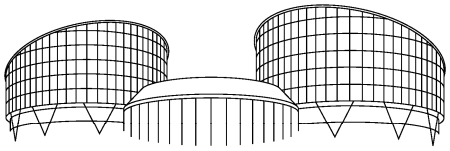

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 25240/20
Alvina GYULUMYAN and Others
against Armenia

The European Court of Human Rights (First Section), sitting on 21 November 2023 as a Chamber composed of:

Gabriele Kucsko-Stadlmayer*, President*,
Arnfinn Bårdsen,
Alena Poláčková,
Pauliine Koskelo,
Jovan Ilievski,
Péter Paczolay*, judges*,
Anna Margaryan*,* ad hoc *judge*,
and Renata Degener, *Section Registrar,*

Having regard to the above application lodged by four Armenian nationals (collectively "the applicants") listed in the appendix, Ms Alvina Gyulumyan ("the first applicant"), Mr Hrant Nazaryan ("the second applicant"), Mr Feliks Tokhyan ("the third applicant") and Mr Hrayr Tovmasyan ("the fourth applicant"), on 26 June 2020,

Having regard to the observations submitted by the parties,

Having regard to the decision of the President of the Chamber to appoint Anna Margaryan to sit as an *ad hoc* judge from a list submitted in advance by the Government (Article 26 § 4 of the Convention and Rule 29 § 1 (a) of the Rules of Court), Mr Armen Harutyunyan, the judge elected in respect of Armenia, having withdrawn from sitting in the case (Rule 28 § 3).

Having deliberated, decides as follows:

THE FACTS

1. The applicants were born in 1956, 1959, 1956 and 1970, respectively. They were represented by Ms S. Sahakyan, a lawyer practising in Yerevan.

2. The Armenian Government ("the Government") were represented by their Agent, Mr Y. Kirakosyan, Representative of the Republic of Armenia on International Legal Matters.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. In 1996 the first and the second applicant, and in 1997 the third applicant, were appointed as members of the Constitutional Court with life tenure, i.e., until their retirement. At that time, the retirement age for members of that court was seventy (see paragraph 29 below).

5. In 2003 the first applicant's term of office was terminated at her request. In 2014, after eleven years of service as a judge at the European Court of Human Rights, she was reappointed as a member of the Constitutional Court with life tenure. At that time, the retirement age for members of that court was sixty-five (see paragraph 30 below).

6. Significant changes were made to the appointment procedure, the appointing authorities and the term of office of judges[1] of the Constitutional Court in 2015 (see paragraph 31 below). The new rules entered into force on 9 April 2018.

7. In the meantime, on 2 March 2018, the fourth applicant, who had earlier been a Member of Parliament of the then-ruling party (until 16 February 2018) and the Minister of Justice (until 30 April 2014) was appointed as a member of the Constitutional Court with life tenure; the retirement age applicable to him was sixty-five, as in the case of the first applicant. G.H. The then President of the Constitutional Court, was entitled to remain in office until his retirement on 23 March 2018, but shortly before his retirement he was appointed as a member of the Supreme Judicial Council by the National Assembly and he thus resigned from his position as President of that court. On 21 March 2018 the National Assembly appointed the fourth applicant as President of the Constitutional Court with life tenure – that is, until his retirement in 2035 – at its last ordinary sitting before the entry into force of the new rules, which took place on 20-21 March 2018.

8. In April and May 2018 large anti-government demonstrations, referred to in Armenia as the "Velvet Revolution", took place. The "Velvet Revolution" led to a peaceful overturn of the previous government and the appointment of the opposition leader Nikol Pashinyan as Prime Minister. It culminated in a landslide victory for the My Step alliance in parliamentary elections held in December 2018. The My Step alliance, supporting Nikol Pashinyan, obtained 88 out of 132 seats in the National Assembly (which is a constitutional majority), while the former governing Republican Party did not receive any seats. One of the priorities of the new government was to combat an endemic corrupt system and to bring about judicial

[1] The term "judges of the Constitutional Court", instead of "members of the Constitutional Court", has been used since the entry into force of the 2015 constitutional amendments, i.e. 9 April 2018.

reform[2]. In the beginning, their intention was to introduce extraordinary vetting procedures to verify the suitability of current judges for continuing their judicial functions. However, after a process of dialogue within Armenian society and with its international partners, that idea was abandoned.

9. On 13 September 2018 Arman Dilanyan was appointed as a Constitutional Court judge for a twelve-year non-renewable term in accordance with the new rules (see paragraph 31 below).

10. On 19 May 2019, following a court decision to release former President Kocharyan[3] on bail, the Prime Minister of Armenia strongly criticised the courts, asked his supporters to block court-houses and called for a renewal of the judiciary[4]. Reportedly around 150 protesters gathered in front of the Constitutional Court on that day. It also appears from footage provided by the applicants, the authenticity of which was not contested by the Government, that on 5 June 2019 the first applicant had to be escorted out of the court's building by police officers because of the presence of a small group of protesters.

11. Soon afterwards, almost all the members of the Supreme Judicial Council who had been appointed before the "Velvet Revolution" resigned.

12. On 18 June 2019 Vahe Grigoryan was appointed as a Constitutional Court judge for a twelve-year non-renewable term in accordance with the new procedure. He immediately declared himself President of the Constitutional Court and disputed the powers of all the court's judges who had been appointed before 9 April 2018, the date on which the 2015 amendments entered into force (see paragraph 31 below) Shortly thereafter, the Venice Commission decided to ask the President of Armenia to follow the situation with respect to the Constitutional Court closely, with a view to making a public statement if appropriate. The relevant part of the report of the 119th Plenary Session of the Venice Commission read as follows:

> "The Commission was ... informed that a newly elected judge of the Constitutional Court had questioned the legitimacy of 7 of the 9 judges of the Court, who had been elected prior to the entry into force of the 2015 constitutional amendments. His main argument was that, according to the previous text of the Constitution, they had been elected as members of the Constitutional Court, while the new text referred to judges of the Constitutional Court. Article 213 of the revised Constitution, however, provided clearly and unambiguously that the chairman and members of the Constitutional Court

[2] See the 2019-23 Strategy for Judicial and Legal Reforms, adopted by the Government in October 2019.

[3] Robert Kocharyan was the President of Armenia from 1998 until 2008. On 26 July 2018 he was charged in connection with the crackdown on the 2008 demonstrations, which resulted in the deaths of ten people. His trial began on 13 May 2019. The trial ended in March 2021 after the Constitutional Court declared unconstitutional the provision of the Criminal Code under which he was being tried.

[4] See the report of the 119th Plenary Session of the Venice Commission (21-22 June 2019), CDL-PL-PV(2019)002rev, p. 17.

> appointed prior to the entry into force of the amendments shall continue to serve until the end of their term of office prescribed by the Constitution amended in 2005. It was disturbing that this statement by the judge had been applauded in parliament and there might be a risk of interference with the mandates of the sitting judges."[5]

13. On 28 June 2019 Judge Vahe Grigoryan (see paragraph 12 above), in a letter to the authorities, repeated his claim that the Constitutional Court was undergoing a crisis, while acknowledging his personal respect for all of its judges. He stated in particular: "In what follows, the aim in indicating names is to ensure the accuracy of the facts, rather than to focus on individual people, in respect of whom I have no attitude other than personal respect", and further: "Not having the least doubt of the professional integrity and honesty of the members of the Constitutional Court, as well as their high personal qualities ...".

14. On 17 July 2019 the Prime Minister of Armenia said, in an interview with a journalist for Radio Free Europe/Radio Liberty, that the Constitutional Court was one of the most discredited institutions in Armenia because from 1996 onwards it had legitimised all election fraud, that there was a crisis of trust towards it, and that it had been decided to have a new such court. He added: "In 2019, Armenia must have a Constitutional Court for 2019. This is a political issue. No one should doubt that this issue must be solved".

15. On 6 September 2019 the Armenian authorities asked the Venice Commission to prepare an opinion on a judicial reform package proposed by the government, which envisaged, *inter alia*, a voluntary early retirement scheme for a certain category of Constitutional Court judges (that is, those who had been appointed with life tenure in accordance with the old procedure, such as the present applicants).

16. On 4 October 2019 the National Assembly decided to apply to the Constitutional Court requesting that it terminate the fourth applicant's term of office on the grounds set out in Article 164 § 9 of the Constitution (see paragraphs 33-34 below). On 14 October 2019 the Constitutional Court declared that request inadmissible.

17. On 14 October 2019 the Venice Commission published its Opinion on the early retirement scheme mentioned in paragraph 15 above[6]. It concluded that, in principle, provided that such a scheme remained strictly voluntary and did not hamper the effective functioning of the Constitutional Court, there were no standards that would lead the Venice Commission to

[5] See the report of the 119th Plenary Session of the Venice Commission (21-22 June 2019), CDL-PL-PV(2019)002rev, p. 18.

[6] See CDL-AD(2019)024 Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the amendments to the Judicial Code and some other laws, adopted by the Venice Commission at its 120th Plenary Session (11-12 October 2019).

oppose it. The relevant part of the Opinion is reproduced in paragraph 54 below.

18. On 29 October 2019 the President of the Venice Commission issued the following statement:

> "I have been closely following the situation in Armenia for several months already. I am very preoccupied about the open conflict between on the one side the Government and Parliament and on the other side the Constitutional Court. The quick succession and mediatisation of recent events do not contribute to a serene settlement of the problems. In a Democracy, the parliament is the depositary of popular sovereignty and thus enjoys the highest democratic legitimacy. The constitutional court is a safeguard institution, entrusted with upholding constitutional values. In a democratic country, all State institutions and office holders have to respect their own prerogatives, obligations and competences and acknowledge and respect those of the other institutions. They have to exercise appropriate institutional restraint, observe the relevant procedures in good faith and display respect for each other. If this is not done, if there lacks democratic culture and maturity, the functioning of the state institutions is compromised and the democratic, civil and economic progress of the society is jeopardised. I call on all sides to exercise restraint, mutual respect and constructive institutional co-operation in order to de-escalate this worrying situation and re-establish the normal operation of the constitution of Armenia."

