Конституционное ПРАВОСУДИЕ

Вестник

Конференции

органов конституционного контроля

стран новой демократии

Выпуск 1(67) 2015

ИЗДАЕТСЯ ЦЕНТРОМ КОНСТИТУЦИОННОГО ПРАВА РЕСПУБЛИКИ АРМЕНИЯ
ЕРЕВАН · 2015

ISSN 18290125

Содержание

Contents

Г. Арутюнян
Председатель Конституционного Суда
Республики Армения,
доктор юридических наук, профессор

Современные вызовы обеспечения верховенства конституции

Уважаемые участники Международной конференции!

Дамы и господа!

Я и раньше имел возможность констатировать тот неоспоримый исторический факт, что Казахстан сумел **избежать конституционного романтизма и идеализма** и избрал путь последовательной конституционализации общественных отношений **с преодолением конфликта между Конституцией и правовой системой в целом, между историческими и сегодняшними реалиями**.

Прошедшие годы конституционного развития для Казахстана стали годами стабильно-эффективного эволюционного развития и убедительно показали, что казахстанский конституционализм, основанный на прочной основе **социокультурной системы ценностей казахского народа**, в полной мере соответствовал исторически сложившимся реалиям в обществе и стал прочной основой развития страны.

В чем заключается основная черта сегодняшнего казахстанского конституционализма.

Это, в первую очередь, ставка на человеческий капитал, что должно стать основой обеспечения конкурентоспособности Казахстана. Одной из таких предпосылок стала реализация идеи о высокообразованной нации как необходимом условии процветания страны. Сегодня уже тысячи выпускни-

ков программы “Болашак” работают на благо страны. Отношение к детям, молодежи, учебе, к развитию науки и культуры, к разрешению социальных проблем, созданию конкурентоспособной и высокотехнологической экономики, усилия и важнейшие инициативы Казахстана в области глобальных интеграционных процессов сформировали уникальную атмосферу созидания и творческого взлета.

Казахстан качественно отличает прежде всего то обстоятельство, что на основе глубоко продуманных и дальновидных инициатив Президента страны были созданы более прочные экзогенные и эндогенные предпосылки для целенаправленного, стабильного и динамичного развития, социальной модернизации общества, превращения основополагающих конституционных ценностей и принципов в живую реальность.

Несомненно, что во всех постсоветских государствах, занимающих громадные территории евразийского пространства, за последние двадцать лет накопилось достаточно опыта для подведения определенных итогов конституционно-правового развития. Для наших стран первоочередной задачей общественной трансформации было и остается установление прочного конституционализма и гарантирование устойчивости конституционно-правовых развитий с учетом ценностно-системных особенностей каждой страны.

Однако еще не везде удается обеспечить стабильный переход к новому конституционному правопорядку. Я не имею в виду только имевшие место политические катаклизмы и социально-экономическую нестабильность. Вопрос относится к государственно-правовой системе в целом.

Ни один конституционалист не сомневается в том, что во всех своих проявлениях основополагающие конституционные ценности составляют системную целостность и делают Конституцию живущей реальностью только тогда, когда на этой ценностно-системной основе базируется также вся правовая система, правоприменительная практика, весь комплекс взаимоотношений человек-государство, когда эти ценности для каждого конкретного индивидуума в гарантированной форме становятся движущей силой бытия.

Лишь призвание Конституции к жизни, утверждение ценностей конституционно-нормативного характера в качестве правил реальной жизни позволят гарантировать верховенство права и системную стабильность. **Для всех стран**, без исключения, **сверхзадачей была и остается гармонизация реалий общественной жизни конституционным решениям, основанным на обеспечении верховенства права.**

Любая деформация конституционализма - это искажение основополагающих конституционных ценностей и принципов в обществе, отход от всеобщего согласия в отношении системы социокультурных ценностей общежития.

С этой точки зрения, сегодня неоспоримым является также тот факт, что не только для стран новой демократии, но и для многих стран старой демократии конституционный дефицит стал тревожной социальной болезнью. Характерными чертами сегодняшней социальной реальности в мире стали:

- низкий уровень конституционной культуры и конституционной морали;
- деформированное восприятие конституционной аксиологии;
- антагонизм между Конституцией и социальной действительностью.

Всеобщая декларация прав человека констатирует, что "признание достоинства, присущего всем членам человеческой семьи, и равных и неотъемлемых их прав является основой свободы, справедливости и всеобщего мира." Подчеркивается также, что "все люди рождаются свободными и равными в своем достоинстве и правах." **Человеческое достоинство является высшей, самодостаточной ценностью** и представляет соразмерные требования к проявлению соответствующего общественного гуманизма и морали. Гуманная правовая система предполагает не только наличие необходимых субъективных моральных качеств у отдельных членов общества. Главное - это наличие адекватной общественной среды для их проявления, формирование таких предпосылок, когда каждый человек, власть и общество в целом будут иметь одинаковые аксиологические ориентиры, базирующиеся на принципе верховенства права.

Конституция в реальной жизни должна стать воплощением общественного согласия именно вокруг тех фундаментальных ценностей, которые в условиях конкретной социальной реальности являются моральной основой и сущностью социального поведения человека, а также основной характеристикой общественного поведения властей /по определению Канта, являются внутренним моральным законом их существования/.

История конституционного развития сама по себе является историей самопознания социума, **историей осознанного бытия, осмысленного сосуществования во времени.**

Имеют тысячелетнюю историю и принадлежат отцу Афинской демократии - Солону те крылатые слова, что Конституции должны излагаться с учетом того, для какого народа и для какого времени они предназначены: народ со своим ценностным восприятием, время - с учетом уровня его осмысления.

Какова в этом плане реальная ситуация конституционной действительности в наших странах. Анализ показывает, что особенно в странах новой демократии имеет место подчеркнутый кризис конституционализма, низкий уровень конституционной и политической этики, деформированность процессов конституционного развития.

Характерными чертами социальной действительности стали:

- высокий уровень коррупции;
- общая апатия и недовольство;
- низкий уровень политической и избирательной культуры;
- недостаточный уровень открытости властей;
- отсутствие системности и гарантированности в обеспечении и защите прав человека;
- недоверие со стороны граждан к судебной системе и др.

Мы и наши коллеги очень часто в различных международных форумах, особенно посвященных торжественным мероприятиям, с гордостью представляем достижения в об-

ласти обеспечения верховенства Конституции в наших странах. Я хочу сегодня нарушить эту добрую традицию и на примере добросовестного врача, который считает, что гарантом правильного лечения является разумная диагностика, представить Вам не очень приятную сторону конституционной действительности в наших странах.

Для анализа я хочу обратиться к расчетам Международной программы юстиции по определению индекса верховенства права. Многие мои коллеги знают, что в моих научных работах я предлагал свою методику для такого анализа. Однако сравнительный анализ конкретных результатов показывает, что не только для количественной, но и для качественной оценки ситуации можно также взять за основу общедоступные результаты оценки индекса верховенства права на 2015 год.

Постараюсь представить Вам только некоторые обобщенные результаты.

Во-первых, исследование охватывает 102 страны;

Второе, для выявления общей картины оценки уровня верховенства права учитывались 535 показателей.

Третье, все эти показатели были сгруппированы по следующим восьми группам:

- уровень разделения властей;
- уровень коррупции;
- защита основных прав;
- открытость управления;
- уровень безопасности;
- правоприменительная практика;
- уголовное правосудие;
- гражданское правосудие.

Представим краткий сравнительный анализ некоторых из приведенных параметров.

На основе проведенного исследования в этом году обобщающий индекс верховенства права имел самый высокий уровень в скандинавских странах - 85-87%.

В США данный индекс составляет 73 процента и страна находится на 19-ом месте. Казахстан находится на 65-ом месте среди 102 стран, а индекс верховенства права оценивается на 50 процентов. В Российской Федерации эти пока-

затели, соответственно, составляют - 75-ое место и 47%, в Кыргызстане - 74-ое место и 47%, в Узбекистане - 81-ое место и 46%.

Необходимо иметь в виду, что 50 процентов и ниже считаются неудовлетворительными результатами.

Какая картина сложилась в отношении коррупции? Из 102 стран в 57 странах ситуация оценивается неудовлетворительно, то есть уровень коррупции превышает 50 процентов.

Самая благополучная ситуация в Дании, Норвегии, Швеции, Финляндии и Сингапуре, где уровень коррупции составляет 4-10 процентов.

В США уровень коррупции составляет 25 процентов, в Казахстане - 55% /58-ое место/, в Российской Федерации - 56% /60-ое место/, в Узбекистане - 65% /81-ое место/, в Кыргызстане - 70% /90-ое место/.

На основе каких индикаторов выявляется такая картина? Она определяется с учетом 68 параметров, которые сгруппированы в четыре обобщенные группы относительно того, насколько должностные лица используют свои функции для получения личной выгоды:

- в исполнительной власти;
- в судебной системе;
- в армии и полиции;
- в законодательной власти.

Представленная картина свидетельствует о социальном метастазе в мировом масштабе, что свидетельствует также о деформированности конституционных ценностей в реальной жизни.

Приведем также некоторые другие обобщения.

Например, по уровню защиты прав человека самая благополучная ситуация в Финляндии, Дании, Норвегии, Швеции, а также в Австрии - 87-91 процент.

США среди 102 стран занимает 26-ое место, а уровень защиты прав человека оценивается на 73 процента. Казахстан, соответственно - 84-ое место, 46%; Российская Федерация - 80-ое место, 47%; Кыргызстан - 70-ое место, 51%; Узбекистан - 91-ое место, 41%.

Какова картина в области уголовной юстиции? Самая

благополучная ситуация в Финляндии, Дании, Сингапуре, Норвегии и Австрии - 82-85%.

США находится на 23-м месте - 64%;

Казахстан занимает 58-ое место - 42%;

Российская Федерация - 74-ое место, 36%;

Кыргызстан - 84-ое место, 34%,

Узбекистан - 49-ое место, 44%.

Не только приведенные цифры, но и результаты некоторых других исследований убедительно показывают, что современные вызовы реального обеспечения верховенства Конституции и установления подлинного конституционализма в наших странах обусловлены именно низким уровнем реализации принципа верховенства права, что в свою очередь определяет характер неотложных конституционно-правовых и институциональных решений, чтобы:

1) принцип верховенства права стал основой социального поведения каждого человека;
2) политическое поведение политических институтов также базировалось на принципе верховенства прав;
3) принцип верховенства права определял характер и содержание общественного поведения властей.

Только таким путем можно в реальности обеспечить верховенство конституции и установить подлинный конституционализм в наших странах.

Позвольте еще раз поздравить народ Казахстана с Днем Конституции и пожелать новых и новых успехов в преодолении современных вызовов общественной трансформации.

Благодарю за внимание.

DRAFT COMPILATION OF VENICE COMMISSION OPINIONS, REPORTS AND STUDIES ON CONSTITUTIONAL JUSTICE

1 Introduction

The *"Compilation of Venice Commission opinions, reports and studies on constitutional justice"* brings together extracts of opinions, reports and studies on constitutional justice adopted by the Venice Commission with the aim of providing an overview of its doctrine on this topic.

The Compilation should serve as a source of reference for drafters of constitutions and legislation on constitutional courts, for researchers as well as for Venice Commission members, who are requested to prepare comments and opinions on such texts.

It is structured in a thematic manner to facilitate the access to topics dealt with by the Venice Commission over the years.

The Compilation was first published in 2006 under the title "*Vademecum* on Constitutional Justice" (CDL-JU(2006)029). It is updated on a regular basis with extracts of newly adopted opinions, reports and studies by the Venice Commission.

Each *opinion* adopted by the Venice Commission that is referred to in this Compilation relates to a specific country. Any recommendation made should therefore be seen in the specific constitutional context of the country for which the opinion was adopted.

Each *report* and *study* adopted by the Venice Commission that is referred to in this Compilation seeks to present a general standard for all member and observer states of the Venice Commission. Recommendations made in its reports and studies will therefore be of a more general nature. Nevertheless, it should be noted that they may focus on specialised constitutional review systems and certain recommendations made are applicable only to those systems.

The brief extracts of all *opinions, reports* and *studies* found in this Compilation must be seen in the specific context of the wider text in which they were adopted by the Venice Commission. Each citation therefore has a reference that leads to its exact position (paragraph number, page number for older opinions) in the text in which it was adopted, which enables the reader to place it within its specific context.

The Venice Commission's position may change or develop over time as new opinions, reports and studies are adopted and on the basis of experience accumulated. In order to gain a full understanding of the Commission's position on a particular issue, it is useful to read the complete chapter in the Compilation on the relevant theme you are interested in.

If you believe that a citation is missing, is superfluous or is filed under a wrong heading, please inform the Secretariat of the Venice Commission at the following e-mail address: venice@coe.int.

2 Type of constitutional court

"(…) This chapter sets up a permanent constitutional court. This fully corresponds to the prevailing practice in the new democracies to protect the constitutionality of the new legal order by a specific, permanent and independent judicial body and can only be welcomed. (…)"

CDL-INF (1997)002 Opinion on the Constitution of Ukraine, p.10.

"The separation between Constitutional Court and the ordinary judiciary probably represents the most widespread model in Europe. On the other hand, a court exercising a power of constitutional review might be considered a part of the judiciary even though it may have a power of review over other courts. However, this seems to be primarily a dogmatic question of classification rather than having a practical effect provided that the Constitutional Court receives the fundamental guarantees for its independence and respect for its authority which should be afforded to the highest judicial organ. In this respect it is to be welcomed that the revised draft speaks about judges rather than 'members'

of the Constitutional Court as was the case in the previous draft. This could be further underlined by adding a clause to Article 88.2 referring to the 'judicial function' of the Constitutional Court."

CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, paragraph14.

"However, the establishment of a Constitutional Court is a catalyst in a society in transition to democracy, the protection of human rights and the rule of law. In addition to protecting the individual rights set out in the Constitution, the Court ensures that the state powers remain within the limits of the Constitution and settles conflicts between them. The legitimacy of a Constitutional Court and its ability to fulfil these functions depend to a good part on its balanced and transparent composition, which allows the various stakeholders and the public in general to trust in the impartiality of the Court. The establishment of a Constitutional Court, which was widely seen as serving the interests of one side only would devalue the judgements by that Court, even if they were sound in substance."

CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 48.

"The Venice Commission wishes to recall the importance of the role of constitutional courts in putting into practice democracy, the rule of law and the protection of human rights. The state constitutional courts are the institutions which can, by interpreting the wording of the constitution prevent the arbitrariness of the authorities by giving the best possible interpretation of the considered constitutional norm at the given time."

CDL-AD(2010)044 Opinion on the Constitutional Situation in Ukraine, paragraph 52.

"Since World War II, constitutional courts were typically established in Europe in the course of a transformation to democracy;

first in Germany and Italy, then in Spain and Portugal and finally in Central and Eastern Europe. The purpose of these courts was to overcome the legacy of the previous regimes and to protect human rights violated by these regimes. Instead of the principle of the unity of power, which excluded any control over Parliament, the system of the separation of powers was introduced. In place of the supreme role of Parliament (being under complete control of the communist party), the new system was based on the principle of checks and balances between different state organs. As a consequence, even Parliament has to respect the supremacy of the Constitution and it can be controlled by other organs, especially by the Constitutional Court. Constitutional justice is a key component of checks and balances in a constitutional democracy. Its importance is further enhanced where the ruling coalition can rely on a large majority and is able to appoint to practically all state institutions officials favourable to its political views."

> *CDL-AD(2013)014* Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraph 76.

"On a more formal level, having a section / a chapter in the Constitution dedicated to the Constitutional Court would clarify the specific nature of the Constitutional Court, and in particular that it is not a court of appeal (…)."

> *CDL-AD(2014)027* Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia, paragraph 75.

3 Sources

"The legal basis of the activity of each constitutional court is usually formed by three kinds of legal regulations having different positions in the hierarchy of norms of the domestic legal order of the state. They play different roles in the process of the complete and coherent legal regulation of the constitutional body.

On the 'top' of this triad is usually the constitution establishing the jurisdiction of the court, the parties entitled to appeal as well as the constitutional principles on which the activity of the constitutional court is to be based. Laws on constitutional courts usually transform these constitutional principles into more concrete norms. Finally, the rules of procedure constitute the next and last level of this triad. They fill in practical details of the everyday judicial activity. The Rules of Procedure should be drafted by the constitutional court itself."

CDL-AD(2004)023 Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, paragraphs 5-6.

"By enacting rules of procedure, constitutional courts should enjoy a certain autonomy with regard to their own procedures within the limits of the constitution and the law on the Constitutional Court and have a possibility to modify them in the light of experience without the intervention of the legislator..."

CDL-AD(2004)023 Opinion on the Rules of Procedure of the constitutional court of Azerbaijan, paragraph 9.

"(...) the Constitution should expressly provide for the adoption of a normative act on the internal organisation and functioning of the Court, while establishing a distinction between issues to be regulated by law and issues reserved to the regulations of the Court."

CDL-AD(2005)015 Opinion on the amendments to the Constitution of Ukraine, paragraph 47.

"In the most elaborate decision on the matter, the German Federal Constitutional Court stated that the grounds of justification aimed at *"exonerate(ing) the intentional killing of persons who sought nothing more than to cross the intra-German border unarmed and without endangering interests generally recognised as enjoying legal protection,"* collided with fundamental human rights and, as such, had to be rejected. The Constitutional Court recognised that this rejection derogated from the principle

of legality, yet it held such derogation justifiable on the basis of *"the requirements of absolute justice."*"

> *CDL-AD(2011)041 Amicus Curiae* Brief on the case Santiago Bryson de la Barra et Al (on crimes against humanity) for the Constitutional Court of Peru, paragraph 46.

"In most European countries constitutional provisions on constitutional courts are further developed in separate laws or constitutional laws. On the contrary, in the Republic there is no special law on the CC. Article 113 of the Constitution stipulates that "the working methods and the procedures before the Constitutional Court are regulated by an act of the Court." The only legal act regulating activities and powers of the CC is currently the Rules of Procedure of 1992. The Venice Commission finds this situation quite irregular. In the opinion of the Commission, it would be useful to adopt a separate law on the CC that would regulate issues relating to the status of its judges, basic conditions for the institution of proceedings before the CC, legal effects of the CC's judgments, etc. Reference to such law should be inserted in the Constitution, which means that a new paragraph should be added to Article 113 correspondingly. It is understood, however, that the adoption of any such law must not affect the power of the CC to regulate its own working methods and to develop the rules of procedure in the Rules of Court."

> *CDL-AD(2014)026* Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, paragraph 80.

"In the current Constitution, the scope of organic laws is vast. The essential feature of organic laws is to be adopted by an absolute majority of members present of each Chamber (Article 76). (...) The explicit mention, in the list of fields of regulation of organic laws, of the organization and functioning of the Constitutional Court, is welcome. (...)"

CDL-AD(2014)010 Opinion on the Draft Law on the Review of the Constitution of Romania, paragraph 135.

"(...) To ensure the necessary flexibility for the Court, the powers of the Secretary General should be determined in the rules of procedure rather than in the law."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 27.

4 Composition of the court

4.1 Balanced composition

"Society is necessarily pluralist - a field for the expression of various trends, be they philosophical, ethical, social, political, religious or legal. Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions.

Constitutional jurisdictions may, by some of their decisions, appear to curb the actions of a particular authority within a State. The Constitution will often confer to the constitutional court the power to deliver its opinion on issues concerning the separation of powers or the relationships between the organs of the State. Even though constitutional courts largely ensure the regulation of these relationships, it may well be appropriate to ensure in their composition a balanced consideration of each of these authorities or organs.

The pursuit of these balances is limited by the indispensable maintenance of the independence and impartiality of constitutional court judges. Collegiality, i.e. the fact that the members adjudicate as a group, whether or not they deliver separate opin-

ions, constitutes a fundamental safeguard in this respect. Even though the rules on the composition of constitutional courts may reflect the coexistence of different currents within a given nation, the guarantees of independence and the high sense of responsibility attaching to the important function of constitutional judge effectively ensure that constitutional judges will act in such a way as to dismiss all grounds of suspicion that they may in fact represent particular interests or not act impartially."

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 21.

"From the outset, it should be underlined that the introduction of ethnic, linguistic or other criteria for the composition of constitutional courts is fundamentally different from the inclusion of such elements in the process of decision making. By likening the composition of the court to the composition of society, such criteria for a pluralistic composition can be an important factor in attributing the court with the necessary legitimacy for striking down legislation adopted by parliament as the representative of the sovereign people."

