the Russian Federation on 11 March⁶ and by the legislative councils of all the federal subjects of the Russian Federation on 12 and 13 March. One day later, on 14 March 2020, it was enacted by the President of the Russian Federation and published on the official online portal www.pravo.gov.ru (hereinafter "the Amendment Law", unofficial translation CDL-REF(2020)066).

14. At the same time, on 14 March, the President sent a request to the Constitutional Court of the Russian Federation to verify the compatibility of the Amendment Law with Chapters 1, 2 and 9 of the Constitution.⁷ The Court issued its Conclusion no. 1-Z on 16 March 2020, finding the amendments and the procedure compatible with these chapters.⁸ The Court concluded that:

- 1) the procedure for the entry into force of Article 1 of the Law of the Russian Federation on Amendments to the Constitution of the Russian Federation "On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Power" was in accordance with the Constitution of the Russian Federation; and
- 2) the provisions of the Law on the amendment to the Constitution of the Russian Federation "On improving the regulation of certain issues of the organization and functioning of public authorities", complied with the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation.⁹

15. Following a postponement¹⁰ due to the covid-19 pandemic, an All-Russian vote (общероссийское голосование) took place from 25 June to 1 July 2020. The voters were asked to answer the following question: "Do you approve the amendments to the Constitution of the Russian Federation?" According to the official data provided by the Central Electoral Commission of the Russian Federation, 78 per cent of the voters casting a valid vote answered yes and 22% answered no, with a turnout of 68 per cent.¹¹ Following the vote, the President

the State Duma on the draft law of the Russian Federation on an amendment to the Constitution of the Russian Federation "On improving the regulation of certain issues of the organisation and functioning of public authorities" (draft No. 885214-7), 11 March 2020).

⁶ *Постановление Совета Федерации Федерального Собрания Российской Федерации О Законе Российской Федерации о поправке к Конституции Российской Федерации "О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти"*, 11 марта 2020 года (Resolution of the Federation Council of the Federal Assembly of the Russian Federation on the Law of the Russian Federation on an amendment to the Constitution of the Russian Federation "On improving regulation of certain issues of the organization and functioning of public authorities", 11 March 2020).

⁷ *Президент направил запрос в Конституционный Суд*, 14 марта 2020 года („The President sent a request to the Constitutional Court“, 14 March 2020, available at <http://kremlin.ru/events/president/news/62989>).

⁸ *Заключение Конституционного суда Российской Федерации о соответствии положениям глав 1, 2 и 9 Конституции Российской Федерации не вступивших в силу положений Закона Российской Федерации о поправке к Конституции Российской Федерации «О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти», а также о соответствии Конституции Российской Федерации порядка вступления в силу статьи 1 данного Закона в связи с запросом Президента Российской Федерации*, 16 марта 2020 года (Conclusion of the Constitutional Court of the Russian Federation on the compliance with the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation of the provisions of the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation "On improving the regulation of certain issues of the organization and functioning of public authorities", as well as on the compliance with the Constitution of the Russian Federation of the procedure for the entry into force of Article 1 of this Law in connection with the request of the President of the Russian Federation, 16 March 16 2020), available at <http://doc.ksrf.ru/decision/KSRFDecision459904.pdf>.

⁹ *Заключение Конституционного суда Российской Федерации* (Conclusion of the Constitutional Court of the Russian Federation), *op. cit.*, p. 51.

¹⁰ The vote had been planned for 22 April 2020.

¹¹ ЦИК РФ, *Ход общероссийского голосования по вопросу одобрения изменений в Конституцию Российской Федерации* (CEC of the Russian Federation, All-Russian vote on the approval of amendments to the Constitution of the Russian Federation), available at <http://www.cikrf.ru/analog/constitution-voting/hod/>.

signed an executive order on 3 July to amend the Constitution and the amendments (Article 1 of the Law) entered into force on 4 July 2020.

IV. Analysis of the procedure for the Adoption of the Constitutional Amendments

16. Replies: As concerns the procedure of adoption of the Amendments, the Replies insist that there was sufficient wide public consultation on the amendments. The Amendments do not amend Chapters 1, 2 and 9 of the Constitution, for which the convening of a Constitutional Convention would have been necessary (Article 135 of the Constitution), and the procedure followed for the constitutional amendments of Chapters 3 to 8 was correctly followed, as the amendments were passed by both chambers of the Assembly and approved by all subjects of the Federation. The provisions of Chapters 1 and 2 retain an enhanced interpretative potential as compared to the amendments in other chapters. Other constitutional provisions must be interpreted and applied only in a systematic relation to them.

17. According to the replies, furthermore, there is no obligation that all parts of a legal act, in this case the Amendment Law, enter into force at the same time. The additional review by the Constitutional Court and the all-Russian vote only provided additional stages that provided increased safeguards and legitimacy, even though this was not even required. Without being obliged to do so, the constitutional legislator limited itself by deciding that to enter into force the amendments would require an additional, nationwide vote. In any case, following their approval in the all-Russian vote, the amendments reflect the will of the sovereign people of the Russian Federation and they constitute the new version of the Constitution in force. The Comments point out that the 2020 amendments were not "wide-ranging" and concern only 26 per cent of the Constitution. Previous amendments were profound as well. They concerned the extension of the mandates of deputies and the President, and the relationship between the Government and the State Duma, the formation of the Federation Council, the organization the judiciary and the prosecutor's office. In order to allow for a more thorough discussion, the deadline for amendments was extended twice, from 6 to 14 February 2020 and then to 2 March 2020. The vote took place on 1 July 2020. This was a quite reasonable timeframe, which allowed civil society and the expert community to make some 1000 proposals for changes. In its opinion on the 1994 constitutional amendments, the Venice Commission had not raised the issue of the speedy adoption of those amendments.

A. Speed of preparation of the amendments - consultations

18. The Constitution of the Russian Federation was adopted in 1993 through a referendum. Between 1993 and 2019, it was subject to minor changes only, the most substantive of them being the extension in 2008 of the mandate of the members of the Duma and of the President from 4 to 5 and 6 years respectively.¹² The constitutional amendments adopted in 2020 constitute the most extensive and substantive revision of the 1993 Constitution ever carried out.

19. Such extensive revisions usually take a long time, as they should involve consultations with various political and social actors concerned by the revisions,¹³ drafting of the text and its discussion in parliament and, potentially, a preparation for a referendum. Instead, the 2020 revision of the Constitution of the Russian Federation, despite its large extent, was carried out in less than six months (and would have been carried out in about 3 months, were it not for the

¹² Law of the Russian Federation on amendment to the Constitution of the Russian Federation dated December 30, 2008 No. 6-FKZ "On Changing the Term of Powers of the President of the Russian Federation and State Duma", which came into force from the day of its official publication on December 31, 2008 (Rossiyskaya Gazeta, December 31, 2008).

¹³ Venice Commission, CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary, paras. 135, 137; CDL-AD(2020)019, Malta - Opinion on ten Acts and bills implementing legislative proposals subject of Opinion CDL-AD(2020)006, paras. 10-13.

COVID-19 crisis). While such a speedy procedure is not *per se* unlawful, it is not appropriate for such a wide-ranging constitutional reform. Representatives of civil society insisted that the speed of process and the procedure chosen did not leave them any meaningful way to express their objections to the amendments of the Constitution.

B. Competence of the Constitutional Court

20. Similar issues relate to the consultation of the Constitutional Court. Seeking the conclusion of the Constitutional Court was not required under Article 136 of the Constitution. This competence of the Constitutional Court was neither foreseen in the Constitution, nor in the Law on the Constitutional Court (which was amended on 25 November 2020) nor in the Court's own rules of procedure. Requesting a new type of conclusion from the Constitutional Court within a very short deadline (the Amending Law requires the Court to reply within seven days) could well be detrimental to a thorough preparation of an assessment of such wide-ranging constitutional amendments. The Comments point out that according Article 3 (1) (7) of the Law on the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court also exercises "other powers" vested in it by federal constitutional law and that Article 3 (2) of the Amending Law was adopted in compliance with the constitutional requirements provided for federal constitutional laws. The Venice Commission however insists that the Amending Law was an ordinary law only, not a constitutional law. Even if it was adopted with the majority required for federal constitutional laws (Article 108 of the Constitution), constitutional laws are labelled as such, which is not the case for the Amendment Law.¹⁴

C. Competence of the Constitutional Assembly

21. In its Chapter 9, the Constitution contains provisions relating to constitutional amendments and review of the constitution. The text makes a distinction between amendments to provisions of Chapters 3-8 that shall be adopted "*according to the rules fixed for adoption of federal constitutional laws and come into force after they are approved by the bodies of legislative power of not less than two thirds of the constituent entities of the Russian Federation*" (Article 136) and a review of any provision of Chapters 1, 2 or 9, which require, if supported by a qualified majority of the two chambers of the Parliament, the convocation of a Constitutional Assembly (Article 135). This Assembly may then either reject or amend the proposed constitutional amendments. Subsequently the (amended) proposed amendments require adoption by the Assembly or need be submitted to a referendum (Article 135).

22. While the constitutional amendments adopted in 2020 do not formally entail revisions of Chapters 1, 2 or 9, these chapters are affected as concerns substance. For instance, materially the provision of the new Article 67.1 on the territory belongs to Chapter 1 (the Fundamentals of the Constitutional System) rather than Chapter 3 (the Federal Structure). New Article 75 on social rights touches a subject matter belonging to Chapter 2 (Rights and Freedoms of Individual and Citizen). The introduction of a ban on same-sex marriage in Article 72 (g1) would also fit into Chapter 2.

23. While from a purely formal viewpoint Article 135 appears not to be applicable, the Venice Commission is of the view that from a material point of view the constitutional amendments adopted in 2020 ought to have fallen within the competence of a Constitutional Assembly. The Comments point out that according to Article 135 a Constitutional Assembly can only decide to reject amendments to chapters 1, 2 and 9 or to elaborate a new Constitution by a vote of two

¹⁴ Закон РФ о поправке к Конституции РФ от 14.03.2020 N 1-ФКЗ "О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти", http://www.consultant.ru/document/cons_doc_LAW_346019/, <http://kremlin.ru/events/president/news/62989>.

thirds of its members or a referendum. As no amendments to chapters 1, 2 and 9 had been proposed, there was no formal basis for convening a Constitutional Assembly. As no federal constitutional law on the Constitutional Assembly as required by Article 135 existed, convening an Assembly would have been unconstitutional. The introduction of values related to Federalism in chapter 3 on the federal structure is natural because this chapter is not limited to the organisation of the territory. The Venice Commission nonetheless still considers that the application of Article 135 would have been appropriate and that a federal constitutional law on the Constitutional Assembly could have been adopted before amending the Constitution.

D. *Ad hoc* procedure

24. By virtue of Article 134 of the Constitution, constitutional amendments have to be adopted according to the rules foreseen for the adoption of federal constitutional laws. Articles 2 and 3 of the Amending Law partly modify the procedure foreseen in Chapter 9 of the Constitution, in an *ad hoc* manner.

25. In 1995, the Constitutional Court held that *“the procedure of the adoption of amendments to Chapters 3-8 significantly differs from the procedure for the adoption of a federal constitutional law”*.¹⁵ Therefore, in 1998 a special law *On the Order of the Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation*,¹⁶ was adopted. The 1998 law has the rank of ordinary law, which can be amended without a constitutional amendment. Nonetheless, any constitutional amendment has to respect the provisions of the Constitution itself.

26. The 2020 Amending Law derogates from the provisions of the 1998 law, establishing specific rules for the adoption and entry into force of the amendments in stages. In its conclusion of 16 March 2020, the Constitutional Court held that *“the provisions of the Law that have entered into force - in relation to the regulation of the procedure for the subsequent entry into force of its other provisions - have priority over the named Federal Law as contained in a special and newer legal act, moreover, having greater legal force”*.¹⁷

27. Through the provisions introduced by the Amending Law, a new procedure in three different stages was established for the adoption and entry into force of the 2020 constitutional amendments.

28. A first stage encompassed the drafting of the amendments, their adoption by the legislative power and by the constituent entities of the Federation until the entry into force of Article 3 of the text. In this stage, the standard rules foreseen by the Constitution and the 1998 Law still applied.

29. A second stage started from the moment of the entry into force of Article 3 of the Amending Law and was regulated by this very provision. Under this *sui generis* procedure, the President was required to submit a request to the Constitutional Court as to the compatibility of the amendments with Chapters 1, 2 and 9 of the Constitution and the compatibility of the procedure for the entry into force of Article 1 of the Amending Law (the substantive amendments to the Constitution, hereinafter, “the Amendments”) The Court was required to issue a conclusion

¹⁵ Постановление Конституционного Суда РФ. N 12-П По делу о толковании статьи 136 Конституции РФ от 31 октября 1995 г (Resolution of the Constitutional Court of the Russian Federation. N 12-P on the interpretation of Article 136 of the Constitution of the Russian Federation of October 31, 1995.), para 2.

¹⁶ Федеральный закон N 33-ФЗ О порядке принятия и вступления в силу поправок к Конституции Российской Федерации от 4 марта 1998 года (Federal Law N 33-FZ On the Procedure for Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation dated March 4, 1998).

