FOUNDATION OF THE FIRST PRESIDENT
OF THE REPUBLIC OF KAZAKHSTAN-ELBASY

KAZAKHSTAN AND VENICE COMMISSION: FOR DEMOCRACY THROUGH LAW

Under the editorship
of Kairat Mami and Igor Rogov

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This book is the first edition, which summarizes the results of more than twenty years of cooperation between Kazakhstan and the Venice Commission.

It includes all opinions of the Venice Commission adopted at the request of the Republic of Kazakhstan, as well as some studies and reports relating to the most important legal institutions. Well-known domestic lawyers and foreign experts involved as speakers share their ideas and views on topical issues of legal development.

The annexes include the statutes and other documents forming the legal basis for the activities of this consultative body of the Council of Europe.

The book will provide an integrated view of the evolution of relations between the state bodies of the Republic of Kazakhstan and the Venice Commission, its activities, the existing international (european) standards in the field of democracy, the rule of law and the protection of human rights and freedoms. Thus, it will contribute to improve the quality of law-making and law enforcement activities, and in general – to ensure the compliance of national legislation with the Constitution and generally recognized principles and norms of international law.

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Dr. Gianni BUQUICCHIO,
President of the Venice Commission

The Venice Commission has been co-operating with Kazakhstan for more than 20 years. Kazakhstan held observer status from 1998 and in 2012 joined the Commission as a full member. This accession confirmed the wish of the authorities of Kazakhstan to actively co-operate with the Commission on constitutional and other legal reforms. Today we can say that through this partnership we were able not only to constructively work with each other but also to establish friendship, trust and mutual understanding.

Over the past thirty years Kazakhstan has made considerable progress in modernising its legislation based on international standards and best practices of European countries. This progress was made in close co-operation with several international organisations, including the Venice Commission. I believe that the potential of this partnership is far from being exhausted and that institutions such as the Venice Commission could continue to help the country on its path of reforms aimed at the democratisation of Kazakhstan and its institutions. It is true that our visions of the implementation of the above-mentioned standards is not always the same; however, ultimately our on-going dialogue will certainly contribute to bringing the constitutional and legal framework of Kazakhstan as close as possible to European standards.

Since 2007 when we were requested to prepare our first opinion on the legislation on the Ombudsman, the Venice Commission has been invited to provide opinions on several pieces of legislation. This first interaction was followed in 2009 by a request from the Constitutional Council to receive advice on the issue of the legal force of acts of the customs union between Belarus, the Russian Federation and Kazakhstan. In 2011 in co-operation with the OSCE/ODIHR, the Commission provided an opinion on the constitutional law on the judiciary and the status of judges in the Republic of Kazakhstan and in 2016 an opinion was prepared on the Code of judicial ethics.

In February 2017 the authorities of Kazakhstan requested the Venice Commission to prepare an opinion on the amendments to the Constitution of Kazakhstan. This was a major, qualitative development in our relations.

Since its adoption in 1995, the Constitution of Kazakhstan has provided stability and a solid basis for building a modern State. However, a number of crucial issues related to the balance of powers, the effective and efficient protection of human rights and the independence of the judiciary remained on the constitutional agenda. The 2017 constitutional reform followed the logic of the 1998 and the 2007 constitutional changes and aimed at striking a better balance between the powers of the President, the Government and the Majilis. It also empowered the Constitutional Council to examine draft constitutional amendments and questions to be submitted to a referendum before their adoption. This could be regarded as an important step in increasing the protection of the constitution and constitutional rights and freedoms.

The amended Constitution reduced some of the presidential powers including the abolition of the right to issue decrees having the force of law. At the same time some of the opinion's major criticisms remained unaddressed. These concerned, among others, recommendations to delete the power of the President to determine which laws should be prioritised on the agenda of the Parliament and reference to the supervisory powers of the Prosecutor's office. There are quite a few other remarks in the opinion which could certainly be useful in any future reform of the Constitution.

Since its creation in 1990, the Venice Commission has worked with many countries in the drafting of their constitutions. From the outset, the Commission was aware that it is not enough to assist countries in the adoption of constitutions and ensuring that they are in line with common standards.

The 2017 constitutional amendments have opened additional opportunities for co-operation between Kazakhstan and the Venice Commission. In 2018 we prepared two opinions upon request from the Ministry of justice and the High Judicial Council on the draft Administrative Procedure and Justice Code and on the Concept Paper on the reform of the High Judicial Council. On both occasions the authorities expressed their intention to co-operate with the Commission on the improvement of the relevant legislation based on its recommendations. I hope that this work will be constructive and lead to pieces of legislation which will respect European standards, and which will be effectively implemented by the competent state bodies.

The Venice Commission will be happy to continue our co-operation on the reform process aimed at further improving its constitutional and legal framework in Kazakhstan.

Kairat MAMI,
Chairman of the Constitutional Council of the Republic of Kazakhstan, Chairman of the Eurasian Association of the Constitutional Review Bodies, member of the Bureau of the World Conference on Constitutional Justice

The formation and further improvement of legal system of independent Kazakhstan takes place taking into account both national and advanced foreign experience and universally recognized international standards. During these years, Kazakhstan has joined a number of universal international treaties on the protection of human rights, recognized the jurisdiction of many international institutions operating in this field. They facilitate the implementation of conventional requirements into the country's legislation, which contain high human rights potential and are shared by all members of the international community.

One of the important partners of Kazakhstan on constitutional and legal construction is the Venice Commission, activities of which provide substantial support to the ongoing judicial and legal reform.

In 2016, as Chairman of the Supreme Court of the Republic, I took part in the 107th plenary session of the Commission, which gave an opinion on the draft Code of Judicial Ethics. The opinion and recommendations of the Commission's experts were used in the finalization of the project and at the VII Congress of Judges of the Republic the Code was adopted.

The Constitutional Council jointly with the Venice Commission held a number of international conferences and forums on topical issues of legal construction.

The role of the Commission in drafting the current Criminal and Criminal Procedural Codes is well known.

I would especially like to note the role of the Commission in carrying out the constitutional reform of 2017 in the country.

At its 110th plenary session, it gave a high assessment, stressing that the constitutional changes in Kazakhstan represent a step forward in the process of democratization of the state. Reform sets the right vector in the further development of the country and shows obvious progress. In the opinion of the Commission, the increase in the role of the Parliament as a whole and Chambers of the Parliament in particular, the transfer of certain functions of the President of the Republic to the

Government, the strengthening of mechanisms for its accountability and control over the Parliament is a positive change that is consistent with the logic of previous constitutional reforms in 1998 and 2007. Some proposals of experts were immediately included in the draft law.

In the modern period, many industries or institutions that are introduced or reformed within the framework of modernization of legal system have a pronounced constitutional and legal orientation. The Constitutional Council has repeatedly stressed that the strengthening of constitutionalism, with the leading role of the Basic Law, will be fully realized only if the rule of law is ensured.

The Commission has gained a great deal of experience in institutional and expert support in the establishment of the Rule of Law in various countries.

It repeatedly provided methodological support when the Constitutional Council considered the appeals received. In 2009, the Commission, at our request, gave an opinion (amicus curiae) on legal force of acts of the Customs Union structures between Belarus, the Russian Federation and Kazakhstan. The opinion of experts was taken into account by the Constitutional Council when passing an appropriate decision, which to some extent played a role in the formation of legal framework of the Customs Union, and later of the Eurasian Economic Union, and is a serious argument in defending national interests.

The Commission's reports on the results of comparative studies are greatly assisted to the defining the concept of the development of legal institutions. In this regard, reports on the Rule of Law (2011), on the right to individual access to constitutional justice (2010), on elections, the Checklist for Assessing the Rule of Law (2016) and many others are very useful.

