

**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 1 OF ARTICLE 17 OF THE
CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT, PARTS 1, 3 AND 8 OF
THE CONSTITUTIONAL LAW ON RULES OF PROCEDURE OF THE NATIONAL
ASSEMBLY, AS WELL AS THE CONSTITUTIONAL LAW ON THE
CONSTITUTIONAL COURT IN PART OF THE ABSENCE OF REGULATIONS ON THE
CONSEQUENCES OF NON-ELECTION OF A JUDGE TO THE CONSTITUTIONAL
COURT WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE
BASIS OF THE APPLICATION OF THE PRESIDENT OF THE REPUBLIC**

Yerevan

November 6, 2018

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 (in the framework of the written procedure)

the applicant: representative of the President of the Republic H. Hovakimyan, Head of the Legal Department of the Office of the President of the Republic,

representative of the respondent: representatives of the National Assembly G. Meloyan, Chief of the Legal Support Division of the Legal Expertise Department of the National Assembly Staff, and A. Kocharyan, Chief of the Legal Expertise Division of the same Department,

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

examined in a public hearing by a written procedure the case on conformity of Part 1 of Article 17 of the Constitutional Law on the Constitutional Court, Parts 1, 3 and 8 of the Constitutional Law on Rules of Procedure of the National Assembly, as well as the Constitutional Law on the Constitutional Court in part of the absence of regulations on the consequences of non-election of a judge to the Constitutional Court with the Constitution of the Republic of Armenia on the basis of the application of the President of the Republic.

The Constitutional Law on the Constitutional Court was adopted by the National Assembly on 17 January 2018, signed by the President of the Republic on 27 January 2018, and entered into force on 9 April 2018.

Part 1 of Article 17 - challenged in this case - of the Constitutional Law on the Constitutional Court (hereinafter also referred to as the Law on the Constitutional Court), titled "Procedure for filling a vacant position of a judge of the Constitutional Court" prescribes:

“1. Following the automatic termination or termination of the powers of a judge of the Constitutional Court, the election of a new judge for the vacant position shall be conducted within the time limits prescribed by the Constitutional Law of the Republic of Armenia on Rules of Procedure of the National Assembly in the manner prescribed by the Constitution and law”.

The Constitutional Law on Rules of Procedure of the National Assembly 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.

Parts 1, 3 and 8 of Article 141 - challenged in this case - of the Constitutional Law on Rules of Procedure of the National Assembly (hereinafter also referred to as the Rules of Procedure of the National Assembly), titled “Election of judges of the Constitutional Court” prescribe:

“1. Election of a judge of the Constitutional Court shall be held in case of vacant position of a judge of the Constitutional Court, as well as within six months preceding the expiration of the term of office or the age limit for tenure of the position of a judge of the Constitutional Court”,

“3. The President of the Republic, the General Assembly of Judges and the Government shall alternately nominate for the vacant positions of judges of the Constitutional Court within one month after the vacancy for the position of a judge of the Constitutional Court occurs, and in the case of expiration of the term of office or the age limit for tenure of the position of a judge of the Constitutional Court - within one month after the President of the Constitutional Court receives the relevant information”,

“8. In case a judge of the Constitutional Court is not elected, a new candidate shall be nominated by a competent body within ten days after the voting”.

The aforementioned Parts 1 and 3 of Article 141 were added and supplemented by the Law HO-50-N of 17.01.18 and the Law HO-96-N of 07.02.18 adopted by the National Assembly.

The case was initiated on the basis of the application of the President of the Republic submitted to the Constitutional Court on 6 June 2018.

Having examined the written explanations of the applicant and respondent in the present case, as well as having analyzed the relevant provisions of the Law on the Constitutional Court and the Rules of Procedure of the National Assembly, and other documents of the case, the Constitutional Court **ESTABLISHES:**

1. Positions of the applicant

The applicant argues that the Constitution does not establish the details (including the timeframe) of the election of candidates for judges of the Constitutional Court (which also includes their nomination) and the founder of the Constitution vested in the Law on the Constitutional Court and the Judicial Code.