¹⁷ Заключение Конституционного суда Российской Федерации о соответствии (Conclusion of the Constitutional Court of the Russian Federation on Compliance), *op. cit.*, p. 7.

within seven days (Article 3.2). Once the request was made and the Conclusion issued, Article 2 of the Amending Law would enter into force (Article 3.3).

30. The third stage encompassed the organization of the nationwide vote and the entry into force of Article 1 of the Amending Law. This stage was regulated by Articles 2 and 3 of the Amending Law. Article 2 provided rules for an *ad hoc* “nationwide vote”, thus derogating from the rules contained in the *Federal Constitutional Law on Referendums*.¹⁸ The main differences compared to a referendum relate to the procedure and notably that there is no quorum and that the vote is not consultative but the entry into force of the Amendments is made conditional on the positive outcome of the vote (Article 3(4) to (5) of the Amending Law). The Comments point out that these procedures provided sufficient guarantees and were approved by the Constitutional Court. Furthermore, that their adoption was justified because the Federal Constitutional Law on Referendums applies only to amendments of Chapters 1, 2 and 9 of the Constitution. The Venice Commission nonetheless considers that in such a case the existing legislation should have been made applicable, rather than creating a new *ad hoc* procedure.

31. The Venice Commission notes that the *ad hoc* nationwide vote was subject to much less elaborate and detailed rules than a referendum would have been. This resulted in a substantial reduction of procedural guarantees, which are *inter alia* designed to ensure a degree of balance in how the issues are presented, and thus increase the legitimacy of the result of the referendum. The Federal Constitutional Law on Referendums would have required sufficient air-time also for opponents of the amendments (Article 59 (9)). Article 60 (5) of that Law would have obliged State institutions to remain neutral.¹⁹ Article 2 of the Amending Law establishing the *ad hoc* rules for the all-Russian vote ensures airtime to the Central Electoral Commission only and has no provisions on the neutrality of state bodies.

32. The Venice Commission further notes that under the rule of law it is inappropriate to introduce a new type of referendum for one particular revision of the Constitution.²⁰ Even if the all-Russian vote did not replace the vote by the Assembly and the constituent entities of the Federation, the Commission recalls that, as indicated in the 2020 Revised Guidelines on the Holding of Referendums, “*referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament’s exclusive jurisdiction*”.²¹

33. According to the Parliamentary Assembly of the Council of Europe, a referendum “should not be used by the executive to override the wishes of parliament or be intended to bypass normal checks and balances”.²² Checks and balances were affected because the review by the Constitutional Court had to be conducted within seven days (see paragraph 19) and the all-

¹⁸ Федеральный конституционный закон N 5-ФКЗ О референдуме Российской Федерации от 28 июня 2004 года (Federal Constitutional Law No. 5-FKZ On the Referendum of the Russian Federation of 28 June 2004).

¹⁹ Article 60 (5) It is prohibited to conduct campaigning on referendum issues, to issue and distribute any campaign materials:

- 1) government bodies, other government bodies, local government bodies;
- 2) persons holding state and municipal positions, state and municipal employees using the advantages of their official or official position;
- 3) military units, military organizations and institutions;
- 4) charitable organizations and religious associations, as well as organizations established by them;
- 5) referendum commissions and voting members of referendum commissions;
- 6) foreign citizens, stateless persons, foreign legal entities;
- 7) representatives of organizations that issue mass media in the course of their professional activities.

²⁰ Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para. 242 ; CDL-AD(2016)007rev, Rule of Law Checklist, II.A.5.i.

²¹ Venice Commission,

CDL-AD(2020)031, Revised guidelines on the holding of referendums, II.1.

²² Parliamentary Assembly, Resolution 2251 (2019), Updating guidelines to ensure fair referendums in Council of Europe member States, point 3.1.

Russian vote was not subject to the same procedural guarantees as a referendum (as explained above).

34. The Amending Law also derogated from Article 2 (2) of the 1998 Federal Law N 33-FZ On the Procedure for Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation, which provides that there should be specific amending laws on interrelated topics, rather than a single *en bloc* vote on all amendments.²³ The Comments insist that the amendments are all interrelated with each other and therefore the requirement of Federal Law N 33-FZ is met. The Venice Commission cannot follow this argument as the amendments cover a very wide range of issues.

35. Furthermore, Article 3 of the Amending Law derogated from Article 136 of the Constitution. Under Article 136 of the Constitution, the proposed amendments had already been adopted because of the approval by the constituent entities. Article 3 of the Amending Law provides that the amendments would not have entered into force if the Constitutional Court had found them incompatible with Chapters 1, 2 and 9 of the Constitution or if the all-Russian vote would have resulted in a negative vote. However, this is regulated at the level of an ordinary law and could not derogate from the Article 136. This means that notwithstanding the promises of the Amending Law, the amendments had to enter into force, no matter what the outcome of the Constitutional Court Conclusion and the all-Russian referendum was.

36. Lastly, comparative constitutional history shows that whenever the amendment procedure provided for by the Constitution was abandoned, this resulted in serious problems for democracy and the protection of human rights.

E. Conclusion as to procedure of adoption of the amendments

37. As regards the procedure, the Venice Commission concludes that the speed of preparing such wide-ranging amendments was clearly inappropriate considering the (societal) impact of the amendments. This speed resulted in a lack of time for a proper period of consultation with civil society prior to the adoption of the amendments by parliament.²⁴ In view of the subject matters which were covered, a Constitutional Assembly should have been convened under Article 135. As a Constitutional Assembly was not convened, the Amendments were adopted, according to Article 136, after their adoption by Parliament and the constituent entities of the Federation. Following these two steps, the Amendments had to enter into force under Article 136. A negative outcome of the additional steps, i.e. the review by the Constitutional Court and the all-Russian vote, could not prevent the entry into force of the Amendments. The procedure used to amend the Constitution creates an obvious tension with Article 16 of the Constitution which safeguards the "firm fundamentals of the constitutional system of the Russian Federation".

²³ Article 2

1. Amendments to Chapters 3-8 of the Constitution of the Russian Federation (hereinafter referred to as "amendments" to the Constitution of the Russian Federation) shall be adopted in the form of a law of the Russian Federation on amendments to the Constitution of the Russian Federation.

2. An amendment to the Constitution of the Russian Federation in this Federal law means any change of the text of Chapters 3-8 of the Constitution of the Russian Federation: deletion, addition or new wording of any of the provisions of the said Chapters of the Constitution of the Russian Federation. One law of the Russian Federation on amendments to the Constitution of the Russian Federation shall cover interrelated amendments to the constitutional text.

3. The law of the Russian Federation on amendments to the Constitution of the Russian Federation shall be given a name that reflects the essence of the amendment.

²⁴ Venice Commission, CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary, para. 135; CDL-AD(2020)019, Malta - Opinion on ten Acts and bills implementing legislative proposals subject of Opinion CDL-AD(2020)006, para. 9 seq.

V. Analysis of the substance of the Constitutional Amendments

38. Following some general considerations, this opinion will mostly follow the order of the fields of constitutional law listed in the Explanatory Report to the Amendment Law,²⁵ which are:

- a) the position of candidates/office holders;
- b) the structure of State bodies, their competences and mutual relationships;
- c) the protection of social rights;
- d) the basic values of the State; and
- e) the relationship between the Russian national law and international law.

As the relationship between the Russian national law and international law has been widely analysed in the previous opinion of the Venice Commission,²⁶ this opinion will focus on the first four areas. In view of its importance for the separation of powers and checks and balances, this opinion will deal with amendments relating to the judiciary in a section of its own.

A. General issues

1. Constitutionalisation of existing law

39. Replies: In the Replies and during the online meeting, the Russian authorities insisted that many of amendments only raise to the constitutional level regulations that have already existed for a long time at the level of ordinary federal legislation (e.g. Article 83 (e1) on the appointment of certain ministers; Article 72 (1) (g1) referring to marriage as a union of a male and a female. Therefore, these amendments do not result in any novelties and should not be criticised at the moment when they were formalised in the Constitution. The Comments explain that raising existing legal provisions to the constitutional level, allow consolidating the established practice of interaction public authorities, and strengthening the guarantees of legal protection of cultural, social and political traditions. Constitutionalisation (also known as constitutional entrenchment) reflects the dialectic of legal development, including the dependence of the effectiveness of the norm on the occupied places in the system of sources of law. They provide a sense of justice and provide social guarantees, that were previously enshrined in ordinary legislation only. The ultimate goal of the adoption of the corresponding block of amendments was to make them irreversible, and to make it impossible to nullify the positive results that Russia has achieved over the past few years of its development and which are positively perceived by Russian society.

40. The Venice Commission does not share this approach. The nature of a provision as constitutional law and as ordinary law is very different and “constitutionalising” a rule affects its character. Constitutionalising issues that in the normal course of affairs should be dealt with through acts of Parliament, excludes them from open debate and thus restricts democracy.

41. An obvious difference is also that constitutional provisions cannot be reviewed by the Constitutional Court (see article 125 of the Russian Constitution). On the contrary, they become the Constitutional Court’s yardstick for evaluating other legal provisions. “Constitutionalising” a legal provision therefore withdraws it from the competence of the Constitutional Court, narrowing the scope of its jurisdiction and affects the constitutional framework for the Court.²⁷

²⁵ Пояснительная записка к проекту закона Российской Федерации о поправке к Конституции Российской Федерации "О совершенствовании регулирования отдельных вопросов организации публичной власти" (Explanatory note to the draft law of the Russian Federation on an amendment to the Constitution of the Russian Federation "On improving the regulation of certain issues of organizing public authority), available at <https://sozd.duma.gov.ru/bill/885214-7>.

²⁶ Venice Commission, CDL-AD(2020)009, Opinion No. 981/2020, *op. cit.*

²⁷ Venice Commission, CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, paras. 138-142

42. Another effect of constitutionalising and raising the hierarchical rank of a law is that it withdraws that legal provision from the influence of any later legislation that could contradict it (exclusion from the *lex posterior* principle) or simply affect its scope through other legislation applied in the same context (e.g. procedural legislation with attenuating effects). Therefore, the constitutionalised norm becomes more rigid and this can lead to a petrification of otherwise more flexible norms, affecting areas that are otherwise open to an application and interpretation in conformity with the changing needs of society.²⁸

43. As a consequence, provisions that may have been acceptable on the level of ordinary law because they were sufficiently flexible and were under the jurisdiction of the Constitutional Court need to be examined more strictly at the moment of constitutionalisation because they will affect society in a more rigid manner for a longer period of time.

2. Separation of powers

44. States have a wide discretion to choose their own political model; this discretion – however – is not unlimited. In its opinion on constitutional amendments in Turkey, the Venice Commission found that “[e]very State has the right to choose its own political system, be it presidential or parliamentary, or a mixed system. This right is not unconditional, however. The principles of the separation of powers and of the rule of law must be respected, and this requires that sufficient checks and balances be inbuilt in the designed political system. Each constitution is a complex array of checks and balances and each provision, including those that already exist in the constitution of another country, needs to be examined in view of its merits for the balance of powers as a whole.”²⁹ This means that even the constituent power is bound by common constitutional heritage and its principles, such as the rule of law, the separation of powers or the protection of human rights. This opinion examines to which extent the amendments remain within the framework of these principles. If one institutional actor is “at the centre of power and other actors have too weak an institutional position to provide sufficient checks and balances”, this creates ‘a serious risk for the rule of law’.³⁰

B. The position of candidates / office holders

45. The Amending Law has substantially altered the requirements for certain candidates/office holders as well as the modalities of their term of office.

1. Office of the President

46. The amended Articles 81 and 91, pertaining to the President of the Russian Federation, now stipulate that:

- a. The President of the Russian Federation shall be prohibited, in accordance with the procedure prescribed by federal law, from opening and holding accounts (deposits) and from keeping cash and valuables in foreign banks located outside the territory of the Russian Federation (Article 81 (2));

²⁸ In respect of Articles 79 and 125 of the Constitution, see Venice Commission, CDL-AD(2020)009, Russian Federation - Opinion on draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights, para. 20.

²⁹ Venice Commission, CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para 124.

³⁰ Venice Commission, CDL-AD(2018)028, Malta – Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, paras. 143-144.

- b. The same person may not hold the office of President of the Russian Federation for more than two terms (Article 81 (3));
- c. Holders of the office of President enjoy immunity even after they leave the office (Article 92-1(1)).

a. Prohibition of financial assets abroad

47. Article 81 (2) constitutionalises in respect of the President existing legislative rules banning state officials from holding accounts and from using financial instruments abroad.³¹ Whereas it is doubtful whether imposing such a prohibition on an extensive category of individuals is necessary and proportional to the pursued goals (making state officials immune from external pressure), in case of the President, the highest representative of the State, the test of proportionality seems to be met.

b. Term limits

48. The new wording of Article 81 (3) prevents a person from holding the office of the President for more than two terms.