"While the composition of a constitutional court may and should reflect inter alia ethnic, geographic or linguistic aspects of the composition of society, once appointed, each judge is member of the court as a collegiate body with an equal vote, acting independently in a personal capacity and not as a representative of a particular group (...)"

CDL-AD(2005)039 Opinion on proposed voting rules for the constitutional court of Bosnia and Herzegovina, paragraphs 3, 13.

4.1.1 Fair representation of ethnic minorities

"Another general issue of importance is the protection of minorities by the Constitutional Court. The Constitutional Law of the Republic of Croatia of 4 December 1991 on human rights and fundamental freedoms and on national or ethnic minorities establishes that minorities that represent more than 8 % of the popula-

tion must be represented in high jurisdictions. The latter should include, in principle, the Constitutional Court."

CDL-INF(2001)002 Opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, paragraph 11.

"Article 6 of the *Draft Proceedings* introduces the terms of *'an official language'* and the *'language of the proceedings'* to replace the term *'state language'* used by the presently valid law. This is to be welcomed as it enlarges the respect by state authorities of linguistic rights, allowing constitutional proceedings to take place in another language than the state language."

CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraph 39.

4.1.2 Judges' qualifications

"The qualities required of a constitutional judge reflect in most cases the necessity of legal qualifications in order to ensure a competent court composition. On the other hand, an excessive legal specialisation could undermine the diversity of the composition of some constitutional jurisdictions. Nevertheless, a distinction should be made between the desire for a certain diversity and the creation of quotas in order to allow certain professions or minority groups to be represented on the court. The search for a balanced representation in order to redress inequality or discrimination may usually be formal in federal or multilingual societies, since these are particularly conscious of the issue of their different constituent groups' equal representation and access to the law."

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 10.

"The great proportion of Constitutional Court members recruited from the judiciary can serve well the independence of

the Court. Nevertheless, this proportion is unusually high compared to other European constitutional courts. This might influence the interpretative methods used by the court as constitutional and statutory interpretation may differ in some aspects. It would be advisable to increase the representation of law professors."

CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paragraph 18.

"The draft amended Article 5.5 would require 12 years of practice as a judge or a prosecutor for candidates as judges of the Constitutional Court. The intention of this provision is probably to increase the level of qualification of constitutional court judges and their impartiality.

However, as a consequence, probably only career judges or prosecutors would be able to become constitutional court judges. Again, this would go contrary to the logic of a specialised constitutional court, the composition of which is different from that of the ordinary judiciary."

CDL-AD(2006)006 Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the constitutional court of Romania, paragraphs 16-17.

"The requirement of 15 years of professional experience risks completely excluding younger judges from the Constitutional Court. This may be detrimental, especially in a new democracy."

CDL-AD(2008)015 Opinion on the Draft Constitution of Ukraine, paragraph 80.

"It ought to be stressed, that the selection of judges must be based on objective criteria pre-established by law or by the competent authorities and should primarily focus on merits. Not only legal professionals such as judges, lawyers or professors can become members of the Court, but also persons from the fields of economics or political sciences are eligible for Court member-

ship. This can be found in other constitutional courts and similar organs."

> *CDL-AD(2011)040* Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 21.

"The selection of the candidates for the positions of judges is done through contest and this is to be welcomed as corresponding to the best practices in the international and European legal standards on the judiciary."

> *CDL-AD(2013)014* Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraph 27.

4.1.3 Age

"The minimum age requirement is used by several countries in order to guarantee professional and life experiences. The proposal elevates the minimum age requirement from forty to fifty years. This is by our knowledge the highest minimum age requirement in Europe, and it might be considered exaggerated. The amended Article 147 will increase the retirement age up to sixty-seven. If the aim is really to maximize the profit from the knowledge and experience gained during the membership of the Constitutional Court, the retirement age could be increased even more, for example to the quite common seventy years. With a view to the relatively long term of office (12 years), the relatively low maximum age requirement (67 years according the proposal), and the high minimum age requirement (fifty years), the circle of the possible candidates could be unreasonably restricted."

> *CDL-AD(2004)024* Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paragraph 25.

"The introduction of an age limit for the retirement of judges is in line with the practice of many European countries, for instance Albania, Armenia, Austria, Bosnia and Herzegovina, Croatia, Hungary, Ireland, Japan, Latvia, Norway, Portugal and Russia. This age limit has also been suggested by the Venice Commission in a previous Opinion 296/2004 on the draft constitutional amendments with regard to the Constitutional Court of Turkey (CDLAD(2004)024), in paragraph 25 *'…The amended Article 147 will increase the retirement age up to sixty-seven. If the aim is really to maximize the profit from the knowledge and experience gained during the membership of the Constitutional Court, the retirement age could be increased even more, for example to the quite common seventy years."*

CDL-AD(2007)036 Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, paragraph 14.

"While the Venice Commission considered a minimum age of 50 years exaggerated, the required age of 40 years appears to be reasonable from the viewpoint of life experience and maturity, without restricting the circle of possible candidates further than necessary."

CDL-AD(2009)042 Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, paragraph 11.

"Article 127 proposes to require newly appointed judges to be 30 years old as against the current 25 and to have five years rather than three years' experience. These provisions seem to be reasonable. It will also be provided in the Constitution that the selection of candidates to be judges is to be done on a competitive basis. This appears to be a desirable provision. It is however not clear what kind of experience is needed."

CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution

proposed by the Constitutional Assembly of Ukraine, paragraph 26.

"Given that upon their election, judges have to be between 35 and 65 years old (Article 8.3) and that the mandate lasts for 10 years (Article 9.1), the maximum age of a judge can be 75 years. Generally, 70 years is considered as the maximum age for a member of the Constitutional Court. To achieve this, the draft law could either define 60 years as the maximum age for becoming a judge or set a maximum age of 70 years, which terminates the judge's mandate before the 10 years. The latter alternative seems more practical."

CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraph 15.

4.2 Incompatibilities

"Constitutional judges are usually not allowed to hold another office concurrently. This general rule serves the purpose of protecting judges from influences potentially arising from their participation in activities in addition to those of the court. At times an incompatibility between the office of constitutional judge and another activity may not be apparent, even to the judge in question. Such conflicts of interests can be prevented from the outset by way of strict incompatibility provisions."

"One criticism of strict incompatibility requirements was that they tend to produce a court composition of retiring members of society (...)"

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), pp.15-16.

"The rules of incompatibility should be rather strict in order to withdraw the judge from any influence which might be exerted via his/her out-of-court activities;"

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p.21.

"Article 13 provides that the participation of a constitutional judge can be challenged for a specific proceeding under certain conditions (when he/she is a party in the proceeding, a legal representative of a party; blood relations / marriage to a party, decision of the case in other court etc.). These cases of incompatibility are not provided for in the Constitution, but they are welcomed, since they are an important guarantee of impartiality of the constitutional judge. Normally, a judge who deems to be incompatible recuses him/herself. Self-recusal could be explicitly provided for in Article 14. That Article could also state that, unless the judges is recused or has recused him or herself, his or her he participation in a court session cannot be refused."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 23.

Article 11.6 should be amended, as the judges of a constitutional court shall never provide "lawful representation in court or other law enforcement agencies" (even for the benefit of their close family members)."

CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraphs 17-18.

4.3 Methods of appointment / election

"The elective system appears to be aimed at ensuring a more democratic representation. However, this system is reliant on a political agreement, which may endanger the stability of the institution if the system does not provide safeguards in case of a vacant position."

CDL-STD (1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p.7.

"The shift from the system of exclusive direct appointment by the President to the mixed system providing elective or appointment powers to the three main branches of power has more democratic legitimacy while it is based on the successful experiences of the previous system."

CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paragraph 19.

"In countries with specialised Constitutional Courts, Parliament is often involved in the appointment of judges. This is done to ensure a balanced composition of the Court, which to the extent possible should reflect various tendencies in of society (see the Venice Commission's Report on the Composition of Constitutional Courts, Science and Technique of Democracy, no. 20). It is true that an appointment by the executive is more usual in countries with a common law background (e.g. Cyprus). Given that the Constitutional Court is to decide on a wide range of issues including very sensitive ones, its composition, especially the first one, has to be established in a way which results in the trust of society in the Court as a neutral arbiter."

CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 13.

"Under the Constitution in force constitutional judges are recruited through three different channels: the President of Ukraine, the *Verkhovna Rada* of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine. According to the draft the judges of the Constitutional Court would be appointed on the submission of the President of Ukraine by a two-thirds majority of the total membership of the *Verkhovna Rada*. In another case the Venice Commission welcomed the shift from the system of exclusive direct appointment of constitutional judges by the President to the mixed system providing for the election or appointment by the three main branches of power because this system has more democratic legitimacy. *A contrario*, abandoning this system and moving to a combination of nomination of candidates by the President and their election by parliament is not welcome, although the proposed solution as such is acceptable and known in other countries. Moreover, in the present situation in Ukraine the proposed system could easily lead to deadlocks and the

monopoly of presenting proposals gives an extremely strong role to the President."

> *CDL-AD(2009)024* Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, paragraph 97.

"System in which all judges of the Court are elected by parliament on the proposal of the President "does not secure a balanced composition of the Court." In particular, "if the President is coming from one of the majority parties, it is therefore likely that all judges of the Court will be favourable to the majority. An election of all judges of the Court by parliament would at least require a qualified majority." The Venice Commission has also pointed out that it would be preferable to leave the election of the President to the Court itself."

> *CDL-AD(2011)010* Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on Courts, the law on State's Prosecutor Office and the law on the Judicial Council of Montenegro, paragraph 27.

"The involvement of both the President and Parliament in the process without any clear criteria being established for appointment would seem to make politicisation of appointments inevitable despite the involvement of the judges and the opposition in the Council for the Selection of Judges. In the event that Parliament does not elect a candidate for the position of judge, the President is required to present a new candidate on the basis of a new competitive selection."

> *CDL-AD(2011)017* Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, paragraph 37.

"The Amendment deletes from Article 85 the provision empowering Parliament to elect the judges for permanent terms. Instead, the power of Parliament will be to determine the network,

establishment, reorganisation and abolition of the courts of general jurisdiction upon the motion of the President of Ukraine.

This amendment is a logical consequence of the change in Article 106(23), which provides that (the President) *"upon and in accordance with the motion of the High Council of Justice appoints the judges to their positions and dismisses them from their positions."* The Venice Commission welcomes the ceremonial position the President now holds in this respect.

These changes to Article 85 and Article 106 are in line with the principle of the separation of powers and affirm the balance and co-operation between the legislative and executive branches, with the aim of ensuring the independence of the judiciary. The powers of Parliament and the President in establishing the court structure and the appointment of judges by the head of state acting on a proposition of the HCJ are designed to limit political influence and partisan pressure on the judiciary.

(…)

Another issue concerns the organ authorised to appoint judges. The Venice Commission had pointed out that the *"appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded. Admittedly, in order to avoid the involvement of Parliament in the appointment of judges, it would be necessary to change Article 128 of the Constitution."* [1]

This suggestion has also been taken into account and thus the Amendments propose new regulations in Article 106 and Article 128 saying that *"appointment to the position of judge is done for unlimited term by the President of Ukraine upon and in accordance with a motion of the High Council of Justice."* The right to appointment is shared by the President (for five years) and Parliament (for an unlimited period of time) in the current Constitution. In the light of the new proposal - instead of Parliament - the decision will be made by the President who will appoint the judge on the basis of a binding proposal of the HCJ

[1] See Opinion on the Draft Law on the Judiciary and the draft Law on the Status of Judges of Ukraine, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), CDL-AD(2007)003, paragraph 29.

for a permanent period of time. With this provision, the President's role has become a ceremonial one, which is to be welcomed."

CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 11-13, 28-29.

"Article 6 puts into effect the new constitutional rules dealing with the selection and election of constitutional judges. The President of Montenegro and the "responsible working body of the Parliament" (together referred to as "the proposers") issue a public call for the selection of candidates. According to Article 153 of the Constitution they must be "reputable lawyers" who have turned at least 40 years of age and have 15 years of service in the legal profession. The list of candidates is published by the proposers on their websites and shall be available to the public at least for ten days. The candidates who meet the requirements for the selection will be interviewed by the proposers, who on the basis of the (written) evidence and the interviews prepare a reasoned proposal for the Parliament. The proposal must take into account "the proportional representation of minorities and other minority ethnic groups and gender-balanced representation." An individual candidate may apply to public calls for candidates by both proposers. In such a case, proposers have to co-ordinate their proposals.

The same person may be elected President or judge of the Constitutional Court only once. In the first voting in the Parliament, a Constitutional Court judge is elected by a two-thirds majority vote, and in the second voting by a three-fifths majority vote of all deputies. The President of the Constitutional Court is elected by the judges of the Constitutional Court from among their own number.

This mechanism guarantees good transparency and enhances public trust in the Constitutional Court but it could be further improved. The objective of the 2013 constitutional amend-

ments was to ensure a balanced composition of the Constitutional Court. Therefore it is recommended that the Law on the Constitutional Court explicitly regulate the composition of the "competent working body of the Parliament" such that the representatives of all political parties are represented therein.

It would be better to specify who are the "reputable lawyers" mentioned in Article 153 of the Constitution, for instance law professors, high ordinary and administrative magistrates, lawyers with a minimum of 15 years of profession.

Article 6 should also determine a deadline on how much time before a vacancy the public call for candidates should be published. Draft Article 10.3 provides that the Court has to inform the proposers of upcoming retirements six months in advance but there is no deadline for the proposers to act upon such information."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 12-16.

4.3.1 Qualified majority for election

"The changing of the composition of a Constitutional Court and the procedure for appointing judges to the Constitutional Court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the Constitutional Court and to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force. This is the reason why, for example, the German Law on the Constitutional Court (the *Bundesverfassungsgerichtsgesetz*) provides for a procedure of elec-ting the judges by a two-third majority in Parliament. This requirement is designed to ensure the agreement of the opposition party to any candidate for the position of a judge at the Constitutional Court. The German experience with this rule is very satisfactory. Much of the general respect which the German Constitutional Court enjoys is due to the broad-based appointment procedure for judges.

It would be advisable if the draft would provide for the inclusion of a broad political spectrum in the nominating procedure.

So far, neither the Constitution nor the Law on the Constitutional Court provide for a qualified majority for the appointment of the two judges elected by Parliament."

CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), paragraphs 18-19.

"Due to the fact that Parliament elects the judges with a simple majority, the procedure before the election has to be as transparent as possible in order to ensure a high professional level of the judges."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 19.

"A qualified majority should be required in all rounds of voting in the election of members of the Court."

CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 24.

"The three constitutional provisions under consideration all contain alternative proposals insofar as the manner of election is concerned, and specifically as regards the anti-deadlock mechanisms.

The Venice Commission has repeatedly stressed the importance of providing for anti-deadlock mechanisms in order to ensure the functioning of the state institutions.

Qualified majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary

function of the anti-deadlock mechanism is precisely that of making the original procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority.

The Venice Commission is aware of the difficulty of designing appropriate and effective anti-deadlock mechanisms, for which there is no single model. One option is to provide for different, decreasing majorities in subsequent rounds of voting, but this has the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Other, perhaps preferable, solutions include the use of proportional methods of voting, having recourse to the involvement of different institutional actors or establishing new relations between state institutions. Each state has to devise its own formula."

> *CDL-AD(2013)028* Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paragraphs 5-8.

"Under the present Constitution, the judges of the Constitutional Court are elected and dismissed by parliament on the proposal of the President of the Republic, without any qualified majority, for a renewable term. In this respect, the Venice Commission had previously stated that this manner of election seriously undermined the independence of the constitutional court in that it did not secure a balanced composition of the court, and was not in line with international standards. The Venice Commission had therefore recommended that, if constitutional judges were to be elected by parliament, their election should be made by a two-third majority with a mechanism against dead-

locks, and that the mandate of the constitutional judges should be non-renewable (CDL-AD(2007)047, §§ 122,123; CDL-AD(2012) 024, § 35). The Commission had also stated that while the "parliament-only" model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors (CDL-AD(2012)009, §8).

Draft Article 153 provides for appointment and dismissal of constitutional judges by parliament on the proposal of the President of Montenegro (two candidates) and of the relevant committee of parliament (five candidates) by a two-thirds majority. The qualified majority requirement is welcome, as it has been strongly recommended by the Venice Commission.

As an anti-deadlock mechanism, a second-round of voting is proposed with two options: either a) by the majority of all MPs or b) by a three-fifths majority. The Venice Commission finds that the second option is clearly preferable, as the first option would provide no incentive for the majority to reach a compromise with the minority and would therefore leave room for the election of five members all belonging to the ruling parties."

CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paragraphs 21-23.

4.3.2 Procedure

"The decision on a violation of the procedure of appointing a judge to the Constitutional Court (Article 14.7.7) should to be taken by the Court itself and not an ordinary court (without the participation of the judge concerned). In general, all grounds for termination of membership in Article 14.1 should be subject to at least a formal decision or declaration of the Constitutional Court itself."

CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia, paragraph 20.

"One of the main issues that needed to be addressed was the question of the judges' *probationary period*. The current Constitution of Ukraine provides two consecutive categories of judges, which works as follows: (1) judges are nominated for the first time for a limited period of time (i.e. 5 years) and these judges should then (2) be nominated for an unlimited period of time. The probationary period was criticised from the outset as going against the general principle of the irremovability of judges and the involvement of Parliament, as a political body, in the nomination of judges was also criticised. This is all the more serious when the procedure for the nomination for an unlimited period of time is not very clear. The criticism made indicates that this probationary period could restrict a judge's impartiality and independence, since s/he may issue rulings or verdicts in view of ensuring his/her future permanent nomination. The Venice Commission was very critical of the probationary period. In its Opinion on the draft Law on the Judiciary and the draft Law on the Status of Judges of Ukraine, the Venice Commission stated that:

> *"Probationary periods by definition raise difficulties for judicial independence but if they are to apply they should not be longer than is needed to assess a judge's suitability. Five years seems too long a period. The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office (CDL-AD(2005)038, §30)."*

The abolition of probationary periods is welcomed and in line with the Venice Commission's recommendations. The Amendment provides for only one category of judges appointed for an unlimited period of time."

CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 17-18.

"The procedure for appointment of new judges to the Constitutional Court (Article 134 of the Constitution) is composed of three steps:

a) The selection by the National Council of double the number of candidates to each vacant post
b) The choice by the President of the Republic of the actual judge out of these candidates
c) The taking up of judicial office by the judge through an oath given to the President of the Republic."

"The Venice Commission observes that in the Slovak Republic the mandate of the constitutional judges expires on the last day of their term (§12.1 of the Act of 1993). In order not to shorten their constitutional mandate, the new judges may thus take their oath only after the expiry of the term of their predecessors. On the other hand, as there appears not to be any possibility to extend such term (there is no default mechanism in the Slovak Constitution whereby constitutional judges would remain in office until the new appointments are made), should the oath not be taken immediately, a seat on the Constitutional Court would remain vacant, which could impair the functioning of the Court.

In order to avoid such situation, step c) of the appointment procedure - the taking of the oath, which is the moment on which the term of office of the appointed judges starts (§11.2 of the Act of 1993) - should therefore take place immediately after the expiry of the term of the previous judges."

CDL-AD(2014)015 Opinion on the Procedure for Appointing Judges to the Constitutional Court in Times of Presidential Transition in the Slovak Republic, paragraphs 17, 21-22.

4.4 Term of office

4.4.1 The judges' term of office and that of parliament

"A ruling party should not be in a position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms. One way of accomplishing this can be by long terms of office or office until the age of retirement. In the former case, reappointment would be possible either only once or indeed not at all; (...)"

> *CDL-STD(1997)020* The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p.21.

"Article 9 provides for a 10 year mandate for the judges of the Court (presumably implicitly also for the President and the Vice-President). In order to safeguard their independence, it would be preferable to exclude the re-election of the judges (at least - by means of transitory provisions - for the judges newly appointed in the future, after the adoption of this draft law, so the mandates of the judges currently in office could remain unaffected). This is no common standard, however. The mandate could be longer or the judges could be elected until retirement. The Constitution is silent on this issue, which thus could be regulated in the draft constitutional law."

> *CDL-AD(2014)017* Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraph 14.

4.4.2 Re-election of judges

"The option of re-election may undermine the independence of a judge. Nevertheless, the possibility of only one further appointment following a long term also appears favourable in order to allow for the continuing service of excellent judges (...)"

> *CDL-STD(1997)020* The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 14.

"It follows neither from the Constitution nor from the Draft Law whether one and the same person may be re-elected as

Constitutional Court judge. The lack of the prohibition of re-election may undermine the independence of a judge."

> *CDL-AD(2008)030* Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 20.

