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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ARMENIA

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

Request for opinion

BACKGROUND: Constitutional amendments of 2015 marked the vision of the constituted power (pouvoir constitué) on having a new Constitutional Court. In particular, the Constitution provided for a completely new procedure for the formation of the Constitutional Court, i.e. nine judges of the Constitutional Court must be elected by the National Assembly, of which three - upon the recommendation of the President of the Republic, three - upon the recommendation of the Government, three - upon the recommendation of the General Assembly of Judges. However, the Constitutional Court was already formed at large at the moment of adoption of the Constitution and the transitional provisions of the Constitution had not, in any way, secured the new model in the transitional stage. In fact, the model of formation of the Constitutional Court provided for by the Constitution has not yet fully been brought to life. At this moment, the crisis within and around the Constitutional Court has several aspects which represent extremely serious challenges for ensuring the democracy, sovereignty guaranteed by the Constitution in the Republic of Armenia as well as the necessary and sufficient qualities for a state governed by the rule of law.

The cardinal problem of the crisis of the Constitutional Court is the obvious difference between the status of the Chairperson, members of the Constitutional Court appointed before the entry into force of Chapter 7 (Courts and the Supreme Judicial Council) of the Constitution, with the amendments of 2015, and judges of the Constitutional Court elected and to be elected thereafter which is displayed by essential difference in terms of both the procedure for appointment, the entities being nominated and the terms of office. In particular, members of the Constitutional Court appointed before the amendments to the Constitution of 2005 shall hold the office until the age of 70 (2 members), those appointed before the amendments of 2015 - until the age of 65 (5) members, and those elected thereafter - for a period of 12 years. The term of office of judges has been set to be 12 years as provided for by the amendments to the Constitution of 6 December 2015.

The limitation of the term of office without possibility to be re-elected further contributes to the strengthening of independence of judges of the Constitutional Court, concurrently allowing for natural change of generation. Where, in ordinary courts, except for the highest instances, the holding of office by judges until the retirement age is one of the most important components of independence and irremovability, the removal of judges holding office in the Constitutional Court may essentially contribute to the effectiveness of justice.

In the current situation, 5 years after the amendments to the Constitution of 2015 only 2 judges of the Constitutional Court are elected in compliance with the procedure prescribed by the amendments to the Constitution of 2015.

Moreover, the way in which the transitional provisions were implemented has had the effect of postponing the full implementation of the rules on the composition of the Constitutional Court for an exceptionally long period of time.

QUESTIONS: Taking into account the existing situation vis-à-vis the Constitutional Court in Armenia, it is important to receive the opinion of the Venice Commission on the legal issues stated below:

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

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

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

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

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

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

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

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

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

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