49. In its 2012 Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions the Venice Commission established that limiting the mandate of the President of a country to one mandate with the right to one re-election was a standard practice.³² In most cases, the rule applies to consecutive re-election, thus not excluding a later return of the person to the office (Czech Republic, Finland, France, Latvia, Lithuania, Romania, Slovakia, etc.). In some cases, it bars individuals from running more than two terms irrespective of whether they are consecutive or not (Austria, Bulgaria, Germany, Poland, etc.). In a minority of countries, re-election is entirely excluded (Mexico, Republic of Korea, Switzerland, etc.). All these models are acceptable, as long as they are based on the respect for the will of the people as the bearer of sovereignty in the state and as long as they grant fair treatment to all the candidates/office holders.

50. In its 2018 Report on Term Limits - Part I – Presidents, the Commission pointed out that “[p]residential term-limits are common in both presidential and semi-presidential systems, and also exist in parliamentary systems (both where the Head of State is directly and indirectly elected), while in the latter systems they are not imposed on prime ministers, whose mandate, unlike those of Presidents, may be withdrawn by parliament at any time. In presidential and semi-presidential systems, term-limits on the office of the President therefore are a check against the danger of abuse of power by the head of the executive branch. As such, they pursue the legitimate aims to protect human rights, democracy and the rule of law.”³³ Furthermore “abolishing limits on presidential re-election represents a step back in terms of democratic achievement.” Specifically, the Commission insisted that “[t]o the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, such amendments (if enacted) should have effect only for future holders of the office, not for the incumbent.”³⁴

³¹ See, for instance, Федеральный закон N 79-ФЗ О запрете отдельным категориям лиц открывать и иметь счета (вклады), хранить наличные денежные средства и ценности в иностранных банках, расположенных за пределами территории Российской Федерации, владеть и (или) пользоваться иностранными финансовыми инструментами, 7 мая 2013 года (Federal Law N 79-FZ On the prohibition of certain categories of persons to open and have accounts (deposits), keep cash and valuables in foreign banks located outside the territory of the Russian Federation, own and (or) use foreign financial instruments, 7 May 2013).

³² Venice Commission, CDL-AD(2012)027, *Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions*, adopted by the Council for Democratic Elections, para. 49.

³³ Venice Commission, CDL-AD(2018)010, *Report on Term Limits - Part I – Presidents*, para. 120.

³⁴ *Ibid.*, paras. 124 and 128.

51. There are good reasons why presidential systems contain strict mandate limits. In a presidential system which grants substantial executive powers to the president, the longer the incumbent remains in office, the more cemented his or her power becomes.

52. In light of the above, the Venice Commission welcomes the introduction of the two-term limitation of the mandate of the President.

53. However, by virtue of Article 81 (3.1), this provision “*is applied to the person having held or holding the post of the President of the Russian Federation without taking into account the number of terms he (she) had held or is holding this post by the time of coming into force of the amendment to the Constitution of the Russian Federation introducing the relevant limitation, and does not exclude for him (her) the possibility to hold the post of the President of the Russian Federation: during the terms allowed by this provision*”. This provision creates an exception for the current and previous holders of the office to stand for two completely new terms, regardless of the number of their past mandates. As this provision applies to two specific persons, this amounts to an *ad hominem* constitutional amendment.

54. Replies: The Replies insist that the removal of term limits was adopted by the Federal Assembly, approved by all the constituent entities of the Russian Federation and approved by the sovereign people in a nationwide vote. Counting the mandates of the current and former Presidents would have been a retroactive application of the term limit. A re-election of the President, without taking into account the previous terms of his tenure, will be possible only as a result of the subsequent expression of the will of citizens in direct elections. This is associated with the presence of two consistently implemented democratic guarantees – the All-Russian vote on the amendments, and in the future – the vote of citizens in direct elections. The constitutional principle of democracy implies the possibility for the people to exercise the right to elect in free elections the person they deem most worthy for the post of the head of state. The participation of a current head of state does not at all prejudice an electoral victory. The Amendments confirm the fundamental intention of the constitutional legislator to ensure the constitutional practice of the periodic rotation of persons holding the office of President. The Amendments result in a redistribution of public authority between the various branches of power, in particular from the President to Parliament. These significant changes justify a transitional rule not to take into account the presidential terms before the Amendments. The Constitution provides sufficient guarantees as to parliamentarism, multiparty system, the presence of political competition, the separation of powers, the provision of rights and freedoms by independent justice, including through constitutional proceedings. Leaders in other countries (Chancellor Merkel, President Kekkonen, Prime Minister Juncker etc.) held office for very long periods.

55. The Commission considers nonetheless that for all the reasons indicated above that show the necessity of limiting the President’s mandate to two terms, and which have been espoused in Article 81.3, the *ad hominem* exclusion from the term limits of the current and previous President is regrettable.

c. Immunity

56. While Article 91 granted immunity to the President in office, the new Article 92-1 provides that also a “*President of the Russian Federation who has ceased to exercise his (her) powers upon expiration of his (her) term of office or before the end of his (her) term due to his (her) resignation or persistent inability for health reasons to carry out the powers invested in him (her), shall have immunity.*” Since former presidents shall become members of the Federation Council for life (Article 95 (2) (b)), they will enjoy immunity in this capacity as well (Article 98

(1)). For lifting the immunity of former Presidents, the same procedure as that applicable to active presidents applies (Article 93).

57. Article 93 establishes a complex procedure for lifting the immunity of current and former Presidents: *“The President of the Russian Federation may be impeached and the immunity of the President of the Russian Federation who has ceased to exercise his (her) powers may be removed by the Council of Federation only on the basis of charges of high treason or of another grave crime brought by the State Duma and confirmed by a resolution of the Supreme Court of the Russian Federation on the existence of indications of a crime in the actions of the President of the Russian Federation, both acting and who has ceased to exercise his (her) powers, and by a resolution of the Constitutional Court of the Russian Federation confirming that the established procedure for bringing charges has been observed.”*

58. Replies: The Replies state that these provisions ensure excluding politically motivated prosecution against former Presidents. According to the Replies, such guarantees are important in countries where the characteristics of the rule of law are relatively recent. Providing this immunity is within the discretion of the constitutional legislator. The special immunity for former Presidents is needed in case a former President were to resign as a Senator for life (Article 95 (2) (b)) and would thus lose senatorial immunity. In practice, former President Medvedev is not member of the Federation Council. The Comments explain that the procedure for lifting presidential immunity under Article 93 corresponds to standard procedures for impeachment of a head of state, as exists in France (Article 68 of the French Constitution) or the USA (Article II, Section 4, of the US Constitution). A lowering of the guarantees for former Presidents would have resulted in insufficient legal protection for a person who served as Head of State, which is unacceptable. Granting immunity to the former Presidents significantly correlates with the constitutional practice of rotation in the office of President.

59. The Venice Commission notes that Article 91 grants full inviolability, not only functional immunity. The same is necessarily true for new Article 92-1 as a former President does not exercise presidential functions anymore. By applying to former Presidents the procedure for lifting of immunity applicable to the current President (Article 93), this provision considerably extends the immunity that the former presidents have already enjoyed under the 2001 *Law on Guarantees for the President of the Russian Federation who has Ceased to Exercise his Powers, and Members of his Family*.³⁵ Whereas this law provided for the lifting of the immunity following decisions of both the Supreme Court and the Constitutional Court with a simple majority in the State Duma,³⁶ the now applicable Article 93 of the Constitution requires both for current and previous Presidents *“two-thirds of votes of the total number of senators of the Russian Federation and deputies of the State Duma respectively, on the initiative of not less than one third of deputies of the State Duma and on the basis of a resolution of a special commission set up by the State Duma”*. The immunity for former Presidents produces effects even with respect to acts carried out after the termination of the mandate.

³⁵ Закон N 12-ФЗ О гарантиях Президенту Российской Федерации, прекратившему исполнение своих полномочий, и членам его семьи, 12 февраля 2001 года (Law No. 12-FZ On guarantees to the President of the Russian Federation, who has terminated the exercise of his powers, and members of his family, 12 February 2001).

³⁶ Article 3 (3): *“The President of the Russian Federation, who has terminated the exercise of his powers, may be deprived of immunity by the Federation Council of the Federal Assembly of the Russian Federation (hereinafter - the Federation Council) only on the basis of an accusation of high treason or other committing by the State Duma of the Federal Assembly of the Russian Federation (hereinafter - the State Duma) a serious crime, confirmed by the conclusion of the Supreme Court of the Russian Federation on the presence in the actions of the President of the Russian Federation, who has terminated the exercise of his powers, signs of a crime and the conclusion of the Constitutional Court of the Russian Federation on the observance of the established procedure for bringing charges.”*

60. The Venice Commission notes that granting such an extensive immunity to former heads of State is very unusual. In most countries, former heads of State either do not enjoy any immunity or, more commonly, continue to enjoy functional immunity with respect to official acts done while in office. Only in a small minority of countries do former heads of State continue to enjoy personal immunity after leaving the office, though even then, the scope of the immunity is usually specified in the relevant legal act.³⁷

61. According to Article 93 of the Constitution, the immunity can be lifted “*only on the basis of charges of high treason or of another grave crime*”. This means that the immunity for other crimes is absolute and cannot be lifted. Granting such absolute personal immunity to Presidents and former Presidents, even for acts committed after the end of the term of office, contradicts the principle of equality before the law granted by Article 19 of the Constitution, which itself has not been amended. Such an unjustified privilege raises a serious issue under the rule of law.³⁸

62. To conclude, the very unusual wide scope of immunity, taken together with rules of impeachment that make it very difficult to dismiss a president, raise serious questions as to the accountability of the President and contradict the rule of law.

2. Requirements for other candidates/office holders

63. The pre-2020 Constitution sets out very few such requirements, for instance, Russian citizenship and a minimum age of 21 for the members of the State Duma (Article 97(1)) and those of Russian citizenship, a minimum age of 35 and permanent residence in the Russian Federation of not less than 10 years for the President (Article 81(2)). The Amending Law introduced citizenship, age and permanent residence conditions for the candidates/holders of all the highest positions in the country. It also introduced a negative condition: candidates/office holders may not have the citizenship of a foreign state or a (right to) permanent residence within the territory of a foreign state. For the President, in addition, this negative condition applies also retrospectively to a foreign citizenship or foreign permanent residence held in the past. There is an exception foreseen for States or territories which have been incorporated³⁹ into the territory of the Russian Federation.

64. Replies: The Replies argue that the constitutional legislator has discretion to impose such restrictions. Residence in a foreign state makes that person vulnerable to outside influences and weakens the link to the Fatherland/homeland. The Constitution may prevent risks associated with such persons holding certain positions. A citizen of the Russian Federation can renounce the citizenship of a foreign state or the residence in a foreign state, thus removing the obstacle to holding relevant public positions. The Russian Federation has an agreement allowing for dual citizenship with Tajikistan only. The Comments explain that these limitations are in conformity with Article 55 (3) of the Constitution (on the limitation of rights and freedoms) and that similar access restrictions to public service are contained in many modern constitutions and the legislation of developed democracies (Australia, Colombia and the USA), since they directly relate to state sovereignty and national security. The legal or actual

³⁷ See Article 3 of the *Constitutional Law of the Republic of Kazakhstan No. 83-II on the First President of the Republic of Kazakhstan – Elbasy*, 20 July 2000; Article 12 of the *Law of the Kyrgyz Republic No. 152 on Guarantees of the Activities of the President of the Kyrgyz Republic*, 18 July 2003; Article 18 of the *Law of Turkmenistan No. 192-IV on the President of Turkmenistan*, 21 May 2011; Article 2 of the *Law of the Republic of Uzbekistan No. 480-II on the Essential Guarantees of the Activities of the President of the Republic of Uzbekistan*, 25 April 2003.

³⁸ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, section II.D.

³⁹ See also Venice Commission, CDL-AD(2014)004, Opinion on “Whether Draft Federal constitutional Law No. 462741-6 on amending the Federal constitutional Law of the Russian Federation on the procedure of admission to the Russian Federation and creation of a new subject within the Russian Federation is compatible with international law”.

subordination of a member of a legislative body to the sovereign will of both the Russian Federation and a foreign country is not consistent with the constitutional principles of the independence of the mandate of members of parliament and state sovereignty and calls into question the supremacy of the Constitution. This reasoning was extrapolated to other offices.

65. The Venice Commission notes that it is common to subject candidates to/office holders of the highest position in the State to certain requirements that usually relate to citizenship, age, permanent residence and/or moral integrity. The Commission however also notes that it is not common to prohibit the candidates/office holders from having, or even having had in the past, more than one citizenship and/or, even more so, permanent residence. The Venice Commission is aware of the change in the Russian legislation⁴⁰ which made it possible for the citizens of the Russian Federation to acquire another citizenship without losing the Russian one. This legislative change has implemented Article 62 (1) of the Constitution, by virtue of which *“a citizen of the Russian Federation may have the citizenship of a foreign State (dual citizenship) according to the federal law or an international agreement of the Russian Federation”*.

66. In view of this legislative change, there might be legitimate reasons to exclude from standing as candidates to the highest positions in the State those who would avail themselves of this new possibility and would acquire another citizenship, in addition to the Russian one. However, it is more difficult to understand why this restriction should apply to a rather extensive range of professions (including all judges and prosecutors), why it should be applied retrospectively (for the President) and why it should even apply to those who hold, or held in the past (for the President), permanent residence in another country. Excluding all such individuals from the circle of potential candidates to a relatively extensive range of positions constitutes a very broad interference with the right of citizens to participate in managing state affairs, including directly, to enjoy equal access to State service and to participate in the administration of justice (Article 32 of the Russian Constitution). Article 19 of the Constitution guarantees the right to equality.