These reviews, which are prepared on the basis of an in-depth study of the fundamental documents of international organizations, the legislation of states of almost all continents belonging to different legal families, are taken into account by the Constitutional Council when drafting final decisions and proposals for strengthening constitutional legality in the country.

As a member of the Bureau of the World Conference on Constitutional Justice, I appreciate the efforts of the Commission aimed at bringing together the bodies of constitutional control of the world for the Rule of Law, developing cooperation between regional associations, and identifying ways to resolve issues of mutual interest.

The World Conference was established on the initiative of the Commission, which serves as the secretariat.

Currently, its members are constitutional justice bodies of 116 states. Congresses of this organization are held every three years. The members discuss topical issues of constitutional development at these meetings.

I would like to pay special attention to the partnership and trust relations between the Commission and the Eurasian Association of constitutional review bodies, in which the Constitutional Council of Kazakhstan presides. In 2003, a cooperation agreement was signed between them, which gives an opportunity to intensify our joint programs.

For twenty years of cooperation, the Commission has become recognizable in Kazakhstan. The pace of cooperation is growing every year. Gradually, the number

of conclusions adopted by the Commission on appeals of state bodies of the country is growing, and they began to consider the authoritative opinion of the European structure as an important assessment of the correctness of the chosen model. Such an approach is fruitful in terms of the compliance of the state's legal infrastructure with leading European standards.

I hope that such cooperation between Kazakhstan and the Commission will serve the interests of the Rule of Law not only in our country, but also beyond its borders.

Igor ROGOV,
Deputy Executive Director of the Foundation of the First President of the Republic of Kazakhstan – Elbasy, Member of the Venice Commission from the Republic of Kazakhstan

The European Commission for Democracy through the Law of the Council of Europe, better known by the name of the city where it gathers, as the Venice Commission, was formed soon after falling of the Berlin wall in 1990 based on the partial agreement by 18 member states of the Council of Europe. In February 2002, concerning the Commission the expanded agreement was accepted the Council of Europe that allowed to the non-european states to enter into it. The Commission played a key role in acceptance by the East European countries of the constitutions conforming to standards of the European constitutional doctrine.

Initially educated as the instrument of urgent constitutional construction in the conditions of democratic changes, the Venice Commission gradually became an international and recognized authoritative forum on exchange of the ideas in the legal sphere.

According to the Statute, the Venice Commission is independent consultative body, which is engaged in studying of legal systems of the State Parties, first for the purpose of rapprochement of these systems and implementation of the principles of the rule of law and democracy.

The Commission promotes distribution of the European constitutional heritage. In addition, the Commission plays a unique role in settlement and conflict prevention through development of norms and recommendations in the constitutional and legal sphere.

In the work, the Venice Commission is guided by three basic principles of the European constitutionalism, which are the cornerstone of activity of the Council of Europe namely: - democracy, protection of human rights and rule of law. These three principles find implementation in the following spheres of activity:

- Democratic institutes and human rights;
- Elections, referendums and political parties;
- Constitutional control and justice.

As a part of the Commission 62 countries, including all member states of the Council of Europe. As the associated member, Belarus takes part in its work. Argentina, Holy See, Uruguay and Japan have the status of the observer at the Venice Commission. The European Union, Palestine and South Africa have the special status of the partner in cooperation.

The Commission, first, makes recommendations, renders «the urgent help» in the field of constitutional law, in particular, in questions of preparation of drafts of constitutions and the constitutional reforms, and for this purpose analyzes documents of the constitutional character. The method of work of the Commission when rendering legal assistance consists in making the legal conclusions under the bills or laws, which are put into operation. In addition, concerning the states which are not members of Council of Europe it becomes only at the request of the relevant state that excludes a possibility of any intervention in its internal affairs. The Venice Commission does not set as the purpose to impose the decision, and prefers exchange of views, applying a dialogue method, but not directives. Decisions of the Commission have advisory nature.

From the first days of the creation, the Venice Commission actively works in the sphere of an electoral law. In 2002, Council for democratic elections was created. Studying of transnational subjects, development of the set of recommendatory norms on elections falls within the scope of its activity. Council conducted, for example, a comparative research on referendums in Europe. Besides, members of Council developed a number of reports on restrictions of electoral rights (in the national law and according to the European convention on human rights) and the report on rules of elections and on the possible actions promoting participation of ethnic minorities in decision-making process in the European countries.

Exchange of the ideas and information between authorities of the constitutional control has paramount value in activity of the Commission. Because of long-term work of the Venice Commission the World Conference on Constitutional Justice as the international association of authorities of the constitutional control was founded. The purpose of this organization is establishing close cooperation at world level between the constitutional courts and equivalent institutes in the sphere of ensuring rule of Basic Laws. Now its participants are 116 states, including Kazakhstan.

Membership in similar associations allows supporting constant exchange of information and opinions on topical issues of implementation of the constitutional control within the congresses, conferences, round tables, seminars, issue of periodic printing editions, etc.

Kazakhstan had the status of the observer in the Venice Commission since 1998, and fourteen years later became her equal member. On March 13, 2012, the President of the Republic of Kazakhstan N. Nazarbayev signed the Decree «About Membership of the Republic of Kazakhstan in the European Commission for Democracy through the Law».

This act of the Head of state followed the decision of Committee of Ministers of the Council of Europe on the satisfaction of the corresponding application of Kazakhstan that is the evidence of recognition by the international community of achievements of Kazakhstan in the sphere of strengthening of the rule of law.

Each State Party appoints in the structure of this authoritative international structure to the four-year term of the member and substitute member of the Commission, which can be the persons, which gained the international fame thanks to the experience at democratic institutes or owing to their contribution to strengthening of a role of the law. Members of the Commission sit at an individual order, do not receive, and do not submit to any instructions.

By Decrees of the President of the Republic N. Nazarbayev I was twice appointed the member of the Venice Commission from the Republic of Kazakhstan since 2012, and substitute members of the Commission - the deputy Head of Presidential Administration T.S. Donakov (2012-2016) and the member of the Constitutional Council U. Shapak (since 2016).

Participation of Kazakhstan in work of the Venice Commission as the full member provides access to the advanced foreign legal technologies in the sphere of development of the national legislation create the additional channel of awareness of the Republic on the current problematic issues of other State Parties in the considered sphere. In addition, it gives the chance to request opinion of the Venice Commission of rather legal acts and bills, anticipating, thus, possible mistakes.

Along with it, the status of the member of Kazakhstan in the Venice Commission allows to strengthen contacts with the European institutes, including, for further implementation of legal and democratic reforms in the country, acquaintance of the international legal public with priorities of our Constitution.

For these years between the Venice Commission and Kazakhstan effective cooperation is established. The Commission on a constant basis interacts with the Constitutional Council, the Supreme Court, the High Judicial Council, Central Election Commission, the Commissioner for Human Rights, the Ministry of Justice both other state and public, including human rights structures of the country. By requests of the Kazakhstan, public authorities the Commission repeatedly rendered the expert and methodological help when reforming separate legal institutes.

Therefore, in 2007 the Commission prepared the opinion concerning a legal status of the Commissioner for Human Rights in the Republic of Kazakhstan.

In 2011, the Venice Commission together with Bureau on Democratic Institutions and Human Rights of OSCE drew the opinion on the Constitutional law «About the Judicial System and the Status of Judges of the Republic of Kazakhstan».

In 2016 according to the request of the Supreme Court, the opinion according to the draft Code of judicial ethics was accepted.

2017 was also productive during which two opinions of the Commission were prepared: under the bill «About Changes and Additions in the Constitution of the Republic of Kazakhstan» and the bill «About Administrative Procedures».

In October 2018, the opinion of the Commission on the draft of the Administrative procedural and justice code of the Republic was accepted. The Minister of Justice of Kazakhstan made such request.

In December 2018, the Commission approved the opinion on Concept of the bill concerning transformation of activity of the High Judicial Council of the Republic of Kazakhstan and the system of selection of judges of Kazakhstan.