19. Following a four-month criminal investigation, on 27 December 2019 the fourth applicant was charged with abuse of office during his time as Minister of Justice. He was alleged to have compelled several notaries and the Notarial Chamber to rent premises belonging to him at inflated prices. His father and daughters were interviewed by law-enforcement authorities in the context of that case. It appears that that case is pending before the relevant court. It further appears that a case against the former Parliament Speaker and one of his former senior aides, concerning the appointment of the fourth applicant as President of the Constitutional Court (see paragraph 7 above), is also currently pending before the relevant court. They are alleged to have accepted and announced the resignation of Judge G.H. before receiving the appropriate letter from him, and to have then backdated the letter to enable the fourth applicant to be appointed with life tenure shortly before the entry into force of the new rules. They have been charged with abuse of office and forgery.

20. On 27 December 2019 those judges of the Constitutional Court who had been appointed with life tenure in accordance with the old procedure, including the present applicants, were offered early retirement with benefits such as a pension in the amount of their salaries.

21. On 3 February 2020 the President of the Venice Commission issued another statement concerning the Constitutional Court:

> "Following my statement of 29 October 2019, I remain preoccupied about the open conflict involving the Constitutional Court of Armenia. I share the concerns of the rapporteurs of the Parliamentary Assembly of the Council of Europe in this respect. I would like to recall the recommendations made in the opinion of the Venice Commission adopted in October 2019 that any early retirement scheme at the

> Constitutional Court has to remain truly voluntary, exclude any undue political or personal pressure on the judges concerned and must be designed not to influence the outcome of pending cases. Recent public statements and acts do not meet these criteria and will not be conducive to deescalating the situation. Democratic culture and maturity require institutional restraint, good faith and mutual respect between State institutions. I call again on all sides to exercise restraint and to de-escalate this worrying situation in order to ensure the normal operation of the constitution of Armenia."

22. On 6 February 2020 the parliamentary majority proposed that the term of office of all seven Constitutional Court judges who had been appointed prior to 9 April 2018 – the date of entry into force of the 2015 constitutional amendments – be terminated. A referendum was planned for 5 April 2020, but that proposal was eventually abandoned.

23. The deadline for accepting the offer of early retirement (see paragraph 20 above) expired on 27 February 2020. None of the judges accepted that offer.

24. In May 2020 the government invited the Venice Commission to give an opinion on draft constitutional amendments proposing, *inter alia*, that the terms of office of those judges of the Constitutional Court who had already served a total of twelve years be terminated, and that all other judges, even if they had been appointed prior to 9 April 2018, continue to serve until the completion of a twelve-year term. It was further proposed that the term of office of the President of the Constitutional Court be terminated, but as his twelve-year term was not up, that he continue to sit as a judge of that court.

25. On 22 June 2020 the Venice Commission published its Opinion on the matter[7]. The relevant part of the Opinion is reproduced in paragraph 55 below. In brief, it recognised that the aim of fully implementing the provisions of the Constitution of 2015 regarding the composition of the Constitutional Court was legitimate. To reconcile this aim with the need to preserve the judges' security of tenure and their independence, the Venice Commission recommended that judges who had not yet completed a twelve-year term of office should be able to stay in office until the completion of that term, and that judges who had already served a twelve-year term should be able to benefit, before being replaced, from a new transitional period whose length should be determined by the Armenian authorities. The Venice Commission regretted that amendments which did not provide for such a transitional period had nevertheless been tabled in the National Assembly on 19 June 2020, the day of the adoption of the Opinion.

26. On the same day, the National Assembly adopted those amendments (see paragraph 32 below). Pursuant to section 86 of the Constitutional Act on the Rules of Procedure of the National Assembly (see paragraph 40

[7] See CDL-AD(2020)16 Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, adopted by the Venice Commission on 19 June 2020.

below), a draft National Assembly resolution on applying to the Constitutional Court was put to a vote and rejected. It transpires from the parliamentary debate that one of the main reasons for rejecting the proposal to seek a prior constitutional review was the fact that seven out of nine judges of the Constitutional Court had a conflict of interest. During the debates, the rapporteur and the then Acting Minister of Justice referred also to a recent statement by the representatives of the Constitutional Court that the scope of a review by that court could cover the entire Constitution (see the Opinion of the Venice Commission cited in paragraph 55 below, § 69), notwithstanding the fact that such review had recently been limited to a control of conformity with unamendable provisions of the Constitution (see paragraph 40 below). They further added that the Constitutional Court should not be permitted to prevent the National Assembly from adopting the constitutional amendments in question, since the people clearly wanted an independent judiciary. Given that section 86 of the Constitutional Act on the Rules of Procedure of the National Assembly was silent as to how to proceed when a draft National Assembly resolution on applying to the Constitutional Court was rejected, the Chairperson of the National Assembly concluded that it was, strictly speaking, not forbidden to adopt the amendments in question, on their second reading, without a prior review by that court[89]. On 29 April 2021 the Constitutional Court held that the National Assembly had not acted contrary to the Constitution when it had decided not to seek a prior review (see paragraph 39 below).

27. The amendments entered into force on 26 June 2020. As a result, the terms of office of the first, second and third applicants, who had already served more than thirteen, twenty-four and twenty-two years respectively, were terminated. The term of office of the fourth applicant as President of the Constitutional Court was also terminated, but he remained in office as a judge of that court.

28. On 15 September 2020 three new judges of the Constitutional Court and in 2022 two new judges of the Constitutional Court were appointed for a twelve-year non-renewable term in accordance with the new procedure. On 12 October 2020 Arman Dilanyan was elected by his peers as the President of the Constitutional Court for a six-year non-renewable term.

[8] Extraordinary sitting of the National Assembly of 22.06.2020 (first reading).
[9] Extraordinary sitting of the National Assembly of 22.06.2020 (second reading).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. As regards the judges and the President of the Constitutional Court

29. The Constitution, adopted in 1995, stipulated that five members of the Constitutional Court were to be appointed by the National Assembly and four members by the President of the Republic. The President of the Constitutional Court was to be appointed by the National Assembly from among the members of that court. Members and the President of the Constitutional Court were to be appointed with life tenure, i.e. until their retirement at the age of seventy (see Article 96 of the Constitution). As to the termination of office of members of the Constitutional Court, the rules were in substance the same as today (see Article 164 §§ 8 and 9 of the Constitution cited in paragraph 33 below).

30. The Constitution was amended in 2005. The appointment procedure for members and the President of the Constitutional Court was generally maintained (as to the appointment procedure for the President, see Article 83 § 2 of the Constitution). At the same time, the retirement age was reduced from seventy to sixty-five, by an amendment to Article 96 of the Constitution. The new rule did not apply to the incumbent members, who were to continue to hold office until attaining the age of seventy (Article 117 § 13 of the Constitution). As to the termination of office of members of the Constitutional Court, the rules were in substance the same as today (see Article 164 §§ 8 and 9 of the Constitution cited in paragraph 33 below).

31. Significant changes were made to the appointment procedure and the term of office of judges of the Constitutional Court in 2015. According to Article 166 § 1 of the Constitution, judges of the Constitutional Court are now to be appointed by the National Assembly for a non-renewable term of twelve years, by at least three-fifths of votes of the total number of deputies. Three judges are to be appointed on the recommendation of the President of the Republic, three judges on the recommendation of the Government, and three judges on the recommendation of the General Assembly of Judges. The General Assembly of Judges may nominate only judges. A six-year non-renewable term of office was established for the President of the Constitutional Court, who is to be appointed by his or her peers. The new rules entered into force on 9 April 2018.

32. Article 213 of the Constitution initially provided that the old rules would continue to apply to the judges and the President of the Constitutional Court who were appointed before 9 April 2018, as was the case of the present applicants. That provision was amended on 22 June and entered into force on 26 June 2020, immediately terminating the term of

office of judges of the Constitutional Court who were appointed before 9 April 2018 and who had served for an overall term of at least twelve years. Other judges of the court appointed before 9 April 2018 were to remain in office until the expiry of a twelve-year term. The term of office of the President of the Constitutional Court was also immediately terminated, and a new President was to be elected by his or her peers for a six-year non-renewable term, pursuant to the new procedure. The old and the current versions of that provision read as follows:

Article 213 of the Constitution (in force from 9 April 2018 until 26 June 2020)

"The President and members of the Constitutional Court appointed prior to the entry into force of Chapter 7 of the Constitution shall continue holding office until the expiry of the term of their powers specified in the Constitution with the amendments of 2005. After the entry into force of Chapter 7 of the Constitution, the nominations for vacant positions of judges of the Constitutional Court shall be made successively by the President of the Republic, the General Assembly of Judges, and the Government."

Article 213 of the Constitution (in force since 26 June 2020)

"1. The powers of a member or a judge of the Constitutional Court, appointed prior to the entry into force of Chapter 7 of the Constitution and having served as a member (a judge) of the Constitutional Court for an overall term of not less than twelve years, shall be considered terminated and his or her tenure shall cease.

2. A member of the Constitutional Court appointed prior to the entry into force of Chapter 7 of the Constitution, whose tenure does not cease under paragraph 1 of this Article, shall remain in office as a judge of the Constitutional Court until the expiry of his twelve-year service, taking into account the period of his or her term of office before and after the entry into force of Chapter 7 of the Constitution.

3. After the entry into force of Chapter 7 of the Constitution, nominations for vacant positions of judges of the Constitutional Court shall be made successively by the Government, the President of the Republic and the General Assembly of Judges. Nominations for the vacant posts of a judge of the Constitutional Court, arising on the basis of paragraph 1 of this Article, shall be made within two months after the position becomes vacant.

4. The term of office of the President of the Constitutional Court shall cease. After the post of the President of the Constitutional Court becomes vacant, the new President of the Constitutional Court shall be elected pursuant to the procedure set under Article 166 of the Constitution, after filling the vacancies for Constitutional Court judges which arose under paragraph 1 of this Article."