Within the framework of the regulations of Articles 166 and 167 of the Constitution, analyzing Article 17 of the Law on the Constitutional Court and Article 141 of the Rules of Procedure of the National Assembly, the applicant considers that:

- pursuant to the requirements of Article 166 of the Constitution, the Law on the Constitutional Court should have envisaged the details of the election of judges of the Constitutional Court, however, the relevant regulation of this Law (Article 17) did not envisage the core details, and their prescription was vested in the Rules of Procedure of the National Assembly;
- according to Part 3 of Article 167 of the Constitution, the procedure of formation of the Constitutional Court shall be prescribed by the Constitution and the Law on the Constitutional Court, although Part 1 of Article 141 of the Rules of Procedure of the National Assembly regulated the issue of the formation of the Constitutional Court, which, according to the applicant, directly goes beyond the constitutionally defined framework of this Law;
- according to the Constitution, no timeframes for nomination are prescribed for the bodies nominating candidates for a vacant position of a judge of the Constitutional Court (hereinafter referred to as the body nominating candidates for judges of the Constitutional Court) and, in essence, by virtue of Part 9 of Article 166 of the Constitution, the founder of the Constitution vested the issue of their provision to the Law on the Constitutional Court and the Judicial Court. However, the relevant regulations are established by another constitutional law - the Rules of Procedure of the National Assembly. As a result, according to the applicant, the legislator has exceeded its authority which is stipulated by the Constitution;
- it is not clear what legitimate and necessary goals are pursued by the timeframes for nomination of candidates for a vacant position of a judge of the Constitutional Court (hereinafter also referred to as for nomination of candidates of a judge of the Constitutional Court) prescribed by Article 141 of the Rules of Procedure of the National Assembly. In one case, the legislator established a one-month timeframe and in another case, in case of non-election of a judge to the Constitutional Court, a 10-day period, and the constitutional legal grounding, as well as the substantiation of their necessity and reasonableness are missing.

Referring to the regulation of Part 1 of Article 166 of the Constitution, according to which: judges of the Constitutional Court shall be elected by the National Assembly by at least three fifths of the votes of the total number of parliamentarians, the applicant does not exclude that there may be cases when, for instance, the National Assembly may prevent replenishment of the Constitutional Court for purely political reasons and, as a result, it may lead to the issue of competence of the sessions of the Constitutional Court. At the same time, the applicant considers that by establishing the regime of the legal competence of the sessions of the Constitutional Court, the Law on the Constitutional Court does not foresee certain features for such a situation when, for instance, the presence of vacant positions of judges of the Constitutional Court may entail challenges of the legitimacy of the sessions, which is a legislative gap and can raise the issue of legal security and violate the constitutional right of natural persons and legal entities to access to the Constitutional Court.

Based on the above-mentioned, in the present case the applicant raises the issue of compliance of Part 1 of Article 17 of the Law on the Constitutional Court with Part 2 of Article 103 of the

Constitution, the issue of compliance of Parts 1, 3 and 8 of Article 141 of the Rules of Procedure of the National Assembly with Part 2 of Article 103, Parts 1 and 9 of Article 166, and Part 3 of Article 167 of the Constitution, as well as the issue of compliance of the Law on the Constitutional Court - in part of the absence of regulations regarding the consequences of non-election of a judge of the Constitutional Court – with Part 1 of Article 166, and Parts 1, 2 and 3 of Article 167 of the Constitution.

2. Positions of the respondent

The respondent states that the regulations of Part 1 of Article 166 imply that the founder of the Constitution clearly delineates between the state body nominating candidates of a judge of the Constitutional Court and the state body electing a judge of the Constitutional Court, thereby the election of a judge of the Constitutional Court by the National Assembly does not include his nomination. Referring to the regulation of Part 9 of Article 166 of the Constitution, according to which the details related to the election and appointment of judges shall be prescribed by the Law on the Constitutional Court and the Judicial Code, the respondent reiterates that in accordance with these constitutional laws, not the entire procedures but the details related to the election and appointment of judges exclusively within the framework of the regulation of these laws shall be prescribed.

According to the respondent, as far as according to Part 1 of Article 166 of the Constitution, judges of the Constitutional Court shall be elected by the National Assembly, this is their function; therefore, the regulation regarding the election of judges of the Constitutional Court is prescribed by the Rules of Procedure of the National Assembly, since according to Part 5 of Article 88 of the Constitution, the National Assembly shall operate in accordance with its Rules of Procedure, and according to Part 2 of Article 103 of the Constitution, the legal regulations of the constitutional law shall not exceed its sphere of competence.

Analyzing the regulations of Parts 1, 3 and 8 of Article 141 of the Rules of Procedure of the National Assembly within the framework of legal regulations of Parts 1 and 9 of Article 166 of the Constitution, the respondent argues that nomination of candidates for judges of the Constitutional Court is the function of the President of the Republic, the Government and the General Assembly of Judges.

