Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA

DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF PART 5 OF ARTICLE 81 AND ARTICLE 82 OF THE CONSTITUTIONAL LAW OF THE REPUBLIC OF ARMENIA JUDICIAL CODE OF THE REPUBLIC OF ARMENIA, ARTICLE 35 OF THE LAW OF THE REPUBLIC OF ARMENIA ON PROSECUTOR'S OFFICE, ARTICLE 12 OF THE CONSTITUTIONAL LAW OF THE REPUBLIC OF ARMENIA ON HUMAN RIGHTS DEFENDER, ARTICLE 39 OF THE LAW OF THE REPUBLIC OF ARMENIA ON TELEVISION AND RADIO BROADCASTING, ARTICLE 17 OF THE LAW OF THE REPUBLIC OF ARMENIA ON THE AUDIT CHAMBER, ARTICLES 18 AND 19 OF THE LAW OF THE REPUBLIC OF ARMENIA ON THE CENTRAL BANK OF THE REPUBLIC OF ARMENIA, ARTICLES 144 AND 145 OF THE CONSTITUTIONAL LAW OF THE REPUBLIC OF ARMENIA ON RULES OF PROCEDURE OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF ARMENIA, ARTICLES 2 AND 3 OF THE LAW OF THE REPUBLIC OF ARMENIA ON SUPPORT, SERVICE AND SOCIAL GUARANTEES OF THE ACTIVITY OF THE OFFICIALS WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF THE PRESIDENT OF THE REPUBLIC

Yerevan March 31, 2020

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, A. Dilanyan, F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan (Rapporteur),

with the participation of**:**

the applicant: representatives of the President of the Republic – L. Yeremyan, Assistant to the President of the Republic and H. Hovakimyan, Head of the Legal Department of the Office of the President of the Republic,

the respondent: K. Movsisyan, official representative of the National Assembly, Head of the Legal Support and Service Division of the National Assembly Staff,

pursuant to Clause 1 of Article 168, Clause 4 of Part 1 of Article 169 of the Constitution, as well as Articles 22 and 68 of the Constitutional Law of the Republic of Armenia on the Constitutional Court,

examined in a public hearing by oral procedure the case on conformity of Part 5 of Article 81 and Article 82 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, Article 35 of the Law of the Republic of Armenia on Prosecutor's Office, Article 12 of the Constitutional Law of the Republic of Armenia on Human Rights Defender, Article 39 of the Law of the Republic of Armenia on Television and Radio Broadcasting, Article 17 of the Law of the Republic of Armenia on the Audit Chamber, Articles 18 and 19 of the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia, Articles 144 and 145 of the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly of the Republic of Armenia, Articles 2 and 3 of the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials with the Constitution on the basis of the application of the President of the Republic.

The Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia was adopted by the National Assembly on 7 February 2018, signed by the President of the Republic on 10 February 2018 and entered into force on 9 April 2018.

The disputed Part 5 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia titled: "Procedure for the formation of the Supreme Judicial Council", stipulates:

"Where the National Assembly fails to elect a member of the Supreme Judicial Council within a period of three months following the day when the vacant position of the member of the Supreme Judicial Council to be elected by the National Assembly opens up, the President of the Republic shall, until the said member is elected by the National Assembly, within a period of fifteen days, appoint an interim member who must comply with the requirements prescribed by the Constitution and this Code for the members of the Supreme Judicial Council elected by the National Assembly".

The disputed Article 82 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia titled: "The term of powers and oath of a member of the Supreme Judicial Council", stipulates:

“1. Members of the Supreme Judicial Council shall be elected for a term of five years, without the right of being reelected consecutively.

2. Members of the Supreme Judicial Council elected by the National Assembly and those elected by the General Assembly shall, immediately after being elected, ceremoniously and individually take the following oath at the National Assembly or during the session of the General Assembly, respectively: “Entering on the high office of a member of the Supreme Judicial Council, I swear in front of the people of the Republic of Armenia to perform my duties in compliance with the Constitution and laws of the Republic of Armenia, ensuring the rule of law, guaranteeing independence of courts and judges”.

3. Following the oath, the member of the Supreme Judicial Council shall sign under the text of the oath.

4. The newly-elected member of the Supreme Judicial Council shall assume his or her office on the day of expiry of the term of office of the relevant member of the Supreme Judicial Council or, if the vacant position of the member of the Supreme Judicial Council had opened up on other grounds, on the day he or she is elected.

5. In the case of election of a judge of the Constitutional Court as a member of the Supreme Judicial Council by the National Assembly, it shall be deemed that the judge of the Constitutional Court has filed a resignation, and his or her powers as a judge shall terminate automatically from the day of assumption thereby of powers of a member of the Supreme Judicial Council”.

The Law of the Republic of Armenia on Prosecutor’s Office was adopted by the National Assembly on 17 November 2017, signed by the President of the Republic on 1 December 2017 and entered into force on 9 April 2018.

The disputed Article 35 of the Law of the Republic of Armenia on Prosecutor’s Office titled: “Requirements for a candidate for the Prosecutor General and election of the Prosecutor General”, stipulates:

“1. The Prosecutor General shall be elected by the National Assembly, upon recommendation of the competent standing commission of the National Assembly, by at least three fifths of votes of the total number of Deputies, for a term of six years.

2. The same person may not be elected as the Prosecutor General for more than two consecutive terms.

3. The procedure for being declared as a competent standing commission of the National Assembly and for nomination thereby of a candidate for the Prosecutor General and for election of the Prosecutor General shall be established by the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly.

4. A lawyer with higher education, having attained the age of thirty-five, who is only a national of the Republic of Armenia, having the right of suffrage, with high professional qualities and at least ten years of professional work experience may be elected as the Prosecutor General.

5. The Prosecutor General must comply with the requirements prescribed by Clauses 1 and 2 of Part 1 of Article 33 of this Law, and no restriction prescribed by Article 34 of this Law must exist.

6. The Prosecutor General shall assume his or her office and perform duties following his or her swearing-in ceremony at the National Assembly, as prescribed by Part 1 of Article 43 of this Law, on the day of expiry of the term of office of the previous Prosecutor General, whereas if the position of the Prosecutor General is vacant at the time of the election, the Prosecutor General shall assume his or her duties on the day following his or her participation in the swearing-in ceremony at the National Assembly".

The Constitutional Law of the Republic of Armenia on Human Rights Defender was adopted by the National Assembly on 16 December 2016, signed by the President of the Republic on 14 January 2017 and entered into force on 4 February 2017.

The disputed Article 12 of the Constitutional Law of the Republic of Armenia on Human Rights Defender titled: "Election of the Defender", stipulates:

"1. Everyone having attained the age of 25, enjoying high authority within the public, having higher education, who is only a national of the Republic of Armenia for the preceding four years, permanently residing in the Republic of Armenia for the preceding four years, and having the right of suffrage, as well as having command of the Armenian language may be elected to the office of the Defender.

2. The Defender shall be elected by the National Assembly, upon recommendation of the competent standing committee of the National Assembly, by at least three fifths of votes of the total number of Deputies, for a term of six years.

3. The Defender shall assume office immediately after having been elected by the National Assembly, by taking the following oath at the National Assembly in the presence of the Deputies:

"By assuming the office of the Defender, I hereby swear to protect the rights and freedoms of an individual and a citizen, remaining faithful to the Constitution and the laws, and the principles of justice. I swear to exercise my powers impartially, in good faith and with due diligence".

4. The Defender shall assume his or her office after the oath-taking ceremony at the National Assembly of the Republic of Armenia, on the day following of the expiry of the term of office of the previous Defender. Where the office of the Defender is vacant at the moment of electing the Defender, the Defender shall assume his or her duties on the day following the oath-taking ceremony at the National Assembly.

5. The elections of the Defender shall be held within the period prescribed by the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly".

The above-mentioned article was amended by the Law HO-355-N of 13.06.18.

The Law of the Republic of Armenia on Television and Radio Broadcasting was adopted by the National Assembly on 9 October 2000, signed by the President of the Republic on 9 November 2000 and entered into force on 18 November 2000.

The disputed Article 39 of the Law of the Republic of Armenia on Television and Radio Broadcasting titled: "Procedure for the formation of the Commission", stipulates:

"1. In accordance with Parts 1 and 2 of Article 197 of the Constitution, the Television and Radio Commission shall consist of seven members. Members of the Television and Radio Commission shall upon nomination by the competent standing committee of the National Assembly, be elected by the National Assembly for a six-year term by at least a three-fifths majority vote of the total number of Deputies.

2. Not earlier than one month before the expiration of the term of office of a member of the Commission and not later than one week before that, and in case of a vacancy for other reasons - within three days, the Chairman of the Commission, and in the event of a vacancy of the Chairman of the Commission - the member of the Commission replacing the Chairman, shall notify the competent standing committee of the National Assembly about this in writing.

