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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

ON CONSTITUTIONAL JUSTICE

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1 Introduction

The present document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning constitutional justice. The aim of this Compilation is to give an overview of the doctrine of the Venice Commission in this field.

This Compilation is intended to serve as a source of reference for drafters of constitutions and of legislation on constitutional courts, researchers as well as the Venice Commission's members, who are requested to prepare comments and opinions on such texts. However, it should not prevent members from introducing new points of view or diverge from earlier ones, if there is good reason for doing so. It merely provides a frame of reference.

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

The Compilation, first published in 2006 and then called the *Vademecum* on Constitutional Justice (CDL-JU(2006)029), is not a static document and will continue to be regularly updated with extracts of newly adopted opinions by the Venice Commission.

Each opinion referred to in the present document relates to a specific country and any recommendation made has to be seen in the specific constitutional context of that country. This is not to say that such recommendation cannot be of relevance for other systems as well.

The Venice Commission's reports and studies presented here seek to present the general standard for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of more general application. Nonetheless, it should be noted that they may focus on specialised constitutional review systems and certain recommendations made are applicable only to these systems.

Both for opinions and reports/studies the brief extracts presented here have to be seen in the context of the wider text adopted by the Venice Commission. Therefore, each citation refers to its precise position (paragraph number, page number for older opinions), thus allowing the reader to access the citation within this context.

Venice Commission opinions may change or develop over time as new opinions are given and in the light of experience. Therefore, to have a full understanding of the Commission's position, it would be important to read all of the Compilation under a particular theme.

The Systematic Thesaurus of the Venice Commission provides a structured English-French glossary of terms used in the field of constitutional justice. It is regularly updated by the Commission's Joint Council on Constitutional Justice, which is composed of the members of the Sub-Commission on Constitutional Justice and the liaison officers appointed by the Constitutional Courts and equivalent bodies in the Commission's member and observer states.

Please kindly inform the Venice Commission's Secretariat if you think that a citation is missing, superfluous or filed under an incorrect heading (Venice@coe.int).

2 Type of constitutional court

"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, para.14.

"…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.

"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, para 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, para. 52.

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, para. 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, para. 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, para. 47.

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 opinions, 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).

"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, para. 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 population 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, para. 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, para .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).

"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, para. 16, 17.

"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, para. 18.

"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, para. 80.

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, para. 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, para. 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, para. 11.

4.2 Incompatibilities

"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), para. 53.

"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), para. 49.

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).

"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, para. 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, para. 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, para. 97

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 electing 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), para. 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, para. 19.

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, para. 20.

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).

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).

"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, para. 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, para. 20.

4.4.3 Continuity of the 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 elective (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).

"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).

"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, para. 17.

"In order to ensure and safeguard the stable functioning of the constitutional judiciary the Venice Commission recommends … 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 functioning of the Constitutional Court of Ukraine, para. 21(b) ; see also CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia.

"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, para. 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, para. 12.

"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, para. 15.

"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, para. 25.

4.5 Termination / suspension of office

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, para. 46.

"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, para. 19.

"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, para. 24.

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).

'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, para. 20.

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, para. 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, para. 16.

4.8 Independence of the judiciary

"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, para. 42.

"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, para.14, 35.

"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, para. 11.

"A general power of the Court to start proceedings on its own initiative would make the Court a political actor and the Court could loose 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, para. 50.

4.9 Salary/Vacation

"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, para. 24, 27, 29.

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, para. 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, para. 17.

5 The right to appeal to the court

5.1 Appeal by a public body

"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 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."

> 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, para. 40.

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 Sénat 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, para. 46.

5.1.2 Ombudsman

"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, para. 7.

"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 violations 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.

"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)039rev Study on individual access to constitutional justice, para. 2, 64, 106, 108.

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, para. 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, para. 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 iure* 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)039rev Study on individual access to constitutional justice, para, 62, 126, 142, 216, 226.

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 Kyrgystan."

"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, para. 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, para. 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)039rev Study on individual access to constitutional justice, para. 3, 79, 80.

5.2.1 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;…"
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> CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, para. 9.

"There may be ordinary remedies, which are prescribed by law but which are ineffective because they ay not be apt to avoid irreversible detrimental consequences for the applicant in the light of he 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, para. 60.

5.2.2 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, para. 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, para. 113, 117, 129.

5.2.3 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).

"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, para. 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, para. 31.

"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)039rev Study on individual access to constitutional justice, para. 124.

"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)039rev Study on individual access to constitutional justice, para. 112.

5.2.4 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, para. 44.

"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)039rev Study on individual access to constitutional justice, para. 202, 226.

"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."

> CDL-AD(2010)039rev Study on individual access to constitutional justice, para. 132.

5.2.5 *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[1], 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."

[1] H.Kelsen, cit.in: R. Ben Achour, "Le contrôle de la Constitutionnalité des lois: quelle procédure?", Actes du colloque international " L'effectivité des droits fondamentaux dans les pays de la communauté francophone ", Port-Louis (Île Maurice), 29-30 septembre, 1er octobre 1993, p.401.

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, para. 57, 58

5.2 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)039rev Study on individual access to constitutional justice, para. 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 type 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)039rev Study on individual access to constitutional justice, para. 94, 109, 149.

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, para. 38.

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, para. 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, para. 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, para. 49, 50.

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, para. 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)039rev Study on individual access to constitutional justice, para. 99.

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 interpretation 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, para. 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, para. 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, para. 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, para. 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, para. 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)018rev Opinion on the law on the Constitutional Court of Ukraine, para. 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, para. 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, para. 7.

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, para. 57.

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)018rev Opinion on the law on the Constitutional Court of Ukraine, para. 11.

7.4 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)039rev Study on individual access to constitutional justice, para. 11, 224, 225, 227.

7.5 Oral / written procedure

"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', para. 4.

"[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 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, para. 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)039rev Study on individual access to constitutional justice, para. 135, 138.

7.5.1 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)039rev Study on individual access to constitutional justice, para. 125.

7.6 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, para. 20,21.

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

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

7.8 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, para. 25.

7.9 Applications 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)039rev Study on individual access to constitutional justice, para. 144, 148, 152.

8 Effects of decisions

8.1 Ex tunc vs. 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, para. 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, para. 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, para. 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)039rev Study on individual access to constitutional justice, para. 192.

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, para. 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 – 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, para. 18.

"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, para. 27.

"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, para. 80.

"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)039rev Study on individual access to constitutional justice, para. 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."

"Judgements 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, para. 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, para. 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)039rev Study on individual access to constitutional justice, para. 165, 170.

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, para. 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.

10. Reference documents

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