"In its Study on the Composition of Constitutional Courts, the Venice Commission favoured long, non-renewable terms or at most one possible re-election. The non-renewability even further increases the independence of a Constitutional Court Judge."

> *CDL-AD(2009)042* Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, paragraph 14.

"Regarding the duration of term of office of the Constitutional Court's judges, which is prolonged to twelve years, the Constitutional Court Act should preferably state that it is non-renewable, to further increase the independence of the Constitutional Court Judges."

> *CDL-AD(2011)016* Opinion on the new Constitution of Hungary, p. 95.

"In line with the Venice Commission's recommendations, draft Article 153 provides that the twelve-year mandate of constitutional judges be non-renewable."

> *CDL-AD(2013)028* Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paragraph 24.

4.4.3 Continuity of membership

"(…) Where no appointment has been made, default mechanisms should be put in place in the interest of the court's institutional stability. It is true that not every possible failure requires a special remedial provision and that it may normally be resolved by a constitutional system capable of assimilating conflicts of power. Nevertheless, default mechanisms already exist in certain elec-

tive (Germany, Portugal, Spain) or semi-elective (Bulgaria) appointment systems, in which the importance of the stability of the court is such that a possible political failure to appoint a constitutional judge would be prevented from affecting this stability. This contingency should be seen as an exception, so as to prevent it from becoming an institution."

CDL-STD (1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 15.

"Rules on appointment should foresee the possibility of inaction by the nominating authority and provide for an extension of the term of office of a judge until the appointment of his/her successor. In case of prolonged inaction by this authority, the quorum required to take decisions could be lowered."

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 22.

"Another issue of great importance (…) is the procedure of election of a new judge by the Parliament. There should be either a procedure allowing the incumbent judge to pursue his/her work until the formal nomination of his/her successor or a provision specifying that a procedure of nomination of a new judge could start some time before the expiration of the mandate of the incumbent one."

CDL-INF(2001)002 Opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, paragraph 17.

"In order to ensure and safeguard the stable functioning of the constitutional judiciary the Venice Commission recommends (…) (b) through legislative changes only: (…) Providing that a judge remains in office until his or her successor takes office;"

CDL-AD(2006)016 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted func-

tioning of the Constitutional Court of Ukraine, paragraph 21(b).

"In some countries, vacant seats at the Constitutional Court were not filled within time for political reasons. In one case this led to the Court being unable sit due to the lack of a quorum. In order to guarantee the uninterrupted functioning of the Constitutional Court the members of the court should continue in their functions until their successor is appointed."

"In order to guarantee the uninterrupted functioning of the Constitutional Court, judges should continue in their functions until their successor is appointed."

CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia, paragraphs 22, 31(2).

"The Venice Commission welcomes the introduction by Article 14.2 of the possibility for a judge to remain in office after the 15 year term or the 70 years age limit, until a new judge is appointed to replace him or her. This should ensure the continuity of the work of the Constitutional Court and is in line with the principle referred to in the Venice Commission's Opinion no. 377/2006 on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the constitutional court of Ukraine (CDL-AD(2006)016). In that Opinion, paragraph 13 states that:

"A safeguard may be established through a provision allowing a judge to continue to sit at the Court after his/her term of office has expired until the judge's successor takes office. Such a mechanism is currently in place for example in Bulgaria, Germany, Latvia, Lithuania, Portugal, and Spain. Such a system prevents that a stalemate during the appointment process blocks the activity of the Court. As this is the case in the countries mentioned, it seems that in Ukraine such a solution could be introduced by amendments to the law on the Court. This will however not be sufficient in case of retirement for health reasons or death of a judge."

CDL-AD(2007)036 Opinion on Draft Amendments to the Law

on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, paragraph 16.

"In the light of past problems encountered in other countries, it might be useful to introduce a provision stating that judges who are going to retire should stay in office until their successor takes office."

CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraph 12.

"It is most important to ensure that after the end of office of a judge, the position does not remain vacant for a prolonged period. In a few countries in Europe, Parliament was indeed very late with the appointment of new judges and in one case, the Court was in-operational for more than a year and a half because the number of remaining judges had fallen below the quorum.

Therefore, Article 10 should provide that judges remain in office until their successor takes up office."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 25.

"In addition, it is inevitable for the institutional stability of the Court and to avoid any institutional blockage, that continuity of the Membership of the Court is ensured. This can be done by extending the mandate of the judge to pursue his/her work until the formal nomination of his/her successor as is already provided for in Article 11.3 CCL. The combined approach of a time limit for the appointment and the extension of the mandate is to be welcomed."

CDL-AD(2009)042 Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, paragraph 15.

"To ensure continuity of membership at the Constitutional Court, a member whose term has expired should remain in office until his/her successor takes over."

CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 27.

"Article 15 allows a Constitutional Court judge who is not eligible for an old-age pension upon the expiry of his/her term of office to continue working for the Constitutional Court as an adviser. It is indeed advisable that financial security be provided for a Constitutional Court judge for a certain period of time following the expiry of his/her term of office, as this has a positive influence on judicial independence. There is a question, however, if the proposed solution is the most appropriate one without further regulation. This rule could result in a former Constitutional Court judge having a decisive influence on the decisions of the Constitutional Court also after the expiry of his/her term of office. In addition, it is questionable whether it is acceptable from the viewpoint of his/her former office to be in a subordinate position in relation to newly elected judges and even the Secretary General. In order to avoid such problems, it would be advisable to specifically regulate the position of former Constitutional Court judges in the rules of procedure of the Constitutional Court."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 24.

4.5 Termination/suspension of office

"Under Article 12 of the Transitional Provisions of the Fundamental Law and the ALSRJ, the upper-age limit would be merged with the retirement age to the effect that everyone reaching the retirement age would actually have to retire. Exceptions with a view to maintaining the upper-age limit of 70 years for "certain public law officers" (these appear to be the Chief Prosecutor, the President of the Court of Auditors and the judges of the Constitutional Court) were nevertheless provided."

CDL-AD(2012)001 Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, paragraph 102.

"Article 14 provides for a series of grounds for the recall of the judges. In each case, the judge is recalled by Parliament upon proposal by the President of the Republic. In particular the death of the judge is purely factual and need not result in a "recall" at all. The same applies regarding resignation and expiration of the term of office. Others require an assessment of the behaviour of the judge: whether he or she has engaged in activity incompatible with the office (Article 14.5), whether he or she has committed and act which discredits the honour and dignity (Article 14.7). In such cases a court - either the Constitutional or the Supreme Court - should decide on this issue before the judge is recalled by political organs (Parliament, the President of the Republic).

Article 14.11 foresees that a judge is recalled after being transferred to another job. However, a transfer of a judge to another position during his or her term as a reason for a recall has to be excluded. During his or her term of office a judge cannot be appointed to another post without a prior resignation, even with his or her agreement.

A violation of legislation relating to traditions, ceremonies and rites is also provided by Article 14.7 as a reason for a recall of a judge. It seems that this law in particular prohibits excessively large weddings and funerals, which ruin whole families. While such a law may make sense in Tajik society in general, it should not be a reason to dismiss a judge of the Constitutional Court."

CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraphs 22-24.

"Article 10 provides that judges can tender their resignation and that Parliament adopts a decision on the termination of office within 30 days as of the date of request. After that period, the term of office of Constitutional Court Judges shall expire. Parliament should have no role in the resignation of a judge. Judges cannot be forced to remain in office against their will. The mandate should automatically terminate after the 30 days period.

Pursuant to Article 10.3 of the draft Law, the Constitutional Court shall notify the proposer that nominated a judge for election six months before the expiry of the term of office of the judge or before the fulfilment of the conditions for receiving an old-age

pension. In accordance with Article 154 of the Constitution, the draft Law regulates the reasons and procedure for the termination of judicial office (Articles 10-12), however, it does not regulate what the consequences are if a nominated candidate is not elected even in a repeated vote. In order to avoid a situation in which judicial positions are vacant due to the fact that new judges have not been elected, the law should explicitly provide that upon the expiry of the term for which a Constitutional Court judge has been elected, s/he continues to perform his/her office until the new judge takes up office.

Article 11 should determine the kind of offences and their level of gravity which render the judge "unfit for duty;" what are the situations of "permanent incapacity for the function," and the context and the modalities through which the judge "publicly expressed his political beliefs." The principle of legality demands that the conditions for such a very serious sanction as the removal be specified in a very detailed and precise way, without giving too wide discretionary power to the Parliament to which the proposal of removal is submitted by the Constitutional Court.

Article 12 provides that during criminal proceedings against a constitutional judge, the judge can be suspended from the office; the decision must be taken with the majority of all judges, without the participation of the judge subject to the criminal proceeding. The suspension is not provided for in the Constitution, but it is a quite common remedy when the criminal proceeding refers to a very serious offense."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraphs 19-22.

4.5.1 Impeachment of a judge

"The Commission is aware that the specific grounds for dismissing the constitutional judges are listed in Article 126 of the Constitution. In this respect, it would strongly recommend introducing a specific requirement in Article 149 that a preliminary decision on this matter be entrusted to the Constitutional Court itself. Such a provision would strongly contribute to guaranteeing the independence of the judges. "

CDL-AD(2005)015 Opinion on the amendments to the Constitution of Ukraine, paragraph 46.

"In the context of Article 9 of the draft Law it is a vote on the suspension of a judge or the President of the Court in relation to a criminal investigation. The person under investigation should not vote (and also not participate in the deliberations) in his or her own case."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 24.

"A dismissal of a judge should always be subject to a fair procedure and involve a decision of the High Council of the Judiciary."

CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 19.

"This Article refers to the initiation of criminal cases against a judge. The decision to initiate such cases is made by the Prosecutor General who must obtain the consent of the Council of Judges. He or she submits a proposal to the Council of Judges, indicating the circumstances of the criminal case and the legal provision under which the judge is accused to initiate the proceedings.

In theory, it is possible for the prosecutors to instruct the case without the consent of the Council of Judges by simply not accusing the respective judge and leaving him or her - willingly - in the status of a suspect or witness. The status of a witness does not provide the person with the same guarantees as those of a suspect or accused. In addition - in particular - a witness has to tell the truth. A better protection of the independence of the judiciary would be if the Council of Judges were requested, at a very early stage of the investigation, to give its approval to proceed."

CDL-AD(2011)017 Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, paragraphs 66- 67.

"There are some proposals relating to the dismissal of judges. The criticism that the "breach of oath" is potentially very wide and that it would be better to be more specific is clearly justified (see under item B, above). The wording proposed is *"commitment of an offence, incompatible with further discharge of the duties of a judge"* - if this welcome wording is to be used, then each of the offences in question would have to be clearly defined in law.

There is a suggestion that dismissal for refusal to consent to transfer should apply only where the transfer is to another court specialised in the same body of law at the same level. There is some merit in the suggestion, although it is conceivable that there could be legitimate reasons why such a transfer could not be made, e.g. because over time, less commercial judges would be needed. There is also a proposal that a judge charged with a crime should have his/her appointment terminated. It seems that it would be reasonable that s/he be suspended from sitting pending trial, provided there is at least a *prima facie* case against the judge. However, there seems to be a problem in the translation (see CDL-REF(2013)020)."

CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 52-53.

4.6 Disciplinary measures

"Disciplinary rules for judges and rules for their dismissal should involve a binding vote by the court itself. Any rules for dismissal of judges and the president of the court should be very restrictive."

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 21.

"Article 16 makes complex provision for enabling other members of the Court to deal with allegations against one or more

members that may have disciplinary consequences. It is rather difficult to see how in all cases, particularly if more than one judge is affected, a proper decision could be given by other members of the Court. Instead of transferring the case to the small provisional committee (see above under Article 11), there may be a need for a wider body taking disciplinary measures."

> *CDL-AD(2009)014* Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 20.

"In order to balance the vagueness of the term of "unworthiness" in Section 16 ACC, allowing the exclusion of a member from the Court, procedural safeguards should be introduced, for example to provide for the decision on exclusion to be taken by at least a two-thirds majority or even the unanimity of other judges."

> *CDL-AD(2012)009* Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, paragraph 54(2).

"The existing provision whereby a judge cannot be arrested or detained without the consent of Parliament will be substituted by a provision that the consent of the HCJ is required. This represents a considerable improvement on the existing provision. However, no criteria on the basis of which consent is to be granted or refused are provided. The Venice Commission has frequently expressed the view that judges should only have functional immunity, i.e. immunity for acts done in the course of their judicial function, or such immunity as may be necessary to protect the independence of the judiciary against the threat from wrongful arrest:

> *"…judges should enjoy only functional immunity, that is to say immunity from prosecution only for lawful acts performed in carrying out their functions. In this regard, it seems obvious that passive corruption, traffic of influence, bribery, and similar offences cannot be considered as acts committed in the lawful exercise of judicial functions."*

Unless there are manifest indications of a false accusation levelled against a judge by the prosecutor, the acts of a judge

should not be removed from the scrutiny of an independent court (see below). Where there are reasonable grounds for believing that a judge is guilty of having committed a criminal offence s/he should not be entitled to immunity and the HCJ should lift immunity, notably also in cases of corruption. It is reasonable that the HCJ should have the function of deciding whether to lift a judge's immunity, but the criteria when to do this should be spelt out."

(…)

"In addition, a judge can only be transferred with his/her consent, unless there is a reorganisation (etc.) of the courts (see Article 85 above) made by Parliament (i.e. not a mere internal reorganisation in a court). This exception should be set out in this provision."

> *CDL-AD(2013)014* Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 19-20, 30.

4.7 President of the Court

"According to Articles 17 and 36, the distribution of cases between the two chambers is a prerogative of the Chairman. The Commission suggests, however, a provision on this issue which relates to objective criteria. This issue could be regulated in the rules of procedure."

> *CDL-AD(2002)005* Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, p. 8.

"The fact that the Constitutional Court's president is elected by a political actor and not the Court itself is a widely accepted phenomenon. Nevertheless, the election of the President by the Court itself is, of course, preferable from the perspective of the independence of the court."

> *CDL-AD(2008)029* Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraph 8.

"Article 4(3) already provides that the President of the Court has the right to participate in the parliamentary session on the adoption of the budget. This provision is to be welcomed."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 16.

"It however notes that, according to the present Constitution of Hungary, the judges have elected the president from their own ranks, a system which is seen, in general, as a stronger safeguard for the independence of the Constitutional Court."

CDL-AD(2011)016 Opinion on the new Constitution of Hungary, paragraph 94.

"Draft Article 153 provides that the President of the Constitutional Court be chosen by the members of the court, a provision which the Venice Commission welcomes (CDL-AD(2012)024, §§37-38).

Proposal of candidates by both the President and the parliamentary committee must be made on the basis of a public call. This is welcome, as it enhances the transparency of the procedure, hence the public trust in the Constitutional Court."

CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paragraphs 25-26.

"Article 8 provides that the President, the Vice-President and the judges of the Court are nominated by the President of the Republic and elected by Parliament. In a presidential system, where the President of the state has real executive powers and not only ceremonial ones, not all nominations should be made by the President. Parliament should be able to directly elect - with a qualified majority - at least part of the judges upon its own proposals. However, such a change would first require an amendment to Articles 56.2 and 69.9 of the Constitution. In addition, preferably the President and Vice-President of the Court should be elected by the judges *themselves.*"

CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraph 12.

"Article 16.3 provides that the President of the Constitutional Court has the right to participate in sessions of the Government, Parliament, the supreme courts and other state organs. The Commission's delegation was informed that this provision helps to ensure a sufficient respect for the Court in protocol issues. In many countries the Constitutional Court President indeed ranks between third and fifth position in State protocol, which shows the importance of the Constitutional Court among state powers. If Article 16.3 were retained for protocol reasons, the President should use this right sparely and participate mostly in ceremonial sessions of other state powers in order to avoid giving the impression of being close to the executive or the legislative powers.

Article 16.3 also provides for "other powers" to be exercised by the President of the Court. Without further specification of the type and source of such powers, this provision should be removed.

Article 18 provides that one of the judges acts as the Secretary of the Court. This position is different from that of a Vice-President. It seems that the President of the Court nominates / makes a proposal for the Secretary (Article 16.1.11) who is then elected by the judges (Article 18). Given the possibly high workload of the Court, a Secretary who is a staff member rather than a judge might be more efficient. However, there is no problem in relation to standards."

CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraphs 30-32.

"Article 17 attributes the usual powers to the President of the Constitutional Court. It is welcome that among his/her competences paragraph 2 provides that the President "shall take care of preserving the independent position of the Constitutional Court in relation to all the state authorities.""

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 26.

4.8 Independence of the judiciary

"While the basic requirements for judicial independence are the same for both ordinary and constitutional court judges, the latter must be protected from any attempt of political influence due to their position, which is particularly exposed to criticism and pressure from other state powers. Therefore, constitutional court judges are in need of special guarantees for their independence, as set out in the current Chapter III, which should not be deleted."

"As a special constitutional body, the Constitutional Court should be entitled to present its own budget directly to Parliament without the intervention of the Council of Judges or Government. The budget of the Constitutional Court should not be a part of the general budget of the judiciary."

> *CDL-AD(2008)029* Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraphs 14, 35.

"A general power of the Court to start proceedings on its own initiative would make the Court a political actor and the Court could lose its independent position. Each decision to take up a case or not to do so could be criticised as a political choice. Consequently, the Court should be limited to act on its own initiative only in cases when it has to apply a norm of which it doubts the constitutionality."

> *CDL-AD(2008)030* Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 50.

"The Court is to have a Chief Clerk and 'a sufficient number' of other administrative staff, who are to be supervised by the President of the Court and the Minister of Justice 'each one within the limits of his legal jurisdiction', and in accordance with the Law of the Judicial Authority. There is a danger that this scheme of supervision by two authorities would in practice cause disputes over the division of supervision. The administrative supervision of the staff of the Constitutional Court by the Minister of Justice endangers the independence of the Court."

CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 42.

"To avoid the impression that the Members of Parliament are seen as a privileged elite, their salaries are fully transparent: 'Information of the total sum paid to a Member shall be available to the public.' A similar rule for the Judges of the Constitutional Court should be introduced."

"The special privilege of up to two extra weeks of holidays for Constitutional Court judges who formerly have served in a court - as opposed for example to former advocates or university professors - seems to contradict the principle of equality between the judges."

"In general, the attribution of bonuses (Article 39 CCL) includes an element of discretion. Remuneration should be based on a general standard and not on an assessment of the individual performance of a judge. At least bonuses, which involve an element of discretion, should be excluded."

CDL-AD(2009)042 Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, paragraphs 24, 27, 29.

"In the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges' salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge's profession and his or her burden of responsibility."

CDL-AD(2010)038 Amicus Curiae Brief for the Constitutional Court of 'The former Yugoslav Republic of Macedonia' on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials, paragraph 11.

"In order to protect their independence, the salaries of the president and the judges of the Constitutional Court (and the ordi-

nary judges) should be determined by law and not be submitted to an annual vote in the parliament on the budget. The coefficient applied should be fixed in the Constitutional Court Law itself."

CDL-AD(2011)050 Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia, paragraph 18.

"The personal privileges granted to the President, provided for in Sections 19 and 20 ACC in such an analytical and specific way, can affect the dignity of the President and the public perception of independence of the entire Constitutional Court. A regulation on the level of law provides a guarantee of independence, however."

CDL-AD(2012)009 Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, paragraph 54(6).

"Legal certainty and the independence of the judiciary are principles that are found in international instruments by which BiH is bound, notably the European Convention on Human Rights and the International Covenant on Civil and Political Rights. More concrete definitions of legal certainty and the independence of the judiciary are provided by soft-law instruments adopted by the United Nations and the Council of Europe and fine-tuned through international case law."

"The independence of the judiciary is an issue that affects all countries, whatever their systems and is related to the democratic regime and to the respect for the separation of powers. It is a fundamental guarantee of the rule of law, democracy and the respect for human rights. It ensures that justice can be done and seen to be done without undue interference by any other branch of power, other bodies inside the judiciary, other judges or any other actors. This independence has an objective and a subjective component. The objective component is the indispensable quality of the judiciary and the subjective component is the right of individuals to have their rights and freedoms determined by an independent judge. This principle is protected, on the European level, by Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union.

The independence of the judiciary can be seen as having two forms: institutional and individual independence. Institutional independence refers to the separation of powers in the state and the ability of the judiciary to act free of any pressure from either the legislature or the executive. Individual independence pertains to the ability of individual judges to decide cases in the absence of any political or other pressure.