3. The National Assembly shall elect a member of the Commission in accordance with the procedure prescribed by the Constitution and the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly.

4. The Commission shall elect from among its members the Chairman of the Commission. A member of the Commission may be nominated as the Chairman of the Commission by self-nomination or by another member of the Commission with his or her consent.

5. All members of the Commission shall vote by secret ballot to elect the Chairman of the Commission.

6. For voting, a ballot paper is drawn up, which includes all candidates.

7. When voting, a member of the Commission shall have one vote. If the voter gave more votes, the ballot paper shall be considered invalid.

8. If, by the results of voting, no candidate received more than half of the votes, then an additional voting is held, in which the two candidates, who received the largest number of votes, participate.

9. If, due to the equality of votes, it is impossible to determine the two candidates who received the largest number of votes, the preference is given to the candidate with more professional experience, and in the case of equality of experience - to the senior candidate.

10. In an additional voting, each member of the Commission shall have one vote. In case of additional voting, the candidate who receives more than half of the number of votes is considered elected. If no one has received votes in favor of at least half of the voting participants, new elections shall be held.

11. The Chairman of the Commission shall be elected by a majority vote of the total number of members of the Commission. A member of the Commission shall have no right to refuse to vote and shall vote only “for” or “against”.

12. The same person cannot be elected as a member of the Commission for more than two consecutive terms, including the Chairman of the Commission.

13. The Chairman of the Commission shall be elected before the expiration of the term of office as a member of the Commission.

14. The election of a new Chairman of the Commission shall be carried out within ten days after filling the vacant positions of the members of the Commission”.

The Law of the Republic of Armenia on the Audit Chamber was adopted by the National Assembly on 16 January 2018, signed by the President of the Republic on 30 January 2018 and entered into force on 9 April 2018.

The disputed Article 17 of the Law of the Republic of Armenia on the Audit Chamber titled: "Member of the Audit Chamber", stipulates:

"1. A citizen meeting the requirements set for the Deputy of the National Assembly, having higher education and a qualification of an auditor obtained in the manner prescribed by the legislation of the Republic of Armenia may be elected a member of the Audit Chamber, including to the position of the Chairperson of the Chamber, where he or she has a work record of an auditor of at least five years, of which at least one year - in a managerial position at a legal entity licensed to provide audit services, or a work record of at least three years in the capacity of a member of the Audit Chamber or a work of at least five years in a managerial position of the 3rd subgroup in the structural units of the Audit Chamber or a work record of at least 10 years – of which at least five years shall be in a managerial position – in the field of public finance management.

2. The Chairperson of the Audit Chamber shall, three months prior to expiry of the term of office of a member of the Audit Chamber, inform the National Assembly to that effect. If a vacancy of a member of the Audit Chamber opens up prematurely and if a period exceeding six months remains until the end of the term of office, the Chairperson of the Audit Chamber shall inform the National Assembly to that effect within five working days. In this case, the new member of the Audit Chamber shall be elected for the term of office of the previous member that has not expired. A vacancy of a member of the Audit Chamber opened up prematurely shall not be filled where a period less than six months remains until the end of the term of office.

3. The Chairperson and other members of the Audit Chamber shall be elected in the manner prescribed by the Constitution of the Republic of Armenia and the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly.

4. A person may not be elected a member of the Audit Chamber, including to the position of the Chairperson of the Chamber, where:

1) He or she has been declared as having no or limited active legal capacity by a court judgment that has entered into legal force;

2) He or she has been held criminally liable, and the conviction has not been expunged or has not expired in a manner prescribed by law;

3) He or she has been deprived of the right to hold a certain office in a manner prescribed by law.

5. Members of the Audit Chamber, including the Chairperson of the Chamber, may not hold any office not related to their status in other state or local self-government bodies, any office in commercial organizations, engage in entrepreneurial activities, or perform other paid work except for scientific, educational and creative work.

6. The powers of a member of the Audit Chamber, of the Chairperson inclusively, shall be terminated by the National Assembly – by at least a three-fifths vote of all Deputies – in the cases of violation of the incompatibility requirement prescribed by Part 5 of this Article or membership of the member of the Audit Chamber in a political party, engagement in political activities, failure to show political restraint in public speeches.

7. The powers of a member of the Audit Chamber shall terminate:

1) In the case of expiry of his or her term of office,

2) By a court judgment that has entered into legal force on conviction of the member of the Audit Chamber for commission of a crime or on declaring him or her as having no or limited active legal capacity, missing or deceased,

3) Where a physical impairment or an illness hindering appointment to the office of a member of the Audit Chamber emerges, which is included in the list of physical disability and illnesses hindering appointment to an office of a judge, approved by the decision of the Government of the Republic of Armenia,

4) In the case of resignation of a member of the Audit Chamber,

5) Where a member of the Audit Chamber ceases to be a citizen of the Republic of Armenia or obtains a foreign citizenship,

6) In the event of his or her death.

8. The resignation letter of a member of the Audit Chamber shall be submitted to the Chairperson of the National Assembly, and the Audit Chamber shall be informed to that effect. This information shall be posted on the official website of the Audit Chamber. In the case of emergence of other grounds for automatic termination of the powers of a member of the Audit Chamber prescribed by Part 7 of this Article, the Chairperson of the Audit Chamber shall submit information on emergence of these grounds to the National Assembly within three working days".

The above-mentioned article was amended by the Law HO-31-N of 21.01.20.

The Law of the Republic of Armenia on the Central Bank of the Republic of Armenia was adopted by the National Assembly on 30 June 1996, signed by the President of the Republic on 30 June 1996 and entered into force on 29 August 1996.

The disputed Article 18 of the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia titled: "The Chairperson of the Central Bank and his or her Deputies", stipulates:

"1. The Chairperson of the Central Bank is the highest official of the Central Bank. The Chairperson of the Central Bank shall be responsible for the realization of the objectives of the Central Bank prescribed by this Law. Where the Chairperson of the Central Bank is absent or is unable to perform his or her official duties, one of the Deputy Chairpersons of the Central Bank shall act in his or her place, and where the Deputies are absent or unable to fulfill their official duties, the senior member of the Board of the Central Bank shall act in his or her place.

2. The Chairperson of the Central Bank shall be elected for a term of six years by the National Assembly - not less than three-fifths of the votes of the total number of Deputies - upon the recommendation of the competent standing committee of the National Assembly.

The Deputy Chairpersons of the Central Bank shall be elected for a term of six years by the National Assembly - by a majority vote of the total number of Deputies - upon the recommendation of the competent standing committee of the National Assembly.

Persons with higher education who have reached the age of 25, who are only nationals of the Republic of Armenia for the last four years, have permanently resided in the Republic of Armenia for the last four years, have the right to vote, and have command of the Armenian language may be elected as a Chairperson and Deputy Chairpersons of the Central Bank, who:

a) Have high authority in the financial system and

b) Have at least three years of executive experience in the implementation of monetary policy or at least three years of professional experience in international financial institutions, or at least four years of executive experience in the banking, insurance or securities market, or at least four years of professional experience of academic or research work in the field of macroeconomics.

3. **(Part repealed by HO-313-N of 13.12.17)**

4. The Chairperson of the Central Bank shall:

a) Co-ordinate and ensure the normal activities of the Central Bank, the Board and Board members,

b) Chair the meetings of the Board of the Central Bank, and sign the acts of the Board of the Central Bank and the minutes of the Board meetings,

c) Organize the execution of the regulatory acts of the Board of the Central Bank,

d) Represent the Central Bank in the Republic of Armenia, in other states, and in international organizations,

e) Issue powers of attorney,

f) Approve the structure and the staff list of the Central Bank,

g) Appoint and dismiss heads of subdivisions and other employees of the Central Bank except for cases prescribed by this Law,

g^1) Adopt individual and internal decisions and executive orders, including decisions on assigning inspections of persons under inspection,

h) Perform other powers not conferred upon the Board of the Central Bank by law".

The above-mentioned article was supplemented and amended by the Laws HO-45-N of 03.03.04, HO-245-N of 08.12.05, HO-36-N of 25.12.06, HO-133-N of 12.11.15, and HO-313-N of 13.12.17.

The disputed Article 19 of the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia titled: "The Board of the Central Bank", stipulates:

"1. The Board of the Central Bank is the highest body of governance of the Central Bank. The Board of the Central Bank is composed of the Chairperson of the Central Bank, his or her two Deputies and five members.

2. Members of the Board of the Central Bank shall be elected for a term of six years by the National Assembly - by a majority vote of the total number of Deputies - upon the recommendation of the competent standing committee of the National Assembly. The terms of office of the Board members shall be as follows:

One member — for one year,

One member — for two years,

One member — for three years,

One member — for four years,

One member — for five years. The term of office of Board members appointed later shall be six years.