33. Article 164 of the Constitution regulates the status of the judges of the Constitutional Court and the other courts. It reads as follows:

"1. When administering justice, a judge shall be independent, impartial and act only in accordance with the Constitution and laws.

2. A judge may not be held liable for opinions expressed or judicial acts carried out during the administration of justice, except where elements of a crime or disciplinary offence are present.

3. Criminal prosecution of a judge of the Constitutional Court with respect to the exercise of his or her powers may be initiated only with the consent of the Constitutional Court. A judge of the Constitutional Court may not be deprived of liberty, with respect to the exercise of his or her powers, without the consent of the Constitutional Court, except where he or she has been caught at the time of or immediately after the commission of a criminal offence. In this case, the deprivation of liberty may not last more than seventy-two hours. The President of the Constitutional Court shall be immediately notified of the deprivation of liberty of a judge of the Constitutional Court.

4. Criminal prosecution of a judge with respect to the exercise of his or her powers may be initiated only with the consent of the Supreme Judicial Council. A judge may not be deprived of liberty, with respect to the exercise of his or her powers, without the consent of the Supreme Judicial Council except where he or she has been caught at the time of or immediately after the commission of a criminal offence. In this case, the deprivation of liberty may not last more than seventy-two hours. The President of the Supreme Judicial Council shall be immediately notified of the deprivation of liberty of a judge.

5. The grounds and procedure for subjecting a judge to disciplinary liability shall be prescribed by the Constitutional Act on the Constitutional Court and the Judicial Code.

6. A judge may not hold any position not related to his or her status in other State or local self-governing bodies, any position in commercial organisations, or engage in entrepreneurial activities or perform other paid work, except for scientific, educational and creative work. The Constitutional Act on the Constitutional Court and the Judicial Code may prescribe additional conditions of incompatibility.

7. A judge may not engage in political activities.

8. The powers of a judge shall cease upon the expiry of the term of those powers, in the case of the loss of citizenship of the Republic of Armenia or the acquisition of citizenship of another State, the taking effect of a criminal conviction against him or her, the termination of a criminal prosecution on non-acquittal grounds, the taking effect of a civil judgment declaring him or her to have no active legal capacity, the fact of being missing or dead, or in the case of his or her resignation or death.

9. In the case of a breach of the conditions of incompatibility, engaging in political activities, the inability to hold office for health reasons, or committing a fundamental disciplinary offence, the powers of a judge of the Constitutional Court shall be terminated by a decision of the Constitutional Court, whereas the powers of a judge shall be terminated by a decision of the Supreme Judicial Council.

10. The remuneration of a judge shall be determined in conformity with his or her high status and responsibility. The amount of remuneration of a judge shall be prescribed by law.

11. Details relating to the status of judges shall be prescribed by the Constitutional Act on the Constitutional Court and the Judicial Code."

34. Article 169 § 1 of the Constitution provides that the National Assembly may decide by three-fifths of the total number of deputies to apply to the Constitutional Court requesting that it terminate the term of office of one of its judges. In accordance with section 83(1) of the

Constitutional Act on the Constitutional Court,[10] the National Assembly may rely in its request on one of the grounds set out in Article 164 § 9 of the Constitution (see paragraph 33 above).

35. Section 16 of the Constitutional Act on the Constitutional Court deals with the issue of "impossibility" for a Constitutional Court judge to sit in the case. The relevant part of that provision reads as follows:

> "...
>
> 3. The issue of impossibility for a judge of the Constitutional Court to sit in the case may be raised by each of the judges of the Constitutional Court.
>
> 4. The Constitutional Court shall decide on the issue of impossibility for a judge of the Constitutional Court to sit in the case within the framework of the procedural decision on accepting the case for examination.
>
> 5. The procedural decision of the Constitutional Court with regard to that issue shall be adopted by at least two thirds of votes of the total number of judges of the Constitutional Court."

36. Pursuant to sections 10(2) and 88(5.1) of the Constitutional Act on the Constitutional Court, a pension shall be granted to Constitutional Court judges whose term of office expired on 26 June 2020 (namely, the first three applicants), regardless of their age. The right to a pension shall not cease in the case of their taking up other employment, except for public service employment.

B. As regards constitutional amendments

37. Article 203 of the Constitution provides that Articles 1, 2, 3 and 203 of the Constitution cannot be amended.

38. Article 202 of the Constitution regulates the adoption of constitutional amendments. It reads as follows:

> "1. The Constitution, amendments to Chapters 1-3, 7, 10 and 15 of the Constitution, and amendments to Article 88, the first sentence of paragraph 3 of Article 89, paragraph 1 of Article 90, paragraph 2 of Article 103, Articles 108, 115, 119-120, 123-125, 146, 149 and 155, and paragraph 4 of Article 200 of the Constitution shall be adopted only through a referendum. The right to initiate adoption of or amendment to the Constitution lies with at least one third of the total number of MPs, the Government or two hundred thousand citizens having voting rights. The National Assembly adopts the decision, after putting the draft to referendum, by at least two thirds of votes of the total number of MPs.
>
> 2. With the exception of the Articles specified in paragraph 1 of this Article, amendments to other Articles of the Constitution shall be adopted by the National Assembly by at least two thirds of votes of the total number of MPs. The right to the corresponding initiative lies with at least one quarter of the total number of MPs, the Government or one hundred and fifty thousand citizens having voting rights.

[10] This Act has been in force since 9 April 2018.

3. In case the National Assembly fails to adopt a draft of constitutional amendments pursuant to paragraph 2 of this Article, it may be put to referendum upon a resolution adopted by at least three fifths of votes of the total number of MPs□"

39. Since 9 April 2018, all draft constitutional amendments must be sent to the Constitutional Court for a prior constitutional review. The relevant provisions read as follows:

Article 168

"The Constitutional Court, as prescribed by the Act on the Constitutional Court, shall:

...

(2) prior to the adoption of draft amendments to the Constitution, as well as draft legal acts put to referendum, determine the compliance thereof with the Constitution;

..."

Article 169 § 2

"In the cases prescribed by point 2 of Article 168 of the Constitution, the National Assembly shall apply to the Constitutional Court in respect of amendments to the Constitution ..."

The Constitutional Court has held that this review is in principle mandatory, except when draft amendments concern the rights of a majority of judges of that court and have no direct legal consequences for any other person (decision SDV-1590 of 29 April 2021[11], § 5.8). In the Constitutional Court's opinion, in such circumstances all of the judges concerned would have to withdraw, leaving the court without a quorum (as regards the quorum, see paragraph 41 below).

40. Section 86 of the Constitutional Act on the Rules of Procedure of the National Assembly regulates in more detail the procedure for the adoption of constitutional amendments. It entered into force on 9 April 2018 (pursuant to section 166(1) of that Act). By an amendment to that Act adopted on 3 June 2020, the scope of review by the Constitutional Court was limited to a control of conformity with unamendable provisions of the Constitution. The amendment in question entered into force on 25 June 2020. The current version of that provision reads as follows:

"1. The draft of constitutional amendments is debated in the National Assembly in two readings in the manner prescribed for draft laws pursuant to Chapters 16-17 of the Rules of Procedure.

2. Prior to adopting constitutional amendments entirely in the second reading, the draft National Assembly resolution on applying to the Constitutional Court regarding constitutional amendments is put to a vote. If the decision is adopted, the Chairperson of the National Assembly shall, within two working days, sign this resolution and

[11] The decision was adopted by a 5-4 majority; all judges appointed before 9 April 2018 voted against it.

send it to the Constitutional Court, together with the draft amendment to the Constitution debated in the second reading, for the assessment of constitutionality of the draft from the perspective of conformity with the unamendable Articles of the Constitution. The debate on the issue is interrupted until receiving the decision of the Constitutional Court.

3. If, while assessing the constitutionality of the draft constitutional amendments from the perspective of conformity with the unamendable Articles of the Constitution, the Constitutional Court declares the draft to be not in compliance with the Constitution, the draft is withdrawn from circulation.

4. If, while assessing the constitutionality of the draft constitutional amendments from the perspective of conformity with the unamendable articles of Constitution, the Constitutional Court declares the draft to be compliant with the Constitution, after the entry into force of its decision, voting on the issue shall be held in the upcoming regular session of the National Assembly pursuant to the following procedure:

1) In the case stipulated in section 84 paragraph 3 of the Rules of Procedure [which refers to Article 202 § 1 of the Constitution], the draft National Assembly resolution on putting the draft constitutional amendments to referendum is put to a vote, which shall be adopted by at least two thirds of the votes of the total number of MPs.

2) In the case stipulated in section 84 paragraph 4 of the Rules of Procedure [which refers to Article 202 § 2 of the Constitution], the draft constitutional amendments is put to a vote, which shall be adopted by at least two thirds of the votes of the total number of MPs.

5. If the draft constitutional amendments mentioned in point 2 of paragraph 4 of this section is not adopted, the main rapporteur may make a statement for maximum twenty minutes introducing a draft National Assembly resolution on putting the draft to referendum. After the statement of the main rapporteur the representatives of factions may make statements for maximum ten minutes after which the draft resolution is put to a vote. The resolution shall be adopted by at least three fifths of the votes of the total number of MPs. If the resolution is not adopted, the draft is withdrawn from circulation.

6. The Chairperson of National Assembly submits the National Assembly resolution on putting the draft constitutional amendments to referendum together with the relevant draft to the President of Republic within one week. The President shall set a referendum within three days after receiving those documents.

7. The Chairperson of the National Assembly promulgates the Constitutional Amendments adopted by the National Assembly within one week."

41. Section 62(4) of the Constitutional Act on the Constitutional Court provides that the court will render decisions on the constitutionality of draft constitutional amendments by the majority of votes of the total number of judges.