The UN Basic Principles on the Independence of the Judiciary of 1985 state that *"the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws. It is the duty of public institutions to respect and observe the independence of the judiciary."* The document enumerates several conditions for judicial independence, including the absence of any inappropriate and unwarranted interference with the judicial process, the exclusive jurisdiction of the judiciary over all issues of a judicial nature, the absence of the review of judicial decisions by non-judicial powers, a fair conduct of judicial proceedings and the respect for the rights of the parties, or the security of tenure and protection of the rights of individual judges.

The European Court of Human Rights has dealt with the independence of the judiciary in several cases. In the case of *Bryan v. the United Kingdom (1995), it declared that "in order to establish whether a body can be considered "independent," regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."* In the case of *Delcourt v. Belgium (1970)*, the court stressed that the principles of independence and impartiality require that judges not have prejudicial connections to, or views about, any party to a dispute, either because of involvement in a previous stage of the dispute, or because of a personal pecuniary connection to a party or issue involved in the dispute.

B. Institutional independence

The judiciary must be independent and impartial. Institutional judicial independence focuses on the independence of the judiciary from the other branches of state power (external institution-

al independence). The relationship between courts within the same judicial system should also be taken into account (internal institutional independence).

Institutional independence can be assessed by four criteria. The first criterion is independence in administrative matters, which means that the judiciary should be allowed to handle its own administration and make decisions without any external interference. It should also be autonomous in deciding the allocation of cases. The second criterion is that the judiciary should be independent in financial matters. The judiciary must be granted sufficient funds to properly carry out its functions and must have a role in deciding how these funds are allocated. The third criterion is that it should have independent decision-making power. The judiciary must be free to decide cases without external interference. Its decisions must be respected (i.e. implemented) and should not be open to revision by non-judicial powers. The fourth criterion is that it should be independent in determining jurisdiction. The judiciary should determine exclusively whether or not it has jurisdiction in a certain case. In addition, the possibility for a person in BiH to move from political functions to positions within the judiciary could give raise to concern and should be avoided.

C. Individual independence

Individual judicial independence refers to the independence enjoyed by individual judges in carrying out their professional duties. Judges must be independent and impartial. These requirements are an integral part of the fundamental democratic principle of the separation of powers: judges should not be subject to political influence and the judiciary should always be impartial.

This requirement has many aspects and the following four seem of particular importance in the context of BiH. The first one is the appointment and the promotion of judges. All decisions concerning the professional career of judges must be based on objective criteria and must avoid any bias and discrimination. The selection of judges and their promotion must be based on merit (professional qualifications, personal integrity). The second is the security of tenure and financial security. The term of office of judges must be adequately secured by law and, ideally, should

end with the retirement of the judge. Adequate remuneration and decent working conditions must also be guaranteed. Any changes in the guarantees should occur only in exceptional situations. The third aspect is independence in the decision-making power. Individual judges must be free to decide cases without any external interference. The fourth refers to the rights of judges. As other individuals, judges enjoy an array of human rights, yet some of these rights (freedom of association, freedom of expression, etc.) are of special importance to them as these rights help in ensuring their individual independence. On the other hand, certain fundamental rights are somewhat limited for judges: for instance, freedom of expression is limited by the duty of confidentiality, which forms a part of the principle of impartiality."

CDL-AD(2012)014 Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina, paragraphs 7, 74-81.

"There is a suggestion that the decision on detention or arrest in the case of judges of the Constitutional Court should be by Parliament. This would certainly not be desirable, as it would represent a continued politicisation of judicial immunity and endanger judicial independence. In all cases, judges' immunity should be reduced to functional immunity only. For ordinary judges, immunity should be lifted by the HCJ. For judges of the Constitutional Court, immunity should be lifted by the plenary of the Court, with the exception of the judge concerned. In both cases, unless there are manifest indications of a false accusation levelled against a judge, immunity should be lifted by the HCJ and the Constitutional Court respectively. The decision on the criminal case should be left to an independent court, notably as concerns cases of corruption."

CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraph 49.

"Article 11.1 provides that "in performing their duties and considering cases" judges of the Constitutional Court shall be bound only by the Constitution and this law. This excludes that the judges be bound by any other legal instruments in the course of judicial proceedings. In view of the presumption of constitutionality of legislation, the binding force of other legal texts "in performing the duties" of the judges should not be explicitly ruled out (e.g. regulations about business trips etc.).

CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraph 17.

"Article 2 of the draft law takes up an earlier recommendation of the Venice Commission that the independence of the Constitutional Court should be explicitly mentioned in the Law. This article should be complemented by a clause providing that the Court's decisions and the constitutionally conform interpretation of the challenged legal norm provided therein shall be obligatory for all public bodies."

"Article 4, in connection with Articles 104 and 105 of the draft Law, ensures the financial independence of the Constitutional Court, which is welcome. Article 4 also states that the funds and "conditions for the operation" of the Constitutional Court shall be provided by the State. These conditions must be regulated exclusively in the Constitution, the Law on the Constitutional Court and its rules of procedure."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraphs 9, 11.

4.10 Internal structure of the court - chambers

"However, we can see the dangers of splitting the Court into two chambers. The possible problems are: development of diverging interpretations and lines of jurisprudence, the distribution of the docket between the chambers, and the resolution of conflict of competences between the two benches. It was thought by the drafters that the possible inconsistencies between the case-law of the chambers can be settled by the plenary session of the Court. The detailed procedural rules should pay attention to

the just distribution of files. The supervising role of the plenum can similarly resolve the conflict between the chambers on the question which bench is competent in the concrete case."

CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paragraph 13.

"The transfer of the authority of a Court of nine judges (with a quorum of six) to a panel of three judges remains questionable. Articles 16(1), 17(2) and 18 even seem to presuppose the permanent existence of the 'provisional' (in another translation 'temporary') committee because it is competent to decide in cases other than those envisaged in Article 11 itself (court holidays). Before such a committee be established other means of communication should be exhausted, e.g. video or even telephonic conferences. The rules of procedure should make it clear that the emergency procedure cannot be used to discard judges from decision making."

CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 17.

"Furthermore, according to Article 13.f CCL the President is entitled "to assign members from another Chamber in case a Chamber fails to convene due to a factual or legal impossibility." Rec(2000)12, para. 24 may be recalled, stating that "the allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case." Thus, if it is seen necessary to assign members from the other Chamber, it should better be done by lot or by a list agreed upon in advance."

"The composition of the Constitutional Court's Chambers should be clearly regulated, taking into account the mixed composition of the Court by providing for members from different branches in each Chamber. The composition should be predetermined in advance for a certain period of time in order to exclude

the possibility to influence a case through an *ad hoc* composition."

"The assigning of members to another chamber should be done by lot or by a list agreed upon in advance."

> *CDL-AD(2011)040* Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraphs 29, 104(3),104(5).

"Article 129 will add to the main principles of judicial proceedings the principle of automatic allocation of cases. The Venice Commission's view on this, as set out in its Report on the independence of the judicial system Part I: the independence of judges, is as follows:

> *"80. In order to enhance impartiality and independence of the judiciary it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria. This can be done for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges will sit on that case. The criteria for taking such decisions by the court president or presidium should, however, be defined in advance. Ideally, this allocation should be subject to review.*

81. To sum up, the Venice Commission strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated."

The automated allocation of cases under Article 129 is therefore in line with Venice Commission recommendations. This is a very welcome change."

CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 31-32.

4.11 Secretary General / staff / experts

"Article 21 of the draft law determines the requirements that a candidate must satisfy in order to be appointed Secretary General. Article 24 determines the requirements for Constitutional Court advisers. In both instances candidates have to hold a degree in law and have seven years of work experience. In light of the importance of the role of the Secretary General for the organisation of the work of the Constitutional Court, it would be appropriate that stricter requirements applied for the appointment of the Secretary General. To ensure the necessary flexibility for the Court, the powers of the Secretary General should be determined in the rules of procedure rather than in the law.

Article 23 should indicate that, in their advisory function, the Constitutional Court advisers are bound by the instructions of the Constitutional Court Judges only, not that of the Secretary General.

Article 26 provides that the Court may "hire experts in certain fields to carry out specialized activities." The law should provide that rules for hiring such experts be set out in the rules of procedure."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraphs 27-30.

5 The right to appeal to the court

5.1 Appeal by a public body

"Article 46.2 prohibits applications by public legal persons. Under the domestic law of a number of European states applications of public legal persons, such as municipalities, broadcasting companies, universities or churches are admissible under certain circumstances. For example, in Austrian and German Constitutional Law, the right of individual application before the Constitutional Court comes with the compulsive existence of a subjective right granted by the law. This is often true for property rights. Fundamental rights are guaranteed to legal persons as well as far as they are applicable to them according to their nature. Also a limited number of public legal persons come under this provision. Hence they should be able to invoke rights under the Constitution before the Constitutional Court."

"Public legal persons should be able to invoke applicable rights under the Constitution before the Constitutional Court (…)"

> *CDL-AD(2011)040* Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraphs 67, 104(17).

"It is envisaged to widen the competence of the Constitutional Court to "solving the dispute between constitutional bodies regarding their constitutional powers" and this is welcome" (see under paragraph "Legal disputes between state organs").

> *CDL-AD(2014)027* Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia, paragraph 73.

5.1.1 Parliamentary minority

"It is not provided in the Constitution that a minority in the Parliament can refer a case to the Constitutional Court. Article 130.III of the Constitution provides that a case can be referred to the Court by the Parliament as a whole, i.e. by a decision taken by the majority of its members. However, the Constitutional Court can play an important role in the establishment of the rule of law

and the reinforcement of law through the protection of the rights of a minoritarian group in the Parliament. When the case is brought before the Constitutional Court by a group of members of Parliament, the Court's decision may result in avoiding political conflict on the passing of a bill (see, for example, the Constitutional revision of 1974 in France which granted to groups of 60 members of the Parliament or 60 members of the Senat the right to refer a case to the Conseil constitutionnel; see also the Constitution of the Russian Federation of 12 December 1993 which gives to groups representing one fifth of the members of the Federation Council or one fifth of the members of the State Duma the right to refer a case to the Constitutional Court)."

> *CDL-INF (1996)010* Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan, p. 3.

"The question who may [have] standing to challenge normative acts before constitutional court is sensitive since it concerns the mutual relationship of constitutional court and legislator. Continental legal orders usually restrict this possibility to the relevant central state bodies or significant percentage thereof (a parliamentary minority opposition should have access to the Constitutional Court). The purpose of this limitation is to restrict the procedure before the Court only for serious cases in which supremacy of the constitution is actually at stake. Taking into consideration the number of the deputies of the Parliament of Moldova (According to Article 60.2 of the Constitution the Parliament consists of 101 members) the number 5 deputies seems too low. Such a low threshold can lead to an overburdening of the Constitutional Court."

> *CDL-AD(2002)016* Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, paragraph 46.

5.1.2 Ombudsman

"Provision is made in paragraph 1 for the possibility for the Defender (after modification of the Constitution on this point: see Article 27) to apply to the Constitutional Court in respect of viola-

tions of human rights and freedoms. This new prerogative of the Defender is in line with the recommendation of the Commission and the European standards."

CDL-AD(2003)006 Opinion on the Draft Law on the Human Rights defender of Armenia, p.4.

"Particularly welcomed are provisions on the ombudsperson's mandate to the promotion, in addition to the protection, of human rights and fundamental freedoms, the ombudsperson's right to appeal to the Constitutional Court, his or her right of unhindered access in private to persons deprived of their liberty and the ombudsperson's budgetary independence."

CDL-AD(2004)041 Joint Opinion on the Draft Law on the ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, paragraph 7.

"The Venice Commission considers that ombudspersons, where they exist, are important elements of a democratic society protecting human rights."

"The Venice Commission recommends that 'the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms. The Ombudsman should be able to do this of his/her own motion or triggered by a particular complaint made to the institution."

"In these systems, ombudspersons provide possible ways of access to individual justice, albeit indirectly. The Venice Commission considers that ombudspersons are elements of a democratic society that secure respect for individual human rights. Therefore, where ombudspersons exist, it may be advisable to give them the possibility to initiate constitutional review of normative acts on behalf of or triggered by individuals."

"An advantage of indirect individual access is that the bodies filing complaints are usually well-informed and have the required legal skills to formulate a valid request. They can also serve as filters to avoid overburdening constitutional courts, selecting applications in order to leave aside abusive or repetitive requests. Finally, indirect access plays a vital role in the prevention of unnecessarily prolonging rather obvious unconstitutional situations. However, indirect access has a clear disadvantage, as its effectiveness is heavily reliant on the capacity of these bodies to identify potentially unconstitutional normative acts and their willingness to submit applications before the constitutional court or equivalent bodies. Therefore, the Venice Commission sees an advantage in combining indirect access with a form of direct access, balancing the different existing mechanisms."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 2, 64, 106, 108.

"Articles 18 and 19 of the law, which grant the Protector the power (...) to *"initiate a proceeding before the Constitutional Court of Montenegro for the assessment of conformity of laws with the Constitution and confirmed and published international treaties or the conformity of other regulations and general acts with the Constitution and law (Art. 19),"* already imply that the Protector is also expected to address more general issues than merely individual human rights violations."

CDL-AD(2011)034 Joint opinion on the law on the protector of human rights and freedoms of Montenegro by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), paragraph 11.

"Section 26 ACC also empowers the Prosecutor General to request the Constitutional Court to examine the conformity of regulations with the Fundamental Law, if a person concerned is unable to defend his or her rights personally or if the violation of rights affects a larger group of people. It is incoherent to give the power to defend individual interests to the Prosecutor General who is called upon to defend the public interest. The Prosecutor

General could easily come into a situation where these interests conflict and he or she cannot pursue both of them with the same vigour which they may merit. Admittedly this is mitigated by the fact that the Prosecutor General may bring a complaint to the Constitutional Court only if he or she participated in the court proceedings on which the case is based. While such powers do not contradict European standards, the Hungarian authorities should consider vesting them in the Commissioner for Fundamental Rights."

CDL-AD(2012)009 Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, paragraph 29.

5.1.3 Courts (preliminary request)

"(...) The question was also raised whether the draft law allows citizens who feel that their constitutional rights are violated by legal acts to bring their case, be it indirectly, before the Constitutional Court (individual applications, *in concreto* control of the constitutionality of norms).

In order to decide whether it is advisable to introduce at this stage this way of referral of cases to the Constitutional Court, it would first be desirable to evaluate the risk of a very large number of applications being brought before the Court. A solution which seems to be permitted under the Constitution and under the draft text consists in authorising the Supreme Court (and also any other jurisdiction through the Supreme Court) to submit to the Constitutional Court any objection of unconstitutionality raised before it. This will allow the Constitutional Court to control not only *in abstracto* the constitutionality of norms (a control which is already foreseen in the Constitution), but also in *concreto* within the framework of incidental control procedures. In other words, in a given case, every tribunal of the Republic of Azerbaijan before which the constitutionality of a legal act is challenged would stay the proceedings until the Constitutional Court has given its decision on this issue."

CDL-INF(1996)010 Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan, p. 4.

"It is recognised as desirable that the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms. The Ombudsman should be able to do this of his/her own motion or triggered by a particular complaint made to the institution. In the latter case, it will be appropriate to observe the distinction that the issues raised by the complaint are in fact suitable for being dealt with by a constitutional court, and that the position of the complainant is not such as to indicate a recourse to the courts of law as the primary solution, which may or may not result in the court of law submitting the question of constitutionality to the constitutional court."

CDL-AD(2007)020 Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, paragraph 14.

"The ordinary courts should not only make preliminary requests when they are asked to do so by the parties but also when they themselves have doubts about the constitutionality of a law they have to apply."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 55.

"From the viewpoint of human rights protection, it is more expedient and efficient to give courts of all levels access to the constitutional court."

"The constitutional court should not be overburdened and if ordinary courts can initiate preliminary proceedings, they should be able to formulate a valid question."

"Ordinary proceedings should be stayed, when preliminary questions in this case are raised to the constitutional court. This can take place either *ipso jure* or by decision of the competent court. Anyway it must be ensured, that the ordinary judge does not have to apply a law, he holds to be unconstitutional and whose constitutionality is to be decided by the constitutional court with regard to the same case."

"However, the Venice Commission notes that, when there is no direct individual access to constitutional courts, it would be too high a threshold condition to limit preliminary questions to circumstances where an ordinary judge is convinced of the unconstitutionality of a provision; serious doubt should suffice."

"(…) Ordinary courts should have a certain degree of discretion. When they are convinced of the unconstitutionality of a provision, they should be able to request preliminary decisions to challenge the norm in question before the constitutional court. If no direct individual access exists, serious doubts should be sufficient for a preliminary control procedure before the constitutional court."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 62, 126, 142, 216, 226.

"Article 25.9 of the draft Code, which states that "*No action for unconstitutionality shall be allowed in constitutional defence actions,"* seems to preclude the possibility of adjudication of constitutionality of norms by the ordinary judge. However, in most of the situations concerned by the defence actions, it is precisely the application of a norm which is unconstitutional that creates the unconstitutional situation against which a remedy is sought.

The ordinary judge should be allowed not to apply the norm deemed unconstitutional in the specific case and such cases should be referred to the Constitutional Court for final decision."

CDL-AD(2011)038 Opinion on the draft code of constitutional procedure of Bolivia, paragraph 32.

5.2 Claims brought by individuals

"Article 14.8 of the current *Law on Constitutional Proceedings* (Article 14.10 of the *Draft Proceedings*) allows individual citizens and legal entities to appeal to the Constitutional Court on *'questions directly affecting their constitutional rights if these do not lie within the competence of the other courts'*. This right should, of course, not be limited to citizens, but be extended to any individual, including foreigners and stateless people, who are under the jurisdiction of Kyrgyzstan.

This type of individual complaint is limited to cases that do *'not lie within the competence of other courts'.* (…) The Venice Commission therefore recommends the introduction of individual complaint proceedings also against individual acts."

CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraphs 22-23.

"Welcoming the introduction of the constitutional complaint, the Commission draws attention to the fact that this will probably change the function of judicial review as increasing the case-load of the Constitutional Court."

CDL-AD(2009)024 Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, paragraph 102.

"Therefore, the Venice Commission sees an advantage in combining indirect and direct access, thereby creating a balance between the different existing mechanisms."

"The Venice Commission is in favour of the full constitutional complaint, not only because it provides for comprehensive protection of constitutional rights, but also because of the subsidiary nature of the relief provided by the European Court of Human Rights and the desirability to settle human rights issues on the national level."

"Full constitutional complaints undoubtedly provide the most comprehensive individual access to constitutional justice and hence the most thorough protection of individual rights."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 3, 79-80.

"On the one hand, the Venice Commission notes with satisfaction that the individual constitutional complaint has been introduced into the constitutional review system."

CDL-AD(2011)016 Opinion on the new Constitution of Hungary, paragraph 97.

"An explicit reference to the European Convention *as interpreted by the European Court of Human Rights* should be added as the basis for individual complaints."

CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 63.

5.2.1 Full constitutional complaint

"In addition, a full constitutional complaint to the Constitutional Court - against all cases of violation of human rights through individual acts - should be introduced. In Ukraine, individual complaints to the Constitutional Court can only be directed against unconstitutional legislation[2] but not against individual unconstitutional acts. The violation of human rights through individual acts, including cases of excessive length of procedure, cannot be attacked before the Constitutional Court. The introduction of a full constitutional complaint was proposed by the Speaker of Parliament in 2011 but this proposal has not yet been implemented. A full constitutional complaint to the Constitutional Court would also cover cases of excessive length of procedure before the Supreme Court."

CDL-AD(2013)034 Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to strengthen the independence of judges of Ukraine, paragraph 11.

"(...) the *amparo* action should not only protect against illegal acts, but also against unconstitutional acts or acts which are legal but unconstitutional."

CDL-AD(2011)038 Opinion on the draft code of constitutional procedure of Bolivia, paragraph 36.

[2] Normative constitutional complaint, see Study on Individual Access to Constitutional Justice, CDL-AD(2010)039rev, paragraph 77.

"As mentioned above under the paragraph "Ensuring the direct effect of fundamental rights and freedom," the right to individual petition to the Constitutional Court should be extended, in particular to include the right to challenge the constitutionality of other legal acts (current Article 101 of the Constitution)."

> *CDL-AD(2014)027* Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia, paragraph 74.

The Amendment stipulates that constitutional complaint should concern a violation of the freedoms and rights of "the individual and citizen." However, it should be lodged by a "natural or legal person." It is understood that individual constitutional complaints may concern not only violation of the rights of citizens *stricto sensu* but also of other private persons, including foreigners and companies.