In case a vacancy occurs in the Board of the Central Bank, the new Board member shall be appointed for the remainder of the term of office of the vacated position.

3. Persons with higher education who have reached the age of 25, who are only nationals of the Republic of Armenia for the last four years, have permanently resided in the Republic of Armenia for the last four years, have the right to vote and have command of the Armenian language may be elected as Board members of the Central Bank, who:

a) Have high authority in the financial system and

b) Have at least two years of executive experience in the implementation of monetary policy or at least two years of professional experience in international financial institutions, or at least four years of executive experience in the banking, insurance or securities market, or at least four years of professional experience of academic or research work in the field of macroeconomics,

c) Are professionally capable of ensuring the performance of the competences prescribed by Article 20 of this Law.

4. In addition to the criteria prescribed by Part 3 of this Article, the Board must be formed so that:

a) At least half of the Board members have professional experience in the field of macroeconomics,

b) The Board members have knowledge in the sphere of audit, financial reporting, information technologies, the legislation governing the activities of the Central Bank and financial organizations.

No person shall be a member, Chairperson or Deputy Chairperson of the Board of the Central Bank who:

a) Have been, upon a court's judgment, declared as having no or limited active legal capacity, or have been, upon a judgment having entered into legal force, convicted for a crime committed intentionally;

b) Have been deprived of a right to hold certain positions in the manner prescribed by law.

5. The Chairperson, Deputy Chairperson and other members of the Board of the Central Bank may not hold a position not determined by their status in state or local government bodies, be members of any political party or engage in political activities in any other way, engage in entrepreneurial activity, perform other paid work, except for scientific, pedagogical and creative

work. They must exercise political restraint in public statements. The members, Chairperson and Deputy Chairperson of the Board of the Central Bank shall have the right to hold positions related to their status in commercial organizations and foundations.

The members of the Board of the Central Bank may not hold any other positions in the Central Bank. A member of the Board of the Central Bank is responsible for his or her work in the Board of the Central Bank".

The above-mentioned article was amended and supplemented by the Laws HO-133-N of 12.11.15 and HO-313-N of 13.12.17.

The Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly of the Republic of Armenia was adopted by the National Assembly on 16 December 2016, signed by the President of the Republic on 14 January 2017 and entered into force on 18 May 2017.

The disputed Article 144 of the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly titled: "Election of Members of the Supreme Judicial Council", stipulates:

"1. Election of a member of the Supreme Judicial Council shall be held:

1) no earlier than three months and no later than one day before the end of term of office of a member of the Supreme Judicial Council elected by the National Assembly;

2) within three months after there is a vacancy for the office of a member of the Supreme Judicial Council elected by the National Assembly.

2. Factions shall have the right to nominate one candidate for an office of a member of the Supreme Judicial Council. The candidate shall be nominated by a decision of the faction. The first and the last names of the candidate for a member in the Supreme Judicial Council and a representative of the faction entitled to present him/her shall be indicated in the decision. The decision shall be attached with documents certifying the provision of the requirements prescribed by the Constitution and the Law. In case of non-compliance with the requirements of the Constitution or the Law, the Chairperson of the National Assembly, within two working days, shall return the decision and the attached documents to the faction specifying the reasons.

3. Candidates may be nominated:

1) no earlier than three months and no later than eighty days before the end of term of office of a member of the Supreme Judicial Council;

2) within ten days after there is a vacancy for an office of a member of the Supreme Judicial Council.

4. No less than one hundred days before the end of term of office of a member of the Supreme Judicial Council, and within 24 hours after there is a vacancy for his/her office, the Staff shall notify the Chairperson of the National Assembly and factions about this in writing.

5. Within 24 hours after the expiration of the term for nominating candidates, the Chairperson of the National Assembly shall make a statement on the candidate for membership of the Supreme Judicial Council, as well as on the day and hour of the elections.

6. The issue on election of a member of the Supreme Judicial Council shall be debated at the regular sittings of the National Assembly after the expiration of the term for nominating candidates, in accordance with the procedure prescribed by Article 135 of the Rules of Procedure.

7. A member of the Supreme Judicial Council shall be elected by a secret ballot by at least three fifths of the total number of Deputies. In the case prescribed by Clause 1 of Part 1 of this Article, a newly elected member of the Supreme Judicial Council shall assume office on the day when the term of office of a member of the Supreme Judicial Council is expired.

8. If two or more candidates participate in the ballot and none of them is elected, a second round of elections shall held, in which the two candidates with the largest number of votes in the first round may participate. The issue shall be debated in accordance with the procedure prescribed by Part 9 of Article 139 of the Rules of Procedure.

9. If a member of the Supreme Judicial Council is not elected, within ten days after voting, a new candidate for a member of the Supreme Judicial Council may be nominated by factions for the vacant position.

The above-mentioned article was amended by the Law HO-50-N of 17.01.18.

The disputed Article 145 of the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly titled: "Procedure for Election of Officials by the Nomination of Competent Standing Committees", stipulates:

"1. Elections of the Prosecutor General, the Human Rights Defender, the Chairperson and other members of the Audit Chamber, the Chairperson of the Central Bank, his or her deputies and other members of the Board of the Central Bank, the Chairperson and other members of the Central Electoral Commission, members of the Television and Radio Commission shall be held:

1) no earlier than three months and no later than one day before the end of term of office of the relevant official;

2) within three months after there is a vacancy for the office of the relevant official.

2. A candidate for an office specified in Part 1 of this Article shall be nominated to the National Assembly by a decision of the competent standing committee of the National Assembly from the composition of candidates nominated by one candidate from each faction.

3. Candidates may be nominated:

1) no earlier than three months and no later than eighty days before the end of term of office of the relevant official specified in Part 1 of this Article;

2) within ten days after there is a vacancy for the office of the relevant official specified in Part 1 of this Article.

4. At least one hundred days before the end of term of office of the official specified in Part 1 of this Article, as well as within 24 hours after there is a vacancy for his or her position, the Staff shall notify the competent standing committee and factions about this in writing.

4.1. A candidate for the position specified in Part 1 of this Article shall be presented to the authorized standing committee of the National Assembly by a decision of a faction. The first and the last names of the candidate and the representative of the faction entitled to present him or her shall be indicated in the decision. The decision shall be attached with documents certifying the provision of the requirements prescribed by the Constitution and the Law. In case of non-compliance with the requirements of the Constitution or the Law, the chairperson of the

authorized standing committee of the National Assembly, within two working days, shall return the decision and the attached documents to the faction specifying the reasons.

5. Within 24 hours after the expiration of the period for nominating a candidate, the chairperson of the authorized standing committee, shall make a statement on the candidates nominated by the factions, as well as on discussing the issue on the day and hour of nominating a candidate to the National Assembly.

6. Within two weeks after the expiration of the period for nominating candidates, the authorized standing committee shall nominate to the National Assembly one candidate for the position specified in Part 1 of this Article. If no candidate is nominated within this period, after that new candidates may be nominated for the vacant position within ten days.

7. The issue of nominating to the National Assembly a candidate for the position specified in part 1 of this Article shall be debated at the sitting of the authorized standing committee. Within 24 hours after the completion of debating the issue, the chairperson of the authorized standing committee shall send the extract of the record of the sitting of the committee to the Chairperson of the National Assembly.

8. The issue of election of the official specified in Part 1 of this Article shall be debated at the regular sittings of the National Assembly following the day of the nomination of the candidate, in accordance with the procedure prescribed by Article 135 of the Rules of Procedure.

9. The Prosecutor General, the Human Rights Defender, the Chairperson and other members of the Audit Chamber, the Chairperson of the Central Bank, the Chairperson and other members of the Central Electoral Commission, members of the Television and Radio Commission shall be elected by a secret ballot, by at least three-fifths of votes of the total number of Deputies.

10. The deputies of the Chairperson of the Central Bank, as well as other members of the Board of the Central Bank, except the Chairperson of the Central Bank, shall be elected by a secret ballot, by a majority of votes of the total number of Deputies.

11. In the case prescribed by Clause 1 of Part 1 of this Article, the newly elected Prosecutor General, the Human Rights Defender, the Chairperson and other members of the Audit Chamber, the Chairperson of the Central Bank, his or her deputies and other members of the Board, the

Chairperson and other members of the Central Election Commission, and the members of Television and Radio Commission shall assume their office on the day of termination of the powers of the relevant official.

12. If the official specified in Part 1 of this Article is not elected, within ten days after the voting, new candidates may be nominated for the vacant position".

The above-mentioned article was supplemented and amended by the Law HO-50-N of 17.01.18.

The Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials was adopted by the National Assembly on 4 February 2014, signed by the President of the Republic on 13 February 2014 and entered into force on 1 July 2014.