Referring to the legal positions expressed in a number of decisions of the Constitutional Court regarding the legal gaps, the respondent does not dispute that there may be cases when vacant positions of judges of the Constitutional Court may bring to the issue of competence of the sessions of the Constitutional Court. However, according to the respondent, the establishment of a mechanism for overcoming this issue goes beyond the competence of the legislature and is not due to the absence of a normative regulation regarding specific circumstances in the sphere of legal regulation. Therefore, the absence of appropriate regulation of the issue at the legislative level - raised by the applicant - cannot be qualified as a legislative gap. Moreover, in a purely procedural aspect, the legislator attempted, in particular, in Part 2 of Article 17 of the Law on the Constitutional Court to envisage regulations preventing the emergence of the mentioned issue.

Based on the foregoing, the respondent considers that:

- the legal regulations regarding the election of judges of the Constitutional Court prescribed by the Rules of Procedure of the National Assembly correspond to the constitutional function of election of judges of the Constitutional Court by the National Assembly and are procedural norms regulating the implementation of this function, as well as they do not go beyond the scopes of regulation of the Rules of Procedure of the National Assembly; therefore, Part 1 of the Article 17 of the Law on the Constitutional Court – which refers to the Rules of Procedure of the National Assembly – is in conformity with Part 2 of Article 103, as well as Part 9 of Article 166 of the Constitution;
- the excerpts of Parts 1, 3 and 8 of Article 141 of the Rules of Procedure of the National Assembly establishing procedural provisions on the nomination of candidates of judges of the Constitutional Court and the formation of the Constitutional Court, are not in conformity with the requirements of Part 2 of Article 103, Part 1 and 9 of Article 166, and Part 3 of Article 167 of the Constitution;
- the Law on the Constitutional Court, insofar as it does not prescribe regulations on the formation of the Constitutional Court, as well as guaranteeing the capacity of the Constitutional Court, does not contradict Part 1 of Article 166, and Parts 1, 2 and 3 of Article 167 of the Constitution.

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

When assessing the constitutionality of the provisions challenged in the present case, also taking into account the positions of the parties, the Constitutional Court considers it necessary to address in particular the following issues:

- a) do the details of the election of a judge of the Constitutional Court prescribed by the provisions challenged in the present case, in particular, emanate from the requirements of the second sentence of Part 2 of the Article 103, Part 9 of Article 166 and Part 3 of Article 167 of the Constitution, as well as from the constitutional regulations of the activities of the bodies nominating and electing candidates for judges of the Constitutional Court, and do those details ensure the proper exercise of the constitutional powers of the latter?
- b) whether there is a legislative gap in the Law on the Constitutional Court in regard to the regulations on the consequences of non-election of a judge of the Constitutional Court, and particularly in regard to special guarantees of ensuring the competence of the sessions of the Constitutional Court.

4. Legal positions of the Constitutional Court

4.1. The Constitutional Court states that the procedure for the election of a judge of the Constitutional Court, as well as the constitutional regulations regarding the formation of the Constitutional Court are prescribed respectively in Article 166 of the Constitution, titled: “Judge Election and Appointment Procedure”, and Article 167 of the Constitution, titled: “The Constitutional Court”.

According to Part 1 of Article 166 of the Constitution, “Judges of the Constitutional Court shall be elected by the National Assembly by at least three fifths of the votes of the total number of parliamentarians, for a 12-year term. The Constitutional Court shall consist of nine judges, three of which shall be elected upon nomination by the President of the Republic, three upon nomination by the Government, and three upon nomination by the General Assembly of Judges. The General Assembly of Judges may nominate only judges. The same person may be elected as a judge of the Constitutional Court only once”.

According to Part 9 of Article 166 of the Constitution, “Details related to the election and appointment of judges shall be prescribed by the Law on the Constitutional Court and the Judicial Code”.

According to Part 3 of Article 167 of the Constitution, the procedure of formation of the Constitutional Court shall be prescribed by the Constitution and the Law on the Constitutional Court.