At requests of authorities of the constitutional control, the Venice Commission draws the short opinions (amicus curiae) in which it does not consider a question of

constitutionality of the legal act, and carries out the comparative analysis of constitutional law of other countries and the international documents on the studied problem. Such document was drawn according to the request of the Constitutional Council in 2009 on validity of acts of structures of the Customs Union between Belarus, the Russian Federation and Kazakhstan.

The recommendations of the Venice Commission are considered by preparation of drafts of acts and adoption of the major state decisions in the legal sphere.

This book represents the first edition, which contains information on the Venice Commission, cooperation of Kazakhstan with it. It included all opinions of the Commission drawn by inquiries of our country. Besides, it included the statutory and other documents regulating activity of the Commission and its authorities and results of comparative researches on separate legal institutes.

I hope that the book will contribute to the further approval of the rule of law in Kazakhstan, promotion of activity of the Commission in this sphere and will be useful to the wide audience, which is interested in questions of constitutional and legal construction.

Unzila SHAPAK,
member of the Constitutional Council of the Republic of Kazakhstan, substitute member of the Venice Commission, Doctor of Law

The European Commission for democracy through law was established at the end of the XX century, when the bloc of socialist states collapsed, the USSR disintegrated, the European Union was established, when new states entered the world's international political and economic relations. This Commission is named after the city where its congresses are held (in agreement with the authorities of the Veneto region, the first plenary session was held in this city), that is, the Venice Commission of the Council of Europe.

In the 90-th of last century, the Venice Commission provided immediate great assistance to the democratically transformed states of Eastern Europe, in formation of their constitutional order, based on overall democratic and universal legal values. Thus, it has made a great contribution to bringing the constitutions of Eastern Europe in line with the constitutional heritage of Western Europe, and the legal and institutional system in line with European standards.

The process of transformation of the state and public life, which began at the end of the twentieth century, with the following coverage of many countries of the world, led to a complicated crisis and serious challenges to the socio-economic, political, spiritual and legal life of these countries. In such a difficult period, the Venice Commission managed to gain recognition in the world community. It turned into a forum recognizable at the international level, able to share constitutional and legal ideas in the legal space in a democratic environment. The Commission is the most authoritative advisory body for the examination of draft constitutions and legislation texts in the field of public law.

Today, 62 states are the members of the Commission.

The Venice Commission, as an independent advisory body, addresses the issues of quality of the Constitution, assists to identifying in the texts of the constitutions of the participant states the ambiguous, elusive concepts, implements the heritage of European constitutional law and strengthens the continuity of common constitutional values in order to bring closer the systems of world law, and also implements the principles of legal state and democratic constitutional provisions. To this end, the

Venice Commission conducts a doctrinal and legal analysis of many important relations in the public life of the participating states in the field of political and legal regulation. In particular, the ongoing in the state constitutional reforms, the relations between the branches of government, the protection of fundamental human rights and freedoms, the electoral system, administrative justice, criminal law and executive penal law, civil relations, the judicial system, the interaction of democratic institutions, etc.

The Commission's work is guided by three basic principles: democracy, the protection of human rights and the rule of law, which are the legacy of the European constitutional tradition, and the basis of the Council of Europe.

Kazakhstan has acquired the status of observer in the Venice Commission since 1998.

Since 2012, Kazakhstan has become a full member of the Commission. Since then, cooperation between the Venice Commission and Kazakhstan has moved to a higher plane. As a member of the Commission, Kazakhstan obtained a voice in decision-making. The Commission cooperates on a regular basis with the Constitutional Council and other state bodies, law enforcement bodies of the country, and at our request has repeatedly provided expert and methodological assistance in the reform of certain legal institutions.

In 2007, the Venice Commission had given an opinion on the legal status of the Commissioner for human rights. It was based on the opinions of its members, namely the representative of Hungary Peter Paczolay and the representative of Iceland Hjortur Torfason. And in 2011, the OSCE Office for Democratic Institutions and Human Rights and the Venice Commission adopted the opinion on the Constitutional law «On the judicial system and the status of judges of the Republic of Kazakhstan», based on the views of the representative of Hungary Karoly Bard (OSCE/ODIHR), substitute member from Ireland James Hamilton, substitute member from Georgia Konstantin Vardzelashvili. The comments and suggestions reflected in the opinion were taken into account while adopting the legislative acts. As time passed, we can judge of the effectiveness of the Commission's legal position.

In 2016, I have been appointed substitute member of the Venice Commission from the Republic of Kazakhstan by the decree of the First President of the Republic – Elbasy N. Nazarbayev.

In the period from 2016 to 2019, the Republic of Kazakhstan submitted to the Venice Commission quite a lot of legislative acts for an expert and methodological opinion. Some of the legal positions and proposals indicated in the Commission's opinions were reflected in the adopted legislative acts.

The procedure for submitting a request to the Venice Commission for an opinion is very simple, and is not complicated by additional formal procedures. A state or other entity wishing to make a request shall enter into relations with the Commission as an equal partner and the activity shall be based on the principle of «mutual trust». In the frames of the Commission work the meetings may be conducted. The opinion of the Commission is published on the official website.

The President, the Parliament, the Government, the Constitutional Court (Council), the Supreme Court, the Ombudsman and other supreme authorities can submit a request on behalf of the state.

In 2016, the Chairman of the Supreme Court of the Republic of Kazakhstan K.Mami submitted to the Venice Commission a request to give an opinion on a draft Code of judicial ethics of the Republic of Kazakhstan. The Commission has appointed experts from members such as Claire Bazy-Malaurie (France), Nicolae Esanu (Moldova), Johan Hirschfeldt (Sweden). On the basis of their expert explanations draft opinion has been made, which was presented at the 107th plenary session.

In the end of 2016, the deputy of the Head of Administration of the President T.Donakov requested an opinion for the draft law "Of administrative procedures". The Commission appointed the reporters Claire Bazy-Malaurie (France), Taliya Khabrieva (Russia) and Johan Hirschfeldt (Sweden).

In the beginning of 2017 the Head of the Administration of the President A. Jaksybekov requested the Commission for opinion on the draft law on "Making amendments and additions to the Constitution of the Republic of Kazakhstan". The Venice Commission for giving an expert opinion appointed the reporters Osman Can (Turkey), Philip Dimitrov (Bulgaria), Gagik Harutyunyan (Armenia), Taliya Khabrieva (Russia), Gunars Kutris (Latvia), George Papuashvili (Georgia). At 110-th plenary session the Venice Commission prepared and adopted the opinions to these draft laws.

In 2018 the Minister of justice of the Republic of Kazakhstan M.Beketayev forwarded to the Commission the draft law on "Administrative procedures and justice code of the Republic of Kazakhstan" for the opinion. At the 116th plenary session in October 2018, the opinion was adopted, based on consideration of experts: Taliya Khabrieva (Russia), Johan Hirschfeldt (Sweden), Slavica Banic (Croatia) and George Papuashvili (Georgia).

Last year Chairperson of the High Judicial Council T.Donakov forwarded the request to examine the concept of the draft law on transforming the activity of the High Judicial Council and the selection system, preparation and promotion of the judges. At its 117-th session the Commission adopted the opinion taking into account opinions of such members as Gunars Kutris (Latvia), Bertrand Mathieu (Monaco), Jasna Omejec (Croatia).

The Venice Commission had an enormous impact on the development of the legal system of our country. The opinions of the Commission bear recommendatory character, but if a dispute arises, its position in majority of cases is applied as a practical standard.

The opinions of the Venice Commission include important scientific-practical conclusions in terms of the constitutional law elaboration, allow to meet the large - scale legal challenges in the national law. The opinion distinguishes by unconventional approach in interpretation of the national law, unlocking the potential, the characteristics, and new approaches to the problems, which were earlier not completely studied in judicial literature, thus being fully examined and critically analyzed from the point of generally recognized constitutional values.