The disputed Article 2 of the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials titled: "Pension security and other social guarantees for persons having held public office", stipulates:

"1. The following shall have the right to pension prescribed by this Law:

1) **(Clause repealed by HO-14-N of 04.03.15)**

2) A judge of the Constitutional Court:

a. In the case of termination of powers on the grounds prescribed by Clause 1 of Part 1 of Article 12 of the Constitutional Law of the Republic of Armenia on the Constitutional Court, regardless of age,

b. In cases of termination or suspension of powers on the grounds prescribed by Clause 2 of Part 1 of Article 12, Clause 4 of Part 2 of Article 12 of the Constitutional Law of the Republic of Armenia on the Constitutional Court, as well as on the basis of recognizing him or her as having no active legal capacity by a court judgment that has entered into legal force;

c. In the case prescribed by Part 4 of Article 88 of the Constitutional Law of the Republic of Armenia on the Constitutional Court;

d. In the case prescribed by Part 4.1 of Article 88 of the Constitutional Law of the Republic of Armenia on the Constitutional Court, in the amount established by that Part.

2.1) A person who has served for at least five years in the office of a member of the Supreme Judicial Council elected by the National Assembly, whose powers have been terminated or suspended, respectively, on the basis of recognizing him or her as having no active legal capacity

by a court judgment that has entered into legal force or on the basis of acquiring a physical disability or illness hindering his appointment to office,

2.2) A person who has served as a member of the Supreme Judicial Council elected by the National Assembly for at least one constitutional term, if he or she reaches the age of 65,

2.3) A person who has served as a judge of an international court, acting with the participation of the Republic of Armenia, for at least one term, if he or she reaches the age of 65,

3) A person who has held the office of a judge for at least 10 years, whose powers were terminated or suspended on the basis specified in Clause 2 of Part 1 of Article 160 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, as well as on the basis of recognizing him or her as having no active legal capacity by a court judgment that has entered into legal force or on the basis of acquiring a physical disability or illness hindering his appointment to an office of a judge,

4) A person who has held the office of a prosecutor for at least 10 years, who was dismissed from office on the basis prescribed by Clause 2 of Part 1 of Article 62 of the Law of the Republic of Armenia on the Prosecutor’s Office, as well as on the basis of recognizing him or her as having no active legal capacity by a court judgment that has entered into legal force or on the basis of acquiring a physical disability or illness hindering his appointment to an office of a prosecutor,

5) A person who has held an autonomous position in the Special Investigative Service for at least 10 years, who was dismissed from office on the grounds prescribed by Clauses 3 and 5 of Part 1 of Article 12 of the Law of the Republic of Armenia on Special Investigative Service, as well as on the basis of recognizing him or her as having no active legal capacity by a court judgment that has entered into legal force,

5.1) A person who has held an autonomous position in the Investigative Committee of the Republic of Armenia for at least 10 years, whose powers were terminated on the grounds prescribed by Clauses 3 and 5 of Part 1 of Article 22 of the Law of the Republic of Armenia on the Investigative Committee of the Republic of Armenia, as well as on the basis of recognizing him or her as having no active legal capacity by a court judgment that has entered into legal force,

5.2) A person who has held the position of an investigator in the Tax Service of the Republic of Armenia for at least 10 years, who was dismissed from office on the basis prescribed by Clause 9 of Part 1 of Article 26 of the Law of the Republic of Armenia on Tax Service, or upon reaching 63 years of age on the basis prescribed by Clause 1 of Part 1 of Article 26, as well as on the basis of

recognizing him or her as having no active legal capacity by a court judgment that has entered into legal force,

5.3) A person who has held the position of an investigator in the Customs Service of the Republic of Armenia for at least 10 years, who was dismissed from office on the grounds prescribed by Clauses 2 and 7 of Part 2 of Article 48 of the Law of the Republic of Armenia on Customs Service, as well as on the basis of recognizing him or her as having no active legal capacity by a court judgment that has entered into legal force,

6) A person who has held the position of the Human Rights Defender of the Republic of Armenia for at least one constitutional term - if he or she reaches the age of 65,

7) A person who has held the position of a Deputy of the National Assembly of the Republic of Armenia for at least one constitutional term, or a person who has held the position of a Deputy of the Supreme Council of the Republic of Armenia for at least five years, if he or she reaches the age of 65,

7.1) A person who has held the position of the Chairman of the Control Chamber of the Republic of Armenia for at least one constitutional term, or a person who has held the position of the Chairman of the Control Chamber of the National Assembly for at least six years, if he or she reaches the age of 65,

8) A person who has held the positions prescribed by Appendix N 1 to this Law, a person who has served for at least 10 years in the position of the head of the diplomatic service bodies operating in a foreign state, if he or she reaches the age of 65,

9) The President of the Republic, Deputies of the National Assembly, members of the Government, judges of the Constitutional Court and other courts, members of the Supreme Judicial Council elected by the National Assembly, the Human Rights Defender, the Chairperson of the Audit Chamber, prosecutors, officers of the Special Investigative Service and the Investigative Committee in case of recognition as disabled with limited ability to practice work activity of the 3rd degree due to injury or damage caused in the performance of official duties or in connection with their performance.

2. In the case referred to in Clause 9 of Part 1 of this Article, a person holding a public office shall be provided with medical care in medical institutions operating in the territory of the Republic of Armenia at the expense of funds from the State Budget of the Republic of Armenia, in accordance with the procedure prescribed by the Government of the Republic of Armenia.

3. A person holding a public office is entitled to a pension if he or she does not hold a public office or a position in the public service".

The above-mentioned article was supplemented and amended by the Laws HO-29-N of 05.19.14, HO-198-N of 01.12.14, HO-14-N of 04.03.15, HO-43-N of 17.01.18, HO-143-N of 07.03.18, HO-341-N of 21.06.18, HO-101-N of 01.07.19, HO-313- N of 11.12.19, and HO-68-N of 21.01.20.

The disputed Article 3 of the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials titled: "Social guarantees of family members of a person holding a public office in the event of death (demise) of a person holding a public office", stipulates:

"1. In the event of the death (demise) of the President of the Republic, a Deputy of the National Assembly, a member of the Government, a judge of the Constitutional Court and other courts, a member of the Supreme Judicial Council elected by the National Assembly, the Human Rights Defender, the Chairperson of the Audit Chamber, a prosecutor, a person holding an autonomous position in the Special Investigation Service and in the Investigative Committee due to injury or damage caused in the performance of official duties or in connection with their performance:

1) A funeral allowance shall be paid to the person, who organized his or her funeral,

2) His or her family shall be provided with one-time financial assistance,

3) On the occasion of the loss of the breadwinner, the members of his or her family, who are entitled to a pension, shall be assigned and paid a pension in accordance with the Law of the Republic of Armenia on State Pensions.

2. The Government of the Republic of Armenia shall establish the one-time financial assistance, the list of documents required for the appointment of the funeral allowance, the procedure for assigning and paying thereof, the amount of the funeral allowance, and the amount of the one-time financial assistance.

The above-mentioned article was supplemented and amended by the laws HO-29-N of 19.05.14, HO-43-N of 17.01.18, HO-143-N of 07.03.18, and HO-68-N of 21.01.20.

The case was initiated on the basis of the application of the President of the Republic submitted to the Constitutional Court on 8 November 2019.

For more effective disclosure of the circumstances of this case, by the Procedural Decision PDCC-33 of the Constitutional Court dated 24 February 2020, it was decided to shift to the oral consideration of the case.

Having heard the report of the Rapporteur in this case, the explanations of the applicant and the respondent, also having analyzed the relevant provisions of the disputed laws, as well as other documents of the case, the Constitutional Court **FOUND:**

1. Applicants' arguments

Applying to the Constitutional Court, the President of the Republic requested to determine the compliance of Part 5 of Article 81 of the Constitutional Law Judicial Code of the Republic of Armenia with Articles 1 and 138 of the Constitution in conjunction with Article 35 of the Law on Prosecutor's Office, Article 12 of the Constitutional Law on Human Rights Defender, Article 39 of the Law on Television and Radio Broadcasting, Article 17 of the Law on the Audit Chamber, Articles 18 and 19 of the Law on the Central Bank of the Republic of Armenia, Articles 144 and 145 of the Constitutional Law on Rules of Procedure of the National Assembly (the above-mentioned articles inclusively, insofar as these articles do not prescribe any legal guarantees of independence of interim officials appointed by the President of the Republic in accordance with Article 138 of the Constitution), as well as the compliance of Article 82 of the Constitutional Law Judicial Code of the Republic of Armenia and Articles 2 and 3 of the Law on Support, Service and Social Guarantees of the Activity of the Officials with Articles 1 and 173 of the Constitution.