Within the framework of the present case considering it necessary to disclose the constitutional legal content of Part 9 of Article 166 of the Constitution, the Constitutional Court considers that the norm on the establishment of details related to the election and appointment of judges by the Law on the Constitutional Court and the Judicial Code does not imply that **exclusively** the mentioned laws should prescribe **all** the details, and in this aspect reservations from the legal regulations of other constitutional laws cannot be provided for. The content of Part 9 of Article 166 of the Constitution and, in particular, the term “details” of this provision, predetermined by the Constitution, should be considered in the context of the integrity of constitutional solutions, **based on specific constitutional goals, and also taking into account the scopes of subject matter of the legal regulation, the constitutional status of the competent authorities, the constitutional order of their activities and the need to ensure the proper implementation of constitutional powers, as well as the type and nature of the regulatory legal act.** In this regard, the details of the election of judges of the Constitutional Court may contain both substantive (principal) and procedural (organizational) legal regulations that ensure their implementation.

It follows from the systemic logic of regulations of Parts 1 and 9 of Article 166, and Part 3 of Article 167 of the Constitution that **the election of judges of the Constitutional Court includes the nomination of candidates for judges of the Constitutional Court and, as an integrated process, aims to implement the same constitutional goal, namely the formation of the Constitutional Court (staff replenishment), and thereby ensuring the proper implementation of its activities and constitutional powers. The end result of the implementation of the aforementioned constitutional goal is obviously the creation of the possibility for the Constitutional Court to exercise constitutional justice, which ensures the supremacy of the Constitution.**

As for the type and nature of legal acts establishing details, Part 9 of Article 166 of the Constitution prescribes that the details concerning the election and appointment of judges are prescribed by the **constitutional laws** - the Law on the Constitutional Court and the Judicial Code. It should be noted that it follows from the general logic of Chapter 7 of the Constitution, titled "Courts and the Supreme Judicial Council", and, in particular, Article 166 of the Constitution, the peculiarities of the constitutional legal status of the Constitutional Court and other courts, that in Part 9 of Article 166 of the Constitution the founder of the Constitution has delimited the prescription of the details of the election of judges of the Constitutional Court and vested in the regulation of the Law on the Constitutional Court, and the prescription of the details of the election and appointment of judges of other courts – in the regulation of the Judicial Code. Actually, it should also be noted that this distinction was further legislatively enshrined in Article 1 of the Constitutional Law on Judicial Code, according to which, the Judicial Code shall regulate relations pertaining to organization and functioning of the judiciary, except for issues pertaining to organization and functioning of the Constitutional Court. In this context, the Judicial Code only establishes the procedure for the election of candidates for judges of the Constitutional Court only by the General Assembly of Judges (Article 75).

Within the framework of the constitutional legal content of Part 9 of Article 166 of the Constitution, it should be noted that the prescription by the constitutional law on the Constitutional Court of details containing substantial legal regulations on the conduct of the election of judges of the Constitutional Court is one of the most important constitutional guarantees also in terms of ensuring the independence of the Constitutional Court (Article 167 of the Constitution).

Within the framework of the constitutional legal content of Part 9 of Article 166 of the Constitution, it should also be noted that the National Assembly - as a constitutional body electing a judge of the Constitutional Court - in accordance with Part 5 of Article 88 of the Constitution acts

in accordance with its Rules of Procedure, which is also a constitutional law (sentence 1 of Part 2 of Article 103 of the Constitution). In the aspect of constitutional laws there is a direct requirement of the Constitution, i.e. the legal regulations of the constitutional law shall not exceed its sphere of competence (sentence 2 of Part 2 of Article 103 of the Constitution).

The system analysis of the Law on the Constitutional Court shows that the legislator implemented the constitutional provisions of establishing the details of the election of judges of the Constitutional Court by the Law on the Constitutional Court especially in Article 17 of the Law on the Constitutional Court, which, in particular, prescribed that following the automatic termination or termination of the powers of a judge of the Constitutional Court, the election of a new judge for the vacant position shall be conducted within the timeframes prescribed by the Rules of Procedure of the National Assembly in the manner prescribed by the Constitution and law (Part 1). This timeframe is prescribed in Article 141 of the Rules of Procedure of the National Assembly, in particular, in Part 1, according to which: the election of a judge of the Constitutional Court shall be held in case of vacant position of a judge of the Constitutional Court, as well as **within six months** preceding the expiration of the term of office or the age limit for tenure of the position of a judge of the Constitutional Court.