Further, the Amendment should probably explain what "individual acts or actions of a state body" mean. It should be clear that constitutional complaints may be lodged against not only administrative but also judicial acts, including decisions of the Supreme Court. It is also important to state explicitly that the CC has the power to quash individual acts (both administrative and judicial), to order the reopening of the proceedings and to award compensation where necessary. The constitutional complaint can be considered as an "effective legal remedy" by the ECtHR only if the CC has sufficient powers and can restore the rights breached. The authorities should consider whether the CC should be competent to hear complaints about inaction by the State bodies and officials along with their "acts.""

> *CDL-AD(2014)026* Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, paragraphs 87-89.

5.2.2 Exhaustion of remedies

"Article 33 settles three issues which were raised in the interim opinion:

- the Constitutional Court can accept complaints even without the exhaustion of other remedies if these remedies cannot prevent irreparable damage to the complainant;(…)"

CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, paragraph 9.

"There may be ordinary remedies, which are prescribed by law but which are ineffective because they may not be apt to avoid irreversible detrimental consequences for the applicant in the light of the constant jurisprudence of the ordinary courts. In such rare and exceptional cases, the Constitutional Court should have the possibility to accept individual complaints even before the exhaustion of these inefficient remedies."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 60.

"An exception to the requirement for the exhaustion of legal remedies should be provided for all cases where adhering to this rule could cause irreparable damage to the individual."

CDL-AD(2012)009 Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, paragraph 54(4).

5.2.3 Free legal aid

"As a guarantee for the protection of human rights, access to the Constitutional Court should be simplified. If there are fees for bringing a case, they should be relatively low and even then the Court should be able to make exceptions for people who do not have the means to bring a claim, which is not manifestly unfounded."

CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraph 45.

"Free legal aid should be provided to applicants if their material situation so requires in order to ensure their access to constitutional justice."

"The Venice Commission recommends that in view of increasingly more comprehensive human rights protection, court fees for individuals ought to be relatively low and that it should be possible to reduce them in accordance with the financial situation of the applicant. Their primary aim should be to deter obvious abuse."

"For reasons of procedural economy, persons who have a lawful interest in the question may be entitled to intervene in a pending case. If there is a large quantity of quasi-identical cases, the court should be able to decide one or more paradigmatic cases and to simplify the procedure for similar claims both concerning inadmissibility and concerning the legal justification."

CDL-AD(2010)039rev Study on individual access to constitutional justice, paragraphs 113, 117, 129.

5.2.4 Determination of admissibility

"The effectiveness of a constitutional court also requires there to be a sufficient number of judges, that the procedure not be overly complex and that the court have the right to reject individual complaints which do not raise a serious issue of constitutional law."

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 22.

"Since the constitutional complaint procedure can be initiated by individuals, it is possible that the Court will have to deal with a large number of such complaints. According to Article 37 of the draft, which applies to all types of procedures, the Court can

refuse to accept manifestly ill-founded cases. This provision might serve as a filter in order to avoid an excessive case-load."

CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, paragraph 8.

"An appeal against the 'return' of application decided by the staff of the court should be available to a committee of three judges rather than to the Court's President only."

CDL-AD(2006)017 Opinion on amendments to the Law on the Constitutional Court of Armenia, paragraph 31.

"Time-limits for applications: While these time limits should not be too long, they must be reasonable in order to enable the preparation of any complaint by an individual personally, or to enable a lawyer to be instructed to prosecute the complaint and defend the individual's rights (…). The Venice Commission recommends that with regard to individual acts the court should be able to extend the deadlines in cases where an applicant is unable to comply with a time-limit due to reasons not related to either their or their lawyer's fault or, where there are other compelling reasons."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraph 112.

"If the constitutional review proceeding will not substantially change the applicant's situation, an application can be refused (…); it should only lead to the denial of a review in cases where it is manifest that the constitutional court's decision will be ineffective as a means to provide effective access to constitutional justice."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraph 124.

"Appeals *[against inadmissibility decisions]* may be beneficial for establishing a common approach with regard to the

admissibility criteria. However, it is also true that such appeals could lead to an overburdening of the Chamber. The explanatory note contains no information on the number of appeals, if and to what extent the Chamber was burdened by the appeals against inadmissibility decisions and whether this was the real reason for the amendment.

One - radical- alternative would be to remove the appeal as such. This may become necessary in the future when the number of petitions and appeals will be much higher and might paralyse the operation of the Chamber. As another alternative, in order to avoid overburdening of the Chamber with appeals, it could be provided that the petition may be declared inadmissible only with unanimous vote of the Panel of judges and providing a requirement to transfer the case to the Chamber if the judges disagree on the issue."

> *CDL-AD(2014)020* Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, paragraphs 15-16.

5.2.5 Relations with ordinary courts

"Some constitutional courts having implemented the review of constitutional complaints faced the problem of interference with ordinary courts. The possibility to review the decisions of ordinary courts may create tensions, and even conflict between the ordinary courts and the Constitutional Court. Therefore it seems necessary to avoid a solution that would envisage the Constitutional Court as a 'super-Supreme Court'. Its relation to 'ordinary' high courts (Court of Cassation) has to be determined in clear terms."

> *CDL-AD(2004)024* Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paragraph 44.

"(...) The Venice Commission is in favour of German and Spanish provisions, according to which in cases where the constitutional complaint is directed against a court decision, the court

should give the party in whose favour the decision was taken an opportunity to make a statement (...)"

"(...) An explicit legislative or even constitutional provision, which would render the constitutional court's interpretation binding on all other state organs, including lower courts, provides an important element of clarity in the relations between the constitutional court and ordinary courts."

"The Venice Commission recommends avoiding a solution in which the constitutional court would act as a 'super-Supreme Court' interfering in the regular application of the law by ordinary courts and that it should only look into constitutional matters, restraining its scope *ratione materiae* and avoiding also its own overburdening (...)"

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 132, 202, 226.

"Examination of appeals against the decisions of the JC [Judicial Council] in disciplinary cases is not a part of the core functions of a constitutional court. In such proceedings the Constitutional Court does not appear as constitutional, but rather as an appellate court. As the Venice Commission has stated in relation to Serbia, "the Constitutional Court is the first and only court to examine the respective decisions of the judicial and prosecutorial councils. The Constitutional Court will therefore have to examine challenged facts more thoroughly than may be necessary in constitutional complaint proceedings."

Furthermore, the combined effect of introduction of the constitutional complaint and redirecting appeals in the disciplinary cases to the Constitutional Court may be problematic, in terms of a possible drastic increase of the workload of the Constitutional Court.

In view of the above, a better solution would be to keep appeal jurisdiction within the Supreme Court but at the same time develop rules which would prevent any possibility for conflict of interests between members of the JC, members of the appeal chamber within the Supreme Court, and those who have the right to initiate disciplinary proceedings against judges."

CDL-AD(2014)026 Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, paragraphs 93-95.

5.2.6 Actio popularis

"The Venice Commission would like to stress that the availability of an *actio popularis* in matters of constitutionality cannot be regarded as a European standard. It acknowledges that this mechanism has been seen as the broadest guarantee of a comprehensive constitutional review[3], which allows eliminating from the legal order quickly unconstitutional laws, especially laws adopted prior to the Constitution. Nevertheless, a comparative perspective shows that most countries did not choose to introduce this mechanism as a valid means to challenge statutory Acts before the Constitutional Court. As a consequence, *actio popularis* is at present rather an exception in Europe and among the Member States of the Venice Commission.

Moreover, in its Opinion on the Draft Law on the Constitutional Court of Montenegro (CDL-AD(2008)030), the Venice Commission recommended the exclusion of the *actio popularis*. The Commission referred, in this context, to the Croatian experience showing that *'such a wide access can totally overburden the Court'* (see §51)."

CDL-AD(2011)001 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paragraphs 57- 58.

"According to part 1, para 1 of Article 20 which is currently in force a private person or a legal entity are entitled to appeal to the Constitutional Chamber in case they believe that the laws or other normative regulatory acts violate their rights and freedoms recognized in the Constitution." The Draft Law (the English version of it)

[3] H. Kelsen, cit.in: R. Ben Achour, "Le controle de la Constitutionnalite des lois: quelle procedure?", Actes du colloque international " L'effectivite des droits fondamentaux dans les pays de la communaute francophone ", Port-Louis (Ile Maurice), 29-30 septembre, 1er octobre 1993, p.401.

proposes to delete the word "his" in this legal provision. However, there is no word "his" in the English text of the law, which seems to be an editorial or translation error. In this regard, Russian texts of the law and the Draft Law are more coherent as they contain the word "his" ("…" in Russian) followed by "rights and freedoms."

According to the explanatory note, this amendment is purely editorial in nature. However, it should be noted that this amendment may lead to establishing *actio popularis* access to the Constitutional Chamber and causes confusion between the subjects of abstract and concrete review. Deleting the word "their" (or "his") in front of the words "rights and freedoms" would enable any person to apply to the Chamber for any alleged violation of the Constitution, irrespective whether such violation has a direct impact on the applicant or not. It is not clear if this was the intention of the drafters. The Venice Commission has already made such observations in 2011 and recommends also now that the proposed amendment is reconsidered. The right to appeal should be limited to those persons whose rights have been affected. Otherwise the Chamber might be seriously overburdened with appeals by individuals who complain about any legal act they come to know of."

> *CDL-AD(2014)020* Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, paragraphs 9-10.

"Further, the text of the Amendment should make it clear that only the person whose rights are affected has a standing to complain. As the text reads now it may be understood that one person may complain about a violation of the rights of another person. The Venice Commission has always warned the States against the introduction of *actio popularis* in their legal systems and it should be made clear that only victims of violations have the right to complain. This comment applies only to individual constitutional complaints, not to proposals for abstract control of laws and other regulations.

> *CDL-AD(2014)026* Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of

Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, paragraph 87.

5.3 Effective remedy

"If a state intended to introduce a process of individual complaint to the Constitutional Court with the purpose of providing a national remedy or filter for cases that would otherwise reach the Strasbourg Court, i.e. providing an effective remedy in the sense of Article 13 of the Convention and to require its exhaustion under Article 35.1, such a process should provide redress through a binding decision in the case. The court must be obliged to hear the case and there must not be any unreasonable demands as to costs or representation."

"However, the risk of overburdening the court must be balanced against the need to ensure effective individual access to constitutional justice. Human rights protection requires that every ordinary court should have access to constitutional proceedings, rather than reducing effective remedies through a too strict selection of applications raising constitutional matters."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 93, 226.

5.3.1 Excessive procedural length

"In cases of alleged excessive procedural length, an individual appeal to the constitutional court should enable it to effectively order the speedy resumption and termination of the proceedings before the ordinary courts or to settle the matter itself on the merits. In these types of cases, the constitutional court should be able to provide compensation equivalent to what the applicant would receive at the Strasbourg Court."

"(…) the introduction of the possibility for lodging individual complaints before a constitutional court and effective constitutional remedies should exist. Moreover, the constitutional or equivalent court should be able to provide a quick remedy and to speed up lengthy procedures, as well as provide compensation in cases where proceedings are of an excessive length."

"Time limits for the adoption of decisions, if they are established, should not be too short to provide the constitutional court with the opportunity to examine the case fully and should not be so long to prevent the effectiveness of the protection of human rights *via* constitutional justice."

> *CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 94, 109, 149.

"Even without such a further complication, a 30-day period for the examination of the constitutionality of a legal provision appears to be extremely difficult to meet, especially in the context of the introduction of individual appeals to the Constitutional Court, which results in a substantial additional work-load. While it is understandable that the Hungarian authorities wish to provide for speedy proceedings before the ordinary courts, this should not be done in a way that renders ineffective constitutional review as an essential element of checks and balances.

The Government Comments (para. 61) announce that the Hungarian Government will submit a proposal amending Article 24.2.b of the Fundamental Law extending the 30 day limit to 90 days. The Venice Commission welcomes that this proposal would result in an improvement but the dead-line is still very tight and should be made more realistic, for example 9 months."

> *CDL-AD(2013)014* Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 117-118.

6 Jurisdiction

"In the Venice Commission's opinion, the jurisprudence of a Constitutional Court has to be consistent and based on convincing arguments in order to be accepted by the people. Changes in the case-law have to be well-founded and explained in order not to undermine legal certainty. The principle of legal certainty, being one of the key elements of the rule of law, also requires that

when declaring a constitutional amendment unconstitutional the time elapsed since its adoption is taken into account. Moreover, when a court's decision is based on formal or procedural grounds only, the substantive effect of such a decision should also be taken into account. In other words, the final decision should be based on a proportionality test where the requirement of constitutionality should be balanced against the negative consequences of the annulment of the constitutional amendment in question.

Finally, it is also important for such a decision to include unambiguous transitory provisions and set a precise time-limit for bringing lower-order norms and the functioning of state institutions into harmony with the Constitution in force."

CDL-AD(2010)044 Opinion on the Constitutional Situation in Ukraine, paragraphs 38-39.

"According to Art. N §3, the Constitutional Court is obliged to respect the "principle of balanced, transparent and sustainable budget management." This statement seems to give the budget management priority with respect to a weighing of interests in cases of infringements of fundamental rights. The Venice Commission considers that financial reasons can bear on the interpretation and application of norms, but they are not as such sufficient to overcome constitutional barriers and guarantees. They must not in any way hamper the responsibility of the Court to scrutinize an act of state and to declare it invalid, if it violates the Constitution."

CDL-AD(2011)016 Opinion on the new Constitution of Hungary, paragraph 51.

"The supremacy of the Constitution is proclaimed with respect to the laws and Constitutions of the Entities, and the Constitutional Court of B.H. is competent to verify the compatibility of the constitutions of the Entities with the Constitution of B.H. The usual elements of a federal State are therefore present."

CDL-AD(2011)030 Amicus Curiae Brief for the Constitutional Court of Bosnia and Herzegovina on the law of

the Republika Srpska on the status of state property located on the territory of the Republika Srpska and under the disposal ban, paragraph 21.

"The limitation of the Constitutional Court's control powers in budgetary matters should be abolished. At least, the excessive restriction of Article 27 of the Transitory Provisions should be brought into line with Article 37.4 of the Fundamental Law."

CDL-AD(2012)009 Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, paragraph 54(10).

"This provision means that procedures already pending before the Constitutional Court are transferred from the Court to the HJC by law. This raises serious doubts with respect to the principle of the separation of powers and the rule of law. The legislator should refrain from intervening into already commenced judicial proceedings and it will be up to the constitutional Court to decide whether or not legislative changes may cause termination of appeals lodged with the Court. In its opinions on the Constitution of Serbia (CDL-AD(2007)004) and on the draft laws on judges and on the organisation of courts of the Republic of Serbia (CDLAD(2008)007), the Venice Commission insisted that decisions concerning termination should be appealable to a court of law.

It would therefore be preferable that, instead of terminating these proceedings in front of the Constitutional Court, the proceedings be simply suspended, pending the new examination by the HJC and the SPC - but enable the appeals to continue if an unfavourable decision was made in relation to an individual judge or prosecutor. A mere suspension rather than termination would not be open to as strong an objection as could be made in the case of termination. It would also preserve the possibility of what would in practice amount to an appeal to the Constitutional Court, in the event of an unfavourable conclusion for any particular individual."

"The legislator should refrain from intervening into already commenced judicial proceedings and it will be up to the Constitutional Court to decide whether or not legislative changes

may cause termination of appeals lodged with the Court. With respect to the latter, instead of terminating the already commenced proceedings, the proceedings should simply be suspended pending the new examination by the HJC and the SPC, but enable the appeals to continue in the event of an unfavourable decision in relation to an individual judge or prosecutor."

CDL-AD(2011)015 Interim opinion on the draft decisions of the high judicial council and of the state prosecutorial council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia, paragraphs18-19, 42.

"In this respect, a consistent pattern of reacting with constitutional amendments to the rulings of the Constitutional Court may be observed in Hungary in recent times, and the Fourth Amendment follows this pattern. Provisions which were found unconstitutional and were annulled by the Constitutional Court have been reintroduced on the constitutional level: this pattern of 'constitutionalisation' of provisions of ordinary law excludes the possibility of review by the Constitutional Court."

(…)

"The representatives of the Hungarian Government have correctly pointed out that it is a sovereign decision of the constituent power - in Hungary Parliament with a two-thirds majority - to adopt a Constitution and to amend it. In itself, the possibility of constitutional amendments is an important counterweight to a constitutional court's power over legislation in a constitutional democracy, as well as an important element in the delicate system of checks and balances which defines a constitutional democracy. Nevertheless, this approach can only be justified in particular cases, based on thorough preparatory work, wide public debate and large political consensus - as in general is necessary for constitutional amendments.

In the discussions in Budapest, representatives of the governmental majority agreed that in some cases Parliament had reacted to decisions of the Constitutional Court by amending the Fundamental Law, but pointed out that this also had happened for example in Austria, where Parliament had resorted to constitu-

tional amendments in order to overcome decisions of the Constitutional Court. In the opinion of the Venice Commission, however, while this example is indeed correct, it has to be pointed out that in 1988 the Austrian Constitutional Court stated that a repeated constitutionalisation of unconstitutional law could be seen by the Court as a total revision of the Constitution, which could not be adopted as a simple constitutional amendment with a two-thirds majority under Article 33.4 of the Austrian Constitution. Indeed, later the Constitutional Court annulled a constitutional amendment. Thus the Austrian Constitutional Court finally retained control over whether constitutional amendments violate fundamental principles.

According to European standards, in particular the Statute of the Council of Europe, Hungary is obliged to uphold democracy, the protection of human rights and the rule of law. The sovereignty of the Hungarian Parliament is therefore limited in international law.

The Venice Commission is concerned that the approach of shielding ordinary law from constitutional review is a systematic one. This results in a serious and worrisome undermining of the role of the Constitutional Court as the protector of the Constitution. This is a problem both from the point of view of the rule of law, but even more so from the point of view of the principle of democracy. Checks and balances are an essential part of any democracy. The reduction (budgetary matters) and, in some cases, complete removal ('constitutionalised' matters) of the competence of the Constitutional Court to control ordinary legislation according to the standards of the Fundamental Law results in an infringement of democratic checks and balances and the separation of powers."

(…)

"The idea that a Constitutional Court should not be able to review the content of provisions of Fundamental Law is common ground as a general rule in many member States of the Council of Europe. In its Opinion on the Revision of the Constitution of Belgium, the Commission stated:

"49. […] Belgium stands in the tradition of countries such as France which firmly reject judicial review of constitutional amendment. The Conseil Constitutionnel argued 'that

because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution.)' Although in Austria and Germany there exists the possibility of review, these cases do not stand for a common European standard.

50. Most constitutional systems operate on the assumption that all constitutional provisions have a similar normative rank, and that the authority which revises the Constitution has the authority to thereby modify pre-existing, other constitutional provisions. The result is that, in general, one constitutional provision cannot be 'played out' against another one. The absence of a judicial scrutiny of constitutional revisions is owed to the idea that the constitutional revision is legitimised by the people itself and is an expression of popular sovereignty. The people is represented by parliament which acts as a constituante. The authority of the decision to amend the Constitution is increased by the specific requirements for constitutional amendment (qualified majority).

51. It is a matter of balancing the partly antagonist constitutional values of popular sovereignty and the rule of law whether to allow for rule-of-law induced barriers against constitutional revision, or for judicial scrutiny. Most Constitutions have placed a prime on popular sovereignty in this context. The Belgian proceedings are well within the corridor of diverse European approaches to this balancing exercise and do not overstep the limits of legitimate legal solutions."

(…)

"The Venice Commission again repeats its serious concern about the limitation of the competence of the Constitutional Court to review legislation. Shielding potentially unconstitutional laws from review is a direct attack on the supremacy of the Fundamental Law of Hungary. The Commission is particularly worried that the Fourth Amendment has given up the link of that provision to continued budgetary difficulties and thus has institutionalised this exception. This provision reinforces the assessment that the Fourth Amendment results in reducing the position of the Constitutional Court as guarantor of the Fundamental Law

and its principles, which include European standards of democracy, the protection of human rights and the rule of law."

> *CDL-AD(2013)014* Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 81, 84-87, 103, 113.

"The Draft Amendment XXXIX broadens the jurisdiction of the Constitutional Court (CC) to examine complaints from individuals about violations of their human rights (hereinafter ЎV "constitutional complaints"). At present the CC can only consider constitutional complaints related to a certain very limited number of basic rights. Now the list of rights is substantially expanded, albeit it remains a closed list.

In general, constitutional justice is considered a cornerstone of constitutional democracy. The Venice Commission has already particularly welcomed that some other States provided for the possibility of constitutional complaints by individuals for human rights violations. So, broadening of the competence of the CC in this field should be met with approval.