67. Further, Article 32 (2) of the Constitution as well as, in respect of elected officials, Article 3 Protocol 1 ECHR, as interpreted by the European Court of Human Rights,⁴¹ guarantee the right to be elected which, in the instant case, might be considered as severely curtailed.

C. The Structure of State Bodies, their Competences and Mutual Relationships

68. The Amending Law introduces extensive institutional changes, establishing certain new bodies and shifts competences among various powers in the State. Many of these changes relate to the powers of the President. Below, this opinion examines how amendments to specific powers affect the separation of powers and checks and balances.

1. Appointment of the Chairman of the Government

69. In the Commission's view, a significant result of the Amending Law is that it strengthens the competences and the position of the President of the Russian Federation. On this point, the representatives of the Russian authorities profoundly disagreed with the rapporteurs. In their view, the amendments either consolidate already existing competences of the President, or even strengthen the role of the parliament to the detriment of the President. The Venice Commission has carefully examined the amendments against the background of this argument

⁴⁰ Федеральный закон N 62-ФЗ *О гражданстве Российской Федерации*, 31 мая 2002 года (Federal Law No. 62-FZ On Citizenship of the Russian Federation, May 31, 2002).

⁴¹ The Comments insist that the practice of the European Court of Human Rights on this article is arbitrary and contradicts the 1969 Vienna Convention on the Law of Treaties. The Venice Commission does not share this view.

but has nonetheless reached the conclusion that the President's position is strengthened by the amendments.

70. Under the Constitution of the Russian Federation, the Russian President does not formally belong to any branch of power, including executive power. As provided in the Constitution the President is the Head of State but not the head of the Government. At the same time, the Constitution provides that the President shall adopt measures to ensure the coordinated functioning and interaction of all bodies of state power, including executive power.⁴² The President shall perform the "*general leadership of the Government of the Russian Federation*" (Article 83 (b)) and executive authority shall be exercised by the Government "*under the general direction of the President of the Russian Federation*" (Article 110 (1)). One of the main functions of a constitution is to identify and distribute public power. The principle of the separation of powers requires that all institutions exercising public power fall within its purview, this obviously includes the President. Otherwise separation of powers is meaningless. An organ of the state which exercises significant power in the state cannot be excluded from this principle by simply stating that it does not "belong" to any particular branch of government.

71. The President shall both appoint, upon the candidature approved by the State Duma, and dismiss the Chairman of the Government (Article 83 (a)). Thus, while the appointment of the Chairman has to be approved by the State Duma, his or her dismissal is decided solely by the President. The Chairman's dismissal does not entail the dismissal of the whole Government (as is the case for Prime Ministers in other (semi-)presidential states).

72. The President disposes of the same powers with respect to the Deputy Chairman of the Government and all the other members of the Government (Article 83 (e)). While previously, the appointment and dismissal of the members of the Government was made on the proposal of the Chairman of the Government, no such requirement is foreseen under the amended Constitution.

73. Replies: The Replies point out that the need for the Chairman of the Government to engage with the State Duma seeking the approval of the ministers does not diminish but rather increases the political importance of the Chairman and the Duma. In this way, the relationship between the President and the Chairman of the Government becomes clearer. According to Article 83 (d), the President appoints federal ministers only after their approval by the State Duma (with the exception of federal ministers, whose appointment takes place after consultations with the Federation Council). This is a strengthening of the role of the State Duma. The President has no right to refuse the appointment of Deputy Chairmen of the Government and federal ministers, approved by the State Duma (Article 112(3)). The provision in Article 113 according to which the Chairman of the Government is personally responsible to the President for the exercise of the powers assigned to the Government strengthens the position of the Chairman of the Government.

74. It is positive that the State Duma now has to approve most ministers. However, the Venice Commission is concerned that this new system of appointment marginalises and weakens the role of the Chairman of the Government. The Chairman of the Government now has a limited say in who members of his/her Government will be, but s/he still holds political responsibility for the acts of his/her Government (Article 113), whereas the President performs in substance the leadership of the Government and does not assume (political or other) responsibility for the acts of that Government.

⁴² Kuznetsova, T. O., Kremyanskaya, E. A., & Rakitskaya, I. A. (2014). Russian constitutional law. ProQuest Ebook Central.

75. If the State Duma rejects three candidatures for the Chairman of the Government submitted by the President, the President shall appoint the Chairman of the Government and s/he may dissolve the State Duma (Article 111(4)) but there is no obligation to dissolve the State Duma as this was the case before the Amendments.

76. Replies: The Replies point out that in practice the State Duma has never been dissolved under this provision, even during times of strained relations between the President and the legislator. The Constitution allows the President to present to the State Duma as Chairman of the Government each time a different candidate or the same candidate three times in a row. The new discretion of the President to dissolve or not to dissolve the State Duma provides an additional opportunity to overcome disagreements between state powers and to avoid delays in the formation of the Government and interruptions in the work of the legislator. The Comments insist that the European Convention on Human Rights does not require any special theoretical constitutional concepts regarding the acceptable limits of their interaction.⁴³ The Amendments refine the model of the separation of powers and correspond to an increased role of parliament in its cooperation with the executive branch. An obligation for the President to dissolve the State Duma would have resulted in the possibility to exert real pressure on the Duma.

77. The Commission notes that the possibility for the President to appoint a Chairman of the Government who does not enjoy the confidence of parliament already existed in the previous version of the Constitution. This was already objectionable as being in conflict with the democratic principle. In addition, the amendments give additional leverage to the President in such a framework as it remains uncertain for the State Duma whether it will be dissolved after the third rejection. During such a phase, the President obtains significant influence over the members of the State Duma.

2. Appointment of ministers / heads of federal executive authorities

78. Articles 83 (e) and 83 (e1) establish a two-track system for the appointment of members of the Government. While for most members, the decision is left to the President with the approval of the State Duma, for some members enumerated in Article 83 (e1) consultation of the Federation Council is required.

79. Article 83 (e1) reserves to the President's discretion "following consultations with the Federation Council", the appointment and dismissal of all "*heads of federal executive authorities (including federal ministers)*" for matters relating to foreign affairs, defence, justice and internal affairs" (often referred to as "power ministers").

80. Article 112 (4) provides that after the rejection of three candidates for the office of Deputy Chairman of the Government or minister by the State Duma, the President can appoint the candidates nonetheless. However, if after three rejections more than one third of the posts of member of the Government remain vacant (i.e. the President has not used his/her right to nominate the candidates notwithstanding their rejection by the State Duma), the President can dissolve the State Duma.

81. Replies: As concerns the power to appoint ministers (Article 83 (e1)), the Replies insist that already before the amendments, there were ministers who operate under a special chain of command. This existing situation relating to the ministers for foreign affairs, defence, justice and internal affairs is now reflected in the Constitution. Therefore, the amendments do not create any new problems or phenomena. The President is the guarantor of the Constitution and determines the basic objectives of the internal and foreign policy of the State (Article 80 (3)).

⁴³ European Court of Human Rights, *Kleyn and Others v. the Netherlands* [GC], of 6.5.2003, application no. 39651/98, 39343/98, 46664/99 et al.

His or her appointing powers are balanced by the need to consult the Federation Council. There is no shift of competences from Parliament to the President and on the contrary the powers of Parliament have been increased. In general, the constitutional legislator has a wide power in regulating the respective powers of the President, the State Duma, the Federation Council, the Government and courts. As concerns the discretion of the President to dissolve or not the State Duma following three rejections of Ministers resulting in the vacancy of more than a third of Government posts, the Replies argue that this threshold provides an indicator as to the inability of co-operation between the Chairman of the Government and the State Duma in personnel matters. The President should have the choice to dismiss the Chairman of the Government or dissolve the State Duma. The Comments recall the Venice Commission's opinion on the 1993 Constitution (CDL(1994)011), according to which "the form of government is based on a novel and interesting conception of presidentialism". The Russian system is more akin to the French than to the US Constitution and the Venice Commission's criticism of the Russian system is too vague. The President may not refuse to appoint Deputy Prime Ministers and federal ministers whose candidacies have been approved by the State Duma. As concerns the formation of the Government's "power block", an additional coordination procedure has appeared in the form of consultations with the Federation Council. Therefore, it remains absolutely unclear how the Amendments would have strengthened the role of the President. The conclusions of the Venice Commission on strengthening the role of the President are not supported by proper arguments and are based on an incorrect interpretation of the Amendments.

82. As already pointed out above, the Venice Commission is of the opinion that the constitutionalisation of the system of appointments of ministers with a special chain of command creates problems of accountability.

83. The split method of appointments of ministers is an exception from the general rules for appointment of Ministers in Article 83 (e) and Article 112 (2), which is problematic taking into account the status of and notably the possible influence of the President on the members of the Federation Council (see below).

84. As such, cooperation between the executive and the legislative powers on the appointment of members of the Government is to be welcome. However, a presidential system which grants such wide powers to the President in effect means that the President can recast the administration of the state as s/he thinks fit.

85. In the light of the possibility for the President to appoint certain Ministers without the agreement of Parliament, the Commission regrets that the Amendments give the President an additional power to dissolve the State Duma. While the constitutional system empowers the President to act as a neutral arbiter in settling disputes between different institutions in the state, there appears to be no institutional mechanism to require him to act neutrally. The President thus can act as a non-neutral arbiter between the State Duma and his own Government.

86. The absence of sufficient checks and balances in this domain goes beyond what is the rule even in strong presidential regimes. For instance, in the United States, the Senate has the power to reject presidential nominations, while, for the most important ministerial positions, the Russian Parliament does not. This is not appropriate under the principle of separation of powers, even in presidential regimes.

3. Presidential administration vs. Government

87. Already before the amendments, the President had a separate "presidential administration". Article 110 (3) provides now that the activities of federal executive authorities are directed by the Government "except those whose activities are directed by the President of the Russian Federation". This somewhat cryptic reference makes it possible to attribute directly to the

President a considerable number of activities. Taken together with the provision that the President exercises the “general direction” of the Government (Article 11 (1)), this provision reveals on the one hand the subordinate character of the Government, despite its approval by Parliament, as well as the centralized character of the presidential power, on the other hand. Such a double system of administration risks creating problems of inefficiency, delays and duplication of work.

4. Forming of the Council of State

88. The Amending Law establishes or, rather, formalises, a new organ, the *State Council* of the Russian Federation (Государственный Совет Российской Федерации). This Council shall be formed by the President “*for the purpose of ensuring the co-ordinated functioning and interaction of public authorities, determining the general direction of the domestic and foreign policy of the Russian Federation and the priority areas of the socio-economic development of the state*” (Article 83 (f5)).

89. Replies: The Replies state that the Council of State is only an advisory body assisting the Head of State. The Council has been in place since 2000, when it was created by a decree of the President.⁴⁴ Following the Amendments, Law No. 394-FZ “On the State Council of the Russian Federation” was adopted on 8 December 2020 and entered into force on 19 December 2020. The State Council is formed by the President to ensure the coordinated functioning and interaction of the bodies that are part of the unified system of public power. It determines the main directions of the domestic and foreign policy of the Russian Federation and priority directions of socio-economic development of the state. The competences of the State Council do not overlap with those of other state bodies. e Comments point out that that the competence of the Council of State does not in any way compete with the competence of the Government and it does not contradict Article 11 of the Constitution. The Council of State is a state body but not a body of state power. The State Council is not a state authority but an advisory body. It does not exercise authority but is a body that assists the President in exercising his authority.

90. The Commission is of the opinion that while, as such, the formalisation of a body which has already existed for two decades is to be welcomed, a tension might be created with Article 11 of the Constitution as the State Council is not mentioned there as a body which exercises state power. It appears to the Venice Commission that the State Council is, de facto, a body exercising state power. The legitimacy provided to Council of State through its constitutionalisation and the strengthening of the Presidential Administration acting on the basis of advice from the Council of State can weaken the Government and add to the problems of “double administration” mentioned above.

5. Appointment of 30 Senators of the Federation Council

91. The Amending Law has altered the composition of the Federation Council. According to the previous version of Article 95, the Federation Council included two representatives from each constituent entity of the Russian Federation - one from the legislative (representative) and one from the executive State government body. In addition, Article 95 provided that the President can appoint up to ten per cent of the members of the Federation Council. The total number of members being 178, the number of Federation Council members appointed by the President

⁴⁴ Указ Президента Российской Федерации № 1602 О Государственном совете Российской Федерации, 1 сентября 2000 г года (Decree of the President of the Russian Federation No. 1602 On the State Council of the Russian Federation, September 1, 2000).

was determined as 17 by an amendment to the Federal Law no. 11-FKZ of 21 July 2014. However, in practice the President did not appoint these 17 members.⁴⁵

92. According to the Amendments, the members of the Federation Council are now called “Senators”. The amendments also changed the composition of the Federation Council by empowering the President to appoint 30 representatives, i.e. removing this ten per cent limit and nearly expanding the number of members who can be appointed by the President to 17 percent. These senators appear to be eligible for reappointment. Seven out of these 30 members may be appointed for life.