C. As regards the Supreme Judicial Council

42. The Supreme Judicial Council is an independent body that guarantees the independence of ordinary courts (including the Court of Cassation) and the judges of those courts. It was established in 2018 by virtue of Article 173 of the Constitution. Pursuant to Article 174 of the

Constitution, the Supreme Judicial Council has ten members appointed for a non-renewable term of five years: five members appointed by the General Assembly of Judges, from among judges having at least ten years of experience as a judge; and five members appointed by the National Assembly, from among prominent lawyers with at least fifteen years of experience. The President of the Council is elected by his or her peers, successively from among the members appointed by the General Assembly of Judges and those appointed by the National Assembly.

II. INTERNATIONAL MATERIAL

A. As regards the period of appointment

43. In a report on the Independence of the Judicial System Part I: The Independence of Judges, adopted at the 82nd plenary session on 12 and 13 March 2010 (CDL-AD(2010)004), the Venice Commission found as follows:

> "34. Opinion No. 1 of the CCJE[12] adds (at 48): 'European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence.' ...
>
> 35. This corresponds to the position of the Venice Commission which has, apart from special cases such as constitutional court judges, always favoured tenure until retirement."

B. As regards security of tenure

1. The United Nations

44. The relevant points of the Basic Principles on the Independence of the Judiciary[13] read as follows:

> "12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
>
> ...
>
> 20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."

45. In General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (Right to equality before courts and tribunals and to a fair trial), published on 23 August 2007, the UN Human Rights Committee stated as follows (footnotes omitted):

[12] Consultative Council of European Judges.

[13] Adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which took place in 1985. They were endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

"20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law."

2. The Council of Europe

46. The relevant part of the European Charter on the Statute for Judges[14] reads as follows:

"1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality ...

...

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

1.4. The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.

...

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

...

[14] Adopted by participants from European countries and two international associations for judges at a meeting held in Strasbourg on 8 to 10 July 1998 (organised under the auspices of the Council of Europe). The Charter was endorsed by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12 to 14 October 1998 and again by judges and representatives from ministries of justice of twenty-five European countries at a meeting held in Lisbon on 8 to 10 April 1999.

7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2. The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof."

47. The relevant part of the Explanatory Memorandum to the above-mentioned European Charter on the Statute for Judges reads as follows:

"1. ... The provisions of the Charter concern the statute for judges of all jurisdictions to which people are called to submit their case or which are called upon to decide their case, be it a civil, criminal, administrative or other jurisdiction.

...

1.3 The Charter provides for the intervention of a body independent from the executive and the legislature where a decision is required on the selection, recruitment or appointment of judges, the development of their careers or the termination of their office.

The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body.

Account had to be taken here of certain differences in the national systems. Some countries would find it difficult to accept an independent body replacing the political body responsible for appointments. However, the requirement in such cases to obtain at least the recommendation or the opinion of an independent body is bound to be a great incentive, if not an actual obligation, for the official appointments body. In the spirit of the Charter, recommendations and opinions of the independent body do not constitute guarantees that they will in a general way be followed in practice. The political or administrative authority which does not follow such recommendation or opinion should at the very least be obliged to make known its reasons for its refusal so to do.

The wording of this provision of the Charter also enables the independent body to intervene either with a straightforward opinion, an official opinion, a recommendation, a proposal or an actual decision.

The question arose of the membership of the independent body. The Charter at this point stipulates that at least one half of the body's members should be judges elected by their peers, which means that it wants neither to allow judges to be in a minority in the independent body nor to require them to be in the majority. In view of the variety of philosophical conceptions and debates in European States, a reference to a minimum of 50% judges emerged as capable of ensuring a fairly high level of safeguards while respecting any other considerations of principle prevailing in different national systems.

The Charter states that judges who are members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature.

There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties.

Finally, without insisting on any particular voting system, the Charter indicates that the method of electing judges to this body must guarantee the widest representation of judges.

1.4 The Charter enshrines the 'right of appeal' of any judge who considers that his or her rights under the statute or more generally independence, or that of the legal process, is threatened or infringed in any way, so that he or she can refer the matter to an independent body as described above.

This means that judges are not left defenceless against an infringement of their independence. The right of appeal is a necessary safeguard because it is mere wishful thinking to set out principles to protect the judiciary unless they are consistently backed with mechanisms to guarantee their effective implementation. The intervention of the independent body before any decision is taken on the judge's individual status does not necessarily cover all possible situations in which his or her independence is affected, and it is vital to ensure that judges can apply to this body on their own initiative.

The Charter stipulates that the body thus applied to must have the power to remedy the situation affecting the judge's independence of its own accord, or to propose that the competent authority remedy it. This formula takes account of the diversity of national systems, and even a straightforward recommendation from an independent body on a given situation provides a considerable incentive for the authority in question to remedy the situation complained of.

...

5.1 The Charter deals here with the judge's disciplinary liability. It begins with a reference to the principle of the legality of disciplinary sanctions, stipulating that the only valid reason for imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute. Moreover, the Charter lays down guarantees on disciplinary hearings: disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation. If the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality. Lastly, the Charter provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges.

The current wording of this provision does not require the availability of such a right of appeal against a sanction imposed by Parliament.

...

7.1 Vigilance is necessary about the conditions in which judges' employment comes to be terminated. It is important to lay down an exhaustive list of the reasons for termination of employment. These are when a judge resigns, is medically certified as physically unfit for further judicial office, reaches the age limit, comes to the end of a fixed term of office or is dismissed in the context of disciplinary liability.

7.2 On occurrence of the events which are grounds for termination of employment other than the ones - i.e. the reaching of the age limit or the coming to an end of a fixed term of office - which may be ascertained without difficulty, they must be verified by the authority referred to in paragraph 1.3. This condition is easily realised when the termination of office results from a dismissal decided precisely by this authority, or on its proposal or recommendation, or with its agreement."

48. The relevant extracts from the Appendix to Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to member States on Judges: independence, efficiency and responsibilities, adopted on 17 November 2010 read, in so far as relevant, as follows:

"1. This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional matters.

...

8. Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy.

...

49. Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists."

49. The relevant extracts from the Explanatory Memorandum to the above-mentioned Recommendation CM/Rec(2010)12 read as follows:

"13. The separation of powers is a fundamental guarantee of the independence of the judiciary whatever the legal traditions of the member states.

...

15. Where the council for the judiciary is a constitutional body, at the same level as the legislative or executive powers, or when another independent authority has such a competence, a statement made by the council or the authority is normally enough to protect the independence of an individual judge. In other cases, the independence of the judge can be guaranteed by a legal remedy before higher courts or another authority, for example the president of the court, with the power to protect judicial independence from any external interference eventually coming from other organs of the state (paragraph 8 of the recommendation)."

C. As regards the impartiality of judges and the doctrine of necessity

1. The United Nations

50. The relevant part of the Bangalore Principles of Judicial Conduct[15] read as follows:

[15] The document was adopted by the Judicial Group on Strengthening Judicial Integrity under the auspices of the United Nations Office on Drugs and Crime in 2001 and revised in 2002 (see E/CN.4/2003/65, annex). In 2006 the United Nations Economic and Social Council adopted resolution 2006/23, emphasising that the Bangalore Principles of Judicial Conduct represented a further development and were complementary to the Basic

"2.5. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. ...

...

provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

51. In March 2007 the Judicial Group on Strengthening Judicial Integrity adopted the Commentary on the Bangalore Principles of Judicial Conduct. Its relevant part reads as follows:

"*'One may not be a judge in one's own cause'*

78. The fundamental principle is that one may not be a judge in his or her own cause. ... if a judge is in fact a party to the litigation or has an economic interest in its outcome, then he or she is indeed sitting as a judge in his or her own cause. This is sufficient grounds for disqualification. ...

...

Doctrine of necessity

100. Extraordinary circumstances may require departure from the principle discussed above. The doctrine of necessity enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice. This may happen if there is no other judge available who is not similarly disqualified, or if an adjournment or mistrial will cause severe hardship, or if a court cannot be constituted to hear and determine the matter at hand owing to the judge's absence. Such cases will, of course, be rare and special. However, they may arise from time to time in final courts that have few judges and important constitutional and appellate functions that cannot be delegated to other judges."

2. The Council of Europe

52. The Venice Commission, in its *amicus curiae* brief on the Law on the Transitional Re-Evaluation of Judges and Prosecutors in Albania, adopted at the 109th plenary session in December 2016 (CDL-AD(2016)036), held:

"...

20. In case the Court is asked to rule on a matter in which some of its members may have, or be perceived to have, an interest, the Court is not absolved by the existence of such an interest from its duty to rule on the issue raised. The Constitutional Court is obliged to rule on the constitutionality of every law which is challenged before it. If it were to permit a situation to arise in which it was precluded from doing so by virtue of disqualifications arising from the possibility of any one or more of its members

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Principles on the Independence of the Judiciary and inviting the Member States to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary.

being the subject of an adverse finding under the legislation, that obligation on the Court to make a decision could not be fulfilled.

21. The Bangalore Principles of Judicial Conduct 2002 envisage that such a situation may arise and provide for such an eventuality. ...

22. This is certainly the case when there is only one court with constitutional jurisdiction and/or there are limited number of judges and when disqualification may actually result in denial of justice.

23. In fact, it is not that difficult to envisage circumstances where such a problem may arise. Challenges to taxation measures, for example, could have implications for the tax liability of every individual judge. Such a situation arose in the Irish case of *O'Byrne v Minister for Finance*, an action by the widow of a judge who sought a finding that the deduction of income tax from the salary of judges amounted to an unconstitutional reduction in judicial remuneration. In the High Court, Dixon J referred to an earlier finding of the United States Supreme Court that '*jurisdiction could not be declined or renounced because of the individual relation of the members of the court to the question, the plaintiff being entitled by law to invoke the jurisdiction and there being no other tribunal to which under the law recourse could be had in a matter of the kind*.'

24. Similar situation may arise if the constitutionality of legal norms regulating constitutional court proceedings, requirements for office holders of the constitutional court, grounds for resignation or disciplinary proceedings is challenged before the Constitutional Court. In such cases, constitutional judges are not precluded from hearing the case.