At present, the Venice Commission is the center, integrating the actions of the international community in efforts of ensuring the supremacy of the Constitution. Membership in such associations allows toexchange the information and views on topical issues of constitutional control, what is very important in our work.

Bakyt NURMUKHANOV,
Secretary General of the Constitutional Council, Kazakhstan, Venice Commission liaison officer

Since 2008, I have been a liaison officer of the Venice Commission with the Republic of Kazakhstan. Over the years, we have managed to establish partnership and friendly relations with the Commission and its Secretariat. Having regularly participated in the plenary sessions and other activities of the Commission, and keeping constant communication with it, I can state the rich scientific and practical potential of this European structure, which contributes to the promotion of the rule of law on the world stage. The Commission develops and distributes advanced legal norms based on European constitutional heritage. They concern democratic institutions, human rights, the electoral system and constitutional justice.

The Commission promotes the integration of constitutional justice bodies endeavors and actively cooperates with individual associations established on continental, linguistic and other principles. Commission brings together representatives of constitutional control bodies around the world at one table. At present, the World Conference on Constitutional Justice, established on its initiative, brings together the relevant structures of 116 countries. The World Conference congresses were held in Cape Town (South Africa), Rio de Janeiro (Brazil), Seoul (Korea) and Vilnius (Lithuania). Fifth Congress to be held in Algeria in 2021.

I would particularly like to note the fruitful work of the Joint Council on Constitutional Justice. It presents one representative (liaison officer) from each court and association of courts cooperating with the Commission, as well as representatives appointed by the Commission from among its members. The exchange of information and experience between liaison officers and members of the Commission is of great use in establishing a permanent dialogue among the courts on actual issues of constitutional development. Joint Board meetings are held annually. The issues of co-opertion of the Commission and the participant states are being discussed, the representatives of the regional associations presenting the reports of their activity, training of the officers on the methods of electronic resources of the Commission are being held during these

meetings. Mini-conferences, on the topics, which are of mutual interest are also held in the frames of these meetings and are very productive.

While considering the applications and conducting the comparative researches the database of the Commission CODICES, that is available on its website, and is constantly updated, is of great interest.

Liaison officers regularly send the decisions of the constitutional courts and other equivalent institutes for inclusion into the database. Now it contains the summary and full texts of more than 9000 decisions.

The case law of the different countries is indexed according to special techniques, that allows to accomplish the search in database of the specific topics.

The commission issues the Bulletin of the Constitutional case law in English and French.

Over the last few years the decisions of the Constitutional Council are being published in these sources and correspondingly the geography of their coverage spreads to all continents of the world. Thanks to this platform, the experience of the Constitutional Council of Kazakhstan has become more recognizable among the constitutionalists of the world.

Constitutional justice bodies often face similar questions. Therefore, the decisions and approaches of some courts that have already encountered certain issues in their practice may be relevant in the consideration of similar appeals by other courts. Established by the Commission in 1997, the so-called Classic Venice Forum allows liaison officers to forward their inquiries to all colleagues participating in the Joint Council on Constitutional Justice.

Requests are sent by e-mail to the Secretariat of the Commission, which sends them to all liaison officers. The latter, in turn, prepare their replies, and within the specified period, send them to the requesting person as well as to the Secretariat of the Commission. They are included in the archive and can be used at any time.

In 2006, the Venice news group forum was established on the Commission's website. It ensures direct exchange of information between the courts without interference of the Secretariat of the Venice Commission. Using this resource, we can ourselves publish announcements about various events taking place in our countries (renewal of the composition of the body, important decisions, conferences and others). All my colleagues in other countries have access to it and promptly bring it to the notice of their colleagues.

In addition, in the Media - observatory of the constitutional justice digests of news about the court, its decisions and other events, posted in the media, can be found. They are formed from Internet sources. The liaison officers may send links and materials to the Commission for supplement.

Over the years as the liaison officer, I administered the process of issuing its opinions by Commission on legal acts of the Republic of Kazakhstan. It expressed in consulting of public authorities, participation in preparation of requests, their forwarding to the Commission, the organizations of meetings of the working group with officials during their visit to Kazakhstan, providing the conclusion drafts and other documents, rendering necessary assistance to delegation of Kazakhstan participating in a plenary session on consideration of the matter.

The request for opinion of the Commission can be directly addressed to the President or the Secretary of the Commission by e-mail, mail or the fax.

This process consists of the following stages: application to the Commission of the authorized state body of the country for opinion on the draft law or law. These are usually letters from heads of state, governments, speakers of the Houses of Parliament, ministers and other officials.

Upon request, the Commission establishes a working group of rapporteurs from among its members or experts who work closely with the Secretariat. The draft opinion is drawn up on the basis of their comments on the compliance of the act with international norms and recommendations for improvement of the text. In order to clarify the matter and exchange information with representatives of the developer, civil society institutions and other interested persons, the working group usually pays a visit to the country. The draft opinion, elaborated according to the results of the meetings, is sent to all members of the Commission for consideration and may be considered by the relevant subcommission jointly with the national authorities. Representatives of the country's authorized bodies are invited to plenary sessions to clarify positions and provide additional information. The final opinion is to be adopted at the session, sent to the addressee and published on the website of the Commission.

The Constitutional Council jointly with the Venice Commission, has held a number of international conferences and forums on the most relevant issues of legal construction.

Every year the range of cooperation between the Council and the Commission expands. Kazakhstan's chairmanship in the Eurasian Association of Constitutional Review Bodies provided additional impetus to our interaction.

Ultimately, the joint efforts of Kazakhstan and the Commission are aimed at consolidating the rule of law, promoting democracy and ensuring human rights.

I believe, that our co-operation in the future will be more fruitful and develop in the spirit of friendship and mutually beneficial partnership.

Veronika BÍLKOVÁ,
Vice-President of the Venice Commission

Two Decades on the Common Path – Kazakhstan and the Venice Commission

The Republic of Kazakhstan is neither a member of the Council of Europe, nor a State party to the European Convention on Human Rights and Fundamental Freedoms. Despite that, it joint – first, in 1998, as an observer State, and then, in 2012, as a full member – the Council of Europe's European Commission for Democracy Through Law (Venice Commission). What is it that a non-European State can gain from the membership in a body whose main task is to *"help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law"?* And what is it that the Republic of Kazakhstan has gained during more than two decades of its cooperation with the Venice Commission?

The Venice Commission

The Venice Commission was founded in 1990 as *"an independent consultative body which co-operates with the member states of the Council of Europe, as well as with interested non-member states and interested international organisations and bodies"* (Article 1(1) of the Statute). Three main tasks have been set for it, those of *"strengthening the understanding of the legal systems of the participating states /.../, promoting the rule of law and democracy, and examining the problems raised by the working of democratic institutions and their reinforcement and development"* (Article 1(1) of the Statute).[1] The Venice Commission provides legal assistance to States by issuing opinions that assess the compatibility of legal acts adopted or proposed for adoption at the national level with international standards. These standards stem from

[1] *For more details, see Т. Я. Хабриева, В. И. Лафитский, Венецианская комиссия. Сто шагов к демократии через право, Москва: Статут, 2014; Т. Я. Хабриева, Венецианская комиссия как субъект интерпретации права, Москва: Статут, 2018.*

binding international instruments, such as the 1950 *European Convention on Human Rights and Fundamental Freedoms,* international case-law, legal doctrine, and comparative constitutional analysis.[2] The Venice Commission also adopts studies, which focus on topical issues of international or constitutional law (e.g. the studies on the rule of law, the right to freedom of association or on counter-terrorism measures and human rights).