The Constitutional Court considers that the reference to the Rules of Procedure of the National Assembly prescribed in Part 1 of Article 17 of the Law does not in itself result in an issue of constitutionality on the Constitutional Court from the standpoint of its form. As for the issue of its content, the Constitutional Court considers that Part 1 of Article 17 of the Law on the Constitutional Court is problematic from the perspective of constitutionality, insofar as the **establishment of timeframes** for the election of a new judge following the automatic termination or termination of the powers of a judge of the Constitutional Court is vested in the legal regulation of the Rules of Procedure of the National Assembly. Part 1 of Article 141 of the Rules of Procedure of the National Assembly establishes a six-month timeframe for holding the election of a judge of the Constitutional Court and, as follows from the legal regulations of Part 3 of the same Article, nomination of candidates of a judge of the Constitutional Court is conducted within the timeframe for the election. As a result of the elections, as mentioned above, the composition of the Constitutional Court is replenished, in this connection its natural activity and the proper exercise of constitutional powers are ensured. Consequently, it is such a substantive legal regulation, which should be established by the Law on the Constitutional Court.

Analyzing also other provisions of Article 141 of the Rules of Procedure of the National Assembly from the same perspective, the Constitutional Court considers that Part 3, the second sentence of

Part 7 and Part 8 of the said Article also establish legal regulations containing substantial details on the conduct of the election of judges of the Constitutional Court, including their nomination and assuming office, in particular, in what sequence and within what timeframe the candidates for a vacant position of a judge of the Constitutional Court are nominated, when does the newly-elected judge of the Constitutional Court assume powers if he is elected within six months preceding the expiration of the term of office or the age limit for tenure of the position of a judge of the Constitutional Court, and what is the timeframe for the nomination of a new candidate for a judge of the Constitutional Court in the event of non-election of a judge of the Constitutional Court?

As for the provisions of Parts 4, 5, 6 and the first sentence (in part of the secret vote) of Part 7 of Article 141 of the Rules of Procedure of the National Assembly, the latter establish legal regulations containing the procedural details of the election of judges of the Constitutional Court, including the details of nomination, as well as they relate exclusively to the exercise of the powers and the issues of regulation of the activities of the National Assembly and, on the basis of the requirements of Part 5 of Article 88 of the Constitution, they should be directly established by the Rules of Procedure of the National Assembly. In particular, the mentioned provisions establish the procedure for nominating candidates for judges of the Constitutional Court by an application addressed to the Chairperson of the National Assembly, the requirements to the application, procedure for returning the application, procedure for announcing the date and time of the elections, procedure for considering issues for electing a judge of the Constitutional Court and voting procedure.

Based on the foregoing, **the Constitutional Court considers that Part 1 of Article 17 of the Law on the Constitutional Court challenged in the present case, insofar as the establishment of the timeframes for the election of a new judge following the automatic termination or termination of the powers of a judge of the Constitutional Court is vested in the legal regulation of the Rules of Procedure of the National Assembly, as well as Parts 1 and 3, the second sentence of Part 7, and Part 8 of Article 141 of the Rules of Procedure of the National Assembly are contentious from the perspective of constitutionality. Based on the requirements of the second sentence of Part 2 of Article 103, Part 9 of Article 166 and Part 3 of Article 167 of the Constitution, the mentioned provisions should be established by the Law on the Constitutional Court.**

The Constitutional Court also considers that Parts 4, 5, 6 and the first sentence (in part of the secret vote) of Part 7 of Article 141 of the Rules of Procedure of the National Assembly, being established by the Rules of Procedure of the National Assembly, are not contentious from the

perspective of constitutionality; moreover, their establishment by the Rules of Procedure of the National Assembly is based on the requirement of Part 5 of Article 88 of the Constitution.

4.2. The Constitutional Court states that the applicant raises the issue of reasonableness of the timeframe for nominating candidates for judges of the Constitutional Court, established by Parts 3 and 8 of Article 141 of the Rules of Procedure of the National Assembly. The applicant also raises the issue of ensuring a unified approach in terms of the timeframes prescribed by the mentioned Parts.

The Constitutional Court argues that for the regulation of the nomination of candidates for judges of the Constitutional Court, the Constitution establishes the range of bodies nominating candidates for judges of the Constitutional Court, and the powers of each of them to nominate three judges of the Constitutional Court, and no regulation is prescribed by the Constitution in terms of the timeframe for nominating candidates for judges of the Constitutional Court.

The nomination of candidates for judges of the Constitutional Court, first of all supposes the election of candidates who meet the requirements prescribed by the Constitution. These requirements, in particular, are stipulated in Part 1 of Article 165 of the Constitution, according to which: “Judges of the Constitutional Court shall be elected from among lawyers with higher education, which have reached the age of 40, are citizens of only the Republic of Armenia, have voting rights, have strong professional qualities and at least 15 years of professional work experience”.