So far, the very limited catalogue of constitutional rights listed in Article 110 §3 of the Constitution together with the procedural rules established in Section IV of the 1992 Rules of Procedure resulted in a negligible number of complaints about human rights' violations before the CC. Thus, in the course of 2013 it had a total of 22 such complaints. The Venice Commission observes that in the same period the European Court of Human Rights received over 500 complaints from the country. It shows that if the new remedy against human rights violations is introduced at the national level, there is a real risk of a strong growth in the number of cases the CC has to examine. The Commission considers that introduction of a new remedy of that kind requires careful preparation: adoption of procedural rules, development of new working methods, hiring and training law clerks and secretarial assistants, etc. In some other countries introduction of such remedy was preceded by a long preparatory period (up to two

years, like in Turkey). The Venice Commission suggests that this welcome amendment should not have immediate effect, so that necessary preparations and amendments at the legislative level can be made.

To process a large number of complaints smaller decision-making bodies within the Constitutional Court should be established, in particular for processing clearly inadmissible complaints under a simplified procedure. The Government are invited to consider adding a provision to this end to the second new paragraph of Article 113 of the Macedonian Constitution."

> *CDL-AD(2014)026* Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, paragraphs 78-79, 81- 82.

6.1 Control of sub-legislative acts

"Particular attention should be paid in order to avoid that the Court being overburdened with work it would have difficulty in assuming. Such a risk exists when, as in the present case, the Constitutional Court not only deals with issues of constitutionality but is also required to ensure respect for the entire hierarchy of norms in Azerbaijan's legal system, a task which, in the European continental legal system, is more often attributed to administrative tribunals."

> *CDL-INF(1996)010* Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan, p. 3.

6.2. A priori control of legislation

"The *ex ante* constitutional review is seen in many countries, i.e. before the enactment of legislation, as a highly important device for securing constitutionality of legislation.

Nevertheless, there is no common European standard as regards the initiators and the concrete modalities of this review. States decide, in accordance to their own constitutional traditions and specific needs, which organs, and to what extent, are authorized to conduct an a *priori review* and who should have the right to initiate it."

CDL-AD(2011)001 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paragraphs 34-35.

"The practice shows that the role of the Constitutional Court in *ex ante* review is accepted in many states beside its main role in *ex post* review. The Venice Commission therefore considers that the Constitutional Court should be seen as the only and best placed body to conduct *ex ante* binding review. Nevertheless, to avoid over-politicizing the work of the Constitutional Court and its authority as a judicial body, the right to initiate *ex ante* review should be granted rather restrictively."

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

"A clear disadvantage of *a priori* constitutional control by the Constitutional Court is that the Court has to decide without the benefit of knowing how that law is applied in practice. Often, unconstitutionality only becomes apparent through the practice of administrative and judicial organs. Conversely, the ordinary judiciary may have 'dealt' with a possibly unconstitutional law by interpreting it in a constitutional way.

The strongest argument against a wide use of *a priori* Constitutional review again lies in the possibility that an unconstitutionality of a law may arise though the practice of state organs, and this even in cases where the Constitutional Court had already been called upon to decide on the constitutionality of the law in abstract *a priori* proceedings."

CDL-AD(2011)001 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paragraphs 49-50.

"It would be advisable to provide the Chamber with discretion in exceptional circumstances (in case of a high public interest) to consider an appeal, even if the challenged act is no longer in force."

CDL-AD(2011)018 Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, paragraph 38.

"(…) the Venice Commission however emphasised that only "in a few countries the Constitutional Court has been given a formal role in the constitutional amendment procedures." The Commission stated that an *a priori* review is a "fairly rare procedural mechanism." And although the Commission declared that a *posteriori* review by the Constitutional Court is "much more widespread," it cannot be seen as a general rule. Such control cannot therefore be considered as a requirement of the rule of law. Belgium stands in the tradition of countries such as France which firmly reject judicial review of constitutional amendment. The Conseil Constitutionnel argued "that because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution)." Although in Austria and Germany there exists the possibility of review, these cases do not stand for a common European standard."

CDL-AD(2012)010 Opinion on the Revision of the Constitution of Belgium, paragraph 49.

6.3 A priori control for international treaties

"Article 135.1.c of the Draft Constitutional Amendments as well as Articles 115.2 and Article 117 of the draft of the Law on Constitutional Court provide for *a priori* constitutional review of international treaties 'subject to ratification' and consequently 'international treaty or some [of] its provisions declared non-constitutional may not be ratified or approved and may not enter into force in the Republic of Moldova' (Article 117.2). It should be pointed out that 'by means of the exception of non constitutionality' and according to Article 115.3 of Draft Law also international treaties entered in force may be subject to the constitutionality control. Declaring such treaty or a part of its non-constitutional 'shall bring about its denunciation'. The ratified (valid) treaties obviously involve relations with other parties and if the Constitutional Court overturns such a treaty this could create

international complications and result in the responsibility of the state in public international law. Article 27.of the Vienna Convention on the Law of Treaties provides clearly that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. A denunciation of an already valid treaty due to its non-conformity with the Constitution does not represent the optimum approach of the state to the valid norms of international law and values enshrined thereof. The general tendency is to rather harmonize legal orders of states (including constitutions) with their international obligations. "

> *CDL-AD(2002)016* Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, paragraph 9.

"The Venice Commission warns against overburdening constitutional courts by transferring to them the competence of protecting not only against infringements of constitutional rights but also against mistakes in interpretation and application of norms which do not amount to violations of the constitution."

> *CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraph 99.

"According to Article 4.1.2 of the draft Law, the Constitutional Chamber shall "make its pronouncement on constitutionality of international agreements to which the Kyrgyz Republic is a party and which have not entered into force". It would be advisable not to use the term "constitutionality" hear but rather refer to the term "concordance with the Constitution" and to refer to "signatory state" in line with the Vienna Convention."

> *CDL-AD(2011)018* Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, paragraph 14.

6.4 Control of sub-statutory acts

"Constitutional Court should not have the interpretation of ordinary law as its competence; it should be limited to interpreta-

tion of the constitution. Usually, interpretations of ordinary laws are given by a Supreme (High) Court."

CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 25.

"Article 30(2) only authorises the Court to request the opinion of Parliament in the procedure of the constitutionality of a law *('may request')*. This exception for Parliament is neither in the interest of constitutional proceedings nor that of Parliament itself. Parliament should always be given a chance to present its opinion, when its acts are under scrutiny by the Constitutional Court."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 44.

"The Venice Commission considers that, with respect to the types of norms which can be submitted for constitutional review, the constitutional court should be in charge of verifying the constitutionality of statutory acts only, leaving in principle the control of lower ranking texts to ordinary courts, in order to avoid its overburdening."

CDL-AD(2010)039rev Study on individual access to constitutional justice, paragraph 6.

6.5 National implementation of decisions of international jurisdictions

"The text could be amended with provisions aimed at implementation of the decisions of international jurisdictions, especially in the field of human rights. The role of the Court in the field of implementation in Croatia of different norms of international instruments on human rights, minorities etc., to which Croatia adhered, could also be clearly stated. The Law could even provide for a specific procedure in this respect."

CDL-INF(2001)002 Opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, paragraph 9.

"Article 68 asking the Constitutional Court to take into account the principles of the European Convention on Human Rights is interesting and has to be welcomed from a European point of view."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 70.

6.6 Conflicts of competence between state organs

"The Commission noted already in its opinion on the Constitution of Ukraine (...) that several procedures which could play an important role for the consolidation of constitutionalism in Ukraine were not specifically mentioned in the text of the Constitution:

(...)

- a provision on conflicts of competence between State organs.

In its opinion, the Commission noted that the Law on the Constitutional Court seeks to remedy these gaps by using the procedures mentioned in the Constitution in a way producing effects similar to the missing procedures."

*CDL(1997)018*rev Opinion on the law on the Constitutional Court of Ukraine, paragraph 4.

"In the absence of a competence on the settlement of disputes of conflicts of competence in Kyrgyzstan, the Court should be obliged by the Law to invite the various state powers (Parliament, President; Government, Judiciary including prosecution if applicable) to submit their arguments as to the interpretation of the constitutional provision. In this way, the Court would benefit from a *quasi* adversarial procedure, even in the framework of a purely abstract procedure."

CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraph 19.

7 Procedure

7.1 Exclusion of a judge from a case

"(…) it must be ensured that the Constitutional Court as guarantor of the Constitution remains functioning as a democratic institution. The possibility of excluding judges must not result in the inability of the Court to take a decision. The provisions of the Code of Civil Procedure are certainly appropriate in the context of the general jurisdiction where there are always other judges available to step in for a judge who has withdrawn. This is not the case for the Constitutional Court. If rules for challenging of a judge were deemed necessary in Romania they would have to apply specifically to the Constitutional Court and exclude the possibility *non liquet* applying the fundamental principle of the Constitutional Court as a guarantor of the supremacy of the Constitution."

> *CDL-AD(2006)006* Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania, paragraph 7.

"The redrafted part 2 of Article 36 defines the procedure for considering motions of the parties requesting recusal of a judge. If such motion is made the Chamber "…shall make a reasoned decision after hearing the opinions of persons involved in the case, and also hear out the judge, to whom the recuse is issued." This provision does not seem to limit the right of the judge to announce self-recusal. However, concerns have been expressed that if under pressure from other state powers or the media, judges could use the recusals to avoid delivering judgements. Such 'political' recusals can considerably weaken the authority of the Court and must be avoided. It is an obligation of the authorities to protect the judges from external pressure and intimidation. They are obliged to act swiftly and effectively in order to prevent as well as respond to the reports of intimidation and thus avoid abnormal situation when judges are forced to recuse themselves due to external pressure. It should also be noted that critical opinions expressed in media may not, by itself, be considered as intimidating and by no means should be considered as ground for the recusal. In order to avoid such recusals, the conditions for recusal have to be defined narrowly and should be strictly limited.

The fact that a judge participated in adoption of the law in Parliament should not be a valid reason for a recusal as this could easily lead to a *non liquet* because the number of remaining judges drops below the quorum. There should be no hearing on the recusal if the judge him- or herself accepts the recusal and withdraws from the case."

> *CDL-AD(2014)020* Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, paragraph 34.

7.2 Mandatory legal representation

"With regard to Article 7.3 of the Draft Law according to which the Constitutional Court shall examine exclusively legal issues, it seems appropriate to require obligatory legal representation of parties before Constitutional Court."

> *CDL-AD(2002)016* Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, paragraph 57.

"The proposed new wording of part 2 of Article 32 guarantees the right of parties to conduct their affairs personally or through their representatives. This is welcome. However, the new wording seems to eliminate requirements that representatives should be lawyers and thus providing for a possibility for the party to appoint non-lawyers as representatives. The Venice Commission advises to clarify the purpose of this provision. In addition, the Commission recommends that legal aid should be available also for proceedings before the Constitutional Chamber."

> *CDL-AD(2014)020* Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, paragraph 26.

7.3 Rights of the parties

"In addition, another serious weakness of the procedure is the absence of any indication on the procedural rights of the private parties to the dispute. The law contains a provision on the introduction of the appeal (Article 42) and that the decision has to be sent to the appellant (Article 70). There is however no indication whether the individual has the right to submit additional briefs to the Constitutional Court and whether he, perhaps assisted or represented by a lawyer, can attend and take part in the session of the Court on his case. It seems indispensable that the individual who has brought a case should also have the right to intervene before the Court. The tendency of the European Court of Human Rights to apply Article 6 of the European Convention also to disputes before a Constitutional Court concerning individuals should be noted. The Court would therefore be well advised to adopt a liberal attitude but, in any case, it seems scarcely acceptable that such an important matter touching individual rights should be left to the internal regulations or the discretion of the Court and not be settled by law."

*CDL(1997)018*rev Opinion on the law on the Constitutional Court of Ukraine, paragraph 11.

7.4 Case allocation

"In the Turkish Constitutional Court the rapporteur-judges play a key role. They are selected from regular judges with at least five years of judicial experience, professors of law and legal researchers or five years of work as assistant rapporteurs (Article 24.2) and they enjoy judicial immunity (Article 24.4). Administratively, they are subordinated only to the President of the Court, not to the members of the Court. The cases are assigned by the President to the rapporteur-judges, not to the members. Given that the rapporteurs at the Constitutional Court of Turkey do not enjoy the same guarantees as the members of the Court, it would be preferable to introduce an automatic system of case-distribution. Justified exceptions from this system should be documented in the case-file."

"The attribution of cases to rapporteur judges should be made via an automatic system of case-distribution. Justified

exceptions from this system should be should be documented in the case-file."

> *CDL-AD(2011)040* Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraphs 39, 104(9).

"Article 14 of the Fourth Amendment supplements Article 27 of the Fundamental Law by the following paragraph 4:

> *"In the interest of the enforcement of the fundamental right to a court decision within a reasonable time and a balanced distribution of caseload between the courts, the President of the National Judicial Office may designate a court, for cases defined in a cardinal Act and in a manner defined also in a cardinal Act, other than the court of general competence but with the same jurisdiction to adjudicate any case."*

Already in its decision 166/2011 the Constitutional Court had found the transfer of cases by the Supreme Prosecutor to be contrary to the European Convention on Human Rights. In order to overcome that decision, this transfer had been 'constitutionalised' in Article 11.4 of the Transitional Provisions. The Fourth Amendment includes into the Fundamental Law the transfers of cases by the PNJO, which had been introduced in Article 11.3 of the Transitional Provisions. The Commission welcomes that the Fourth Amendment does not provide for transfers by the Supreme Prosecutor him- or herself.

The transfer of cases has been strongly criticised by the Venice Commission: *"The system of the transferring of cases is not in compliance with the principle of the lawful judge, which is essential to the rule of law; it should be revised. Pending a solution of this problem, no further transfers should be made."*

The Government Comments (para. 44) state that on 7 June 2013, the Hungarian Government announced that the system of transfers of cases will be eliminated on the constitutional and the legislative level. The Venice Commission warmly welcomes this intention of the Government to introduce a parliamentary procedure and hopes that Parliament will soon be able to adopt this proposal."

CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 72-75.

7.5 Panels of judges and qualified assistants

"To ensure an adequate balance between the interest of individual access to constitutional justice and the risk of being overburdening the constitutional court, the Venice Commission recommends that the constitutional judges be supported by qualified assistants and that their number should be determined in accordance with the case-load of the court (…)"

"The Venice Commission recommends that judges are supported by qualified assistants; their number should be determined in relation to the court's case-load (…)"

"A useful method for alleviating the court's case-load can be the creation of smaller panels of judges when deciding matters initiated by one of the types of individual access, where the plenary only acts if new or important questions need to be decided. It is important that the law establishing the constitutional court provides for the possibility of a decision by the plenary if there are conflicting decisions by the chambers; otherwise, the unity of the constitutional court's jurisprudence is endangered. There needs to be clear rules to avoid any possibility of bias in the allocation of cases to the chambers or in the composition of panels (…)"

"In order to ensure an adequate balance between the interest of individual access to constitutional justice and the limited competences of the constitutional court and the risk that it will become overburdened, the Venice Commission recommends that constitutional judges are supported by qualified assistants and that their number should be determined in relation to the court's case-load. The correct working of the court must also be ensured through an appropriate distribution of judges in chambers, which is a useful method for alleviating the Court's case-load but a mechanism should exist to preserve the unity of the constitutional court's jurisprudence."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 11, 224, 225, 227.

"It is a common and useful method for alleviating the Constitutional Court's case-load to create *"smaller panels of judges deciding matters initiated by one of the types of individual access, where the plenary only acts if new or important questions need to be decided."* It is therefore an amendment in conformity with European standards."

CDL-AD(2011)010 Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro, paragraph 25.

7.6 Oral / written procedure

"[t]he Court should not depend on the parties in its decision for a written procedure except in cases relating to civil and criminal matters in the sense of Article 6 ECHR."

CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, p. 7.

"The requirement of oral hearings can be justified by several considerations. It allows for the direct involvement of the parties, enables their direct contact with the judges and can accelerate the procedure. Oral hearings are an aspect of transparency, which is a core democratic value. Oral hearings can improve the quality of judicial decision-making because the judges obtain a more immediate impression of the facts, of the parties and of their divergent legal opinions. At the same time, oral hearings serve as a form of democratic control of the judges by public supervision. Oral hearings thereby reinforce the confidence of the citizens that justice is dispensed independently and impartially. They counteract the experience from previous times that the judgments are the results of secret contacts or even instructions. Therefore on the European continent a well-known reform movement emerged already in the early 20th century that aimed to foster the primacy

of 'orality' in order to create an immediate contact between judges, parties, and witnesses. The desired aim of this reform movement was to make litigation procedures simple, inexpensive, and quick."

> *CDL-AD(2004)035* Opinion on the Draft Federal Constitutional Law 'on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation', paragraph 4.

"The Constitutional Court should have a wider choice in dealing with cases in written proceedings. This may be important in order to avoid an overburdening of the court with individual complaints."

> *CDL-AD(2008)029* Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraph 44.

"From the perspective of human rights' protection, public proceedings are preferable at least in cases involving individual rights (…). Consequently, oral proceedings before the constitutional court should be public, subject to restrictions only in narrowly defined cases."

"The Venice Commission notes that it is widely accepted that it should be possible for a constitutional court to suspend or limit oral proceedings if this is necessary to safeguard the parties' or the public interests such as procedural efficiency (time and costs of proceedings)."

> *CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 135, 138.

"Article 23 but also other provisions (Articles 31 and 47) place a very strong emphasis on the oral nature of the proceedings. These provisions seem to be inspired from civil and criminal proceedings, where the taking of evidence is essential. However, constitutional proceedings are very different in nature. The facts

of the underlying case are usually not essential. The issue before the Constitutional Court is an abstract one, whether a given norm is in conflict with the Constitution. The underlying case only provides the 'flavour' for the case. Many constitutional courts decide cases without hearings or hold hearings only in some cases and only pronounce the decision in public. The law should also provide for a written procedure. There is of course no objection in principle against hearings in some cases, which help the public to get acquainted with the work of the Court but there is a danger of overburdening the court with hearings. In any case, the clause in Article 23 requiring the reading out of all documents seems excessive and should be deleted."

CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraph 36.

"Moreover, as the Venice Commission stated in the previous opinion on the Draft Law on the Constitutional Chamber, it should be taken into account that in constitutional proceedings taking physical evidence is rather an exception. Constitutional review is mainly focused on the legal arguments rather than facts, which only rarely may be relevant for the Chamber as evidence supporting the legal argument. Therefore, the parties should not be obliged to but rather be given a possibility to submit evidence."

CDL-AD(2014)020 Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, paragraph 12.

7.6.1 Transparency of the proceedings

"Applications to the constitutional court must be made in writing, and sometimes follow very strict rules (…). These rules pursue the goals of transparency and traceability. However, an applicant needs to be given the possibility to correct or complete a document within a certain time limit (see above) and only under specific conditions. This is especially important when formal requirements are very strict. It is even more important where legal representation is not obligatory."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraph 125.

7.7 Dissenting opinions

"Consequently, dissenting opinions do not weaken a Constitutional Court but they have numerous advantages. They enable public, especially scientific, discussion of the judgments, strengthen the independence of the judges and ensure their effective participation in the review of the case.

The intention of the Amendments to publish dissenting opinions earlier thus has to be welcomed. However, the Amendments still allow for a publication of the dissent after the main part of the judgement. These parts form a whole, however, and should be published together."

CDL-AD(2009)042 Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, paragraphs 20-21.

"Dissenting opinions should always be published together with the judgment itself."

CDL-AD(2011)018 Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, paragraph 51.

7.8 Interlocutory decisions

"Concerning interim measures, the Venice Commission is in favour of the possibility to suspend the implementation of a challenged individual and/or normative act, if the implementation could result in further damages or violations which cannot be repaired once the unconstitutionality of a provision is established (…)"

"The Venice Commission is in favour of a power to suspend the implementation of a challenged individual and/or normative act, if the implementation could result in further damages or violations which cannot be repaired once the unconstitutionality of the act challenged is established. The conditions for suspension should not be too strict. However, especially for normative, the extent to which non-implementation itself would result in dam-

ages and violations that cannot be repaired must be taken into account."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 9, 140.

7.9 Joinder of cases

"The Court should not be obliged to reject a claim on the same subject as a pending case but be allowed to join it with the first claim."

CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia, paragraph 25.

7.10 Application withdrawal

"Following an application's withdrawal, the court should be able to continue to examine the case if this is in the public interest. This is an expression of the autonomy of constitutional courts and their function as guardians of the constitution, even if the applicant is no longer party to the proceedings."