93. Replies: The Replies explain that the amendments do not endanger the independence of the Federation Council. The federal basis of the bicameral model is safeguarded because the Federation Council members representing the constituent entities of the Federation are still much more numerous than those appointed by the President. In addition, there are sufficient safeguards for the Senators who enjoy immunity during their term of office according to Article 98. Article 102 of the Constitution considerably extends the list of powers of the Federation Council and the new Article 103-1 reflects the competence of the Council to exercise parliamentary control. The Comments explain that the 30 Senators to be appointed by the President are representatives of the Russian Federation, not of the President. The Federation Council is not conceived as a body representing political interests but a forum for cooperation between the Federation and the constituent entities. The purpose of the amendments is to facilitate such cooperation. The Amendments strengthen both chambers of the Assembly. All constituent entities of the Federation have equal legal status and powers and the Senators representing them have equal status as well. The number of senators from the constituent entities by far outweigh those appointed by the President. The appointment of Senators of the Upper House by the President is similar to the situation in other countries (Belarus, India, Ireland, Italy, Kazakhstan, Tajikistan, Uzbekistan).

94. The Venice Commission notes that while there is a shift of powers towards the Federation Council, the composition of the same body changes, enabling the President to appoint a larger share of members to the body that is competent to control his or her activities.

95. An important factor to take into account is the relative size of the 85 constituent entities of the Federation (Article 65) composing the other part of the Federation Council. They include territories of very unequal size and political weight (20 republics, 7 territories, three towns of federal importance and a large number of regions whose political weight is certainly lower). This heterogeneity means that a “presidential block” of 30 Senators could have an important impact on the work of the Federation Council.

96. The total number of Senators will change, depending on the number of these new members of the Federation Council (amended Article 95). The fact that in the past the President has not appointed his 17 members does not rule out that he – or a future President – will appoint all 30 Senators of his/her quota. The President thus gains leverage to influence the membership of the Federation Council. Given that the Federation Council is the only State body competent to decide on the impeachment of the President and that it also plays an important role in the appointment of various high State officials, such a right is problematic from a structural and systematic viewpoint, even if the President did not appoint any members of the Federation Council in the past.

⁴⁵ System of composition: <http://council.gov.ru/en/structure/council/status/>; current composition <http://council.gov.ru/en/structure/members/>.

97. However, it is positive that the Senators now have a six-year term (Article 95 (6)), whereas the Constitution did not guarantee a fixed term of office beforehand.

98. Further, the two assemblies benefit from the extension of the powers of parliamentary control provided for in new article 103.1, including the possibility of carrying out inquiries into the heads of state bodies. This is to be welcomed.

6. Reinforced veto power

99. With regard to Parliament, beyond the unchecked appointment of 30 Senators, the President's veto power is reinforced by his/her new possibility to appeal to the Constitutional Court (Article 107 (3)). Already under the previous wording, a presidential veto had to be overridden by a two thirds majority of the total number of Deputies of the State Duma and members of the Federation Council. The additional possibility of a recourse to the Constitutional Court is positive as it can lead to a judicial settlement of an otherwise only political conflict. See, however, the comments of the changes relating to the Constitutional Court below.

7. Unified system of public authority - position of constituent entities of the Federation and local self-government

100. Article 80 (2), which defines the missions of the President, provides that s/he *"shall ensure the coordinated functioning and interaction of bodies forming the unified system of public authority"*. Article 132 (3) stipulates that *"Local self-government bodies and state power bodies shall be integrated in the unified system of public authority in the Russian Federation, and shall cooperate to most efficiently resolve tasks in the interests of population inhabiting the relevant territory."*

101. The amendments also expand the powers of the Federation, including the "organisation of public authority" (Article 71 (d)) and the joint jurisdiction (Article 72). These provisions shift considerable competences from the constituent entities to joint competence with the Federation (e.g. information technology, digital data, education).

102. Replies: The Replies point out that the amendments do not negatively affect the country's federal nature and municipal autonomy. The changes are not incompatible with the principle of federalism and the delimitation of competences, as set out in Articles 71 to 73 of the Constitution. The unified system of public authority is primarily a functional unity, which does not exclude organisational interaction between public authorities and local self-governing bodies when they solve tasks in the respective territory. The need for the coordinated functioning of public authorities derives from Article 3 of the Constitution, according to which the multinational people is the bearer of sovereignty in the Russian Federation. Ensuring human rights requires concerted action of various levels of public power as a single whole for the benefit of citizens. The amendments do not affect the autonomy of regional or local authorities, including the system of financial resources required for their functioning. The power to "establish" local taxes is changed to their "introduction", which is in conformity with the requirement of a "legally established tax" as per Article 57 of the Constitution. The Comments insist that the competence of the constituent entities and municipalities is extended by adding joint jurisdiction in the field of agriculture, general issues of youth policy, provision of affordable and high-quality medical care, preservation and strengthening of public health, protection of family, motherhood, fatherhood and childhood, etc. There is no reduction in their competences in the field of information technology and digital data, which were not regulated in the Constitution before. In the Russian concept and practice of federalism there is no conflict between regions and the Federation. Already according to Article 3 (2) of the Federal Law of 27 July 2004 No. 79-FZ "On the State Civil Service of the Russian Federation" the state civil service of the Russian Federation is subdivided into the federal state civil service and the state

civil service of the constituent entities of the Russian Federation. Strengthening the unified system of state power objectively contributes to strengthening the role of local government, regions and their interaction with central authorities. The division of the State civil service into federal and regional, as well as the existence of a municipal service, is not affected by these amendments. No changes have been made to the legislation on the state civil and municipal service in this context and are not planned to be made. Article 71 (r) only concerns restrictions related to state and municipal service as a specific element of the legal status (residence, bank accounts in a foreign state). In conformity with the principle of unity of the legal foundations of the federal civil service and the civil service of the constituent entities of the Russian Federation, the existing Federal Law "On Municipal Service in the Russian Federation" already provides for restrictions related to municipal service in Russia. Article 73 on the exclusive competences of the constituent entities was not amended. Article 72 on joint competence was expanded in the fields of agriculture, youth and public health to develop cooperative federalism. Local self-government has new powers to ensure medical care (Article 132 (1)). Regional or local autonomy have not been restricted.

103. The Venice Commission notes that the division of authorities and powers among State government bodies of the Russian Federation and State government bodies of constituent entities of the Russian Federation (unamended Art. 11 (3)) is an important measure to ensure checks and balances.

104. Even before the amendments, Article 77 specified that all the public powers, central or territorial, formed a "unified system of executive authority ". However, Article 80 introduces a new notion by referring to a "unified system of public authority". The terms "executive authority" and "public authority" are not identical. The reference to this new term in the Article 132 (3) on local authorities confirms this assessment: *"Local self-government bodies and state power bodies shall be integrated in the unified system of public authority in the Russian Federation, and shall cooperate to most efficiently resolve tasks in the interests of population inhabiting the relevant territory"*.

105. Practical effects of this new terminology can be seen in Article 71 (r), which provides that the status of all public officers, including posts of "municipal service" will be fixed at the federal level only. This results in a serious limitation to the powers of self-government on the regional and local levels. It means that the civil service of these entities can be integrated into the civil service of the Federation. If this were the case, the constituent entities of the Federation and municipalities no longer can count on the loyalty of their civil servants because they are part of a fully integrated civil service that is obliged to follow instructions from the central power.

106. It is the President who shall ensure the coordinated functioning and interaction of the bodies forming part of the unified system of public authority (Article 80 (2)). Specific arrangements ("properties") of exercising public authority on the territories of cities of federal significance, administrative centres (capitals) of constituent entities of the Russian Federation and other territories can be established by federal law (Article 131 (3)). Bodies of state power can take part in forming bodies of local self-government, appointing and relieving of their posts the officials of local-self-government in order and in cases specified by federal law (Article 131 (1-1)).

107. With such an increased centralization comes a continued affirmation of the "Russian" character of the Federation,⁴⁶ even if the unamended Article 3 of the Constitution affirms that the State is "multinational" and that it ensures local autonomy. Thus, the amendments seriously

⁴⁶ See comments on the "state-forming nation" in Article 68 (1) and the corresponding explanations in the Comments below.

curtail regional and local autonomy to a degree that seems to contradict the federal character of the Russian Federation.

108. The Venice Commission concludes that the strengthening of the President's powers and position does not only take place at the expense of the other state organs on the federal level as the Government, the Duma and the Federation Council, but also at the expense of the constituent entities and notably local self-government bodies. This is at odds with the idea of a Federation and local democracy, which are guaranteed by the unamended Articles 11 (3) and 12 of the Constitution.

8. Conclusion on changes in structure and competences of state powers

109. Taken together, while in some respects the powers of the parliament have indeed been expanded, at least formally, the Commission is of the view that important increases in the presidential powers (single system of state power, appointments of the chairman and members of the Government, constitutionalisation of the presidential Council of State, appointment of 30 Senators of the Federation Council, etc.) have been introduced. The combined effects of these presidential powers weaken the possibility of other actors, such as the Federation Council, to effectively provide checks and balances.

D. The Protection of Social Rights

110. Article 75 of the Constitution deals with monetary policy, the system of taxes and state loans. The Amending Law has added three more paragraphs which read as follows:

“5. The Russian Federation respects the labour of citizens and ensures protection of their rights. The state guarantees minimal wage in the amount of no less than subsistence rate for able-bodied general population throughout the Russian Federation.

6. In the Russian Federation the system for pension provisions to citizens shall be developed on the basis of principles of generality, fairness and solidarity of generations, its effective functioning shall be supported, and the pensions indexation shall be performed no less than once a year in the order established by federal law.

7. In the Russian Federation in accordance with the federal law obligatory social insurance, targeted social support of citizens and indexation of social allowance and other social payments shall be guaranteed.”

111. Moreover, a new Article 75-1 has been added which stipulates that *“conditions shall be created in the Russian Federation for the sustainable economic growth of the country and improving the welfare of citizens, and for mutual trust between the state and society, protection of the dignity of citizens and respect for working persons shall be guaranteed, civil rights and duties shall be balanced and social partnership, economic, political and social solidarity shall be ensured”*.

112. Replies: The Replies explain that sustainable economic growth cannot be enforced in court as it is not a subjective right. However, this provision can serve as an argument in assessing the constitutionality of other legal provisions in the economic sphere. It can also serve as a criterion for assessing the effectiveness of public authorities in exercising their powers in the framework of political responsibility of the Government under Article 117 of the Constitution.

113. The Venice Commission notes that the Constitution already contains a list of social rights in its Chapter 2. More specifically, Articles 37 and 39 stipulate:

“Article 37

1. Labour shall be free. Everyone shall have the right freely to use his (her) labour skills and to choose the type of activity and occupation.

[...]

3. *Everyone shall have the right to work in conditions, which meet safety and hygiene requirements, and to receive remuneration for labour without any discrimination whatsoever and not below the minimum wage established by federal law, as well as the right of protection against unemployment. [...]*"

"Article 39

1. *Everyone shall be guaranteed social security for old age, in case of illness, disability and loss of the bread-winner, for the bringing up of children and in other cases specified by law.*

2. *State pensions and social benefits shall be established by law.*

3. *Voluntary social insurance, the creation of additional forms of social security and charity shall be encouraged."*

114. The new provisions incorporated by the Amending Law elaborate on these provisions and, as such, belong into Chapter 2 of the Constitution, which can be amended only by the Constitutional Assembly (see above). From the substantive perspective, the new provisions seem compatible with the obligations that the Russian Federation assumes under its national law (Chapter 2 of the Constitution) and under various international instruments (the International Covenant on Economic and Social Rights, the European Social Charter, ILO instruments, etc.). They should be welcomed in this respect.

E. The Basic Values of the State

115. The Amending Law has introduced several provisions which declare certain basic values on which the State relies. As the Venice Commission has already noted, these provisions would, from a substantive perspective, belong to Chapter 1 or, in some cases, the Preamble of the Constitution. Yet, they are mostly incorporated in Chapter 3.

1. State succession

116. Article 67.1(1) declares the Russian Federation as the successor of the USSR and the successor with respect to the membership in international organizations, international treaties, assets, debts and obligations.

117. Replies: The Replies state that this provision is an integral characteristic of and basis of the sovereignty of the Russian Federation. This provision only re-states an already established situation in public international law. They distinguish between the following categories:

- a) the Russian Federation, which considers itself the successor state of the USSR, including as concerns the seat in the UN Security Council;
- b) the Baltic states, which do not consider themselves successors to the USSR; and
- c) Other successor states of the USSR.

118. The Venice Commission does not see a problem in referring to this status of the Russian Federation in the Constitution, even if it would have been more coherent to place this provision in the preamble of the Constitution.

2. Equality of peoples of the Russian Federation

119. The Venice Commission notes that it is the usual practice to incorporate provisions on basic values and normative orientation of the State into the text of the Constitution. Yet, the State needs to make sure that the provisions are formulated, and implemented, in such a way so as not to contradict obligations under international law.⁴⁷ Four of the amended provisions give rise to some concern in this respect.