Analyzing the relevant provisions of the disputed laws and presenting his positions on their constitutionality mostly from the viewpoint of legislative gap and legal certainty, the applicant, in particular, concludes:

a) If the National Assembly does not elect relevant officials within three months in accordance with the established procedure, it becomes a direct and unequivocal requirement of Article 138 of the Constitution to define by law the procedure for appointing interim officials by the President of the Republic;

b) The relevant articles of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, the Law of the Republic of Armenia on Prosecutor's Office, the Constitutional Law of the Republic of Armenia on Human Rights Defender, the Law of the Republic of Armenia on Television and Radio Broadcasting, the Law of the Republic of Armenia on the Audit Chamber, the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia, as well as the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly do not prescribe any procedure by which the President of the Republic can appoint an interim member of

the Supreme Judicial Council, interim Prosecutor General, interim Human Rights Defender, interim member of the Television and Radio Commission, interim member of the Audit Chamber, or interim member of the Board of the Central Bank respectively. As for the President of the Republic, setting the period is the only provision prescribed by the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia that differs from the content of Article 138 of the Constitution. However, setting the period is not in itself a constitutional requirement;

c) Except for the interim members of the Supreme Judicial Council and the Central Electoral Commission, no period for appointment of the rest of the above-mentioned officials is prescribed in legislative regulations. However, setting the period by law seemingly is not a constitutional requirement; nevertheless, it derives from the constitutional goals of the settlement of the given issue;

d) The current legislative regulations do not ensure the guarantees of legal and social independence of the interim officials, appointed by the President of the Republic in accordance with Article 138 of the Constitution.

In order to ensure the stability of the tenure, the applicant proposes, as a possible solution, to establish a minimum term of office of an interim member of the Supreme Judicial Council by the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, and only after the completion of this period the National Assembly may elect a member of the Supreme Judicial Council instead of an interim member.

2. Respondent’s arguments

The respondent requests the Constitutional Court to make a decision on declaring the disputed provisions complying the Constitution in the case on conformity of Part 5 of Article 81 and Article 82 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, Article 35 of the Law of the Republic of Armenia on Prosecutor’s Office, Article 12 of the Constitutional Law of the Republic of Armenia on Human Rights Defender, Article 39 of the Law of the Republic of Armenia on Television and Radio Broadcasting, Article 17 of the Law of the Republic of Armenia on the Audit Chamber, Articles 18 and 19 of the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia, Articles 144 and 145 of the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly of the Republic of Armenia,

Articles 2 and 3 of the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials with the Constitution.

Referring to the applicant's argument that the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly does not provide any procedure for the appointment of an interim member of the Supreme Judicial Council by the President of the Republic, the respondent notes that the mentioned constitutional law refers to the main powers and functions of the National Assembly; therefore it is quite logical that it does not contain any provision regarding the procedure for the appointment of an interim member of the Supreme Judicial Council by the President of the Republic.

According to the respondent, it follows from the essence of the institution of interim officials, that his or her term of office is connected with the advent of any event; therefore, it would not be logical for the legislator to appoint a mandatory minimum term of office for an interim member of the Supreme Judicial Council, since establishing such period would hinder the National Assembly from effective implementation of its constitutional powers. Detailed legal regulations on the issue of appointment of an interim official may lead to the devaluation of the meaning and significance of this constitutional institution.

The respondent considers that, according to the law, the President of the Republic has 15 days to appoint an interim member of the Supreme Judicial Council, which is, in fact, an objectively reasonable period for assessing the professional qualities of the candidate and making a decision.

Referring to the social guarantees, the respondent states that the legislator has linked the right to receive a pension to holding a given position for a certain period; i.e. at least five years or one constitutional term. It is reasonable to assume from the institution of interim officials that the given person holds a temporary vacant position of a member of the Supreme Judicial Council for a period of less than five years or less than one constitutional term; otherwise the existence of this institution would become meaningless, therefore the issue of receiving a pension cannot be discussed in the case of an interim official.

According to the respondent, the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials does not prohibit the use of analogy, so the notion "a member of the Supreme Judicial Council elected by the National Assembly" is also applicable to an interim member of the Supreme Judicial Council.

The respondent considers that there are appropriate legal guarantees in the legislation, which make it possible, in practice, to elect and appoint the relevant candidate as an interim official without any significant obstacles.

According to the respondent, although there may be a legislative gap in the disputed legal regulations, however, its overcoming is within the competence of the legislator.

3. Circumstances to be ascertained within the framework of the case

When assessing the constitutionality of the disputed provisions in this case, the Constitutional Court considers it necessary to address, in particular, the following issues:

a) Does defining only the period for appointing by the President of the Republic of the interim members of the Supreme Judicial Council elected by the National Assembly in accordance with Part 5 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia comply with the requirement of appointing interim officials in accordance with the procedure prescribed by law, pursuant to Article 138 of the Constitution?

b) Does the lack of defining direct grounds and procedures for the appointment of interim officials by the relevant legal regulations of the disputed laws impede the exercise of the powers of the President of the Republic in accordance with Article 138 of the Constitution?

c) Do the disputed laws provide guarantees for the interim officials appointed by the President of the Republic, and do they comply with the requirements of Article 138 of the Constitution?

4. Legal assessments of the Constitutional Court

4.1. The new status of the President of the Republic was fixed due to the transition to parliamentary government according to the Constitution with amendments of 2015.

By virtue of Article 4 of the Constitution titled “The Principle of Separation and Balance of Powers”, the President of the Republic was included in the executive branch in functional aspect, however, he was completely excluded from the institutional system of the executive branch; and unlike other independent or autonomous bodies included in the executive branch in functional aspect, the President of the Republic is the head of state and has functions typical for that status and powers derived from them. According to that, the President of the Republic, as the head of state (Part 1 of Article 123 of the

Constitution), **is a constitutional body that integrates the society and the state, as well as symbolizes the national unity**.

In fact, refraining from the function of participating in the development of the domestic and foreign policy of the state, and in the process of its governance it in terms of content, as well as not bearing responsibility for the above-mentioned, the President of the Republic is constitutionally delegated **to be impartial and be guided exclusively by state-wide and nation-wide interests** (Part 3 of Article 123). Accordingly, the President of the Republic is constitutionally **assigned the role of a supra-party arbitrator**, who may not be a member of any party during the term of exercising his powers (Part 5 of Article 124 of the Constitution). At the same time, the role of a supra-party (non-partisan) arbitrator is based on both the integrative function of the President of the Republic as the head of state and his impartiality, which presupposes the **implementation of the function of observance the compliance with the Constitution**, and this is also directly prescribed by the Constitution (Part 2 of Article 123 of the Constitution). In addition, the function of observance the compliance with the Constitution, in turn, implies that **the President of the Republic must have the possibility to effectively exercise this function through checks and balances**; therefore he must not only be able to assess the alleged unconstitutional actions (inactions) or decisions after the facts have been committed, but must also be able, first of all, **to prevent their occurrence being endowed with certain powers of preventive constitutional review**.

4.2. In order to ensure the implementation of the constitutional functions of the President of the Republic, the Founder of the Constitution endowed him with equivalent powers (Part 4 of Article 123 of the Constitution), explicitly prescribing those powers by the Constitution in order to exclude the possibility of influencing the President of the Republic, as well as leaving the legislator to regulate their implementation in the cases directly envisaged by the Constitution.

Within the framework of the function of observance the compliance with the Constitution, the President of the Republic monitors the observance of constitutional norms by political actors, including the compliance of the legislative process and its outcome with the constitutional requirements, as well as the constitutionality of the formation of constitutional bodies. He is endowed with **balancing powers** over both the legislative and the executive bodies, and even the Supreme Judicial Council. In this regard, the President of the Republic is endowed especially with such instrumentarium as delivering an address to the National Assembly, applying to the Constitutional Court, and temporary appointment of officials.