Although the Venice Commission is not, in its activities, *a priori* limited by some strict geographical criteria, its special link to the Council of Europe has made it, since its creation, primarily a European institution. Moreover, as its establishment coincided with the end of the Cold War and the disintegration of the socialist block, the Commission has, in practice, had its prime clients among the countries of Central and Eastern Europe. Opinions produced at the request of, or with respect to, these countries account for more than 80% of all the opinions that the Venice Commission has adopted. In the first decade of its existence, the Commission did not engage in virtually any other task but bringing the European (Western European) legal and constitutional heritage into the countries of Central and Eastern Europe and helping these countries in the uneasy process of legal and political transformation. The situation changed at the turn of the 1990s and 2000s, when the Venice Commission gradually started to provide its service to countries outside the CEE region, in the other parts of Europe and also beyond the European continent. That was reflected in the 2002 revision of the Statute which allowed for the accession of *"interested non-member states"* of the Council of Europe. By the end of 2018, the Venice Commission has had 14 members meeting this description, including two from Central Asia (Kazakhstan and Kyrgyzstan).[3]

Why should non-European countries be interested in the cooperation with, and formal membership in the Venice Commission? There are, in my opinion, at least two reasons. First, the Commission provides a unique service, by assessing *ex ante* the pieces of legislation that have been adopted or are considered for adoption at the national level. Such assessment makes it possible for States to revise the sections of (draft) legal acts that might otherwise be found incompatible with national or international standards in *ex post* proceedings before national or international courts. In this way, the Venice Commission helps States prevent legal problems and improve their legal systems. Such a help is useful for States regardless of their geographical origin. Secondly, the standards that the Venice Commission refers to in its work, are not always limited in their scope of application to Europe. The Commission regularly invokes the decisions of human rights bodies operating within the UN system, e.g. the UN Human Rights Council. Occasionally, it looks into the case-law of non-European human rights courts, such as the Inter-American Court of Human Rights. Moreover, when engaging in the comparison of various constitutional systems, the Commission takes into account systems existing in all parts of the world. The opinions and studies of the Venice Commission therefore

[2] *See S. Bartole, The experience of the Venice Commission: sources and materials of its elaboration of the international constitutional law, CDL-PI(2016)016, 14 December 2026.*

[3] *See S. R. Dürr, The Venice Commission's Involvement in the Establishment of a Human Rights Protection System in Asia – (Variable) Geography and other relevant issues, Nagoya University Asian Law Bulletin, Vol. 1, 2016, pp. 17-47.*

often build on standards which are not merely European but have a universal nature and/or scope of application.[4]

At the same time, the cooperation with the States non-members of the Council of Europe is a great asset for the Venice Commission as well. It incites it to get well acquainted with the non-European approaches to international and constitutional law. For instance, the seminars held together with partners from Latin America have revealed both similarities and differences in the treatment of the same topics by the two most developed regional human rights systems. The Venice Commission has to be aware of these similarities and differences when assessing legal acts coming from non-European States or when seeking to define general, universal standards. Moreover, the regular contacts with non-European countries make the Commission adopt a more critical stance with respect to the standards which are generally accepted in Europe. It also allows it to learn about, and/or from, the legal systems which exist in other parts of the world but which have often not, due to the (neo)colonial mindset still largely present in the Western legal circles, got sufficient attention at the international level. The Central Asian legal systems, combining elements of traditional customary laws, the remnants of the Soviet legal institutions and the recent "imports" inspired by the universal instruments, are certainly among those systems which deserve scrutiny.[5]

The Venice Commission and the Republic of Kazakhstan

The Republic of Kazakhstan started its engagement with the Venice Commission in the late 1990s, when Kazakhstan became one of the observer States of the Venice Commission.[6] It took however almost a decade, before this cooperation got a more concrete and solid form. Yet, already by the early 2010s, Kazakhstan had already become a regular partner, and also client, of the Venice Commission. The representatives of the Commission took part in various events organized in the Republic of Kazakhstan, such as the conference on the *Development of the Ombudsman Institution in Kazakhstan* (Astana, 18 September 2007), the conference on the *Universal Declaration of Human Rights and its fundamental principles – implementation in the Constitution of the Republic of Kazakhstan* (Astana, 2 December 2008), or the conference on *Safeguarding constitutional human rights in pre-trial criminal proceedings* (Almaty, 18-19 February 2011).

Moreover, even prior to formally joining the Commission, the Kazakh authorities requested three opinions. The opinions deal with important and quite divers aspects of the legal order of the Republic of Kazakhstan. The first opinion, issued in June 2007, addressed several important questions linked to the possible reform of the ombudsman institution in Kazakhstan. The second opinion, adopted in December 2009, is an *amicus curie brief* prepared at the request of the Constitutional Council of the Republic of

[4] *See also G. Buquicchio, S. R. Dürr, The Venice Commission's Action in Africa, in S. Yazici, K. Gözler, E. Göztepe, Essays in Honour of Ergun Özbudun, Vol. II, Ankara: Yetkin, 2008, pp. 165-174.*

[5] *See also S. Newton, The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis, Hart Publishing, 2017; G. Staberock, A Rule of Law Agenda for Central Asia, Essex Human Rights Review, Vol. 2 No. 1, 2005, pp. 1-22.*

[6] *See Cooperation of the Republic of Kazakhstan with the Council of Europe, The Ministry of Foreign Affairs of the Republic of Kazakhstan, 20 September 2018.*

Kazakhstan. It offers the interpretation of the Constitution of the Republic of Kazakhstan concerning the participation in the Customs Union within the Euro-Asian Economic Community. The third opinion, issued in June 2011 and co-authored by the OSCE-ODIHR, analyses the *Constitutional Law on the Judicial System and Status of Judges.* The requests confirmed that already prior to 2012, Kazakhstan was interested in getting an international assessment of the legal reforms undertaken in the country and that it considered the Venice Commission as the body capable of giving such an assessment. The Commission responded by providing a detailed analysis of the questions raised by the national authorities and by formulating recommendations that should second Kazakhstan in its effort to build up a modern legal and institutional system.

The accession of Kazakhstan to the Venice Commission in March 2012 has led to a further intensification of the mutual cooperation. The members and experts of the Venice Commission have regularly participated in the events organized in Kazakhstan, such as the exchange of views on the Draft Code of Criminal Procedure (Akbulak, 6-7 March 2014) or the conferences organized annually at the occasion of the Day of the Constitution (2015-2018). Since 2012, the Venice Commission has adopted five opinions on the Republic Kazakhstan. Most of them focus on some aspects of the operation and reform of the judicial system. That is so with the Opinion on the *Draft Code of Judicial Ethic* (2016), the Opinion on the *Draft Law on Administrative Procedures* (2017), the Opinion on the *Administrative Procedure and Justice Code* (2018) and the Draft Opinion on the *Concept Paper on the Reform of the High Judicial Council* (2018). One opinion is broader in scope, discussing the amendments to the Constitution considered in the country in early 2017. All the opinions welcome the legal acts submitted for review as steps in the right direction on the way to the democratisation of the country and building up of an efficient system of check and balances. They however also, as usual, contain recommendations aimed at further improving these legal initiatives.

The short overview of the cooperation between the Republic of Kazakhstan and the Venice Commission confirms the wisdom of the decision to open up to States non-members of the Council of Europe. The range of States which may benefit from the rich expertise of the Venice Commission has since then importantly expanded, ensuring the presence of the Commission on almost all the continents, with the exception of Australia/ Oceania. Although the focus of the work of the Commission still lies, and will probably always lie, in Europe, its experience in providing legal assistance to States seeking to improve their legal systems and to make these systems better compatible with the international standards of democracy, human rights and the rule of law, may certainly be found helpful by non-European countries as well. I am personally very pleased that the Republic of Kazakhstan is one of the countries which have decided to take full part in the activities of the Venice Commission. The first two decades of the cooperation between the Kazakhstan and the Commission have been mutually enriching and there are no reasons to doubt that the next decades will not be (at least) equally so. I am looking forward to this future cooperation.