It is obvious that at least one of the requirements stipulated in Part 1 of Article 165 – i.e. presence of strong professional qualities - must be assessed and it requires a certain time for the body nominating candidates for judges of the Constitutional Court.

Analysis of Parts 3 and 8 of Article 141 of the Rules of Procedure of the National Assembly shows that the legislator has established different timeframes for nominating candidates for a vacant position of a judge of the Constitutional Court. Thus, Part 3 of Article 141 of the Rules of Procedure of the National Assembly, in particular, establishes that the bodies nominating candidates for a vacant position of a judge of the Constitutional Court shall nominate for the vacant positions of judges of the Constitutional Court within one month after the vacancy for the position of a judge of the Constitutional Court occurs, and in the case of expiration of the term of office or the age limit for tenure of the position of a judge of the Constitutional Court - within one month after the President of the Constitutional Court receives the relevant information. Part 8 of Article 141 of the Rules of Procedure of the National Assembly states that in case a judge of the

Constitutional Court is not elected, a new candidate shall be nominated by a competent body within ten days after the voting.

The Constitutional Court considers that in the cases provided for by Part 3 as well as by Part 8 of Article 141 of the Rules of Procedure of the National Assembly, the timeframes for the nomination of candidates for judges of the Constitutional Court **cannot be arbitrarily distinguished from each other**. In case of non-election of a judge to the Constitutional Court, the body nominating candidates for judges of the Constitutional Court, in essence, carries out the same process of nomination as in the previous case, since no other special process is prescribed by the Law, and the requirements for the candidates of a judge of the Constitutional Court are uniform and are not caused by the results of the nomination of candidates for judges of the Constitutional Court.

As for the specific approaches to the nomination by the bodies nominating candidates for judges of the Constitutional Court, they should to be exercised by each nominating body within the framework of their constitutional legal powers, based on constitutional legal regulations including the constitutional legal requirements for the candidates of a judge of the Constitutional Court.

The Constitutional Court considers that **the issue of establishment of timeframes for nomination of candidates for judges of the Constitutional Court should be in the competence of the legislature. Nevertheless, when establishing timeframes for nomination of candidates for judges of the Constitutional Court, the legislator should define a reasonable time limit for nominating candidates for judges of the Constitutional Court in order to ensure the proper implementation of the constitutional power of nominating candidates for judges of the Constitutional Court. At the same time, the Constitutional Court considers that the one-month timeframe prescribed in Part 3 of Article 141 of the Rules of Procedure of the National Assembly is not problematic from the perspective of constitutionality.**

Based on the foregoing, **the Constitutional Court considers that the ten-day timeframe prescribed in Part 8 of Article 141 of the Rules of Procedure of the National Assembly, insofar as it differs significantly from the one-month timeframe for nominating candidates for judges of the Constitutional Court prescribed in Part 3 of the same Article, is problematic from the perspective of ensuring the proper implementation of the constitutional power of nominating those candidates, who meet the constitutional legal requirements for judges of the Constitutional Court.**

4.3. Within the framework of the present case, the applicant also raises the issue of a legislative gap in part of the regulations of the Constitutional Law on the Constitutional Court regarding the

consequences of non-election of a judge to the Constitutional Court, and in particular, in part of the special guarantees ensuring the competence of the sessions of the Constitutional Court.

First of all, it should be noted that the competence of a public authority is determined by the ability to exercise its authorities. **The presence of a quorum is the prerequisite for the existence of legitimacy of the competence of the given authority and the implementation of its functions.**

In a number of decisions (including DCC-1081 and DCC-1384), the Constitutional Court expressed clear legal positions regarding the competence of the sessions of the collegial body, which are important for the present case. In particular, the Constitutional Court affirmed that the exercise of public authority, both individually and collegially, is a constitutional legal condition that directly follows from the legal regulation of the unamendable Article 2 of the Constitution, and it is due to the need for continuous implementation of democratic principles of governance.

From the perspective of ensuring the activities of the collegial body, for the adoption of decisions it is necessary to ensure the necessary number of members of the collegial body in case of the impossibility of ensuring the participation for objective reasons of all its members at a session of this body, **and this would guarantee the ability of the collegial body to adopt legitimate decisions.**

It should also be noted that in the Republic of Armenia the legal regulations of legal acts regulating the activities of collegial bodies of public authority are mainly based on the logic that:

- a) the competence of the session of a collegial body is ensured if the session is attended by the majority of the total number of members of the collegial body or a qualified majority;
- b) in a collegial body, decisions are made by a majority vote of members of the collegial body attending the session or the total number of members of the collegial body, or by a qualified majority.