25. However, if there are grounds to believe that a judge considering the constitutionality of the Vetting Law would fail the requirements established by this very law and thus appears to be unfit for the office, not only the judge has a right but, in certain circumstances, may be under the obligation to resign, for instance, if the judge concerned foresees his/her failure to satisfy the background assessment due to inappropriate contacts with the members of the organized crime. However, since there is a presumption that judges of the court are acting in good faith, the judge should be allowed to evaluate constitutionality of the requirements established by law.

26. From a political point of view, the absence of a legislative regulation in the Vetting Law of a possible conflict of interests requiring the disqualification of all the constitutional judges could be interpreted as recognition of the constitutional necessity of preserving the functionality of the judicial review of legislation. ... The Constitutional Court could also take into account the criteria used in the [*amicus curiae* opinion on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania, adopted at the 80th plenary session of the Venice Commission in October 2009 (CDL-AD(2009)044)], i.e. the margin of legal interpretation of the judge concerned in his/her function of judicial review of legislation: a large margin, or a leeway in deciding the case may justify the disqualification, whereas in case the constitutionality/unconstitutionality issue is rather clear and the judicial adjudication does not involve any value judgment by the judge, then the effective functioning of the Constitutional Court as a democratic institution should prevail.

...

61. Concerning the issue of conflict of interest and the possible disqualification of constitutional judges, the Venice Commission underlines that all the constitutional judges, according to the Constitution and the Vetting Law, will be the subject of the

Vetting Law which provides for the re-evaluation of every judge in Albania including the judges of the Constitutional Court. Therefore, the possible conflict of interest may affect the position, not only of one or some constitutional judges, but of all the constitutional judges sitting at the Constitutional Court. Consequently, the disqualification of the constitutional judges because of the existence of a conflict of interest would result in the total exclusion of the possibility of judicial review of the Vetting Law in view of its conformity to the Constitution. This would undermine the guarantees ensured by a functioning judicial review of legislation. This situation could be considered by the Constitutional Court as an 'extraordinary circumstance' which may require departure from the principle of disqualification in order to prevent denial of justice.

..."

D. The relevant opinions of the Venice Commission concerning Armenia

53. The relevant part of the First opinion on the draft amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, endorsed by the Venice Commission at its 104th Plenary Session (23-24 October 2015, CDL-AD(2015)037; hereinafter "the 2015 Opinion")[16] reads as follows:

"144. The chapter on the Courts and the Supreme Judicial Council includes Articles on the Administration of Justice, the Courts, the Status of a Judge, the Constitutional Court, the Cassation Court and The Supreme Judicial Council.

145. Article 162 on 'The Courts' lists the courts of the Republic of Armenia and mentions among them the Constitutional Court. However, in view of the competence of the Constitutional Court to 'resolve constitutional disputes arising between constitutional bodies with respect to their powers' (Article 167 paragraph 1.3), the Constitutional Court should be kept separated from the other Courts: the Constitutional Court cannot be a party of these disputes as a component part of the judiciary.

146. The Venice Commission is of the opinion, as already mentioned in the Opinion on the Draft concept paper that having a section / a chapter in the Constitution dedicated to the Constitutional Court would further clarify the specific nature of the Constitutional Court.

...

161. The Constitutional Court shall consist of nine members: three 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. They shall be elected by the National Assembly, by decision made by the majority of the

[16] This opinion was sent to the Armenian authorities as a preliminary opinion and made public on 30 July 2015. It was then endorsed by the Venice Commission at its 104th Plenary Session (23-24 October 2015).

total number of votes of the parliamentarians[17] (Article 166 paragraphs 1 and 2). This system provides the necessary democratic legitimacy for the Constitutional Court.

...

165. Paragraph 5 which states that 'Judges of the Constitutional Court shall serve in office for 12 years until reaching the age of 70 and may not be re-elected to the office of a Constitutional Court judge' is in line with European practice.

166. The Constitutional Court chairperson and deputy chairperson shall be elected by the Court from its own members (paragraph 5) which is a good safeguard for the independence of the Court. The chairperson and deputy chairperson are elected for a six-year term and cannot be re-elected."

54. The relevant part of the Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, on the amendments to the Judicial Code and some other laws, adopted by the Venice Commission at its 120th Plenary Session (11-12 October 2019, CDL-AD(2019)024; hereinafter "the 2019 Opinion") reads as follows:

"57. One of the amendments contained in the Package stands apart: this is an amendment to the Law on the Constitutional Court (CC) which introduces the possibility for a certain category of CC judges (members – i.e. those justices who obtained their mandates under the Constitution before its revision in 2015 for life, until retirement) to resign before the end of the mandate with several advantages, if they so wish. The authorities were straightforward as to what their intentions are: they want to offer certain judges whom they associate with the 'old regime' a 'dignified exit', as an alternative to more radical modalities which were considered earlier this year. The authorities defended this proposal by reference to a revolutionary context, which necessitates the renewal of the composition of the CC appointed largely under the previous regime, and by the public distrust in the current composition of the CC.

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

59. The Armenian authorities plan an exceptional early retirement scheme. They invoke the implementation of the Constitution as revised in 2015 in a post-revolutionary context and consider that the shift from the life-time tenure of constitutional justices (provided by the Constitution before the 2015 revision) to fixed-term mandate (provided by the current version of the Constitution) should be applied immediately.

60. At the outset, the Venice Commission stresses that all justices of the CC should enjoy the same status, irrespective of whether they were appointed before or after the

[17] The requirement of a qualified majority of at least three-fifths of the total number of votes of the parliamentarians for the election of Constitutional Court judges has subsequently been introduced and highly welcomed by the Venice Commission in its Second opinion on the draft amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16) of the Republic of Armenia, endorsed by the Venice Commission at its 104th Plenary Session (23-24 October 2015, CDL-AD(2015)038).

2015 revision of the Constitution. As to the early retirement scheme of judges appointed before the 2015 revision, the Venice Commission has previously criticised early retirement schemes when they were mandatory or when they affected a large number of judges. However, this criticism cannot be mounted where the resignation depends on a voluntary decision of the CC justices concerned. As a matter of principle, where the early retirement scheme remains truly voluntary, i.e. excludes any undue (political or personal) pressure on the judges concerned, or when it is not designed to influence the outcome of pending cases, there are no standards that would lead the Venice Commission to oppose such a scheme. However, the potential simultaneous retirement of several and even as many as seven out of nine justices might hamper the effective functioning of the Court. The Venice Commission therefore recommends that the Armenian authorities revise the proposed scheme so that this concern is alleviated."

55. The relevant part of the Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, adopted by the Venice Commission on 19 June 2020 by a written procedure (CDL-AD(2020)16; hereinafter "the 2020 Opinion"), reads as follows:

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

...

1. Applicable international standards and previous opinions

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

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

'Furthermore, although the applicant remained in office as judge and president of a civil division of the new Kúria, he was removed from the office of President of the Supreme Court three and a half years before the end of the fixed term applicable under the legislation in force at the time of his election. This can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges,

which – according to the Court's case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence ...'

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

...

2. The proposed amendments to transitional Article 213

a. Concerning the judges of the Constitutional Court

32. The process of constitutional development in Armenia during the last 25 years shows a continued struggle for the improvement of democratic standards and the promotion of the rule of law. This process was accompanied by regular recommendations from the Venice Commission and it was not free from political conflicts. In this process, the concern for the independence of the sitting judges was very pronounced.

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

b. Concerning the Chairperson of the Constitutional Court

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

55. The Venice Commission recalls that there are basically two systems in Europe for the election of presidents, vice presidents and presidents of chambers or panels. In some states, such as Germany or Austria, the president and the vice-president are elected by the organs competent to elect the other judges (Government, Parliament). On the other hand, quite a number of systems, if not the majority, provide for an election of presidents by the judges of that court. Above all and inevitably, this is the case at the ECtHR and the Court of Justice of the European Union. For the present analysis, the standards of the latter group are relevant. Here the shorter terms for court presidents are acceptable, and they may even contribute to more collegiality than hierarchy among the judges. In Bosnia and Herzegovina for instance, the President of the Constitutional Court which has been established under strong international

influence, is elected by secret ballot by a rotation of the judges of the court selected by the legislative authorities of the Entities, for three years (Article 84 of the Rules of the Constitutional Court of Bosnia and Herzegovina), which is even shorter than is the case in Armenia. In the Armenian case, the Chairperson of the Court under the current rules would remain in the chair for 17 years, longer than the term foreseen for judges under the new Constitution. This risks leading to a predominant role of the Chairperson and is not conducive to collegiality among the judges.

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

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

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

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

B. <u>Second question</u>: ***In terms of best European standards would it be deemed acceptable defining the scope and relatively short deadline for the Court's ex-ante***

constitutional review to the extent of compliance of the amendments with non-amendable articles of the Constitution?

...

65. In its 2010 Report on Constitutional Amendment, the Venice Commission distinguished substantive judicial review of constitutional amendments and purely procedural/formal review in order to check and ensure that the amendments have been adopted following the prescribed constitutional procedures. As for the procedural review, the Commission has taken the position that all constitutional systems should allow for democratic and judicial control to ensure that constitutional amendments have been adopted according to the prescribed constitutional procedures. This is an issue which may suitably tried before a court and such a formal control by courts does not interfere with the sovereign rights of the constituent power, but rather serves to protect democracy.

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

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

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

69. However, if a constitution such as the Constitution of Armenia provides for such *ex ante* review, this rule obviously has to be respected. Limiting the scope of such review to a control of conformity with unamendable provisions of the Constitution is in line with the European standards, unless this limitation contradicts the text of the Constitution. The scope of the judicial review then depends on the definition of unamendable provisions by the Constitution itself. The 'unamendability' under the Constitution should be interpreted narrowly. According to Article 203 of the Constitution, only Articles 1-3 and 203 are unamendable, which on the face of it appears like a rather limited scope for judicial review of constitutional amendments. Taking into account the statement by the representatives of the Constitutional Court during the meetings that the scope of review of the constitutional amendments by the Constitutional Court may cover the entire Constitution, the Commission considers that an expansive interpretation by the Constitutional Court of its own review power

would be inappropriate. It would be problematic if the Constitutional Court invalidated constitutional amendments based on vague principles loosely connected with or based on a broad interpretation of the unamendable provisions in the Constitution.