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Venice Commission and the institutional and legal reforms in the Republic of Kazakhstan

The emergence of a new international legal order in the second half of the 20th century was accompanied by the appearance of a number of special international organizations that have an impact on the national legal systems. These international actors include primarily the European Commission for Democracy through Law (the Venice Commission of the Council of Europe), which has been around for almost 30 years[1].

One of the priority goals of the Venice Commission as a specialized advisory body of the Council of Europe is the assistance to various states alignment their legal and institutional systems with European standards and international experience in the field of democratic development, human rights and the supremacy of law. The Commission aims to cooperate not only with the member states of the Council of Europe, but also with non-member states and with all interested international organizations and structures. The Commission is composed of legal experts appointed by the member states and has positioned itself as an "independent forum for the exchange of ideas in the field of constitutional law".

The most important means of enabling the Commission to address a wide range of legal challenges is its ability to interpret international and national law by comparing national legislation with the criteria contained in the international and regional standards. The opinions of the Venice Commission are of advisory and explanatory nature, and its status is determined by a flexible legal form such as "partial agreement".

The legal nature of the international "partial agreements" is determined by their objectives: the need for such agreements exists when certain issues are of interest to a

[1] *The European Commission for Democracy through Law was created in 1990. Hereinafter referred to as the «Venice Commission» or the «Commission». In 1999, the GRECO (Group of States Against Corruption) was also established.*

group of countries, but not necessarily to all members of an international organization. A group of actors can thus work effectively on issues that are of particular importance to it. The Deputy Secretary General of the Council of Europe, during the debate at the 437th conference of Deputy foreign Ministers of the Council of Europe (1990), noted that this model is the most appropriate, since the Commission is "charged with the task of making independent opinions".[2]

In 2002, the Venice Commission was transformed into an «extended agreement» that legalized the possibility of participation in the work of the Commission of states outside the Council of Europe. On this basis the resolution of The Committee of Ministers of the Council of Europe (2002)3 of 21 February 2002 "On the adoption of the revised Charter of the European Commission for Democracy through Law" was developed and adopted in 2002.

The preamble to the 2002 Charter "welcomes the interest shown by many states that are not members of the Council of Europe in the work of the Commission and expresses the wish to give these states the opportunity to participate in the work of the Commission on equal rights".

These mentioned changes were dictated by a sharp expansion of the geographical area of scientific research and opinions of the Commission. It is indicative that by 2002, that is, for 12 years of its existence, the Commission issued only 4 opinions on "old democracy" European countries[3]: Belgium, Liechtenstein, Finland and Luxembourg (the opinions concerning Belgium and Luxembourg were drawn up on the basis of a request by the Parliamentary Assembly of the Council of Europe).

Currently, the European Commission for Democracy through Law includes 62 full-fledged states, of which 47 are members of the Council of Europe at the same time, and the remaining 15 are in other regions of the world[4]. According to Article 2.5 of the Charter of the Commission as amended in 2002, The Committee of Ministers may, by a majority vote (in accordance with the procedure laid down in Article 20d of the Charter of the Council of Europe), decide to invite any state not a member of the Council of Europe to accede to the Expanded Agreement. However, members of the Commission appointed by the states that are not members of the Council of Europe cannot vote on issues raised by the statutory bodies of the Council of Europe.

The revised 2002 Charter also clarified the main areas of work of the Commission, which became the basis of its activities.

According to the Charter, the Commission specializes in the area of legal guarantees of democracy. In more detail its objectives are disclosed in Art. 1.1. of the Charter: to deepen the study of the legal systems of the member countries, primarily with a view

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[2] *CM/Del/Concl (90) 437, p. 33.*

[3] *By 2002, the «Eastern direction» had become so prevalent in the Commission's activities that the government of Luxembourg supported its request to the Venice Commission with the following words: «The Venice Commission also submits recommendations to the old member states of the Council [of Europe].»*

[4] *Algeria, Brazil, Canada, Chile, Costa Rica, Kazakhstan, Kyrgyzstan, Kosovo, Israel, Republic of Korea, Morocco, Mexico, Peru, Tunisia and the United States. Among the associated members of the Commission are the Republic of Belarus (1994), 4 observers – Vatican (1992), Japan (1993), Argentina (1995) and Uruguay (1995), as well as 3 entities with a special statute – the European Union, the Palestinian Autonomy, South Africa.*

to bringing these systems closer together; to implement the principles of the rule of law and democracy; to study the problems associated with the functioning, strengthening and development of democratic institutions.

It is worth noting that the main areas of activity of the Venice Commission, as they were originally conceived – the supremacy of law, human rights and democracy – largely duplicated the main activities (or "pillars") of the Council of Europe itself. However, the Commission was designed to carry out its tasks in other ways. The main functions of the Commission are advisory and scientific-methodological, but they also have a significant practical effect: from the implementation in the constitutions of many countries of the institutions of the "European constitutional heritage" to the settlement of constitutional crises, from the interpretation of international law and the development of the "standards" – to participation in the comprehensive modernization of national legal systems.

Special reference should be made to the work of the Commission in assistance in the improvement of the *national constitutional law* of various world states. As evidenced by the former member of the Commission, the well-known Italian lawyer Sergio Bartole, participation in constitutional reforms has always occupied a special place in the work of the Commission[5].

Many authors writing about the Commission indicate that there are four main areas of national constitutional law that are considered by the Commission as priority objects for making recommendations: the process of adoption of constitutions and basic constitutional norms; constitutional changes (amendments, reforms); legislation that directly or indirectly affects the interpretation and application of constitutional provisions; constitutional practices of public authorities, including the citizens' rights[6]. In the nearly 30 years since the Commission's inception, requests from states, as well as general studies, have enabled the Commission to define (and sometimes formulate) the standards of constitutional law that constitute the «common constitutional heritage».

It is worth noting that the impact of the "European heritage" and the Council of Europe's recommendations on the national legislation of the "new democracies" in the 1990s was due not only to the political and legal requirements associated with the entry into various international organizations and the implementation of relevant international obligations. It could not also be explained by the "popular" trend of borrowing European constitutional principles and the supremacy of law principle (even where these values did not fully correspond to the local legal culture). Attention is drawn to the desire for the actual reproduction by many states at the turn of the century, in the course of profound social reforms, humanistic ideals and values formed by the philosophy of law and the political history of European states during the bourgeois revolutions of the 17-19 centuries. In developing its legal positions, the Venice Commission paid great attention to this issue.

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[5] *See, Bartole, S. Final Remarks: the Role of the Venice Commission //Review of Central and East European Law. 2000. No 3. P. 5.*

[6] *See: Craig, Paul P. Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy//University of Oxford- Faculty of Law, October 1, 2016, UCI Journal of International, Transnational and Comparative Law, p. 6.*

The "wave" of new constitutions in the 1990s – early 2000s, containing one or another reproduction of these values, allowed researchers to talk about the "internationalization of constitutional law", the emergence of "international constitutionalism", "convergence of constitutions", and the widespread dissemination of the "European constitutional experience"[7]. After the adoption of these constitutions, most of the requests sent to the Commission deal with more detailed issues of the organization of authority– the «balance of power», the ratio of the powers of the head of state, the executive and the legislative power, the place and role of the judiciary. In a number of countries, the newly formed presidential power had the desire for the most absolute, often uncontrolled exercise of its power, often leveling the role of Parliament and using the institutions of direct democracy, public referendums to expand its prerogatives[8]. Taking into account this scenario, the Venice Commission has prepared a series of opinions on Ukraine, Belarus, Moldova, Kyrgyzstan and Azerbaijan.