To what extent does the Constitution regulate the issue of the competence of the sessions of the Constitutional Court? The Constitutional Court considers that this issue has been clearly regulated. The number of votes of the judges of the Constitutional Court required for the adoption of decisions and opinions of the Constitutional Court is established by Part 5 of Article 170 of the Constitution, according to which: opinions, as well as decisions on the matters stipulated by Points 10 and 12 of Article 168 of the Constitution, shall be adopted by at least a two-thirds majority vote of the total number of judges of the Constitutional Court, while other decisions shall be adopted by majority vote of the total number of the judges.

No exception is made by the aforementioned constitutional regulation, therefore **the legislative regulation stipulating the participation of a number of judges of the Constitutional Court not prescribed by the Constitution in order to ensure the competence of the sessions of the Constitutional Court, will be problematic from the perspective of Point 5 of Article 170 of the Constitution, therefore the Law on the Constitutional Court (or any other law) cannot establish special rules of the quorum of the sessions of the Constitutional Court.**

The Constitutional Court addressed the issue of constitutionality of the legislative gap in a number of its decisions, in particular, in Decision DCC-864, DCC-914, DCC-917, DCC-922, DCC-933, DCC-1020, DCC-1056, DCC-1143, DCC-1154, and DCC-1255. In the framework of the present case, reiterating and developing the legal positions expressed in the aforementioned decisions, the Constitutional Court considers that **there is no legislative gap in all cases where the issues regarding the alleged legislative gap are directly regulated by the Constitution.**

The Constitutional Court also states that Part 2 of Article 37 of the Law on the Constitutional Court envisages the general rule of competence of the sessions of the Constitutional Court, according to which: “2. The session shall be competent, where the quorum for rendering a decision with regard to the given case provided for by Article 62 of this Law is present”. That is to say, for rendering a decision or an opinion of the Constitutional Court, the presence at the session of the required number of judges is sufficient to recognize the session as competent.

The systemic analysis of the Law on the Constitutional Court provides that the legislator, in essence, has provided guarantees for ensuring the quorum of the sessions of the Constitutional Court within the framework of regulations on the organization of the process of election of a judge of the Constitutional Court in case of termination of the powers of a judge of the Constitutional Court upon the participation of judges of the Constitutional Court at the sessions of the Constitutional Court and the expiration of term of office or the age limit for tenure of the position of a judge of the Constitutional Court (Point 1 of Part 3 of Article 12, and Part 2 of Article 17 of the Law on the Constitutional Court).

Turning to the applicant's approach, according to which the issue of the competence of the sessions of the Constitutional Court can arise only for political reasons, the Constitutional Court considers it necessary to note that **the holding of elections for a judge of the Constitutional Court, including his nomination, is a mandatory and not discretionary constitutional power, non-fulfillment of which - in accordance with the procedure and timeframes prescribed by the Constitution and the Law - regardless of the motives, may obstruct the administration of justice by the**

Constitutional Court prescribed by Part 1 of Article 167 of the Constitution, ensuring the primacy of the Constitution.

Ensuring the replenishment of the Constitutional Court, its natural activity and the proper implementation of constitutional powers follows from the fundamental principles of the rule of law state, in particular, from the principles of the rule of law, checking and balance of powers and is intended to protect the entire constitutional order.

In respect with this issue, the applicant also expresses the approach that in the process of replenishing the relevant vacancies, the previous Law on the Constitutional Court as an exception included the cases where a member of the Constitutional Court participated in one or more case trials, and in this case his powers were terminated on the day of the completion of the case (s) (but this process could not last more than six months from the day he reached age limit for tenure of the position), **which may also be considered as a guarantee established by the legislator, ensuring the competence of the sessions of the Constitutional Court until the relevant replenishment is made.**

The Constitutional Court first of all considers it necessary to note that in accordance with Part 1 of Article 166 of the Constitution, judges of the Constitutional Court **shall be elected for a 12-year term.**

At the same time, Part 8 of Article 166 of the Constitution states that judges of the Constitutional Court shall serve in office **until reaching the age of 70**. Article 213 of Chapter 16 of the Constitution, titled “Final and Transitional Provisions”, states that the President of the Constitutional Court and members appointed prior to entry into force of Chapter 7 of the Constitution shall continue to serve until the end of the term of their office prescribed by the Constitution amended in 2005. That is, after the entry into force of the Constitution amended in 2005, the current members of the Constitutional Court shall continue to serve **until reaching the age of 70** (Point 13 of Article 117 of the Constitution amended in 2005), and those appointed after the entry into force of the Constitution amended in 2005 - **until reaching the age of 65** (Article 96 of the Constitution amended in 2005). **It is obvious that the founder of the Constitution did not establish any exception by the mentioned norms of the Constitution, especially, by using the term “until”.**