⁴⁷ See, for instance, Venice Commission, CDL-AD(2011)016, Opinion No. 621/2011, *Opinion on the new Constitution of Hungary*, 20 June 2011.

120. The first one is the amended Article 68(1) with the reference to the language of the “*state-forming people*” (язык государствообразующего народа), even if it is specified that this people is in a union of equal peoples among themselves (входящего в многонациональный союз равноправных народов Российской Федерации). The previous wording confined itself to saying that Russian was the official language.

121. Replies: The Replies argue that these provisions are only an objective recognition of the Russian people’s role in the formation of Russian statehood. They do not change the nature of the Russian Federation because they are of a non-political, supra-party and non-confessional nature and do not establish any state ideology, change the principles of pluralistic democracy and the secular nature of the Russian State. They do not introduce any restrictions of human rights that would be incompatible with Chapters 1 and 2 of the Constitution and they do not violate the rights and the dignity of other nationalities or national minorities. They are not incompatible with the provisions of Articles 3 (1) on the multi-ethnic people of the Russian Federation, Article 19 (2) on the right to equality regardless of [ethnic] nationality and on the Preamble provision on the principle of equality and self-determination of peoples. The Comments explain that the term “state-forming people” should be considered in relation to Articles 67.1⁴⁸ and 68⁴⁹, which are dedicated to national traditions, the memory of ancestors, thousand-year history and continuity in the development of the state and multinational culture. Terms such as “French nation” or “all Germans” in the other constitutions are not objectionable either. Article 3 of the Constitution establishes as the bearer of sovereignty the multinational, not the Russian, people of the Russian Federation. Article 5 enshrines the principle of equality of peoples. Some of the constituent entities of the Russian Federation are formed on the basis of the national-territorial principle and have the right to establish their own state language. The Russian people being the state-forming nation and the Russian language being the state language is an objective fact of modern Russian society. The reference “state-forming people” does not violate the principle of equality of peoples. Provisions on state languages exist in many multi-lingual countries (Belgium, Canada, or India)

122. The Venice Commission notes that the concept of a state-forming people is not used anywhere else in the text and it is not clear what it is intended to express. It seems that these assertions are not a response to particular national, territorial or cultural claims, but express a desire to explain the specificity of Russia in a historical continuum.

123. As the provision stresses that the state-forming people “*are part of the multi-ethnic union of equal peoples of the Russian Federation*”, the Venice Commission tends to agree with the Replies that this is not meant to establish any legal or other hierarchy. However, the inclusion of provisions referring to the Russian nation creates a tension with this multi-ethnic character of the Russian Federation.

⁴⁸ Article 67

1. The territory of the Russian Federation shall include the territories of its subjects, internal waters and territorial sea and air space above them.

2. The Russian Federation shall possess sovereign rights and exercise jurisdiction over the continental shelf and in the exclusive economic zone of the Russian Federation as defined by the federal law and the rules of international law.

3. The boundaries between the subjects of the Russian Federation may be altered upon their mutual agreement.

⁴⁹ Article 68

1. The state language of the Russian Federation throughout its territory shall be the Russian language.

2. Republics shall have the right to introduce their own state languages. In state bodies, bodies of self-government and institutions of Republics they shall be used equally with the state language of the Russian Federation.

3. The Russian Federation shall guarantee to all its peoples the right to preserve a native language, create conditions for its learning and development.

3. Religion

124. Article 67.1 (2) refers to faith in God as part of the memory of the ancestors that should be preserved. The Comments explain that this reference does not result in abandoning the secular nature of the Russian Federation and it does not contradict Article 14, according to which no religion can be established as state religion or as mandatory. Religious associations are separated from the state and equal before the law.

125. The Venice Commission recalls that under Article 9 of the ECHR, Article 18 of the ICCPR and Article 28 of the Constitution of the Russian Federation, everyone is granted freedom of conscience and religion, which also entails freedom not to have any religion (and any faith in God).⁵⁰ Article 67.1 (2) must not be interpreted as entailing the obligation to have any religion and the Venice Commission assumes that it will not be interpreted in this way. The Commission also notes that Article 9 of the Convention guarantees a broader right to freedom of religion than Article 28 of the Constitution. The latter should also be extended to guarantee public manifestations of worship, teaching, practice, and observance, in accord with the Convention standard.

4. Freedom of expression / scientific freedom

126. By virtue of the amended Article 67.1 (3), the Russian Federation “*shall honour the memory of the defenders of the Motherland and shall defend historical truth. Belittling the significance of the heroic feat of the people in defending the Motherland shall not be permitted*”.

127. Replies: The Replies state that an expression that violates the rights and freedoms of others is socially dangerous and may be punishable under criminal law.⁵¹ Under the legislation in force, actions aimed at desecrating the memory of the defenders of the Fatherland/homeland and rehabilitation of Nazism are already punishable.⁵² This constitutional amendment does not affect the freedom of expression, which is guaranteed by the unamended Article 29 of the Constitution. This provision intends to suppress the rehabilitation of Nazism, and is in line with international obligations of the Russian Federation, notably the UN General Assembly Resolution 72/156 of 19 December 2017, which, *inter alia*, calls on states to take concrete measures to prevent the denial of crimes against humanity and war crimes committed during the Second World War. The Comments insist that the school curricula on history do include a critical analysis of Russian history and that the Amendments cannot be seen as limiting freedom of expression and scientific research which are guaranteed under the Constitution and the European Convention on Human Rights. The feat of the Russian people in defending the Fatherland is an objective fact and cannot be subject to revision. This circumstance is in no way associated with the prohibition of scientific research.

128. The Venice Commission is not in a position to assess whether the amendment would even extend to cover the punishment of criticism of such matters as the Ribbentrop Molotov Pact as has been alleged in civil society. The Commission notes that it is not unusual for constitutions to contain identity-strengthening, or extolling, provisions. However, this amendment seems aimed at historical research. It is the hallmark of a democratic society that it is sufficiently sure in itself not to need prohibitions on historical research. This is not, in any way, to question that Nazi

⁵⁰ See ECtHR, *Kokkinakis v. Greece*, Application No. 14307/88, 25 May 1993, para 31.

⁵¹ Decisions of the Constitutional Court of 25 September 2014 No 1873-O, 27 October 2015 No 2450-O, 29 September 2016 No 1927-O, 28 March 2017 No 665-O, 27 June 2017 No 1411-O and others.

⁵² Article 13.15 of the Code of Administrative Offences; Article 354 and 244 (b) (2) of the Criminal Code.

Germany was defeated in large part due to the efforts of the peoples of the Soviet Union, and that these peoples paid a huge price for this.

129. This amendment should therefore be given a narrow interpretation, to avoid any risk that important historical research is discouraged. It must not collide with the right to freedom of holding opinions without interference, the right to freedom of expression and the right to freedom of academic research. These rights are enshrined in the Constitution of the Russian Federation (Article 29), the ECHR (Article 10) and the ICCPR (Article 19).

5. Kin-minorities

130. New Article 69 (3) stipulates that *“the Russian Federation shall provide support to its compatriots living abroad in the exercise of their rights, the protection of their interests and the preservation of all-Russian cultural identity”*.

131. Replies: In explaining this provision, the Replies refer to Federal Law No. 99-FZ of 24 May 1999 "On State Policy of the Russian Federation Regarding Compatriots Abroad", according to which "compatriots" are individuals who were born in one state, live or have lived in it and have common language, history, cultural heritage, traditions and customs, as well as descendants of those individuals in direct descending line. Compatriots abroad are thus citizens of the Russian Federation permanently residing outside the territory of the Russian Federation. Compatriots are also persons and their descendants residing outside the territory of the Russian Federation and belonging, as a rule, to peoples who have historically lived in the Russian Federation, as well as persons who have made a free choice in favour of a spiritual, cultural and legal connection with the Russian Federation whose relatives in the direct ascending line previously resided in the Russian Federation, including persons who were citizens of the USSR, resided in states that were part of the USSR, acquired citizenship of these states or became stateless persons; descendants (emigrants) of the Russian state, the Russian republic, the RSFSR, the USSR and the Russian Federation, who had the corresponding citizenship and became citizens of a foreign state or stateless persons (Article 1 of the said law).

132. In its 2001 *Report on the Preferential Treatment of National Minorities by their Kin-State*, the Venice Commission recalled that, while States may legitimately protect their own citizens during a stay abroad, *“responsibility for minority protection lies primarily with the home-States”*.⁵³ It further recalled that *“the adoption by States of unilateral measures granting benefits to the persons belonging to their kin-minorities, which in the Commission's opinion does not have sufficient diuturnitas to have become an international custom, is only legitimate if the principles of territorial sovereignty of States, pacta sunt servanda, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected”*.⁵⁴ In this context, the Commission also recalls that *“[t]he protection of a State's citizens on the territory of a third State is mainly a responsibility of the latter State.”*⁵⁵

133. In its 2011 Opinion on the Constitution of Hungary, the Venice Commission expressed its trust *“that future interpretation of the Constitution and subsequent legislation and policies will be based on the interpretation [of the relevant provision] as a commitment to support the Hungarians abroad and assist them, in co-operation with the States concerned, in their efforts to preserve and develop their identity, and not as a basis for extra-territorial decision-making”*.⁵⁶

⁵³ Venice Commission, CDL-INF(2001)019, *Report on the Preferential Treatment of National Minorities by their Kin-State*, conclusions.

⁵⁴ *Ibidem*.

⁵⁵ Venice Commission, CDL-AD(2010)052, Opinion on the Federal Law on the Amendments to the Federal Law on Defence of the Russian Federation, para. 60.

⁵⁶ Venice Commission, CDL-AD(2011)016, *op. cit.*, para 44.

The Venice Commission expresses the same trust, relating this time to the Russians living abroad, with respect to the interpretation and application of Article 69 (3) of the Constitution of the Russian Federation.

6. Marriage

134. While the European Court of Human Rights has left some margin of appreciation in this field,⁵⁷ same-sex marriage is a hotly discussed topic in many European countries. The Commission observes a trend in some parts of Europe to enable same sex marriage,⁵⁸ whereas it is by way of constitutional amendment that same sex marriage is excluded in other countries.⁵⁹

135. Replies: The Replies point out that this provision is in line with the cultural traditions of the people of Russia. The Constitution considers the family as one of the traditional foundations of society⁶⁰ and this provision does not impose any discriminatory restrictions on other types of unions, including polyamorous unions, same-sex unions, etc. The European Court of Human Rights had not established a European consensus on a right to marriage for same sex-couples.⁶¹ The institute of marriage between a man and a woman “serves the goal of the preservation of the human race”.

136. The addition of Article 72 (1) on joint jurisdiction of the Russian Federation and constituent entities of the item (g1) on the “*protection of the institution of marriage as the union of a man and a woman*” has the effect of permanently excluding same-sex marriage, which excludes further discussion on this topic. The Comments point out that in the absence of European consensus this question cannot be seen as a human rights issue and therefore does not relate to chapter 2 of the Constitution.

137. Article 72 (1) (g1) is one of the provisions that in substance belong to the chapters that can be amended only by a Constitutional Assembly. As a rider, it was added however to a provision on the joint jurisdiction of the Russian Federation and the constituent entities.

7. Non-interference into the internal affairs of the State

138. New Article 79-1, provides that the Russian Federation takes measures to preserve and strengthen international peace and security, to ensure peaceful coexistence of the states and peoples, to prevent intervention into the internal affairs of a State.

139. Replies: The Replies point out that the Constitution envisages only the sovereignty of the Russian Federation.⁶² Article 79-1 does not imply a waiver by the Russian Federation of international treaties and of its international obligations and therefore do not conflict with Article 15 (4) of the Constitution. The principle of non-interference in the internal affairs of a state is a universally recognised principle of public international law, including in Article 2(7) of the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. Therefore, its inclusion in the

⁵⁷ European Court of Human Rights, *Schalk and Kopf v. Austria*, 24 June 2010 (Application no. 30141/04); *Orlandi and Others v. Italy*, 14 December 2017 (Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12).

⁵⁸ Austria, Constitutional Court, decision G 258/2017 of 04-12-2017 [CODICES: AUT-2017-3-003; France, Constitutional Council, decision 2013-669 of 17-05-2013 [CODICES: FRA-2013-2-002].

⁵⁹ Serbia, Article 64 of the Constitution; Georgia, Article 30 of the Constitution; Slovakia, Article 41 of the Constitution.

⁶⁰ See also Constitutional Court decision no. 24-P of 23 September 2014.

⁶¹ *Oliari and Others v Italy* (Applications nos. 18766/11 and 36030/11), §§189-194.

⁶² Constitutional Court of the Russian Federation Ruling 249-O, 6 December 2001, para. 3.1.

text of the Constitution of the Russian Federation cannot become an obstacle to the fulfilment of the Russian Federation's international obligations.

140. The Venice Commission agrees that this provision does not and cannot imply a waiver by the Russian Federation of its international obligations. Therefore, the Russian authorities cannot avail themselves of the principle of non-interference in internal affairs to reject criticism of the alleged non-observance of its international obligations.