"The mere discontinuation of a case can be an insufficient means to secure human rights protection in cases of concrete review or individual complaints. It is however controversial if the constitutional court should be enabled to award itself pecuniary compensation for the violation of a right in order to redress the breach to the individual's human rights."

"The constitutional court should be able to continue to analyse a petition, even if it is withdrawn, in order to protect the public interest. However, in cases where the challenged act loses its validity, there is no general consensus on whether the constitutional court should or should not be able to continue its analysis."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 144, 148, 152.

"Following the withdrawal of a submission, the Court should be enabled to continue the proceedings when it finds this to be in the public interest in all types of procedures."

CDL-AD(2011)050 Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia, paragraph 41.

7.11 Adversarial proceedings

"Article 22 establishes the principle of adversarial proceedings. While this principle certainly applies to civil and criminal proceedings, the nature of constitutional proceedings is different. While one party, the applicant, has a clear interest in the proceedings the identification of the other party is not straightforward. The simple fact that an act was issued by a state organ does not necessarily make that organ an appropriate adversarial party. Due to political reasons, the organ might not have a real interest in defending the constitutionality of the adopted act. Therefore, some constitutional justice systems work in an inquisitorial way, with the Constitutional Court establishing arguments in favour and against constitutionality of the challenged provision. Other adversarial systems provide that prosecution defends public interests as a party."

CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraph 35.

"In the absence of a competence on the settlement of disputes of conflicts of competence in Kyrgyzstan, the Court should be obliged by the Law to invite the various state powers (Parliament, President; Government, Judiciary including prosecution if applicable) to submit their arguments as to the interpretation of the constitutional provision. In this way, the Court would benefit from *a quasi* adversarial procedure, even in the framework of a purely abstract procedure."

CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraph 19.

7.12 Repetitive cases

"(...) In other words if the judges of the Panel (at the stage of admissibility) or the Chamber (during the consideration of the case) realise that a matter raised by the applicant is similar to the one that has already been decided, they have to terminate proceedings.

The Venice Commission recommends revising this provision as it unnecessarily limits the power of the Chamber to decide on the constitutional issues when they (re)appear in the law. The mere fact of the existence of the decision should not be enough for terminating the case or even for adopting inadmissibility decision.

For instance, if the Chamber upholds constitutionality of the legal act, future petitions that may demand evaluation of constitutionality of the same legal act should indeed be declared as inadmissible, unless there are new circumstances, e.g. a consistent different interpretation given to the contested legal provision by the ordinary courts. However, if the petitioner questions constitutionality of the norm, which is re-adopted despite the earlier finding of unconstitutionality, the Panel and/or the Chamber should not be precluded from considering the case. The Constitutional Chamber should be provided with effective mechanisms to ensure the binding nature of its decisions and offering a solution when legislator fails to follow the ruling of the Chamber."

CDL-AD(2014)020 Opinion on the Draft Constitutional Law on Introduction of Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, paragraphs 35-38.

8 Effects of decisions

"(...) the Constitutional Court should be allowed to refer the case to the last instance ordinary court in cases where the unconstitutionality lies only in the unconstitutional interpretation of the law by that court and when there is no need to gather and examine further evidence (...)"

"(...) in order to make sure that the instructions by the Constitutional Court to the ordinary courts are implemented, the decision by the ordinary court should be annulled."

CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraphs 81-82.

8.1 Ex tunc v. ex nunc effects

"Articles 53-56 are not clear about the effect of the decisions of the Court. It is not clear when the Court 'abrogates', 'repeals' or 'annuls' unconstitutional norms. Therefore, it is not clear if the effects of its decisions are '*ex tunc*' or 'ex nunc'. A possible solution could be to fix the effects of decisions of the Constitutional Court as '*ex tunc*' and to foresee a possible exception allowing under certain specific circumstances to maintain temporarily the effects of the annulled act."

CDL-INF(2001)002 Opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, paragraph 22.

"Article 14 paragraph 3 Draft CC provides for a clarification of the *ex tunc* effect by stating that judgments by the ordinary courts, which have final force, can be reopened by an ordinary court upon receipt of a complaint. A rigid application of an *ex tunc* effect could potentially have serious implications for society and could result in a heavy burden on the state budget if numerous cases have to be reopened, which date back to the distant past. The current legislation does not provide for an attenuation of this effect by the Constitutional Court, as is the case for example in Portugal where the Court itself can limit the effects of its *ex tunc* judgments. Limiting the effects of a decision of the Constitutional Court to future cases and cases, which have not yet been decision in final instance has an advantage from the viewpoint of legal certainty."

CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraph 26.

"Article 56 allows for the re-opening of all individual acts based on a general norm found to be unconstitutional, which were adopted no less than two years for before the request for the reopening. Such requests must be made no more than six months after the Constitutional Courts unconstitutionality decision on the general act. This results retroactive effects, which can have serious consequences for society. It seems therefore prudent to entrust the Constitutional Court to decide on the effects of its decisions. Even with the limitation on two years, such retroactivity can have very costly or negative effects (also on third parties) and should be avoided."

"Similar to Article 56 discussed above, Article 62 generalises the effect of an individual complaint (even without a two year limitation). Again, this can have serious and unexpected consequences for society. It seems safer to have a general *ex nunc* effect with the exception of the petitioner who should benefit from the complaint and to leave the determination of possible retrospective effects of an individual complaint to the Court. On the other hand, persons imprisoned on the basis of an unconstitutional act should benefit also retroactively from the Constitutional Court decision."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraphs 58,67.

"Both *ex tunc* and *ex nunc* decisions are sometimes found to need attenuation. One possibility is to enable the constitutional court to decide when its decision enters into force (either in the past, as a middle course between nullity and derogation, or at some moment in the future, or both). The other possibility is to resort to techniques of (authoritative) interpretation that combine adequate protection of the constitution and coherence of the legal order in that not all provisions are removed immediately from the legal order."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraph 192.

"An *ex tunc* effect of the Chamber's decisions should be applied with great caution, providing it in exceptional circum-

stances only. It is absolutely necessary to provide the courts with clear guidance with regard to the *ex tunc* effect of the Chamber's decisions."

CDL-AD(2011)018 Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, paragraph 61.

8.2 Obligation for ordinary courts to reopen a case

"Article 33 settles three issues which were raised in the interim opinion:

(…)

- the ordinary courts are held to reopen the case which had been decided on the basis of an unconstitutional normative act in accordance with provisions of the Criminal and Civil Procedure Codes (which need to complement the present Law).

The constitutional complaint procedure would require more specific regulation especially as concerns the effects of the decision as to the unconstitutionality of the normative act on the individual act which resulted in the alleged violation of human rights (Article 6 of the Draft Constitutional Law on Human Rights). Is the individual decision annulled or only declared as being based on an unconstitutional general norm and sent back for review to the authority which took the decision (in most cases the Supreme Court)? Article 33 seems to imply the second option. This should be spelled out both in this draft law and in the administrative, civil and criminal procedure codes. This authority should be obliged to review the case on the basis of the abrogation of the normative act on which it had based its decision. The corresponding part of Article 33 could therefore read '(…) proceedings on the case in the court that adopted the final decision shall resume in accordance with provisions of the Criminal Procedure and Civil Procedure Codes on the basis of the abrogation of the normative act by the Constitutional Court."

CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, paragraphs 9-10.

8.3 Functions of the constitutional court

"In line with Article 85 of the Constitution, Article 11.2 *Draft Proceedings* introduces a new competence for the Court to provide an official interpretation of the norms of the Constitution (…)"

(…) The Commission understands the fact that in new democracies the existence of such a competence of a constitutional review body may enable maintaining constitutional stability. Nonetheless, in such cases, the Court is forced to render a judgment without having had the benefit of hearing both sides. Furthermore, it may happen that in the light of the binding interpretation of a constitutional provision, a law based on this provision is unconstitutional. As the Court was only asked to interpret the Constitution, this ЎV obviously unconstitutional - law remains in force. The Venice Commission therefore does not recommend the introduction of such a competence (…)"

> *CDL-AD(2008)029* Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paragraphs 17-18.

"Even more than the possibility for the Court to initiate proceedings on its own motion, Article 110 brings the Constitutional Court in the political arena. The law should restrict the task to monitor the implementation of constitutionality and legality from a general supervision to monitoring the execution of its own decisions."

> *CDL-AD(2008)030* Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 80.

"A Constitutional Court should be able to annul or quash a provision in a law that conflicts with the Constitution."

> *CDL-AD(2009)014* Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 27.

"(…) The constitutional court must in any case reply to all questions submitted and declared admissible (…)"

"In any case, constitutional courts must be given the tools to prevent unserious, abusive or repetitive complaints."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 155, 221.

8.4 Obligation to follow constitutional interpretation provided by the constitutional court

"It is important to stress the relevance of the Constitutional Court's reasoning, which should guide ordinary courts. Respect shown by the ordinary courts for the Constitutional Court's reasoning is the key to providing an interpretation that is in conformity with the Constitution. This is due to the fact that only the interpretation by the Constitutional Court is constitutional. Ordinary courts or state bodies will only be able to apply a given law in a manner that is in line with the Constitution if they base themselves on this interpretation."

"It is unusual to create a new constitutional procedure in order to explain judgments rendered by the Constitutional Court. The reasoning of the Constitutional Court's judgment itself has to explain the ruling, and this should not be the task of another, additional, judgment. While it is true that such a procedure exists in a number of countries, it seems that in new democracies, where legal culture is not yet settled, such a provision could even be used to pressure a constitutional court into changing a previous judgement in substance."

"Judgments should be straightforward to understand and should not need further explanation. Nonetheless, it may indeed happen that the Constitutional Court, in its judgment, was not able to solve the constitutional problem or it may even have created a new problem. In such cases, a new judgment in a new procedure should be delivered, but not as an explanation of the former ruling."

CDL-AD(2007)036 Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, paragraphs 22, 24, 25.

"Article 69 obliging other state authorities to take into account the legal reasons of the decision of the Constitutional Court when they adopt a new individual act is also a positive element. Often, the problems with other courts result from the fact that they follow the operative part but not the reasoning of the Constitutional Court."

CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 71.

"An explicit legislative - or even better constitutional - provision obliging all other state organs, including the courts, to follow the constitutional interpretation provided by the constitutional court provides an important element of clarity in the relations between the constitutional court and ordinary courts and can serve as a basis for individuals to claim their rights before the courts."

- "A nuanced view is necessary when considering preliminary ruling procedures. First, exceptions of unconstitutionality and preliminary questions initiate review of a normative act. It is uncontested that a decision following an exception of unconstitutionality has a binding effect between the parties and that the ordinary court is obliged to apply the constitutional court's decision in the concrete case."

*CDL-AD(2010)039*rev Study on individual access to constitutional justice, paragraphs 165, 170.

"The constitutional revision follows, *inter alia*, the judgment of the Belgian Constitutional Court No. 73/2003, of 26 May 2003. It might be considered as aiming in particular at reversing some effects of this judgment. There is however no general standard saying that a constitutional revision cannot go against a decision of a constitutional court. This would make the Constitution as interpreted by the Constitutional Court intangible. Frequent constitutional amendments aimed at reversing decisions of the Constitutional Court would however undermine constitutional culture, the authority of the Constitutional Court, and thus the respect for the Constitution itself."

CDL-AD(2012)010 Opinion on the Revision of the Constitution of Belgium, paragraph 67.

"From a functional perspective, the task of constitutional courts can be described as safeguarding the supremacy of the Constitution by providing an interpretation of it, which leads to a coherent development of law on the basis of the principles contained in the Constitution. Earlier case-law, even adopted on the basis of constitutional provisions, which are no longer in force, is an important source for this coherent development of the law. In Hungary, many human rights principles have been formed over years and have found their expression in the practice of the Constitutional Court. The decision of the Constitutional Court of Hungary on the abolition of the death penalty was ground breaking and acclaimed world-wide. It served as inspiration for the abolition of the death penalty by the Constitutional Courts of South Africa, Lithuania, Albania and Ukraine.

It is a misconception that it is good for constitutional courts to have a wide margin of appreciation. They should not take arbitrary decisions, but provide for constitutional coherence through decisions based on the Constitution and previous case-law. Furthermore, any constitutional court is free to deviate from its former decisions, provided it does so in a reasoned way.

Even if the constituent power were concerned that by basing itself on its earlier case-law, the Constitutional Court could perpetuate the old Constitution and would thus impair the effect of the new Fundamental Law, the complete removal of the earlier case-law would be neither adequate nor proportionate. Following any constitutional amendment, it is the task of constitutional courts to limit their reference to those provisions and principles that have not been affected by an amendment."

(…)

"The Venice Commission therefore cannot support the Hungarian authorities' argument that the Constitutional Court should be more free to decide. As shown, there was no justification to repeal the Constitutional Court's former case-law in order to enable the Constitutional Court to renew its jurisdiction in cases where it is necessary. It is inherent in a Constitutional Court's approach to interpret a constitution on the basis of its provisions

and the principles contained in it. These principles transcend the constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. It is these principles which are reflected in the case-law of the Constitutional Court since its establishment."

CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraphs 92-94, 96.

"According to Article 21.2, the Secretary General shall "take care of and be responsible" for the enforcement of the acts of the Constitutional Court. Being "responsible" is asking too much from a staff member who cannot be held responsible, for instance for inaction by Parliament. The Secretary General can only be in charge of following up on the execution of the decision."

CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 28.

8.5 Re-opening of a case by the Constitutional Court

"Re-opening the case upon the discovery of new circumstances is highly unusual for constitutional courts. Article 96 runs also counter to Article 135.3 of the Amendment of the Constitution, according to which 'The Constitutional Court shall perform its activity at the initiative of subjects provided by the Law on the Constitutional Court.' Among these subjects, there cannot be the Court itself. If the Court is given the power to review its own judgements whenever new circumstances appear or there is a changing of the provisions upon which the Court has founded a previous judgement, this can endanger the Court's role in the constitutional system. In addition, several questions need to be clarified: what are the terms of this possibility, what is the relationship of the 'new' judgment of the Constitutional Court with earlier decision, what about res judicata objections etc."

CDL-AD(2002)016 Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, paragraph 66.

9 Relations of the constitutional court with the media

"In accordance with Article 20 of the draft law, the mass media shall not have the right to interfere in the Constitutional Court's activities nor directly or indirectly exert influence on the judges of the Court. Persons committing such acts bear legal responsibility in the established legal order. The Commission does not overlook the fact that sometimes a virulent press campaign may exercise some influence on the judiciary. It also recognises that the provision of Article 20 aims at safeguarding the judiciary from such interferences. However, a very cautious approach is required in order to obtain a fair balance between the interests some administration of justice and those of freedom of expression guaranteed under Articles 47 and 50 of the Constitution of Azerbaijan. The case-law of the European Court of Human Rights in this field could provide guidelines on this issue."

CDL-INF(1996)010 Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan, p. 5.

"Although the publicity of the work of the Constitutional Court has already been guaranteed by public hearings in procedures before the Court, the publication of its decisions and the release of communiquйs to the media, it is highly appreciated that Article 1 Amendments provides that decisions of the Court and session notifications are also to be published on the Internet site of the Constitutional Court. This is especially relevant in view of the postponement of the publication of decisions (see section L, below). All decisions should be published immediately on the site, even if their publication in the official journal may be postponed."

CDL-AD(2011)050corr Opinion on draft amendments and additions to the Law on the Constitutional Court of Serbia, paragraph 12.

Appendix - Reference documents

1. CDL-INF(1996)010 Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan, adopted by the Venice Commission at its 29th Plenary Session (Venice, 15-16 November 1996).

2. CDL-INF(1997)002 Opinion on the Constitution of Ukraine, adopted by the Venice Commission at its 30th Plenary Session (Venice, 7-8 March 1997).

3. CDL(1997)018rev Opinion on the law on the Constitutional Court of Ukraine, adopted by the Venice Commission at its 31st Plenary Session (Venice, 20-21 June 1997).

4. CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997).

5. CDL-INF(2001)002 Opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, adopted by the Venice Commission at its 45th Plenary Session (Venice, 15-16 December 2000).

6. CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, adopted by the Venice Commission at its 50th Plenary Session (Venice, 8-9 March 2002).

7. CDL-AD(2002)016 Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002).

8. CDL-AD(2003)006 Opinion on the Draft Law on the Human Rights defender of Armenia, adopted by the Venice Commission at its 54th Plenary Session (Venice, 14-15 March 2003).

9. CDL-AD(2004)023 Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, adopted by the

Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004).

10. CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, adopted by the Venice Commission at its 59th Plenary Session (Venice, 17-18 June 2004).

11. CDL-AD(2004)035 Opinion on the Draft Federal Constitutional Law "on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation", adopted by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2004).

12. CDL-AD(2004)041 Joint Opinion on the Draft Law on the ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004).

13. CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004).

14. CDL-AD(2005)005 Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, adopted by the Venice Commission at its 62nd Plenary Session (Venice, 11-12 March 2005).

15. CDL-AD(2005)015 Opinion on the amendments to the Constitution of Ukraine, adopted by the Venice Commission at its 63rd Plenary Session (Venice, 10-11 June 2005).

16. CDL-AD(2005)039 Opinion on proposed voting rules for the constitutional court of Bosnia and Herzegovina, adopted by the Venice Commission at its 64th Plenary Session (Venice, 21-22 October 2005).

17. CDL-AD(2006)006 Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the constitutional court of Romania, adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006).

18. CDL-AD(2006)016 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, adopted by the Venice Commission at its 67th Plenary Session (Venice, 9-10 June 2006).

19. CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia, adopted by the Venice Commission at its 67th Plenary Session (Venice, 9-10 June 2006).

20. CDL-AD(2007)020 Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007).

21. CDL-AD(2007)036 Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, adopted by the Venice Commission at its 72nd Plenary Session (Venice, 19-20 October 2007).

22. CDL-AD(2008)015 Opinion on the Draft Constitution of Ukraine, adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008).

23. CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008).

24. CDL-AD(2008)030 Opinion on the Draft Law on the Constitutional Court of Montenegro, adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008).

25. CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009).

26. CDL-AD(2009)024 Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).

27. CDL-AD(2009)042 Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009).

28. CDL-AD(2010)038 Amicus Curiae Brief for the Constitutional Court of "The former Yugoslav Republic of Macedonia" on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

29. CDL-AD(2010)039rev Study on individual access to constitutional justice, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

30. CDL-AD(2010)044 Opinion on the Constitutional Situation in Ukraine, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

31. CDL-AD(2011)001 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011).

32. CDL-AD(2011)010 Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

33. CDL-AD(2011)015 Interim opinion on the draft decisions of the high judicial council and of the state prosecutorial council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia, adopted by the Venice Commission at its 87th Plenary Session, (Venice, 17-18 June 2011).

34. CDL-AD(2011)016 Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

35. CDL-AD(2011)017 Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

36. CDL-AD(2011)018 Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

37. CDL-AD(2011)030 Amicus Curiae Brief for the Constitutional Court of Bosnia and Herzegovina on the law of the Republika Srpska on the status of state property located on the territory of the Republika Srpska and under the disposal ban, adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011).

38. CDL-AD(2011)034 Joint opinion on the law on the protector of human rights and freedoms of Montenegro by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011).

39. CDL-AD(2011)038 Opinion on the draft code of constitutional procedure of Bolivia, adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011).

40. CDL-AD(2011)040 Opinion on the law on the establishment and rules of procedure of the Constitutional Court of

Turkey, adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011).

41. CDL-AD(2011)041 Amicus Curiae Brief on the case Santiago Bryson de la Barra et Al (on crimes against humanity) for the Constitutional Court of Peru, adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011).

42. CDL-AD(2011)050 corr Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia, adopted by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011).

43. CDL-AD(2012)001 Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012).

44. CDL-AD(2012)008 Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012).

45. CDL-AD(2012)009 Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012).

46. CDL-AD(2012)010 Opinion on the Revision of the Constitution of Belgium, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012).

47. CDL-AD(2012)014 Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012).

48. CDL-AD(2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013).

49. CDL-AD(2013)028 Opinion on the Draft Amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013).

50. CDL-AD(2013)034 Opinion on Proposals amending the draft Law on the amendments to the Constitution to strengthen the independence of judges of Ukraine (Venice, 6-7 December 2013).

51. CDL-AD(2014)005 Report on the Protection of Children's Rights: International Standards and Domestic Constitutions (Venice, 21-22 March 2014).

52. CDL-AD(2014)010 Opinion on the Draft Law on the Review of the Constitution of Romania (Venice, 21-22 March 2014).

53. CDL-AD(2014)014 Amicus Curiae Brief for the Constitutional Court of Georgia on Individual Application by Public Broadcasters (Venice, 21-22 March 2014).