Thus, the regulations of the mentioned constitutional norms directly imply that from the moment of the expiration of the term of office or the age limit for tenure of the position of a judge of the Constitutional Court, a person cannot hold the office of judge of the Constitutional

Court, and in this aspect the Law on the Constitutional Court cannot prescribe any exception.

At the same time, the Constitutional Court considers it necessary to note that the expiration of the term of office or the age limit for tenure of the position of a judge of the Constitutional Court are foreseeable grounds for the termination of powers of a judge of the Constitutional Court, and according to the Law on the Constitutional Court, the powers of a judge of the Constitutional Court may also be automatically terminated or terminated for unforeseen reasons, in particular upon loss of citizenship of the Republic of Armenia or acquisition of the citizenship of a different state, his death, his resignation in the manner prescribed by law, engagement in political activities.

The Constitutional Court considers that within the framework of the new legal regulation of the Law on the Constitutional Court, the aforementioned approach of the applicant cannot be considered as a guarantee of ensuring the competence of the sessions of the Constitutional Court. Unlike the previous Law on the Constitutional Court (HO-58-N of June 1, 2006), according to the current Law on the Constitutional Court, at least six months preceding the expiration of the term of office or the age limit for tenure of the position of a judge of the Constitutional Court, in order to organize the process of election of a judge of the Constitutional Court, the President of the Constitutional Court shall notify the bodies nominating candidates for judges of the Constitutional Court (Part 2 of Article 17), and consequently the process of election of a judge of the Constitutional Court shall start with the nomination of candidates for judges of the Constitutional Court. In addition, Part 5 of Article 12 of the Law on the Constitutional Court stipulates: following the automatic termination or termination of powers of a judge of the Constitutional Court, the President of the Constitutional Court shall, within a period of one day, notify the bodies nominating candidates for judges of the Constitutional Court. That is, in the event of automatic termination or termination of the powers of a judge of the Constitutional Court, the legislator has established regulations for the organization of the process of election of a judge of the Constitutional Court and, therefore, also for guaranteeing the competence of the sessions of the Constitutional Court.

Based on the foregoing, **the Constitutional Court considers that according to the Law on the Constitutional Court, the lack of a general rule of the quorum of the sessions of the Constitutional Court due to the available vacant positions of judges of the Constitutional Court, is not questionable from the perspective of constitutionality, it follows from the requirement of Part 5 of Article 170 of the Constitution, and in this aspect there is no legislative gap in the Law on the Constitutional Court.**

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

1. To declare Part 1 of Article 17 of the Constitutional Law on the Constitutional Court contradicting the second sentence of Part 2 of Article 103, Part 9 of Article 166, and Part 3 of Article 167 of the Constitution and void, insofar as the establishment of the timeframes for the election of a new judge following the automatic termination or termination of the powers of a judge of the Constitutional Court is vested in the legal regulation of the Constitutional Law on Rules of Procedure of the National Assembly.

2. To declare Parts 1, 3 and 8 of Article 141 of the Constitutional Law on Rules of Procedure of the National Assembly contradicting the second sentence of Part 2 of Article 103, Part 9 of Article 166, and Part 3 of Article 167 of the Constitution.

3. In part of regulations on the consequences of non-election of a judge to the Constitutional Court, the Constitutional Law on the Constitutional Court is in conformity with the Constitution.

4. Based on Part 3 of Article 170 of the Constitution, Point 4 of Part 9 of Article 68 of the Constitutional Law on the Constitutional Court, as well as considering the fact that declaring the challenged provisions stipulated in Points 1 and 2 of this Decision as contradicting the Constitution will inevitably create obstacles to the replenishment of the Constitutional Court and, therefore, ensuring the proper implementation of its natural activities and constitutional powers, thereby violating the legal security established by repealing the aforementioned provisions, to define April 1, 2019 for the final invalidation of the provisions declared as contradicting the Constitution, providing the National Assembly the possibility to reconcile the legal regulations of the Constitutional Law on the Constitutional Court and the Constitutional Law on Rules of Procedure of the National Assembly with the requirements of this Decision.

5. 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

November 6, 2018

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