Due to the need for an in-depth analysis of these trends, the Commission gained additional expertise in assessing not only the already established models of European constitutionalism, but also new, original constitutional systems in other countries, especially in the «post-Soviet» space. New kind of constitutions appeared here – post-socialist constitutions that combine new liberal democratic principles for these countries with the preservation of many legal traditions and entrenched approaches. In fact, the Commission has been involved in a complex and highly «domestic» process of national law-making, in the form of its views, advice and recommendations on the application of certain principles and approaches. As a result, a large amount of comparative legal materials was accumulated, which allowed developing visions and ideas about the state and legal systems of various states. The Venice Commission noted with insight that in Eurasia and the Central Asian region the ongoing social transformations would require changing constitutional regulation for many years.

While during the first decade of the 21st century a significant contribution was made to the development of previous traditions, during the second decade of the modern era their significant transformation is often experienced. A new wave of reforms in the countries of Eurasia and Central Asia in 2010-2018 – in Armenia, Georgia, Azerbaijan, Kyrgyzstan, Kazakhstan, Turkmenistan, Uzbekistan, as well as in Turkey and Ukraine – was characterized by a considerable diversity. The vector of modernization of this or

[7] *See: Bartole, S. Final Remarks: the Role of the Venice Commission; Craig Paul P. Transitional Constitution-Making; Hoffman-Riem, Wolfgang. The Venice Commission of the Council of Europe – Standards and Impact. //The European Journal of International Law (2014) vol.25 No 2. PP.579-597; V.D. Zorkin. Modern World, Law and Constitution. M., 2010.P. 122-123, 470-488; T.Y. Khabrieva. The Venice Commission as a subject of interpretation of law. M., 2018;. S.V. Chirkin. The Foreign Constitutionalism: Development Experience. // Constitution of the Russian Federation. From the image of the future to reality. Edited by the academician of RAS T.Y. Khabrieva. M., 2013.P. 82-86; D.G. Shustrov. Tamed Leviathan: the state as an object of constitutional and legal regulation. SPb., 2015.P. 362-375.*

[8] *See, CDL-AD (2010) 001. Report on Constitutional Amendment, adopted by the Venice Commission at its 81-st Plenary Session (Venice, 11-12 December 2009), para 71, 190-191. In Russian: The report of the constitutional amendment. Survey No. 469/2008 CDL-AD (2010), approved by the Venice Commission at the 81st Plenary meeting (Venice, 11-12 December 2009) – in the Volume: The Venice Commission: on constitutions, constitutional amendments and constitutional justice. Collection of materials. Edited by the academician of RAS T.Y. Khabrieva. Moscow. 2016.*

that kind of the republican form of government has received here different, direction, which was often quite opposite. In some countries, these processes were quite consistent (Armenia, Kazakhstan), and in the others – contradictory, sometimes reciprocating (Kyrgyzstan, Ukraine). In general, the development of constitutionalism on a global scale in the current decade of the 21st century has been accompanied by contradictory trends, and it is hardly possible to assess the prevalence of one of them. On the one hand, there are signs of formal similarity and universalization in the consolidation of many constitutional and legal principles, which confirms the thesis of the compatibility of «universal values» and cultural and national identity. There were some changes in the constitutions of socialist and Muslim countries, softening their former Orthodoxy. On the other hand, there is a trend of increasing diversification in the systems of authorities, there are recurrent phenomena in the field of constitutional justice and human rights, deep ideological differences in the constitutional doctrines of our time remain (and in some cases are exacerbated) – liberal (or social) – democratic, communist and religious (primarily Islamic)[9].On the way to universalism, as noted by the Chairman of the Russian Constitutional court, V.D. Zorkin, there are always two insurmountable obstacles – the lack of synchronization of world-historical development and fundamental cultural specificity[10].

An Advisory body, the Venice Commission in its recommendations considers it necessary to be sensitive to the political, legal, religious, historical and cultural differences in each community. Therefore, in most cases, when there are several options (models) to comply with the basic principles, the Commission does not express its explicit preferences, but only indicates which option, in its opinion, is optimal in accordance with the situation in the country, and how it can be practically applied with certain consequences. For example, the choice between a parliamentary, presidential and semi-presidential form of government is within the absolute competence of the state, provided that such form is implemented in accordance with the "basic democratic standards".[11] A model applicable to one state cannot be easily «transplanted» to another one. When deciding what model should be chosen, the Commission usually assesses its universality, i.e. the possibility of adaptation within a different political and social context[12].

With the accumulation of experience in the analysis of constitutional reforms and comparative material, the Commission began to send to interested states much more recommendations of a general nature, which were certain principles – standards. The

[9] *For more information on these trends, see: T.Y.Khabrieva. Genesis of the constitution and basic constitutional models; S.V. Chirkin. The Foreign Constitutionalism: Development Experience. // in the Volume: Constitution of the Russian Federation: from the image of the future to reality. Edited by the academician of RAS T.Y. Khabrieva. M., 2013. P. 39-48, 80-87.*

[10] *See: V.D. Zorkin. Civilisation of law and the development of Russia. M., 2015. P.11-12.*

[11] *At the same time, the chosen system, in the opinion of the Commission, should be as clear as possible, and the provisions should not create an opportunity for political conflicts. The minimum requirements for maintaining parliamentary influence and control should be met. – CDL-AD(2010)001, para 143.*

[12] *Buquicchio, Gianni / Granata-Menghini, Simona, The Venice Commission Twenty Years on: Challenge Met but New Challenges Ahead. //Fundamental Rights and Principles. –Liber Amicorum Pieter van Dijk, Cambridge, Antwerp, Portland (Intersentia 2013). P.244.*

"Report on constitutional amendment"(2010)[13], for example, is very indicative of the interpretation activities of the Venice Commission, as it reflects all the previous legal positions of the Commission with regard to constitutional changes and constitutional reforms.

In a number of important areas of legislative development, such as electoral law and electoral standards, legislation on political parties, improvement of mechanisms for the protection of human rights and minority rights, the rights of convicts, constitutional justice, etc., the Venice Commission has formed an «arsenal» of legal opinions, guidelines and recommendations that allow us to talk about the formation of the legal positions of the Venice Commission, which are reflected in the decisions and rulings of the European Court of Human Rights, the bodies of the Council of Europe and the European Union, the constitutional courts, as well as other Supreme courts of states. During the first decade of the Commission's existence, the European Court of Human Rights has referred to the Commission's opinions more than 50 times. By now this number has already exceeded one hundred. The most frequently cited opinions were on the issues of electoral law, the judicial system, the activities of political parties, and on the right of assembly and freedom of religion[14].

The next waves of constitutional and legislative reforms, rolling over certain regions of the world, testify to the fact that the world law evolution needs modernization of the very concept of constitutionalism. According to a number of researchers, it becomes «multilevel».**[15]** There is a counter trend – the constitutionalization of the international law.**[16]** In this regard, the growing role of the Venice Commission as a centre for initiating scientific and expert discussions that contribute to the formation of a planetary constitutional understanding cannot be ruled out. This role, however, would face certain difficulties, since the modern period is characterized by a rather complex, extraordinary interaction of supranational and national law, the relationship of a number of states both with the Council of Europe and within the Council of Europe, as well as with the European Court of Human Rights.