It should be noted that the powers of the President of the Republic, depending on the constitutionally predetermined goals, are both **mandatory** and **discretionary** in nature. Mandatory and discretionary powers of the President of the Republic are independent or non-independent (constrained). Non-independent powers are exercised either in the presence of preconditions prescribed by the Constitution or on the basis of exercising the powers of another constitutional body (competent entity). Thus:

The President of the Republic shall exercise the following **mandatory powers** on the grounds (in the manner) prescribed by the Constitution:

a) Calling regular and extraordinary elections to the National Assembly (Article 93 of the Constitution);

b) Accepting the resignation of the Government (Article 130 of the Constitution);

c) Temporary appointment of officials (Article 138 of the Constitution);

d) Making appointments to the positions of the Office of the President of the Republic (second sentence of Part 1 of Article 145 of the Constitution);

e) Appointment of the Prime Minister (Parts 1 and 5 of Article 149 of the Constitution);

f) Proposing to the National Assembly the candidates for vacant positions of three judges of the Constitutional Court (second sentence of Part 1 of Article 166 of the Constitution);

g) Calling a referendum (first sentence of Article 206 of the Constitution);

The President of the Republic shall exercise the following **discretionary powers** on the grounds (in the manner) prescribed by the Constitution:

a) Delivering an address to the National Assembly on issues falling under his competence (Article 128 of the Constitution);

b) signing and promulgating a law adopted by the National Assembly, or applying to the Constitutional Court for the purpose of determining the compliance of the law with the Constitution (Article 129 of the Constitution);

c) Making changes in the composition of the Government (Article 131 of the Constitution) or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

d) In the field of foreign policy - concluding international treaties, appointing and recalling diplomatic representatives to foreign states and international organizations, receiving the letters of credence and letters of recall of diplomatic representatives to foreign states and international

organizations, approving, suspending or revoking international treaties not requiring ratification, conferring the highest diplomatic ranks (Article 132 of the Constitution), or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

e) In the field of Armed Forces - appointing and dismissing the supreme command of the armed forces and of other troops, conferring the highest military ranks (Article 133 of the Constitution), or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

f) Resolution of issues related to the granting and termination of citizenship of the Republic of Armenia (Article 134 of the Constitution), or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

g) Granting pardon to convicts (Article 135 of the Constitution), or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

h) Decorating with orders and medals of the Republic of Armenia, and granting honorary titles (Article 136 of the Constitution), or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

i) Awarding the highest ranks (Article 137 of the Constitution), or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

j) Appointing the Chief of the General Staff of the armed forces (first sentence of Part 3 of Article 155 of the Constitution), or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

k) Appointing the judges of the Cassation Court, appellate and first instance courts, chairpersons of the chambers of the Cassation Court, chairpersons of first instance and appellate courts (first sentence of Part 3, first sentence of Part 4, Part 6, and first sentence of Part 7 of Article 166 of the Constitution), or the alternative powers prescribed by Parts 2 and 3 of Article 139 of the Constitution;

l) Appointing the deputy prime ministers and ministers (third sentence of Article 150 of the Constitution), or the alternative power prescribed by the fifth sentence of Article 150 of the Constitution.

Most of the discretionary powers of the President of the Republic are exercised either by the presence of preconditions prescribed by the Constitution or on the basis of exercising the powers of another constitutional body (competent entity). The powers to deliver an address to the National Assembly on issues falling under his competence (Article 128 of the Constitution), not to sign a law

adopted by the National Assembly (Part 1 of Article 129 of the Constitution), to submit objections to appointments or, alternatively, to apply to the Constitutional Court or not to take any action (Articles 131-137, Part 3 of Article 155, and Parts 3, 4, 6 and 7 of Article 166 of the Constitution interconnected with Parts 2 and 3 of Article 139, as well as the third and fifth sentences of Article 150 of the Constitution), as well as the powers to apply to the Constitutional Court in the cases prescribed by Clauses 1 and 4 of Article 168 of the Constitution are an exception to the above-mentioned rule.

The Constitutional Court also considers it necessary to note that the separation of powers of the President of the Republic from each other and the heterogeneity of their content are aimed at ensuring the proper implementation of the functions of the President of the Republic.

At the same time, the separation of powers of the President of the Republic means that the **President of the Republic may not voluntarily change the essence of his powers or, which is the same as actually transform the mandatory powers into discretionary powers, as well as he may not refuse to exercise his mandatory powers by the force of discretionary powers, or for any other reason.** This also applies to any other constitutional body, competent entity or official.

The Constitutional Court states that in addition to the powers of a governmental nature, the President of the Republic is also authorized to exercise official actions of non-governmental nature within the framework of Part 1 of Article 6 of the Constitution, which have a nature accompanying his powers, in particular, speeches, meetings and interviews.

4.3. Article 138 of the Constitution, titled “Temporary appointment of officials”, stipulates: “If the National Assembly fails, within a three-month period, to elect the respective officials under the procedure prescribed by Part 3 of Article 174, Part 1 of Article 177, Part 1 of Article 192, Part 2 of Article 195, Part 2 of Article 197, Part 2 of Article 199 and Part 1 of Article 201 of the Constitution, then the President of the Republic shall appoint interim officials on the grounds and under the procedure prescribed by law until they are elected by the National Assembly”.

The Constitutional Court finds that the powers of the President of the Republic prescribed by Article 138 of the Constitution are directly derived from the functions of the President of the Republic as the head of state, an impartial arbiter, and, accordingly, observing the compliance with the Constitution. The exercise of the above-mentioned powers by the President of the Republic **is necessary for the purpose of complete formation or replenishment of a number of constitutional bodies (albeit temporary), which are important for the vital activity of the state**.

In terms of procedure, the Founder of the Constitution has endowed the President of the Republic, as the highest official of the state, and at the same time a sole constitutional body, with the authority of temporary formation of the above-mentioned constitutional bodies or the temporary replenishment of their composition (temporary appointment of relevant officials) instead of the National Assembly as the only constitutional body endowed with the primary mandate of the state.

In addition, taking into account the impartiality of the President of the Republic, he, as a supra-party arbitrator, **must counterbalance the political forces represented in the National Assembly**, overcoming the consequences of their political or personal disagreements, and by temporarily ensuring the functioning of a number of constitutional bodies due to his position and authority, he must appoint interim members of the Supreme Judicial Council (non-judge members) elected by the National Assembly, interim Prosecutor General, interim Human Rights Defender, interim Chairperson and other members of the Central Electoral Commission, interim members of the Television and Radio Commission, interim Chairperson and other members of the Audit Chamber, as well as interim Chairperson of the Central Bank and other members of the Board of the Central Bank.

Unlike the non-judge members of the Supreme Judicial Council, the Constitution does not envisage the appointment of interim judges.

The rest of the constitutional bodies or officials referred to in Article 138 of the Constitution are bodies (officials) endowed with institutional independence or autonomy, which are functionally assigned to the executive branch. Therefore, in one case, for the purpose of guaranteeing the independence of the courts and judges in a proper manner, and in other cases, for the purpose of ensuring the balancing functions of the constitutional bodies or officials operating in the sphere of executive branch, the Founder of the Constitution has emphasized the need for the formation or replenishment of those bodies by stipulating substitute powers for the President of the Republic. At the same time, in the case of the appointment of the interim Chairperson of the Central Bank and other members of the Board of the Central Bank (despite the fact that the rule of a stable parliamentary majority is prescribed), the Founder of the Constitution has prescribed the requirement of majority of the total number of Deputies, and not at least three-fifths of the total number of votes (the second sentence of Part 1 of Article 201 of the Constitution) for electing other members of the Board of the Central Bank (except for the Chairperson of the Central Bank), thus the Founder of the Constitution has ensured the guaranteed implementation of the functions of the Central Bank, and in the case of other constitutional bodies or officials, who are elected by at least three-fifths of the total number of votes of the Deputies of the National Assembly (Part 3 of Article 174, Part 1 of Article 177, Part 1 of

Article 192, Part 2 of Article 195, Part 2 of Article 197, and Part 2 of Article 199 of the Constitution), the Founder of the Constitution has guaranteed not only the functionality of the constitutional bodies formed by overcoming that high barrier, but also the **integrative and balancing** participation of the President of the Republic in the cases when due to the political or other positions of the majority and minority of the National Assembly, it was not possible to ensure the formation or replenishment of those bodies.

Thus, the Constitutional Court finds that by defining the replacing participation of the President of the Republic in the formation or replenishment of a number of constitutional bodies, the Founder of the Constitution, as a mandatory power (duty) of the President of the Republic, has considered the President of the Republic as a **key figure** to counterbalance the National Assembly on the one hand, and to guarantee the normal functioning of certain constitutional bodies on the other hand.

The Constitutional Court considers it necessary to emphasize that non-fulfillment of the above-mentioned **duty** by the President of the Republic may lead to meaninglessness of that counterbalancing function, creating preconditions for discrediting the institution of the President of the Republic, as well as creating a direct threat to the normal functioning of a number of constitutional bodies due to non-formation or non-replenishment of those bodies; thereby creating unconstitutional situations in which a number of constitutional bodies endowed with key functions may fail to become effective or be deprived of their functionality. This is especially evident in the case of the Supreme Judicial Council, since, in addition to its fundamental function from the viewpoint of preserving the constitutional order, that is guaranteeing the independence of the courts and judges (Article 173 of the Constitution), this constitutional body is formed on a parity (balance) basis, i.e. an equal number of judge members and non-judge members are elected to the Supreme Judicial Council, and the quantitative supremacy of these two groups over each other must be ruled out by the force of the Constitution both at the legislative level and in practice. Otherwise, the legitimacy of the Supreme Judicial Council may be called into question, which may disrupt its normal functioning.