...

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

...

82. The Commission regrets that a proposal for constitutional amendments was introduced in the Armenian Parliament on the day of the adoption by the Venice Commission of this Opinion, which proposal is not in line with the recommendations in this Opinion."

E. Other material

56. The relevant part of the Nations in Transit – Armenia Country Report 2021, by Freedom House, a United States non-governmental organisation, reads as follows:

"Against serious headwinds, the government made some progress on reform efforts in 2020, largely before the war. Judicial reform has been a top priority, and in 2020, the legislature resolved a crisis of legitimacy that had beleaguered the country's Constitutional Court, which was widely seen as captured by the HHK [the former governing Republican Party]. In June, the National Assembly approved a package of amendments that instituted a universal 12-year limit for all Constitutional Court judges, leading to the retirement and replacement of three of the court's nine sitting members. The amendments were a step back from more extreme reform proposals. In 2019, the government had come under domestic and international criticism for attempting to pressure the court's chair and HHK affiliate, Hrayr Tovmasyan, to resign. In 2020, Tovmasyan retained a seat on the court but not his chairmanship and was facing criminal charges for abuse of office. The courts remain among the weakest and least trusted of Armenia's institutions, and serious judicial reform at all levels is critical to future democratic progress."

COMPLAINTS

57. The applicants complained under Article 6 § 1 of the Convention that they had not had access to a tribunal in order to defend their rights in relation to the termination of their terms of office as judges of the Constitutional Court (the first three applicants) or President of that court (the fourth applicant). The applicants further complained under Article 8 of the Convention, taken alone and in conjunction with Articles 14 and 18, that the termination of their terms of office was arbitrary. Lastly, they complained under Article 1 of Protocol No. 1 of the loss of their future income due to the premature termination of their terms of office.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. The parties' submissions

58. The Government acknowledged that the test established by the Court in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 62, ECHR 2007-II) – hereafter "the *Eskelinen* test" – applied to the case at hand. They maintained that the two cumulative conditions of that test had been met, rendering Article 6 inapplicable. First, the present applicants' terms of office had not been ended on one of the grounds listed in Article 164 § 9 of the Constitution (see paragraph 33 above), which provided for judicial protection in certain employment disputes involving judges of the Constitutional Court. When the term of office of a judge of that court was ended on any other grounds, as in the present case, no access to a court was provided for under national law (see Article 164 § 8 of the Constitution, cited in paragraph 33 above). What is more, the applicants' terms of office had been ended by means of constitutional amendments, which were not subject to judicial review after their entry into force. In this regard, they referred to a decision of the Constitutional Court of 11 February 2021. Having regard to the above, the Government asserted that the applicants had been "expressly excluded" from access to a court for the purposes of the *Eskelinen* test.

59. Turning to the second condition of the *Eskelinen* test, the Government submitted that the exclusion of access to a court was justified on objective grounds in the State's interest, as the constitutional amendments of 2020 had been adopted to overcome the discrepancy between different tenures of the Constitutional Court judges and to implement the logic of the constitutional amendments of 2015. They added that the constitutional amendments of 2020 had been in accordance with the

rule of law. Lastly, the Government pointed out that there was a "special bond of trust and loyalty" between the judges of the Constitutional Court and the State.

60. Therefore, this part of the application was, in their view, incompatible *ratione materiae* with the provisions of the Convention.

61. The applicants disagreed. While acknowledging that they had not had access to a court under national law in order to defend their rights in relation to the termination of their terms of office, the applicants maintained that such access had not been "expressly excluded" for the purposes of the *Eskelinen* test.

62. In any event, the applicants asserted that the exclusion of access to a court had not been justified on any objective grounds in the State's interest. First of all, they challenged the necessity of the reform of the Constitutional Court. They argued that it had been driven by the authorities' determination to replace the sitting judges with newly elected ones of their choice and to influence the outcome of pending cases, including the case of former President Kocharyan (see paragraph 10 above). They referred, in particular, to the events described in paragraphs 10-12 above, public statements made by some high-ranking officials (see, for example, the public statement of the Prime Minister reproduced in paragraph 14 above), the fact that they had not been allowed to remain in office until the appointment of their successors, and the fact that they had not been allowed to continue to deal with such cases as they already had under consideration. The applicants also maintained that the reform was contrary to the rule of law because, notwithstanding the fact that, pursuant to domestic law, the National Assembly should have sought a prior constitutional review of the constitutional amendments at issue, it had decided not to do so (see paragraph 26 above). In the applicants' opinion, under domestic law, the constitutional amendments at issue should have also been subject to judicial review after their entry into force. In their opinion, this was contrary to the Armenian Constitution and Article 6 § 1 of the Convention. Furthermore, the national authorities had entirely disregarded a recommendation of the Venice Commission that a transitional period be set up in order to avoid any abrupt and immediate change in the composition of the Constitutional Court encroaching on the independence of that institution (see the 2020 Opinion, cited in paragraph 55 above, §§ 53, 59 and 82). Lastly, the applicants referred to the Court's case-law according to which the Court must be particularly attentive to the protection of members of the judiciary against measures that could threaten their judicial independence and autonomy.

63. Therefore, the applicants concluded that Article 6 was applicable under its civil limb.

B. The Court's assessment

1. General principles deriving from the Court's case-law

64. The relevant principles concerning the applicability of the "civil" limb of Article 6 § 1 in the light of the *Eskelinen* test (see *Vilho Eskelinen and Others*, cited above, § 62) in situations involving the termination of a judge's term of office were recently restated in *Grzęda v. Poland* [GC], no. 43572/18, §§ 257-63, 15 March 2022 (case-law references omitted):

> "257. For Article 6 § 1 in its 'civil' limb to be applicable, there must be a dispute over a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play ... Lastly, the right must be a 'civil' right ...
>
> 258. Article 6 § 1 does not guarantee any particular content for civil 'rights and obligations' in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned ...
>
> 259. In order to decide whether the 'right' in question has a basis in domestic law, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts ... The Court reiterates that it is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention ... Thus, where the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction of access to a court, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law and by finding, contrary to their view, that there was arguably a right recognised by domestic law ...
>
> 260. With regard to the 'civil' nature of the right, the Court has noted that an employment relationship between a public-law entity, including the State, and an employee may be based, according to the domestic provisions in force, on the labour-law provisions governing relations between private individuals or on a body of specific rules governing the civil service. There are also mixed systems, combining the rules of labour law applicable in the private sector with certain specific rules applicable to the civil service ...
>
> 261. As regards public servants employed in the civil service, according to the criteria established in *Vilho Eskelinen and Others* ... the respondent State cannot rely before the Court on the applicant's status as a civil servant to exclude the protection embodied in Article 6 unless two conditions are fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In order for the exclusion to be justified, it is not enough for the State to

establish that the civil servant in question participates in the exercise of public power or that there exists a special bond of trust and loyalty between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent State to demonstrate, first, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified ...

262. Whilst the Court stated in *Vilho Eskelinen and Others* ... that its reasoning in that case was limited to the situation of civil servants, it has extended the application of the criteria established in that judgment to various disputes regarding judges. It has noted that although the judiciary is not part of the ordinary civil service, it is considered part of typical public service ...

263. The Court has applied the criteria set out in *Vilho Eskelinen and Others* ... to all types of disputes concerning judges, including those relating to recruitment/appointment ..., career/promotion ..., transfer ..., suspension ..., disciplinary proceedings ..., as well as dismissal ..., reduction in salary following conviction for a serious disciplinary offence ..., removal from post (for example, President of the Supreme Court, President of the Court of Appeal or Vice-president of the Regional Court) while remaining a judge ... or judges being prevented from exercising their judicial functions after legislative reform ..."

2. Application of the above principles to the present case

(a) Existence of a right

65. In determining whether there was a legal basis for the right asserted by the applicants, the Court needs to ascertain only whether the applicants' arguments were sufficiently tenable, not whether they would necessarily have been successful had they been given access to a court (see *Grzęda,* cited above, § 268, with further references to the Court's case-law). Although there is, in principle, no right under the Convention to hold a public post related to the administration of justice, such a right may exist at the domestic level (ibid., § 270).

66. In the present case, it is not disputed that under the Constitution of Armenia the applicants had been entitled, until the entry into force on 26 June 2020 of the impugned constitutional amendments prematurely terminating their terms of office, to remain judges of the Constitutional Court (the first three applicants) or President of that court (the fourth applicant) if none of the exceptional grounds set out in Article 164 §§ 8 and 9 of the Constitution (see paragraph 33 above) materialised. It can therefore be said that until that time there had existed in the domestic legal order provisions affording the three applicants irremovability from their judicial office until their retirement, despite the 2015 major constitutional reform that established new rules for appointment of constitutional judges,

including a fixed-term non-renewable term of office. As regards the fourth applicant, his entitlement to remain in office derived from the Constitution and the National Assembly's decision of 21 March 2018 to appoint him with life tenure – until his retirement in 2035 – as President of the Constitutional Court. The National Assembly's subsequent request to the Constitutional Court to terminate his term of office was to no avail (see paragraphs 4-7, 16 and 29-32 above).

67. In the light of the above, the Court considers that the three applicants could arguably claim to have under Armenian law an entitlement to serve their full terms in judicial office and that the fourth applicant enjoyed a similar entitlement in respect of his office as President of the Constitutional Court. The fact that, as the Government argued, the applicants' terms of office were terminated by means of constitutional amendments which were not subject to a judicial review after their entry into force (see paragraph 58 above), could not remove, retrospectively, the arguability of their rights under the previous applicable rules. Consequently, in the present case there was a genuine and serious dispute over a "right" which the applicants could claim on arguable grounds under domestic law (see *Grzęda*, cited above, §§ 285-86, and *Baka v. Hungary* [GC], no. 20261/12, §§ 110-11, 23 June 2016).