54. CDL-AD(2014)015 Opinion on the Procedure for Appointing Judges to the Constitutional Court in Times of Presidential Transition (Venice, 13-14 June 2014).

55. CDL-AD(2014)017 Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan (Venice, 13-14 June 2014).

56. CDL-AD(2014)020 Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic (Venice, 13-14 June 2014).

57. CDL-AD(2014)026 Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones (Venice, 10-11 October 2014).

58. CDL-AD(2014)027 Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia (Venice, 10-11 October 2014).

59. CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro (Venice, 10-11 October 2014).

60. CDL-AD(2014)043 Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan (Venice, 12-13 December 2014).

ИМЕНЕМ РЕСПУБЛИКИ АРМЕНИЯ

ПОСТАНОВЛЕНИЕ КОНСТИТУЦИОННОГО СУДА РЕСПУБЛИКИ АРМЕНИЯ

ПО ДЕЛУ ОБ ОПРЕДЕЛЕНИИ ВОПРОСА СООТВЕТСТВИЯ ВТОРОГО АБЗАЦА ЧАСТИ 3 СТАТЬИ 36 ЗАКОНА РА "О ГОСУДАРСТВЕННЫХ ПЕНСИЯХ" КОНСТИТУЦИИ РЕСПУБЛИКИ АРМЕНИЯ НА ОСНОВАНИИ ОБРАЩЕНИЯ ЗАЩИТНИКА ПРАВ ЧЕЛОВЕКА РА

г. Ереван **14 октября 2014 г.**

Конституционный Суд Республики Армения в составе Г. Арутюняна (председательствующий), Ф. Тохяна, А. Туняна, А. Хачатряна, В. Оганесяна, Г. Назаряна, А. Петросян (докладчик),

с участием (в рамках письменной процедуры):

заявителя - Защитника прав человека РА К. Андреасяна,

привлеченного в качестве стороны-ответчика по делу официального представителя Национального Собрания РА - начальника Юридического управления Аппарата Национального Собрания РА А. Саргсяна,

согласно пункту 1 статьи 100, пункту 8 части 1 статьи 101 Конституции РА, статьям 25, 38 и 68 Закона РА "О Конституционном Суде",

рассмотрел в открытом заседании по письменной процедуре дело "Об определении вопроса соответствия второго абзаца части 3 статьи 36 Закона РА "О государственных пенсиях" Конституции Республики Армения на основании обращения Защитника прав человека РА"

Поводом к рассмотрению дела явилось зарегистрированное в Конституционном Суде РА 13 мая 2014 года обращение Защитника прав человека РА.

Изучив письменное сообщение докладчика по настоящему делу, письменные объяснения стороны-заявителя и стороны-ответчика, а также исследовав Закон РА "О государственных пенсиях", имеющиеся в деле другие документы, Конституционный Суд Республики Армения **УСТАНОВИЛ:**

1. Закон РА "О государственных пенсиях" принят Национальным Собранием РА 22 декабря 2010 года, подписан Президентом РА 30 декабря 2010 года и вступил в силу с 1 января 2011 года.

Оспариваемый по настоящему делу второй абзац части 3 статьи 36 Закона РА "О государственных пенсиях", озаглавленной "Выплата невыплаченной суммы пенсии", устанавливает:

"Эта сумма выплачивается, если заявление и необходимые документы представляются в подразделение, назначающее пенсию, в течение шести месяцев после смерти пенсионера. В случае непредставления заявления в шестимесячный срок невыплаченная вследствие смерти пенсионера сумма пенсии подлежит наследованию, если заявление и необходимые документы представляются в подразделение, назначающее пенсию, в течение двенадцати месяцев после смерти пенсионера".

Оспариваемое положение в действующей редакции закреплено Законом от 19 марта 2012 года ЗР-100-Н "О внесении изменений и дополнений в Закон РА "О государственных пенсиях".

2. Оспаривая конституционность второго абзаца части 3 статьи 36 Закона РА "О государственных пенсиях", заявитель считает, что упомянутое положение противоречит статьям 31 и 37, а также части 3 статьи 42 Конституции РА.

Заявитель считает, что Гражданский кодекс РА относительно наследования невыплаченной суммы пенсии, в отличие от оспариваемого положения, предусматривает иное регламентирование. Согласно заявителю, из регламенти-

рования Гражданского кодекса РА можно сделать вывод, что хотя предусмотрен шестимесячный срок для принятия наследства, тем не менее также установлено, что наследство может быть принято наследником без обращения в суд по истечении срока, установленного для его принятия, при наличии согласия всех остальных наследников, принявших наследство, а также возможности обращения в суд с целью признания причин пропуска срока принятия наследства уважительными. Оспариваемое же положение своим регламентированием ограничивает право лица на получение невыплаченной суммы пенсии в случае смерти пенсионера и соответственно также создает противоречие не только с регламентациями Гражданского кодекса РА, но и с положениями Конституции РА.

Заявитель утверждает, что хотя статьей 64 предыдущего Закона РА 2002 года "О государственных пенсиях" и был установлен шестимесячный срок, однако это не касалось наследования невыплаченных сумм, из чего становилось очевидно, что в случае наследования правоотношение уже регулировалось Гражданским кодексом РА - общими регулированиями наследственных правоотношений. А новое регламентирование оспариваемого положения Законом РА "О государственных пенсиях" 2010 года ведет к ухудшению правового положения лица и тем самым - к противоречию также с положениями части 3 статьи 42 Конституции РА.

Заявитель считает, что оспариваемое правовое регулирование препятствует эффективному осуществлению права собственности лица, а также не исходит из требований принципа верховенства права и создает проблему и конституционности, и противоречия международным обязательствам РА.

3. Сторона-ответчик, возражая против аргументов заявителя, считает, что второй абзац части 3 статьи 36 Закона РА "О государственных пенсиях" соответствует требованиям статей 31 и 37, а также части 3 статьи 42 Конституции РА.

Согласно ответчику, оспариваемое положение для наследования указанных сумм устанавливает условие, не предусмотренное Гражданским кодексом РА, а именно: пись-

менное обращение в подразделение, назначающее пенсию, для получения соответствующей суммы, что находится вне предмета регулирования Закона РА "О государственных пенсиях".

Сторона-ответчик находит, что данная проблема не создает противоречие с Конституцией РА, а имеется противоречие между Гражданским кодексом РА и Законом РА "О государственных пенсиях". Кроме того, согласно ответчику, эта проблема вызывает неоднообразную правоприменительную практику, что должно быть исправлено посредством устранения существующего противоречия между оспариваемым положением и Гражданским кодексом РА, и направленный на это проект законодательных изменений уже находится в обращении.

Согласно ответчику, постольку, поскольку в аспекте соотносимости закона и кодекса оспариваемое положение по сути противоречит предусмотренным Гражданским кодексом РА регулированиям, а не Конституции РА, суждения относительно его обратной силы необходимо рассматривать именно в данном контексте.

4. Констатируя в рамках конституционно-правового спора по настоящему делу, что оспариваемое правовое регулирование касается правоотношений в связи с наследованием суммы пенсии, невыплаченной вследствие смерти пенсионера, учитывая также правовую позицию Конституционного Суда, выраженную в Постановлении от 4 октября 2006 года ПКС-649, согласно которой "пенсия, являясь средством социального обеспечения, также является формой собственности согласно прецедентному праву Европейского суда", Конституционный Суд считает необходимым раскрыть конституционно-правовое содержание оспариваемого правового регулирования, особенно учитывая:

а) конституционные положения о праве собственности, о его осуществлении, ограничении и защите, а также правовые позиции относительно них, выраженные в постановлениях Конституционного Суда РА;

б) наличие конкретных гарантий обеспечения легитимных ожиданий, защиты права собственности, обус-

ловленных необходимостью обеспечения верховенства права.

Конституционный Суд констатирует, что согласно части 1 статьи 8 Конституции РА "в Республике Армения признается и защищается право на собственность". Реализация этого конституционного положения гарантируется Конституцией РА, в частности статьями 31 и 43.

Согласно частям 1-3 статьи 31 Конституции РА "каждый имеет право на владение, пользование, распоряжение своей собственностью и ее наследование по своему усмотрению. Осуществление права собственности не должно наносить вред окружающей среде, нарушать права и законные интересы иных лиц, общества и государства.

Никого нельзя лишать собственности, за исключением предусмотренных законом случаев - в судебном порядке.

Отчуждение собственности для нужд общества и государства может быть произведено только в исключительных случаях при наличии высших общественных интересов в установленном законом порядке с предварительной равноценной компенсацией".

В статье 43 Конституции РА закреплено, что "ограничения основных прав и свобод человека и гражданина не могут превышать пределы, установленные международными обязательствами Республики Армения". В частности, статья 1 Протокола номер 1 к Европейской конвенции О защите прав человека и основных свобод устанавливает: "Каждое физическое или юридическое лицо имеет право на беспрепятственное пользование своей собственностью", а часть 2 статьи 17 Всеобщей декларации прав человека устанавливает: "Никто не должен быть произвольно лишен своего имущества".

К вопросам права собственности, его реализации, ограничения и защиты Конституционный Суд РА обращался во многих своих постановлениях. В частности, правовые позиции, выраженные в Постановлениях от 18 апреля 2006 года ПКС-630, 18 марта 2008 года ПКС-741, 13 июля 2010 года ПКС-903, 24 февраля 2012 года ПКС-1009, применимы также по настоящему делу.

5. Конституционный Суд констатирует, что второй абзац части 3 статьи 36 Закона РА от 22 декабря 2010 года ЗР-243-Н "О государственных пенсиях" в редакции, действующей по Закону РА от 19 марта 2012 года ЗР-100-Н, устанавливал:

"Эта сумма выплачивается, если заявление и необходимые документы представляются в подразделение, назначающее пенсию, в течение шести месяцев после смерти пенсионера. В случае непредставления заявления в данный срок невыплаченная сумма пенсии подлежит наследованию". Из упомянутого предыдущего правового регулирования следует, что правоотношения в связи с наследованием регулируются Гражданским кодексом РА. Стоит отметить, что аналогичное регламентирование предусматривала также часть 7 статьи 64 Закона РА от 19 ноября 2002 года ЗР-519-Н "О государственных пенсиях".

Во изменение вышеупомянутого предыдущего регламентирования Законом РА от 19 марта 2012 года ЗР-100-Н "О внесении изменений и дополнений в Закон РА "О государственных пенсиях" второй абзац части 3 статьи 36 был изложен в новой редакции, согласно которой: "Эта сумма выплачивается, если заявление и необходимые документы представляются в подразделение, назначающее пенсию, в течение шести месяцев после смерти пенсионера. В случае непредставления заявления в шестимесячный срок невыплаченная вследствие смерти пенсионера сумма пенсии подлежит наследованию, если заявление и необходимые документы представляются в подразделение, назначающее пенсию, в течение двенадцати месяцев после смерти пенсионера".

Анализ части 3 статьи 36 Закона РА "О государственных пенсиях" показывает, что она регулирует правоотношения в связи с выплатой невыплаченной вследствие смерти пенсионера суммы пенсии с правом наследования этой суммы, а также с реализацией данного права.

Конституционный Суд подтверждает свою правовую позицию, выраженную в Постановлении от 18 сентября 2010 года ПКС-917, согласно которой "в силу части 1 статьи 42 Конституции РА государство признает также право насле-

дования, которое включает не только право передачи в наследство, но и право получения наследства.

Право на наследство обеспечивает защиту прав собственника также после его смерти, делая возможным преемственность его собственнических правомочий. В то же время оно создает для наследника конституционно защищенную возможность правопреемства по отношению к собственности наследодателя".

Что касается оспариваемого по настоящему делу правового положения относительно правового регулирования реализации права наследования невыплаченной вследствие смерти пенсионера суммы пенсии, то Конституционный Суд находит, что законодатель Законом от 19.03.2012 г. ЗР-100-Н устанавливает новое правовое условие, по которому осуществление права наследования обуславливается представлением заявления и необходимых документов в подразделение, назначающее пенсию, в **течение двенадцати месяцев** после смерти пенсионера. А любое, особенно новое, правовое условие должно иметь правомерную цель создания более эффективных гарантий, которая не может быть реализована игнорированием какой-либо конституционно-правовой нормы и принципа. В условиях данного правового регулирования новое правовое условие - двенадцатимесячное временное ограничение - исключает возможность получения невыплаченной вследствие смерти пенсионера суммы пенсии в случае пропуска этого срока по уважительной причине. Устанавливая новое правовое условие, законодатель не предусматривает возможность считать уважительными причины пропуска двенадцатимесячного срока, в том числе в судебном порядке. Конституционный Суд считает, что отсутствие подобного правового регулирования препятствует полноценному осуществлению конституционного права собственности, в частности установленной статьями 18 и 19 Конституции РА защите этого права в отношениях в связи со сроком принятия наследства.

Исходя из вышеизложенного, принимая за основание правовые позиции Конституционного Суда относительно права собственности, его ограничения, осуществления и защиты, а также учитывая правовые регулирования Закона РА

"О государственных пенсиях", результаты исследования письменного объяснения привлеченного в качестве стороны-ответчика по настоящему делу Национального Собрания РА, Конституционный Суд находит, что установленное оспариваемым правовым регулированием двенадцатимесячное временное ограничение не обусловлено требованием охраны публичных ценностей и в результате не целенаправлено на обеспечение разумного баланса между правами собственника и иных лиц и публичными интересами. Обоснованием подобного ограничения может служить уточнение судьбы наследственной массы, правовое регулирование которой, однако, предусмотрено Гражданским кодексом РА.

6. В рамках рассмотрения настоящего дела Конституционный Суд считает необходимым обратиться к соотношению оспариваемого правового регулирования и правовых регулирований в связи с наследованием Гражданского кодекса РА.

Согласно части 2 статьи 1184 Гражданского кодекса РА "наследование регулируется настоящим Кодексом, а в случаях им установленных - и иными законами". Анализ показывает, что несмотря на то, что Гражданский кодекс РА не содержит никакого положения относительно предусмотрения какого-либо регламентирования по Закону РА "О государственных пенсиях", тем не менее оспариваемое по настоящему делу правовое положение Закона РА "О государственных пенсиях" предусматривает правовые регулирования, не созвучные с правовыми регулированиями Гражданского кодекса РА. Согласно части 3 статьи 1249 Гражданского кодекса РА, посвященной наследованию невыплаченных сумм заработной платы, пенсий, пособий и платежей в возмещение вреда, "если нет лиц, которые имели бы на основании пункта 1 настоящей статьи право на получение сумм, не выплаченных умершему, или они не предъявили требований о выплате этих сумм в установленный срок, соответствующие суммы включаются в состав наследства и наследуются на общих основаниях, установленных настоящим Кодексом". То есть в случае несоблюдения предусмотренной Гражданским кодексом РА особой процедуры применяются общие

правила наследования. Согласно части 1 статьи 1226 и части 1 статьи 1227 Гражданского кодекса РА принятие наследства осуществляется подачей нотариусу по месту открытия наследства заявления наследника о принятии наследства или его заявления о выдаче свидетельства о праве на наследство в течение шести месяцев со дня открытия наследства. Однако этот срок не является абсолютным, и наследник может принять наследство без каких-либо временных ограничений при удовлетворении некоторых реквизитов. Так, согласно части 1 статьи 1228 Гражданского кодекса РА "наследство может быть принято наследником по истечении срока, установленного для его принятия, без обращения в суд при условии согласия на это всех остальных наследников, принявших наследство". Законодатель не предусматривает никакого временного ограничения для осуществления этого права. Согласно части 2 той же статьи "по заявлению наследника, пропустившего срок для принятия наследства, суд может признать его принявшим наследство, если найдет причины пропуска срока уважительными, в частности, если установит, что этот срок был пропущен потому, что наследник не знал и не должен был знать об открытии наследства и при условии, что наследник, пропустивший срок для принятия наследства, обратился в суд в течение шести месяцев после того, как причины пропуска этого срока отпали". Здесь законодатель также не ставит никаких временных ограничений для промежутка времени между истечением срока принятия наследства и моментом, когда отпала причина пропуска этого срока. То есть независимо от того, сколько времени прошло после истечения срока принятия наследства, все равно в случае обращения в суд в течение шести месяцев после того, как отпали причины пропуска этого срока, причины пропуска срока могут считаться уважительными, а наследство может быть принято наследником.

Следующий способ принятия наследства предусмотрен частью 3 статьи 1226 Гражданского кодекса РА, согласно которой "считается, если не доказано иное, что наследник принял наследство, когда он фактически вступил во владение или управление наследственным имуществом, в том числе, когда наследник:

1) принял меры к сохранению имущества и к защите его от посягательств или притязаний третьих лиц;
2) произвел за свой счет расходы на содержание имущества;
3) оплатил за свой счет долги наследодателя или получил от третьих лиц причитавшиеся наследодателю суммы".

Вышеупомянутое правовое положение не обуславливает принятие наследства подачей нотариусу какого-либо заявления. Лицо может не обращаться ни в какой орган, а просто фактически вступить во владение или управление наследственным имуществом. Анализ этого правового положения и части 3 статьи 1225 Гражданского кодекса РА свидетельствует, что в силу фактического владения считается, что наследник принял также невыплаченную вследствие смерти пенсионера сумму пенсии.

Подытоживая проведенный анализ, Конституционный Суд находит, что оспариваемое по настоящему делу правовое положение игнорирует не только закрепленные Гражданским кодексом РА способы принятия наследства, не предоставляя возможности наследнику в силу фактического владения получить также невыплаченную вследствие смерти пенсионера сумму пенсии, но и предусматривает временное ограничение права наследования, что противоречит срокам, предусмотренным Гражданским кодексом РА.

Изучение правоприменительной практики относительно проблемы, являющейся предметом спора по настоящему делу, свидетельствует, что в правоотношениях в связи с наследованием невыплаченной вследствие смерти пенсионера суммы пенсии административные правоприменительные органы, по сути, руководствуются оспариваемым правоположением.

Конституционный Суд, принимая за основание часть 6 статьи 9 Закона РА "О правовых актах", согласно которой "все иные законы Республики Армения в сфере правоотношений, регулируемых кодексом, должны соответствовать кодексам", а также требование части 1 статьи 1 Гражданского кодекса РА, согласно которому "нормы гражданского права, содержащиеся в других законах, должны соответ-

ствовать настоящему Кодексу", считает, что оспариваемое правовое положение может применяться постольку, поскольку оно не противоречит правовым регулированиям Гражданского кодекса РА. С целью обеспечения правомерной правоприменительной практики Конституционный Суд обозначает необходимость обеспечения гармоничного Гражданскому кодексу РА правового регулирования отношений в связи с наследованием в Законе РА "О государственных пенсиях", что находится в компетенции законодательного органа.

Исходя из результатов рассмотрения дела и руководствуясь пунктом 1 статьи 100, пунктом 8 части 1 статьи 101, статьей 102 Конституции Республики Армения, статьями 63, 64 и 68 Закона Республики Армения "О Конституционном Суде", Конституционный Суд Республики Армения **П О С Т А Н О В И Л:**

1. Положение второго абзаца части 3 статьи 36 Закона РА "О государственных пенсиях" "если заявление и необходимые документы представляются в подразделение, назначающее пенсию, в течение двенадцати месяцев после смерти пенсионера" признать противоречащим требованиям статей 18, 19 и 31 Конституции Республики Армения и недействительным.

2. Согласно части второй статьи 102 Конституции Республики Армения настоящее Постановление окончательно и вступает в силу с момента оглашения.

ПРЕДСЕДАТЕЛЬСТВУЮЩИЙ **Г. АРУТЮНЯН**

14 октября 2014 года
ПКС-1167

Конституционное
ПРАВОСУДИЕ

Вестник Конференции
органов конституционного контроля
стран новой демократии

Выпуск 1 (67) 2015

Адрес редакции:
0019, Ереван, пр. Баграмяна 10
Тел.: 529991, (011) 588189
Факс: 529991
Email: armlaw@concourt.am
URL: http://www.concourt.am

Сдано в набор 20.08.2015 г.
Подписано к печати 27.09.2015 г.
Печ. л. 8.25
Бумага офсетная
Печать офсетная
Формат 60x84 1/16
Тираж 750 экз.

Выходит ежеквартально

Статьи вестника “Конституционное правосудие” публикуются в авторской редакции

Вестник включен в перечень ведущих рецензируемых научных журналов и изданий, в которых должны публиковаться основные научные результаты диссертаций на соискание ученых степеней доктора и кандидата наук

Зарегистрирован коллегией
N 8/22 Министерства юстиции РА
27 февраля 1998 г.