The Constitutional Court considers it necessary also to emphasize that non-replenishment of vacancies due to inaction and by failing to fulfill constitutional obligations in terms of formation or composition of the Supreme Judicial Council may ultimately jeopardize also the independence of the courts if the guarantor of their independence - the Supreme Judicial Council, is not empowered to exercise its powers properly.

The possible inaction of the guarantor of the independence of courts and judges will also have other unpredictable consequences for the observance of the Constitution and the constitutional order, as the

Supreme Judicial Council also has, inter alia, the decisive power of formation of the courts, as well as the authority to terminate the powers of judges, and in certain cases the latter acts as a court.

In addition, the Constitutional Court notes that if non-election of a judge member of the Supreme Judicial Council by the General Assembly of Judges is not counterbalanced by the equivalent powers of other constitutional bodies, the non-nomination of a non-judge member of the Supreme Judicial Council by the factions of the National Assembly and (or) non-election of the latter by the National Assembly are counterbalanced by the power of the President of the Republic to temporary appoint up to all five non-judge members of the Supreme Judicial Council. Therefore, the failure to fulfill the duty of the President of the Republic prescribed by Article 138 of the Constitution directly endangers the functioning of the Supreme Judicial Council, and as a result, the independence of the courts and judges.

4.4. The analysis of Article 138 of the Constitution shows that the preconditions for the appointment of interim officials by the President of the Republic are as follows:

a) Failure by the National Assembly to elect relevant officials within three months;

b) Appointment of interim officials on the grounds prescribed by law;

c) Appointment of interim officials in the manner prescribed by law.

Article 138 of the Constitution also defines the term of office of the interim officials appointed by the President of the Republic, that is, **until the election of the relevant officials by the National Assembly**. The latter, as well as the constitutional precondition for the National Assembly not to elect relevant officials within three months, are clearly prescribed by Article 138 of the Constitution and are not subject to further legislative detailing.

As for the constitutional preconditions for the appointment of interim officials on the grounds and by the procedure prescribed by law, although the mentioned grounds and the procedure are subject to stipulation in the relevant laws, however, the latter do not imply that they must be mandatorily and directly prescribed in regard of appointing interim officials.

The Constitutional Court finds that **the grounds prescribed by law** for appointing interim officials **include the requirements for them, which should be identical to the requirements for officials elected by the National Assembly to the relevant position**.

The requirements prescribed by Article 138 of the Constitution for the election of relevant officials to certain positions shall be defined by the Constitution, and in cases envisaged by the Constitution,

additional requirements may be established by the relevant laws. The above-mentioned requirements are obligatory for the interim officials appointed by the President of the Republic, as grounds prescribed by law. And in the cases when requirements prescribed by Article 138 of the Constitution for the election of the relevant officials to certain positions are defined exclusively by the Constitution, the constitutional precondition for appointment on the grounds prescribed by law does not oblige the legislator to establish additional grounds (requirements).

At the same time, the legislator is empowered to interpret the constitutional precondition of appointing officials on the grounds prescribed by law, as provided by Article 138 of the Constitution, providing **guarantees for the appointment** of interim officials, in particular, depending on the independence of the official in the constitutional body, the legislator is empowered to establish a requirement to maintain a permanent job (public position or public service position) by suspending his or her employment contract or authority at the main workplace, as well as additional social and labor guarantees for the purpose of effectively ensuring the temporary replenishment of constitutional bodies.

As for the **procedure prescribed by law** for appointing interim officials, **the content thereof shall be determined by the legislator**. This procedure certainly **should not preclude the appointment of interim officials**. The legislator is empowered to establish a procedure for the appointment of a certain interim official and, in particular, to establish any substantive or procedural rule on the appointment procedure, or confine itself to exclusively envisaging a certain period. In addition, the legislator is also empowered to address the issue relating the procedure within the logic of the general regulations of the relevant laws, in particular, within the scopes of the logic of legislative regulations, in particular, within the scopes of the legislative regulation, such as the provision of normal activities. This, in turn, presupposes the proper notification of the National Assembly electing officials mentioned in Article 138 of the Constitution about the vacancy in relevant positions, as well as the proper notification of the President of the Republic appointing interim officials to those positions. In this context, it should be noted that in certain cases the legislator, in order to inform the National Assembly, has directly established provisions on informing about a vacancy in a relevant position within a certain time period (in particular, Part 3 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, Part 2 of Article 39 of the Law of the Republic of Armenia on Television and Radio Broadcasting, and Part 2 of Article 17 of the Law of the Republic of Armenia on the Audit Chamber).

The Constitutional Court notes that the specific duty to inform the competent authorities on the election and appointment of interim officials (which directly follows from the general regulation of ensuring the normal activities) has not been consistently and directly (literally) enshrined in all relevant laws, which, however, according to the assessment of the Constitutional Court, cannot be an obstacle to the fulfillment of the abovementioned duty.

Referring to the applicant's assertion that the minimum term of office of interim officials should be established by law as one of the guarantees of the independence of interim officials, the Constitutional Court finds that it contradicts both the purpose of Article 138 of the Constitution, namely, the temporary formation or replenishment of a number of constitutional bodies (temporary appointment of an official), as well as its direct (literal) regulation. The mentioned article defines the time period of temporary appointment, i.e. **until the election by the National Assembly;** so it is obvious that setting any minimum term of office of the interim officials will directly contradict the Constitution, moreover, it will block the exercise of the relevant powers of the National Assembly.

In addition, on the one hand, the scope and content of guarantees relating to interim officials should not impede the proper exercise of their powers or make them dependent on the bodies providing such guarantees, or otherwise make the interim officials dependent; and on the other hand, the extent of such guarantees may not exceed the extent of guarantees provided to officials elected in the constitutional body on a permanent basis. The opposite would mean that, from the viewpoint of general equality before the law (Article 28 of the Constitution), the state, for the constitutionally unjustifiable purpose, provides unfounded guarantees to interim officials compared to the officials occupying the relevant positions on a permanent basis.

Thus, the Constitutional Court considers that, in accordance with Article 138 of the Constitution, the interim officials appointed by the President of the Republic, as well as the officials holding the relevant positions on a permanent basis **should have the same guarantees of independence, including social guarantees**. Therefore, if social guarantees are established for officials holding the relevant positions on a permanent basis in conditions of certain legislative terms, for instance, after a certain period of office, then it is obvious that it should also apply to the interim officials.

4.5. The Constitutional Court considers it necessary to address separately the issue raised by the applicant that the legislative regulation of appointing interim non-judge members of the Supreme Judicial Council within fifteen days is problematic from the viewpoint of the Constitution.

The Constitutional Court, first of all, considers it necessary to emphasize that the regulations of the Constitution (concerning all competent entities, such as the National Assembly and the General Assembly of Judges) relating to the nomination and election of non-judge members of the Supreme Judicial Council, **have force of mandatory requirements** and are considered as mandatory functions and powers of relevant entities, so they cannot be unimplemented. The same also applies to the other mandatory powers of those bodies, as well as to the mandatory powers of other constitutional bodies, and especially to the head of state in the constitutionally structured system of counterbalances.

As for the allegations of the applicant that the fifteen day period established for the appointment of interim non-judge members of the Supreme Judicial Council is unreasonable within the framework of Part 5 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, the Constitutional Court Considers that the mentioned period cannot be a priori assessed as reasonable or unreasonable, as such an assessment, as a rule, depends on the nature of the authority exercised during the certain period, as well as on the fact whether the mentioned authority has ever been exercised in practice. The President of the Republic has never exercised the above-mentioned authority, therefore, there is no fact about the impossibility of its application in practice, and the determination of the period is at the discretion of the legislator; so the Constitutional Court does not consider problematic the period prescribed by Part 5 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia from the viewpoint of constitutionality.

Thus, the Constitutional Court emphasizes that according to Article 138 of the Constitution, the legislator is endowed with the power to choose the legislative solutions that ensure the effectiveness of the appointment of interim officials by the President of the Republic. This means that neither the President of the Republic nor any other body of executive power is empowered to assess the constitutionality of the legislative basis refraining to exercise their mandatory powers, and refrain from exercising their responsibilities prescribed by the Constitution or the law based on own assumptions on contradiction of the mentioned legislative basis with the Constitution.

Emphasizing the observance of the constitutional principle of legality (Part 1 of Article 6 of the Constitution), the Constitutional Court notes that, referring to the alleged unconstitutionality of the laws and stating that “For the effective exercise of the constitutional powers of the President of the Republic, proper legislative regulations deriving from the Constitution and clear structures for their realization are required”, the President of the Republic has not appointed an interim non-judge member of the Supreme Judicial Council within the period established by the Constitutional Law of the

Republic of Armenia Judicial Code of the Republic of Armenia. According to the materials in this case, on November 4, 2019, the Office of the President of the Republic received a corresponding letter from the President of the National Assembly on the non-election of a member of the Supreme Judicial Council by the National Assembly. On November 8, 2019, the President of the Republic applied to the Constitutional Court with an abstract constitutional review "to declare the relevant legislative gaps as unconstitutional".