F. Judiciary

141. Notably in presidential regimes, the independence of the judiciary is an essential element of checks and balances. In respect of the Constitution of Turkey, the Venice Commission was of the opinion that *“[i]n a presidential system, important supervisory and control powers fall on the judiciary. The judiciary has to be fully independent from the legislative and, especially, from the executive power and has to be able to check, and if necessary strike down, acts adopted by the parliament and the president.”*⁶³ Moreover, *“[t]he fundamental principles of the rule of law, the separation of powers and the independence of the judiciary create the framework which legitimates various political systems and forms of government, as long as they remain democratic. Negligence of these fundamental rules could lead to the transformation (or, better, the degeneration) of the whole system into an authoritarian one. This danger is stronger in the case of introduction of a presidential system instead of a parliamentary one. In legal literature, presidentialism is often considered to be generally less conducive to democracy, especially in countries with deep political cleavages, in which more than two political parties compete for power and which do not have a long tradition of political compromises. A presidential regime requires very strong checks and balances. In particular, a strong, independent judiciary is essential because the controversies which in a parliamentary regime are normally settled through political debate and negotiations, in a presidential regime often end up before the courts.”*⁶⁴

1. Criteria of eligibility for judicial office

142. The amendments in Article 119 of the Constitution concern the criteria of eligibility for judicial office. The new components are (i) the requirement to be “permanently resident in the Russian Federation”, (ii) the prohibition to hold the citizenship of a foreign state or a residence permit or any other document confirming the right of the holder to permanent residence within the territory of a foreign state, and (iii) the prohibition from opening and holding accounts (deposits) or keeping cash and valuables in foreign banks located outside the territory of the Russian Federation.

143. European and international standards demand that judicial appointments need to be based on objective, transparent and non-discriminatory selection criteria, which can relate to formal requirements (nationality, minimum age, qualifications, professional experience, et cetera), judicial skills and human skills.⁶⁵

⁶³ Venice Commission, CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para. 111.

⁶⁴ Venice Commission, CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para 44.

⁶⁵ M. Kuijer, *The Blindfold of Lady Justice*, Wolf Legal Publishers 2004, p. 222. See, inter alia:

- CM/Rec(2010)12, para. 44: appointments “should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.”

144. In so far as the newly introduced criteria aim to secure that only Russian nationals living in the Russian Federation are eligible for judicial office, they appear to be unproblematic. The Venice Commission has previously held that *“it is usually a fundamental principle that a country cannot have foreign nationals serving as judges”*⁶⁶. Equally, it appears reasonable to expect a judge to live in the country to do his/her work. From the viewpoint of the country concerned, persons with double citizenship are citizens with all rights (e.g. right to vote in national election) and obligation (e.g. military service) pertaining to citizenship. Therefore, it would be less reasonable to rule out double citizens from judicial office, notably as double citizenship is even expressly allowed under Federal law.

145. In so far as the new criteria are introduced to allow the relevant authorities to check the financial assets of judges in order to enforce anti-corruption legislation, they would be equally unproblematic⁶⁷ (assuming that this is indeed the rationale behind the amendment).

2. Court Presidents

146. According to Article 102 (1) (g) it is within the jurisdiction of the Federation Council to appoint the President, the Vice-President and the other judges of the Constitutional Court and of the Supreme Court.⁶⁸ Article 83 (f) stipulates that the President of the Russian Federation “shall appoint presidents, vice-presidents and judges of other federal courts”. It appears that the President of the Russian Federation is empowered to appoint court presidents of federal courts, except for the Constitutional Court and the Supreme Court.

147. Already before the constitutional amendments, court presidents were appointed by the President of the Russian Federation. The amendments constitutionalise this competence. As concerns the level of regulation – constitutional or legislative -, it is true that *“[t]here are no standards on whether the appointment of court presidents should be explicitly regulated on the constitutional or legislative level. In any case, in view of the important functions of the court presidents, a clear regulation on their appointment must be adopted. [...]”*⁶⁹

148. Court presidents have a very powerful role not only in the Russian Judiciary. In general, the Venice Commission recommends depoliticising the appointments of court presidents: *“[...] The main role in judicial appointments should [...] be given to an objective body such as the High Judicial Council provided [...] in the Constitution. It should be understood that proposals from this body may be rejected only exceptionally. From an elected parliament such self-restraint cannot be expected and it seems therefore preferable to consider such appointments as a presidential prerogative. Candidatures should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. For court presidents (with the possible exception of the President of the Supreme Court) the procedure should be the same.”*⁷⁰

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- A similar provision is included in the European Charter on the Statute for Judges in sections 2.1 and 2.2. In doing so it mentions criteria related to legal knowledge (i.e. qualifications and professional experience), judicial skills (i.e. independent thinking and the ability to show impartiality) and human skills (i.e. the candidate's capacity to respect human dignity and put the law into practice).

⁶⁶ CDL-AD(2013)018, Monaco – Opinion on the balance of powers in the Constitution and the Legislation, para. 86.

⁶⁷ CDL-AD(2019)024, Armenia – Opinion on the amendments to the Judicial Code and some other laws, para. 42.

⁶⁸ There may be a translation error in the English translation of the Constitution (CDL-REF(2021)010).

⁶⁹ Venice Commission, CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, §24.

⁷⁰ CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, §17.

149. By constitutionalising the power of the President to appoint “other” court presidents, the amendments introduce a further element of strengthening the powers of the President in the delicate field of the judiciary where not only objective elements but also the appearance of independence is important⁷¹ this results in a further reinforcement of the powers of the President over the court hierarchy.

3. Prosecution office

150. According to the amended Article 129 (3), the “[t]he Prosecutor General of the Russian Federation and deputies of the Prosecutor General of the Russian Federation shall be appointed and dismissed upon consultations with the Council of Federation by the President of the Russian Federation.” The previous wording of Article 129 (2) had provided that the “[t]he Prosecutor General of the Russian Federation and deputies of the Prosecutor General of the Russian Federation shall be appointed and dismissed by the Council of Federation upon a proposal of the President of the Russian Federation.” The Comments explain that the institute of the Prosecutor’s Office had been established in the 18th century under Peter I. The powers of the Prosecutor’s Office were significantly reduced in 2007 when the functions of the initiation of criminal cases were transferred to the Investigative Committee of the Russian Federation and the possibility to seek the annulment of court decision was reduced. Nonetheless, the Venice Commission is of the opinion that in view of the wide powers of the prosecution system, attributing the appointment of the Prosecutor General to the President results in a deeply problematic reinforcement of the powers of the President.

151. In 2005, the Venice Commission discussed the overly wide powers of the prosecution system in Russia: *“Nevertheless the overwhelming impression remains of an organisation which is still too big, too powerful, not transparent at all, exercises too many functions which actually and potentially cut across the sphere of other State institutions, in which the function of supervision predominates over that of criminal prosecution, but which nevertheless, despite its powers, remains vulnerable to presidential and other political power. The strongly hierarchical structure of the Procuracy, concentrating power in the hands of the Prosecutor General, reinforces these concerns. As it stands, the system does not seem to comply with Recommendation (2000)19 and raises serious concerns of compatibility with democratic principles and the rule of law.”*⁷²

152. This opinion was critical notably of the provisions on supervisory powers, which define *“the organs over which supervision is exercised: ‘federal ministries, state committees, services and other federal executive authorities, representative (legislative) and executive state authorities of constituent entities of the Russian Federation, local self-government bodies, military administration bodies[...] and heads of commercial and non-commercial organisations’.* That is an exceptionally wide circle of entities, encompassing as it does organs of legislative, executive and local-government authority as well as commercial and non-commercial institutions. Combined with the sweeping powers of the Prosecutor’s Office as described above, this inevitably raises concerns as to the compatibility of these supervisory powers with the checks and balances required for the functioning of a democratic system.”⁷³

⁷¹ Venice Commission, CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, para. 28.

⁷² Venice Commission, CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor’s Office) of the Russian Federation, para. 75.

⁷³ Ibid. para. 59.

153. It is regrettable that by attributing to the Prosecutors Office the supervision of the “implementation of laws”, the amended Article 129 (1) now even added a constitutional basis for excessive powers.

154. However, it is positive that the Federation Council now has a new competence to hear the annual report of the Prosecutor of the Russian Federation on the rule of law and public order in the Federation (Article 102 (1) (l)).

4. Dismissal of highest judges - Constitutional Court / Supreme Court

155. The amended Article 83 (f3) gives the President the power to propose to the Federation Council the termination *“in accordance with the federal constitutional law the powers of the President of the Constitutional Court of the Russian Federation, the Vice-president of the Constitutional Court of the Russian Federation and the judges of the Constitutional Court of the Russian Federation, the Chief Justice of the Supreme Court of the Russian Federation, deputy chief justices of the Supreme Court of the Russian Federation and judges of the Supreme Court of the Russian Federation, presidents, vice-presidents and judges of the cassation and appeal courts in the event of them committing a violation tarnishing the honour and dignity of judge, as well as in other situations established by federal constitutional law demonstrating impossibility for a judge to continue discharging of its powers”*.

156. Conversely, Article 102 (1) (k), provides as a competence of the Federation Council, the *“termination upon proposition of the President of the Russian Federation in accordance with the federal constitutional law of powers of the President of the Constitutional Court of the Russian Federation, the Vice-president of the Constitutional Court of the Russian Federation and the judges of the Constitutional Court of the Russian Federation, the Chief Justice of the Supreme Court of the Russian Federation, vice-presidents of the Supreme Court of the Russian Federation and judges of the Supreme Court of the Russian Federation, presidents, vice-presidents and judges of the cassation and appeal courts in the event of them committing a violation tarnishing the honour and dignity of judge, as well as in other situations established by federal constitutional law demonstrating impossibility for a judge to continue discharging of his (her) powers.”*

157. Replies; The Replies insist that in its decision 45-P of 2 February 2006, the Constitutional Court had noted that only the Supreme Court shall hear as a court of first instance decisions to suspend or terminate the powers of judges. The mandate of a judge can be terminated only if a miscarriage of justice was the result of conduct inherently incompatible with the judge’s office (Constitutional Court decision No 3-P of 28 February 2008). Safeguards against the dismissal of judges are not personal privileges but ensure the interests of justice. The procedure of dismissal only concerns judges who by virtue of their position in the judiciary can influence decision-making in their favour by the judicial community. Therefore, this special mechanism restores the balance of power and can be regarded as an extraordinary measure. The commission of an offence against the honour and dignity of a judge is a serious reason to terminate a judge's mandate and this procedure is essentially similar to the "impeachment" procedure applied to judges in a number of countries. The grounds for this procedure are governed by federal constitutional laws, which are not exempt from possible future constitutional review. The new procedure is thus intended to contribute to transparency in the dismissals of these judges. Nonetheless, as the term honour and dignity of a judge indeed leaves some discretion, the judicial authorities are currently preparing a revised code of judicial ethics which will elaborate on these grounds for dismissal. The Comments explain that committing an offense that defames honour and dignity is traditionally the basis for the removal of judges from office. These concepts are applied in reference to the Code of Judicial Ethics. Law No. 3132-I "On the status of judges in the Russian Federation" establishes that the early termination of the powers of a judge occurs in exceptional cases for material, guilty,

incompatible with high rank of judge violation of the provisions of substantive law and (or) procedural legislation.

158. The Commission is strongly of the view that the reference in Article 102 (1) (k) to “a violation tarnishing the honour and dignity of judge” is very vague. While this ground for termination already existed on the level of legislation,⁷⁴ moving it to the constitutional level compounds the problem. The elaboration of the grounds for dismissal in a Code of Judicial Ethics would be useful but a regulation on the level of law would be preferable to compensate for the vagueness in Article 102 (1) (k). In the absence of further specification of these grounds, judges would be placed in a position of uncertainty which might have a chilling effect on the independence of the judicial power.

159. In the field of judicial discipline, a balance needs to be struck between judicial independence, on the one side, and the necessary accountability of the judiciary, on the other, in order to avoid negative effects of corporatism within the judiciary. The Consultative Council of European Judges has stated that it does not believe that it is possible to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings.⁷⁵ Such codification of misconduct should be done at the national level. A comparative law research report entitled “Judicial Independence in Transition”⁷⁶ observed that in many European countries the grounds for the disciplinary liability of judges are defined in rather general terms. As an exception, in Italy the law provides an all-inclusive list of thirty-seven different disciplinary violations concerning the behaviour of judges both in and outside their office.

160. Principle 5.1 of the European Charter on the Statute for Judges states that the grounds giving rise to a disciplinary sanction need to be “expressly defined”. A similar wording was chosen by the European Court of Human Rights in the case *Pitkevich v. Russia*.⁷⁷ In this case, the Court found it relevant that the grounds for taking disciplinary action were “precisely defined”. This point was repeated in the 2013 *Volkov* judgment: in the absence of practice, domestic law needs to establish guidelines concerning vague notions to prevent arbitrary application of the relevant provisions: “*the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of ‘breach of oath’ and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects*”.⁷⁸

161. Moreover, as the *UN Basic Principles on the Independence of the Judiciary* confirm,⁷⁹ disciplinary proceedings against judges shall be conducted according to an established procedure, for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and shall be carried out by an independent authority and subject to review. In its 2015 Concluding observations on the Russian Federation, the UN Human Rights Committee recommended that the Russian Federation “*ensure that an independent body is responsible for judicial discipline, clarify the grounds for disciplinary action and guarantee due process in*

⁷⁴ See also International Commission of Jurists, *Securing justice: The disciplinary system for judges in the Russian Federation Report of an ICJ Mission*.