(b) "Civil" nature of the right – the *Eskelinen* test

68. The next issue to be determined is whether the "right" asserted by the applicants was "civil" within the meaning of Article 6 § 1, bearing in mind that the concept of "civil rights and obligations" cannot be interpreted solely by reference to the respondent State's domestic law; it is an autonomous concept deriving from the Convention (see, among many other examples, *Grzęda*, cited above, § 287).

(i) The first condition of the Eskelinen *test – whether access to a court was excluded under domestic law*

69. Whilst the applicants acknowledged that they had not had access to a court under national law in order to defend their rights in relation to the termination of their terms of office, they argued, contrary to the Government, that their access to a court was not "expressly excluded" (see paragraph 61 above).

70. However, the Court has recently developed the first condition of the *Eskelinen* test. It has held that the first condition can be regarded as fulfilled where, even without an express provision to this effect, it has been clearly shown that domestic law excludes access to a court for the type of dispute concerned (see *Grzęda*, cited above, §§ 291-92). First of all, this condition is satisfied where domestic law contains an explicit exclusion of access to a court. Secondly, the same condition may also be satisfied where the

exclusion in question is of an implicit nature, in particular where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation, as in the present case.

(ii) The second condition of the Eskelinen *test – whether the exclusion of access to a court was justified*

71. The Court would emphasise that where judges are concerned, the second criterion of the *Eskelinen* test referring to the "special bond of trust and loyalty" must be read in the light of the guarantees for the independence of the judiciary. In that regard, the Court has held that those two notions, namely the special bond of trust and loyalty required from civil servants and the independence of the judiciary, cannot be easily reconciled. While the employment relationship between a civil servant and the State can traditionally be defined as one based on trust and loyalty to the executive branch in so far as employees of the State are required to implement government policies, the same does not hold true for the members of the judiciary, who play a different and more independent role because of their duty to provide checks on government wrongdoing and abuse of power. Their functional role for the State must therefore be understood in the light of the specific guarantees essential for judicial independence. When referring, therefore, to the special trust and loyalty that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can deliver decisions *a fortiori* on the basis of the requirements of law and justice, without fear or favour. It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching their individual independence and impartiality (see *Grzęda*, cited above, § 264; *Bilgen v. Turkey*, no. 1571/07, § 79, 9 March 2021; and *Gumenyuk and Others v. Ukraine*, no. 11423/19, § 66, 22 July 2021).

72. Having said that, the Court considers it relevant that the present case, unlike the previous similar cases before the Court which involved judges of ordinary courts or supreme courts (see, *inter alia*, *Bilgen*, cited above, § 79; *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, § 120, 29 June 2021; and *Gumenyuk and Others*, cited above, § 66), concerns constitutional court judges. The Court has often underlined the special role and status of constitutional courts (see *Süßmann v. Germany*, 16 September 1996, § 37, *Reports* 1996-IV, and, as a more recent example, *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, § 193, 7 May 2021). Indeed, notwithstanding the fact that the Constitution of Armenia deals with the Constitutional Court and ordinary courts in the same Chapter (contrary to a recommendation of

the Venice Commission to keep the Constitutional Court separated from the other courts in the 2015 Opinion cited in paragraph 53 above, § 145), it is clear that the Constitutional Court has a particular status in the Armenian legal order. Notably, the Supreme Judicial Council, set up to ensure the independence of the judges and courts, has no authority over the Constitutional Court (see paragraph 42 above). The independence of its judges is ensured by the Constitutional Court itself, which also has exclusive jurisdiction in disciplinary matters, the lifting of immunity of its judges and the termination of their powers (see Article 164 of the Constitution cited in paragraph 33 above). Accordingly, the intervention of the Supreme Judicial Council was inconceivable in the present case (see, in this regard, the European Charter on the Statute for Judges, cited in paragraph 46 above, §§ 1.3 and 1.4 calling for the intervention of, and the right of appeal to, such an authority).

73. Another peculiarity of the present case is that the applicants' terms of office as judges (the first three applicants) or President of the Constitutional Court (the fourth applicant) were ended through a constitutional amendment, as part of a broader constitutional reform. For that reason, the intervention of any ordinary courts was likewise inconceivable (contrast *Ovcharenko and Kolos v. Ukraine*, nos. 27276/15 and 33692/15, 12 January 2023, concerning the dismissal of individual Constitutional Court judges for a disciplinary offence which was open to challenge in the courts).

74. In this connection, the Court has already held that the Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary and that the power of a government to undertake reforms of the judiciary cannot be called into question, on condition that any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies (see *Gumenyuk and Others*, § 43, and *Grzęda*, § 323, both cited above). On the material before it, in the present case the Court finds no convincing evidence to support the applicants' argument that the impugned amendment was aimed at, or resulted in, undermining the legitimacy or independence of the Constitutional Court and that it targeted them specifically (contrast *Baka*, cited above, § 117, and *Grzęda*, cited above, § 299). In that respect, it would further refer to the successive opinions of the Venice Commission which comprehensively dealt with various aspects of that reform (see paragraphs 53-55 above).

75. To begin with, both the 2015 and the 2020 Opinion confirmed that the introduction of a non-renewable twelve-year term of office for judges was "fully in line" with European practice. A new procedure pursuant to which the President of the Constitutional Court was no longer to be appointed by the National Assembly for life – as the fourth applicant had been – but was to be elected by the judges for a non-renewable term of six

years, was deemed to be a "good safeguard for the independence of the Court". In the 2019 Opinion it was emphasised that all the judges of the Constitutional Court should enjoy the same status, regardless of whether they had been appointed before or after the 2015 reform. Nevertheless, concerns were expressed as regards a potential retirement of seven – out of nine – justices appointed like the present applicants before 9 April 2018. This, in the Venice Commission's view, might have affected the effective functioning of that court (see paragraph 60 of the 2019 Opinion cited in paragraph 54 above).

76. In that context, the Court also attaches importance to the Venice Commission's overall assessment of the process of constitutional developments in Armenia, which has lasted for twenty-five years. In particular, in the 2020 Opinion it is stated, in unambiguous terms, that that process demonstrated a "continued struggle for the improvement of democratic standards and the promotion of the rule of law" and a pronounced "concern for the independence of the sitting judges" (see paragraph 32 of the 2020 Opinion cited in paragraph 55 above).

77. Furthermore, the Court sees no reason to disagree with the Venice Commission's finding that the impugned constitutional amendments had had a legitimate aim, since their objective was to ensure that the high democratic standards concerning the independence of the Constitutional Court, which had entered into force in 2018, produced their effects as soon as possible, and that all judges of the Constitutional Court would enjoy the same status irrespective of the time of their appointment (see the Opinion cited in paragraph 55 above, §§ 45-48, and contrast *Grzęda*, cited above, § 348). In that regard, the Court also notes that, had the June 2020 amendment not taken effect, the full implementation of the 2015 reform would have been excessively protracted as it would have taken the authorities up to the next twenty years to achieve all the objectives sought. For instance, the fourth applicant would have remained President of the Constitutional Court until 2035.

78. The authorities had therefore to make difficult choices when weighing in the balance, on the one hand, the important interest of the State in concluding a long-lasting and complex constitutional reform involving a complete overhaul of the judges' appointment procedure and introduction of a non-renewable fixed term of office and, on the other, the principle of irremovability of judges *vis-à-vis* the applicants' individual right to continue their terms of office until retirement and to preserve their status (see, *mutatis mutandis*, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 239-40, 1 December 2020, in which the Court held that the principle of irremovability of judges during their term of office was not absolute and in certain circumstances – for instance where the fundamental principles of the Convention came into conflict – was not to be upheld at all costs). The authorities' concern for achieving the right balance was reflected

in their questions to the Venice Commission in the context of the June 2020 amendment (see paragraph 55 above). While the Commission accepted that there were good arguments in favour of the proposed approach, it considered that the renewal of the composition of the Constitutional Court should be gradual and accompanied by a certain transitional period to be determined by the authorities. A transitional period was also suggested in respect of terminating the term of office of the President of that court, namely the fourth applicant. The authorities, for their part, chose not to apply any such period in respect of the applicants. In the Court's view this decision, although in defiance of the Venice Commission's suggestions, cannot *per se* undermine the legitimacy of the aims pursued by the constitutional reform as eventually effected by the June 2020 amendment.

79. As regards the applicants' argument that the impugned constitutional amendment terminating their terms of office should have been subject to a prior constitutional review, the Court would reiterate that Article 6 does not guarantee a right of access to a court with power to invalidate or override a law enacted by the legislature (see, for instance, *Posti and Rahko v. Finland*, no. 27824/95, § 52, ECHR 2002-VII, and *Sakskoburggotski and Chrobok v. Bulgaria*, nos. 38948/10 and 8954/17, § 272, 7 September 2021). Nor can a right for an individual to trigger a decision of a parliamentary body to seek a constitutional review of a law be derived from that provision.

In any event, the Court observes that at the relevant time seven out of nine sitting judges of the Constitutional Court (that is, the majority of the judges) were adversely affected by the constitutional amendment in question.

80. It must be emphasised, in this connection, that pursuant to the Court's case-law any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009). The impartiality of judges (*nemo iudex in causa sua*) is indeed one of the cardinal principles of a State governed by the rule of law. Indeed, the Court has found a violation of Article 6 § 1 of the Convention in cases where some members of the bench were disqualified by law from sitting in the case (see *Guðmundur Andri Ástráðsson*, cited above, § 217, and the authorities cited therein).