The Constitutional Court states that the observance of the Constitution by the President cannot be limited to the discretionary power to apply exclusively to the Constitutional Court. The President of the Republic must fulfill his function of the observance of the Constitution, first of all, by exercising his mandatory constitutional powers, in this case, by appointing interim officials in accordance with Article 138 of the Constitution. In other words, the President of the Republic, as an entity of abstract constitutional control, obviously always has the right to challenge in the Constitutional Court the constitutionality of the legal acts mentioned in Clause 1 of Article 168 of the Constitution, but never at the expense of exercising his mandatory powers. This also applies to other competent constitutional bodies.

4.6. By challenging the provisions of a number of laws in the present case, the applicant primarily raises the issues of legislative gaps therein.

In a number of decisions, the Constitutional Court has addressed the issue of legislative gaps. Thus, by the Decision DCC-1476 of September 4, 2019, the Constitutional Court, in particular, has expressed the following legal positions:

1) The legislative gap may become a subject of consideration by the Constitutional Court in the event that it is a deficiency of legal regulation, and not the will of the law-making body; in this case, the legislator's will to refrain from legal regulation perceived as a legislative gap;

2) Not every imperfect legislative regulation may become a subject of consideration by the Constitutional Court, but only such a legislative gap that cannot be overcome by the interpretation and application of other relevant legal regulations;

3) The legislative gap should have led to a contradictory law enforcement practice that cannot be overcome or that has not actually been overcome by ordinary courts;

4) The legislative gap exists in the case when due to the absence of an element ensuring the integrity of the legal regulation or imperfect regulation of this element, **the fully-fledged and normal implementation of the legislatively regulated legal relations** is violated;

5) In cases where a gap in law is due to the absence of a normative requirement regarding specific circumstances within the sphere of legal regulation, overcoming such a gap is within the competence of the legislative body. Within the framework of the consideration of the case, the Constitutional Court refers to the constitutionality of any of the gaps in the law if, due to the content of the challenged norm, the legal uncertainty led to such an interpretation and application of this norm in law enforcement practice **that violates or may violate a specific constitutional right**.

Based on the results of the analysis of the laws related to this case, the Constitutional Court states that:

a) According to Article 138 of the Constitution, issues related to the appointment of interim non-judge members of the Supreme Judicial Council by the President of the Republic shall be regulated by Part 5 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia;

b) According to Article 138 of the Constitution, the grounds for and procedure of appointment of interim officials by the President are not **directly** prescribed by Article 82 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, as well as by any relevant legal provisions of the Constitutional Law of the Republic of Armenia on Human Rights Defender, the Law of the Republic of Armenia on Prosecutor's Office, the Law of the Republic of Armenia on Television and Radio Broadcasting, the Law of the Republic of Armenia on the Audit Chamber, and the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia;

c) According to Article 138 of the Constitution, the issues related to the appointment of interim officials by the President of the Republic are not **directly** regulated by any relevant legal provisions of the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly;

d) According to Article 138 of the Constitution, the issues related to interim officials appointed by the President of the Republic are not **directly** regulated by any relevant legal provisions of the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials.

Based on the legal positions expressed in this decision, the Constitutional Court finds that:

a) The Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia precisely stipulates the grounds (requirements) necessary for the appointment of an interim non-judge member of the Supreme Judicial Council by the President of the Republic, as well as Part 5 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia defines, in particular, the **period**, which is also a **procedure**, during which the President of the

Republic is obliged to appoint an interim official, and the choice of the procedure is within the discretion of the legislator; therefore, Part 5 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia is not problematic from the viewpoint of constitutionality;

b) Article 82 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, namely within the framework of the subject of the application, does not contain any legislative gap to be considered by the Constitutional Court;

c) The fact that the relevant legal provisions of the Constitutional Law of the Republic of Armenia on Human Rights Defender, Law of the Republic of Armenia on Prosecutor’s Office, the Law of the Republic of Armenia on Television and Radio Broadcasting, the Law of the Republic of Armenia on the Audit Chamber, and the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia **do not directly define** the grounds and procedure for the appointment of interim officials by the President of the Republic **does not lead to** such **a legislative gap** that violates the requirements prescribed by Article 138 of the Constitution and hinders the implementation of the mandatory powers by the President of the Republic prescribed by the mentioned article of the Constitution, since all the relevant laws at least prescribe a requirement for the competent officials to ensure the normal functioning of those bodies, which obliges to inform the competent body, in this case the President of the Republic, about the non-election of relevant officials by the National Assembly within three months. This is also a legal procedure within the meaning of Article 138 of the Constitution. Besides, as mentioned above, it is at the discretion of the legislator to define both the mentioned component of the procedure and other components, namely the period, and the absence of the period does not hinder the exercise of the mandatory powers of the President of the Republic as prescribed by Article 138 of the Constitution. If no period is prescribed by law, these powers of the President of the Republic should be exercised **at the shortest possible period**, taking into account the imperative need for the formation or replenishment of the relevant body, and the Founder of the Constitution substantiated this fact in Article 138 of the Constitution. Irrespective of the number of components of the procedure prescribed by law, for the proper implementation of the mandatory powers prescribed by Article 138 of the Constitution, the President of the Republic, in his turn, must take the necessary measures in advance, in particular, through his Office to select candidates for the positions of interim officials. Consequently, although the law does not **directly** define the procedure, however, the minimum requirements for such a procedure are met; therefore, there is no legislative gap to be considered by the Constitutional Court;

d) The fact that the issues related to the appointment of interim officials by the President of the Republic are not regulated by the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly, **is lawful**, since according to Part 5 of Article 88 of the Constitution (interconnected with the second sentence of Part 2 of Article 103 of the Constitution), the legal regulation of the mentioned constitutional law should not go beyond the scope of its subject; consequently, in accordance with Article 138 of the Constitution, the grounds and procedure for the appointment of interim officials by the President of the Republic cannot be defined by the mentioned constitutional law;

e) In part of social guarantees for interim officials appointed by the President of the Republic, the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials does not contain a legislative gap to be considered by the Constitutional Court, since, according to Article 138 of the Constitution, the same guarantees envisaged by the mentioned law for the interim officials appointed by the President of the Republic (where certain conditions prescribed by that law exist) also refer to the officials elected to those positions by the National Assembly.

As a result of the above-mentioned, the Constitutional Court finds that the issues related to the legislative gap raised in this case can be overcome **by interpreting and applying other relevant legal regulations;** the mentioned issues **have not led to contradictory law enforcement practices**, moreover, they **have never been applied in practice**, therefore, their solution is within the competence of the National Assembly, and the proceedings in this case are subject to termination in this part.

Based on the review of the case and governed by Clause 1 of Article 168, Clause 4 of Part 1 of Article 169, Parts 1 and 5 of Article 170 of the Constitution, as well as Clause 1 of Part 1 of Article 60, Articles 63, 64 and 68 of the Constitutional Law of the Republic of Armenia on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Part 5 of Article 81 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia is in conformity with the Constitution.

2. To partially terminate the proceedings of the case on conformity of Part 5 of Article 81 and Article 82 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, Article 35 of the Law of the Republic of Armenia on Prosecutor’s Office, Article 12 of the Constitutional Law of the Republic of Armenia on Human Rights Defender, Article 39 of the Law of the Republic of Armenia on Television and Radio Broadcasting, Article 17 of the Law of the Republic

of Armenia on the Audit Chamber, Articles 18 and 19 of the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia, Articles 144 and 145 of the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly of the Republic of Armenia, Articles 2 and 3 of the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials with the Constitution on the basis of the application of the President of the Republic, in part of Article 82 of the Constitutional Law of the Republic of Armenia Judicial Code of the Republic of Armenia, Article 35 of the Law of the Republic of Armenia on Prosecutor's Office, Article 12 of the Constitutional Law of the Republic of Armenia on Human Rights Defender, Article 39 of the Law of the Republic of Armenia on Television and Radio Broadcasting, Article 17 of the Law of the Republic of Armenia on the Audit Chamber, Articles 18 and 19 of the Law of the Republic of Armenia on the Central Bank of the Republic of Armenia, Articles 144 and 145 of the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly of the Republic of Armenia, Articles 2 and 3 of the Law of the Republic of Armenia on Support, Service and Social Guarantees of the Activity of the Officials.

3. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **H. Tovmasyan**

March 31, 2020

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