⁷⁵ CCJE-GT (2002) 7, p. 32.

⁷⁶ Seibert-Fohr, Anja (ed.); [Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht], *Beiträge zum Ausländischen Öffentliches Recht und Völkerrecht*; vol. 233, Berlin, 2012.

⁷⁷ ECtHR (admissibility decision) 8 February 2001, *Pitkevich v. Russia* (appl. no. 47936/99).

⁷⁸ ECtHR, *Oleksandr Volkov v. Ukraine* of 9 January 2013, application no. 21722/11, para. 185.

⁷⁹ *UN Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principles 17-20.

judicial disciplinary proceedings and independent judicial review of disciplinary sanctions".⁸⁰ Any decision on the dismissal of judges taken by the legislative or executive power should always be preceded by, and conditioned upon, a disciplinary decision issued within the judiciary itself.

162. The Venice Commission acknowledges that using broadly defined norms cannot be completely avoided. The Opinion on the Judicial System Act of Bulgaria states that "[t]he Venice Commission acknowledges that, in defining unethical behaviour, the law may have recourse to some comprehensive formulas".⁸¹ However, the Commission has previously noted that concepts such as the "dignity of a judge" are too subjective to form the basis of a disciplinary liability.⁸² Similarly, the Commission has previously commented that "undermining the reputation of the court and judicial function" is excessively vague.⁸³ In its 2016 *Rule of Law Checklist*, the Venice Commission stressed that "offences leading to disciplinary sanctions /for judges/ and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s)".⁸⁴ These requirements belong among the guarantees of the independence of the judiciary as one of the main elements of the rule of law.

163. When using open-ended notions, it is particularly important which body is assigned with the interpretation and application of such notions in practice. The constitutional arrangements in the Russian Federation allocate this task to the Federation Council which appears to be at odds with international standards. In the 2013 Volkov judgment, the ECtHR emphasised the importance of the independence and impartiality of the body imposing disciplinary sanctions and referred to the European Charter on the Statute for Judges in this respect (i.e. the substantial participation of judges in the relevant disciplinary body). The Venice Commission has likewise stated on various occasions that the removal of a judge from office should not be imposed by a political body.⁸⁵

164. The Commission was informed that the Federation Council asked the General Assembly of Judges to draw up a list of examples clarifying this notion to be put in the Judicial Code of Ethics. The Venice Commission welcomes this information and recommends that the Federation Council include such criteria in the implementing legislation.

165. Article 18 of the *Federal Constitutional Law on the Constitutional Court of the Russian Federation*⁸⁶ requires a decision from the Constitutional Court itself and (in specific cases) a

⁸⁰ UN Doc. CCPR/C/RUS/CO/7, *Concluding observations on the seventh periodic report of the Russian Federation*, 28 April 2015.

⁸¹ CDL-AD(2017)018, Bulgaria – Opinion on the Judicial System Act, para. 108.

⁸² CDL-AD(2014)018, Kyrgyz Republic – Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges, para. 22.

⁸³ CDL-AD(2015)053, Former Yugoslav Republic of Macedonia – Opinion on Laws on the Disciplinary Liability of Judges and Evaluation of Judges, para. 36.

⁸⁴ Venice Commission, CDL-AD(2016)007, *Rule of Law Checklist*, para 78.

⁸⁵ See for example Venice Commission, CDL-AD(2018)028, Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, para. 53.

⁸⁶ Art. 18 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation)

The termination of the powers of the Judge of the Constitutional Court of the Russian Federation shall be implemented by the decision of the Constitutional Court of the Russian Federation which shall be transmitted to the President of the Russian Federation, to the Federation Council and which shall constitute an official notification of the occurrence of the vacancy.

The termination of the powers of the Judge of the Constitutional Court of the Russian Federation under the provisions of Paragraph 1 of Section One of the present Article shall be effected by the Federation Council upon the submission of the Constitutional Court of the Russian Federation.

Termination of powers of a Judge of the Constitutional Court of the Russian Federation on the ground indicated in Item 6, 7 or 8 of Section 1 of the present Article shall be effected by the Council of Federation upon submission of the Constitutional Court of the Russian Federation adopted by the majority of not less than two thirds of the number of acting Judges.

qualified majority of not less than two-thirds of the acting judges. It provides that the termination shall be effected by the Federation Council upon the submission of the Constitutional Court.

166. What is new and worrying, given the vagueness of this ground (and other grounds in Article 18 of the *Federal Constitutional Law on the Constitutional Court of the Russian Federation*), is the body to whom the interpretation and application of this ground is assigned. The initiative for the termination of powers has now been shifted from the Court itself to the President, which constitutes a severe interference with the independence of judges. It is not clear whether the wording of Article 83 (f3) and 102 (1) (k) (“in accordance with federal constitutional law”) means that the requirement of a submission of the Constitutional Court shall be maintained. The Comments point out that the President the President would exercise his powers under Article 83 (f3) only based on a submission by the Court itself. However, there is no constitutional guarantee for that.

167. In the light of the problematic constitutional provisions, the Commission recommends including in implementing legislation the criteria for dismissals that are currently being prepared by the General Assembly of Judges and to specify that disciplinary liability may only be engaged if a violation has been committed ‘deliberately’/‘with intent’ or ‘with gross negligence’ which would prevent application of open-ended notions too hastily.⁸⁷ The Comments point out that this already corresponds to the current practice of the implementation of the legislative provisions.

5. Reduction of the number of judges of the Constitutional Court

168. Article 125 (1) reduces the number of the judges of the Constitutional Court from 19 to 11, including the Chairman of the Court and his/her deputy. Article 3 (7) of the Amending Law provides that the judges of the Constitutional Court who are in office on the day on which Article 1 of the Amending Law enters into force, shall continue to exercise their powers and no new judges shall be appointed until the number of 11 is reached. The current number of judges is 12.

169. Replies: The Replies explain that after the adoption of the Constitution in 1993, the Constitutional Court originally operated in two chambers of 9 and 10 judges respectively. This separation into two chambers was later abolished. Courts which operate in chamber usually have a larger number of judges. Given that the Constitutional Court now only works in plenary, the large number of judges was no longer justified. The determination of the number of judges of the Constitutional Court is in the discretion of the constitutional legislator. In any case, there will be no early termination of mandates and all current judges remain in function until the expiry of their mandates (there is no age limit for the President of the Constitutional Court according to Article 13 of the Federal Constitutional Law on the Constitutional Court).

170. The Venice Commission agrees that the number of judges at the highest courts and tribunals of a state, including constitutional courts, varies largely from country to country and there is no ideal number. For each country, the appropriate number depends on *inter alia* the procedural laws and the ensuing workload for such courts, the legal culture and the overall trust of the people in the justice system.⁸⁸

171. Nonetheless, even if the mandates of the current judges are not affected, the Commission notes that Article 3 (7) of the Amending Law explicitly refers to the grounds for the termination of powers as described by the *Federal Constitutional Law on the Constitutional Court of the*

⁸⁷ Cf. CDL-AD(2017)018, , para. 106.

⁸⁸ CDL-AD(2019)027, Ukraine – Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies, para. 40.

Russian Federation. Such a reference to the grounds for dismissal the Constitutional Court judges in the Amending Law, taken together with the President's new competence to initiate their dismissal(see above), could have a chilling effect for the current Constitutional Court judges.

6. *A priori* control by the Constitutional Court

172. Article 125 (5-1) establishes a new competence of the Constitutional Court, which upon request by the President shall *inter alia* verify the constitutionality of draft laws before the enactment by the President.

173. Replies: The Replies point out that *a priori* constitutional review has long been known in constitutional law theory as a means of checking the constitutionality of laws that are not yet in force, as a mechanism in the system of checks and balances.

174. The Venice Commission has previously held that a combination of *a priori* and *a posteriori* control needs to be approached carefully.⁸⁹ When a draft law is submitted to purely abstract control its scope of practical application and interpretation by the ordinary courts is not yet known. Often, a pre-existing unconstitutionality becomes visible only in the practice of the application of the law. The legislation on the Constitutional Court should ensure that *a priori* control does not exclude *a posteriori* control of provisions that were found to be constitutional in the abstract procedure.

7. Conclusion on the Judiciary

175. Even if certain amendments taken in isolation fall within the discretion of the national constituent legislator, the Venice Commission is of the view that, taken together (and in the light of the changes in the composition of the Federation Council (see Article 95)), the provisions on the Judiciary may amount to a serious danger for the rule of law in the Russian Federation. This danger should be mitigated by implementing legislation.

VI. Conclusion

176. By letter of 29 May 2020, the Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on constitutional amendments and the procedure for their adoption in the Russian Federation.

177. The Venice Commission has already dealt with some of the 2020 Constitutional Amendments to the Constitution of the Russian Federation in its previous opinion CDL-AD(2020)009. The present opinion therefore addresses the remaining substantive issues which were not analysed in the previous opinion as well as the procedure for the adoption of the amendments.

178. The Venice Commission welcomes that the Amendments bring about a number of positive changes, *inter alia*:

- The increased protection of social rights.
- The two-term limitation of the mandate of the President.
- The possibility for the President to refer to the Constitutional Court the use of a presidential veto.

⁸⁹ Venice Commission, CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paragraph 37; 49-50.

- The constitutionalisation of the State Council, which has, already for two decades, operated based solely on an executive legal act.
- The extension of parliamentary control, including the possibility of carrying out inquiries into the heads of state bodies and the competence to “hear” the annual report of the Prosecutor of the Russian Federation.
- The introduction of a fixed six-year term for most of the Senators of the Federation Council.

179. Nonetheless, the Commission has also identified some serious flaws in the Constitution and the procedure of its adoption.

180. As to the **procedure of the adoption of the amendments**, the Venice Commission concludes that the speed of the preparation of the preparing such wide-ranging amendments was clearly inappropriate for the depth of the amendments considering the (societal) impact of the amendments. This speed resulted in a lack of time for a proper period of consultation with civil society prior to the adoption of the amendments by parliament. In view of the subject matters which were covered, a Constitutional Assembly should have been convened under Article 135. As a Constitutional Assembly was not convened, the Amendments were adopted under the procedure of Article 136 of the Constitution. Once the two steps of this procedure were exhausted (adoption by Parliament and the constituent entities of the Federation) the Amendments had to enter into force. A possible negative outcome of the additional steps which were introduced by ordinary law, (the control by the Constitutional Court and the all-Russian vote), could not prevent the entry into force of the Amendments under the procedure foreseen in the Constitution.

181. The procedure used to amend the Constitution creates an obvious tension with article 16 of the Constitution which safeguards the “the fundamental principles of the constitutional order of the Russian Federation”.

182. Analysing the **substance of the amendments**, the Venice Commission concludes that they have disproportionately strengthened the position of the President of the Russian Federation and have done away with some of the checks and balances originally foreseen in the Constitution.

183. The *ad hominem* exclusion from the term limits of the current and previous Presidents contradicts the very logic of the adopted amendment limiting the President’s mandate to two-terms. The unusually wide scope of immunity, taken together with rules of impeachment that make it very difficult to dismiss a President put an excessive limit on the accountability of the President.

184. The President has acquired additional powers at the expense of the Chairman of the Government. The increase in the number of Senators appointed by the President may give the latter additional leverage, thus raising doubts as to whether the Federation Council will be independent enough from the executive to be able to exercise the monitoring functions entrusted to it by the Constitution.

185. Taken together, these changes go far beyond what is appropriate under the principle of separation of powers, even in presidential regimes.

186. The Amendments weaken constituent entities and local self-government bodies. The inclusion of provisions referring to the Russian nation creates a tension with the multi-ethnic character of the Russian Federation.

187. With regard to the judiciary, the amendments, notably the power for the President to initiate the dismissal of apex court presidents as well as presidents, vice-presidents and judges of the cassation and appeal courts on the basis of a very vague ground, and the conferral of the relevant decision to the Federation Council, affect the core element of judicial independence. Taken together, the amendments to the provisions on the Judiciary amount to a danger to the rule of law in the Russian Federation. The Venice Commission recommends at the very least to include in the implementing legislation the detailed criteria of what constitutes “*a violation tarnishing the honour and dignity of judge*” and “*impossibility of discharging the functions of a judge*” as defined by the Assembly of Judges. In addition, the implementing legislation should specify that disciplinary liability may only be engaged if a violation has been committed ‘deliberately’/‘with intent’ or ‘with gross negligence’ which would prevent application of open-ended notions too hastily.

188. The Comments by the State Duma note that many of the amended constitutional provisions considered will be developed in legislation and in the practice of their application. Only on this basis, will it be possible to make balanced conclusions on the development of constitutionalism in the Russian Federation. The Venice Commission will complement this interim opinion with a final opinion, taking also into account major implementing legislation.

189. The Venice Commission remains at the disposal of the Russian authorities and the Parliamentary Assembly for further assistance in this matter.