81. It is true that the Bangalore Principles of Judicial Conduct provide that extraordinary circumstances may require a departure from that principle (see paragraphs 50-51 above). The Court also takes note of the Venice Commission's views as to what could be possible examples of circumstances where constitutional judges, despite being the subject of an adverse finding under legislation, should not be precluded from hearing a case (see paragraph 52 above). However, the doctrine of necessity in the Bangalore Principles of Judicial Conduct enables a judge who is otherwise disqualified to hear and decide a case only where failure to do so would result in injustice, in particular where an adjournment or mistrial will cause

severe hardship, such cases being "rare and special" (see the document cited in paragraph 51 above, § 100). For its part, the Venice Commission, referring to that doctrine, has opined that this applies only if the disqualification might result in denial of justice, noting that a large margin in deciding a case may justify the disqualification, whereas in situations where the constitutionality or unconstitutionality issue is rather clear and judicial adjudication does not involve any value judgment by the judge concerned the effective functioning of a constitutional court as a democratic institution shall prevail (see paragraph 52 above).

82. This is not one of such cases. Nor does it, in the Court's view, involve the circumstances of "necessity" as referred to above. Notably, the impugned constitutional amendment had adverse consequences solely for the applicants and their own interests. The termination of their term of office did not have any effects for the future mandates of the Constitutional Court justices as the twelve-year non-renewable term of office had already been introduced by the 2015 constitutional amendment, in force since 9 April 2018, that is to say, some two years before the events that gave rise to the present application.

83. Therefore, even assuming that the doctrine of necessity is compatible with the guarantees of Article 6 of the Convention (see *Harabin v. Slovakia*, no. 58688/11, § 139, 20 November 2012, in which that question was also left open), the Court considers that respect for the principle of impartiality (*nemo iudex in causa sua*) could not be reconciled with ensuring to the applicants the right of access to the Constitutional Court in practice.

84. Having regard to the very particular circumstances of the present case, notably the facts that the applicants were judges of the Constitutional Court, the highest court with a special status in the Armenian judiciary, and that their terms of office were terminated through a constitutional amendment, which was not directed against them specifically (contrast *Baka*, cited above, § 117; *Grzęda*, cited above, § 299; and *Ovcharenko and Kolos*, cited above, § 113), the Court considers that the exclusion of access to a court was objectively justified for the purposes of the second condition of the *Eskelinen* test.

(c) Conclusion

85. Since both conditions of the *Eskelinen* test are fulfilled, Article 6 § 1 of the Convention is not applicable. Accordingly, this part of the application must be dismissed as incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 35 §§ 3 (a) and 4.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLES 14 AND 18 OF THE CONVENTION

A. Article 8 of the Convention

1. The parties' submissions

86. The Government maintained that the applicants had not demonstrated that the termination of their terms of office had seriously affected their private life. The Prime Minister and many other Armenian officials had repeatedly stated that the impugned constitutional amendments had been aimed at putting in place the new model of the Constitutional Court and that they could not be interpreted as personally targeting any judge of that court. Consequently, this complaint was incompatible *ratione materiae*.

87. The applicants submitted lengthy observations concerning the merits of this complaint and, in particular, the lawfulness of the impugned measure. As to the Government's objection that this complaint was incompatible *ratione materiae*, the applicants claimed that Article 8 should be applicable whenever a judge was dismissed. They also asserted that statements made by Armenian officials criticising the Constitutional Court and the judiciary in general (see paragraphs 10 and 12-14 above) had tarnished their reputation, in itself rendering Article 8 applicable. In this context, the fourth applicant also referred to the criminal proceedings instituted against him (see paragraph 19 above).

2. The Court's assessment

88. The relevant case-law concerning this matter was restated in *Denisov v. Ukraine* [GC], no. 76639/11, §§ 92-117, 25 September 2018. In particular, the Court held that employment-related disputes were not *per se* excluded from the scope of "private life" within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include: (i) the applicant's "inner circle"; (ii) the applicant's opportunity to establish and develop relationships with others; and (iii) the applicant's social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measure (reason-based approach) or – in certain cases – because of the consequences for private life (consequence-based approach). If the latter approach is at stake, the threshold of severity with respect to all the above-mentioned aspects assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his

or her case. The applicant must present evidence substantiating the consequences of the impugned measure. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree. The Court has established criteria for assessing the severity or seriousness of alleged violations in different regulatory contexts. An applicant's suffering is to be assessed by comparing his or her life before and after the measure in question. The Court has also considered that in determining the seriousness of the consequences in employment-related cases, it is appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. This analysis would have to cover both the material and the non-material impact of the alleged measure. However, it remains for the applicant to define and substantiate the nature and extent of his or her suffering, which should have a causal connection with the impugned measure.

89. In the present case, there is no indication that any "private life" issue was the reason for the termination of the applicants' terms of office. Therefore, the Court considers it appropriate to follow a consequence-based approach and to examine whether the impugned measures had sufficiently serious negative consequences for the applicants' private life, in particular as regards their "inner circle", their opportunities to establish and develop relationships with others and their reputation.

90. Firstly, the applicants did not claim, let alone substantiate, that the termination of their terms of office had resulted in a significant reduction in their income. The Court notes, in this regard, that the fourth applicant, while no longer the President of the Constitutional Court, remains in office as a judge of that court (see paragraph 27 above) and the other applicants are entitled to a full pension, regardless of their age (see paragraph 36 above). Furthermore, there are no other indications that the "inner circle" of the applicants' private life was affected by the termination of their terms of office (see, for example, *J.B. and Others v. Hungary* (dec.), no. 45434/12, § 132, 27 November 2018, and contrast *Xhoxhaj v. Albania*, no. 15227/19, § 363, 9 February 2021).

91. Turning to the question of establishing and maintaining relationships with others, the dismissal of the fourth applicant from his position as President of the court did not result in his removal from his profession. He has remained at the same court as a judge. It follows that, even if his opportunities to establish and maintain relationships, including those of a professional nature, might have been affected, there are no factual grounds for concluding that such effects were substantial (see *Denisov*, cited above, § 123). As regards the other applicants, it suffices to note that the applicants did not put forward any allegations in this respect (see, for example, *J.B. and Others*, cited above, § 133, and *Camelia Bogdan v. Romania*, no. 36889/18, § 89, 20 October 2020). The Court has held that dismissal from a

job does not automatically generate an issue in the sphere of private life. It is an intrinsic feature of the consequence-based approach under Article 8 that convincing evidence showing that the threshold of severity is attained has to be submitted by the applicant (see *Denisov*, cited above, §§ 113-14).

92. It remains to be examined whether or not the impugned measure encroached upon the applicants' reputation in such a way that it seriously affected the esteem in which they were held by others, with the result that it had a serious impact on their interaction with society.

93. The applicants complained that statements made by various Armenian officials criticising the Constitutional Court had undermined their reputation. The Court notes that there is no evidence of any individualised negative remarks made by the domestic authorities as regards the present applicants' professional performance or their personality, moral values or character (see *J.B. and Others*, cited above, § 136; contrast *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013, in which the applicant was criticised and received a disciplinary sanction for his performance as a judge). It further observes that the applicants did not substantiate how criticisms towards the judges appointed before the "Velvet Revolution" in general had affected the core of their individual reputation or had caused them serious prejudice in their professional or social environment. Lastly, they did not put forward any other specific personal circumstances indicating that the termination of their terms of office had had a serious impact on their private life. The Court has noted the fourth applicant's argument that the criminal proceedings instituted against him had undermined his reputation (see paragraph 87 above), but considers it irrelevant because they concerned charges of abuse of office during his time as Minister of Justice and not as a judge of the Constitutional Court.

94. Accordingly, gauging the applicants' subjective perceptions against the objective background and assessing the material and non-material impact of the impugned measure on the basis of the evidence presented before the Court, it has to be concluded that the negative effects which the termination of the applicants' terms of office had on their private life did not cross the threshold of seriousness for Article 8 of the Convention to be engaged.

95. It follows that this Article is not applicable and that the applicants' complaint must be dismissed as incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 35 §§ 3 (a) and 4.

B. Articles 14 and 18 of the Convention

96. The Court has consistently held that Article 14 complements the other substantive provisions of the Convention and the Protocols thereto. Article 14 has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby.

Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see *Molla Sali v. Greece* [GC], no. 20452/14, § 123, 19 December 2018).

97. In a similar way to Article 14, Article 18 of the Convention has no independent existence; it can only be applied in conjunction with an Article of the Convention or the Protocols thereto which sets out or qualifies the rights and freedoms that the High Contracting Parties have undertaken to secure to those under their jurisdiction. This rule derives both from its wording, which complements that of clauses such as the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11, which permit restrictions to those rights and freedoms, and from its place in the Convention at the end of Section I, which contains the Articles that define and qualify those rights and freedoms (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 287, 28 November 2017, with further references; *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 164, 15 November 2018; *Selahatti Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 421, 22 December 2020; and *Juszczyszyn v. Poland*, no. 35599/20, § 306, 6 October 2022).

98. Consequently, since the complaint under Article 8 is incompatible *ratione materiae* (see paragraph 95 above), the complaints under Articles 14 and 18 taken in conjunction with that Article are also incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be dismissed pursuant to Article 35 § 4 (see *J.B. and Others*, cited above, § 111).

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

99. The Government argued that in accordance with the Court's case-law, future income could not be considered to constitute "possessions" within the meaning of Article 1 of Protocol No. 1, thus rendering that Article inapplicable.

100. The applicants maintained their complaint.

101. In accordance with the Court's well-established case-law, Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not create a right to acquire property. Future income thus cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable (see *Denisov*, cited above, § 137; and *Juszczyszyn*, cited above, § 344). Accordingly, this complaint is incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto and must be rejected pursuant to Article 35 §§ 3 (a) and 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 7 December 2023.

Renata Degener Registrar	Gabriele Kucsko-Stadlmayer President

Appendix

List of applicants:

Application no. 25240/20

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	Alvina GYULUMYAN	1956	Armenian	Yerevan
2.	Hrant NAZARYAN	1959	Armenian	Yerevan
3.	Feliks TOKHYAN	1956	Armenian	Yerevan
4.	Hrayr TOVMASYAN	1970	Armenian	Yerevan