So far, the positive examples in these relations prevail. Recent years have been marked, in particular, by a very fruitful and mutually beneficial experience of cooperation of the European Commission for Democracy through Law with the Republic of Kazakhstan**[17]**

The Republic of Kazakhstan became a member of the Venice Commission, according to the Decree of the President of Kazakhstan Nursultan Nazarbayev since 13 March 2012.**[18]** Until that time, Kazakhstan's legal cooperation with the Venice Commission (in the observer status) has already taken place, including on the reform

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[13] *CDL-AD (2010) 001. Please also refer to the Compilation of the opinions of the Commission on this issue Venice Commission – Opinion CDL-PI(2015)023.*

[14] *Wolfgang Hoffmann-Riem. Op.cit., p. 585.*

[15] *See: D.G. Shustrov. Specified works. P.372*

[16] *See: Y. Khabermas Split West. M., 2008*

[17] *The Republic of Kazakhstan is not a member of the Council of Europe, but it is member of the Venice Commission.*

[18] *Until that moment, Kazakhstan had the observer status. The Chairman of the Constitutional Council of Kazakhstan, I.I. Rogov was appointed a member of the Venice Commission from the Republic of Kazakhstan.*

of the Ombudsman institution[19] and on the judicial system and the status of judges.[20] In respect of the registration of Kazakhstan's permanent membership in the Venice Commission, the Ministry of foreign Affairs of Kazakhstan noted that Kazakhstan's accession to the Venice Commission «would allow adopting the practical experience of European countries in the field of constitutional law, elections and referendums, cooperation with constitutional courts and comparative studies on the implementation of democracy «. Time has shown that the subsequent activity of the Republic of Kazakhstan in the implementation of a number of legal reforms has become an important factor in deepening the experience of the expert and advisory work of the Venice Commission itself.

In 2015, the President of Kazakhstan, Nursultan Nazarbayev, proposed 5 institutional reforms: the formation of a modern, professional and autonomous state apparatus, ensuring the supremacy of law, the industrialization program, strengthening Kazakhstan's identity, the formation of a transparent and accountable state. These changes suggest that a constitutional reform should be carried out step by step, involving the redistribution of power from the President to the Parliament and the Government, taking into account our traditions. [21]

Based on the practical experience, the implementation of a number of reforms was not long in coming, and their speed and depth of study make us talk about the high level and quality of the approaches used. In this respect, the modern modification of the Constitution of the Republic of Kazakhstan and its further implementation in the modernization of legislation are of particular interest.

Any constitutional modernization (and, moreover, a reform) has certain prerequisites and qualitative characteristics, and without them it can hardly be recognized as successful. As mentioned above, the Venice Commission was able to formulate fundamental requirements for the constitutional reform: legitimacy, constitutional succession, changing the formal Constitution through amendments, not through informal (unwritten) changes, the need for balance between rigidity and flexibility of the Constitution to make the necessary changes, the priority role of the Parliament in the consideration of amendments, the use of the nationwide referendums in strict compliance with the Constitution, special control over amendments that strengthen the position of the executive power, the restrictive interpretation of "immutable" provisions, the need for a clear understanding of the implications of the reform, free and open public discussion of the reform[22]. Of course, the reform should be legitimate – both at the time of introduction of changes, and in the subsequent stages of discussion and adoption of amendments to the Constitution. Further, the constitutional reform is both a legal and a socio-political process.[23] It should be added that a full-fledged constitu-

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[19] *CDL-AD (2007)020 – Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan.*

[20] *CDL-AD (2011)012 – Joint Opinion on the Constitutional Law on the Judicial System and Status of Judges.*

[21] *News of Kazakhstan and the World on the business portal Kapital. Kz 12 March 2015; Kazakhstan pravda, 31 March 2015*

[22] *See: CDL-AD (2010) 001, IX*

[23] *For details please see: V.V.Kireev. Theoretical problems of reforming the Constitution of the Russian Federation. Chelyabinsk, 2008.*

tional reform should be an action or a set of homogeneous actions, with a target for reform. The essence of the constitutional reform is not limited to the problem of updating the formal Constitution, as the implementation of the reform goes beyond the narrow-law, procedural issues and legal technique. In addition, the legal and actual results of the reform suggest that one of its most difficult stages (or probably the most difficult) is the legal enforcement, updating of legislation, preservation and protection of constitutional and legal changes (adaptation and modernization period). Further, the constitutional reform should be featured in all its stages with appropriate resource and organizational, legal, informational, material support.[24] The importance of social support for reform has already been mentioned.[25]

The 2017 constitutional reform in the Republic of Kazakhstan fully corresponded to all these qualitative characteristics. One of the important features of the reform was the preservation of constitutional stability. The Venice Commission noted that the amendments to the Constitution of Kazakhstan in 2017 did not change the essence of the ongoing constitutional reform, they were a logical continuation of the 1998 and 2007 reforms.[26] The democratic modernization of the presidential republic was characterized by positive evolutionary changes, continuing the general trend and logic of transformations. The President remained the head of state, he determined the main directions of domestic and foreign policies, ensured the protection of the Constitution, the protection of the rights and freedoms of man and citizen, retained the key powers in the field of security and defense and represented the country at the international level. At the same time, a number of organizational and legal powers of the head of state were transferred to the Government; new elements were introduced in the relationship between the President, Parliament and the Government. Due to these mechanisms, the balance in the system of separation of powers and increased authority of the Parliament improved, including through the cessation of publication by the President of decrees having the force of law, and also through the practice of revoking or suspending acts of the government and the Prime Minister. The role of dialogue and competition processes at all levels of government has increased – for example, the President no longer appointed a majority of central executive bodies other than the government; his sole right to appoint and release them at his discretion has been restricted in some way to local bodies. The Prime Minister's reports were introduced not only to the President, but also to the lower chamber of Parliament. The status of the Supreme Court, the Prosecutor's office and the Commissioner for human rights were clarified. All these and other changes were not «cosmetic», but serious, and in compliance with the «fine tuning» of the entire state mechanism, they affected the system of power, the entire block of the supreme bodies of the state, the judicial system, the lower levels of state and municipal government, the powers of the Constitutional Council. The Venice Commission noted in this respect: «... the fact that the Constitutional Council would consider the draft constitutional amendments and the issues put to a referendum before their entry into force can be assessed

[24] *For more information, see: T.Y. Khabrieva. Constitutional reform in the modern world. M..2016*

[25] *See: M. Brandt, D. Cottrell, Y. Guy, E. Regan. The development and reform of the Constitution: the process selection. Kyiv, 2011.*

[26] *CDL-AD (2017) 010-e – Opinion on the Amendments to the Constitution of Kazakhstan, adopted by the Venice Commission at its 110th Plenary Session (Venice 10-11 March 2019), paras 8, 17.*

as an important step in the protection of the Constitution and the protection of constitutional rights and freedoms».[27]

Constitutional amendments had a clear and verified organizational support that allowed them to be carried out in a fairly short time, which in general did not affect the quality of their implementation. The draft law was submitted for general discussion (26 January 2017), passed a scientific examination, was checked by the Constitutional Council for compliance with constitutional values and fundamental principles of the state system, was adopted by the Parliament on 6 March 2017 and signed by the President of Kazakhstan on 10 March 2017. It should be noted that the final text of the draft constitutional amendments differed significantly from the original version, which testifies to the creative work of professionals and the general public throughout the preparatory phase of the reform. Simultaneously with the signing of the Law on amendments and additions to the Constitution, the Presidential Decree of 10 March 2017 was adopted, which defined the plan for the implementation of the constitutional reform. Finally, on 13 March of the same year, the President signed the Constitutional law No. 52-VI "On amendments and additions to some constitutional laws of the Republic of Kazakhstan", which introduced certain results of the reform at the legislative level.

It seems that the improvement of the Constitution and the state system in the Republic of Kazakhstan creates should adequate tools for further progress in public administration and in the development of society as a whole. Of course, a number of ambiguously assessed innovations of the basic law would be regulated in more detail by the legislation and the constitutional practice: among them are the issue of deprivation of citizenship by a court decision for terrorist crimes (exists in rare countries), the new order and conditions of action in the territory of Kazakhstan of the international treaties, the President's authority to determine the priority of consideration of draft laws. Overall, an updated constitutional framework was built, which created prerequisites for the improvement of state legal traditions and political practice.

The Constitution of the Republic of Kazakhstan as an ideological document clearly defines the basic principles and elements of "inviolability" of the state organization of the community: independence, unitarity, territorial integrity, Republican form of government. These values are also characterized by a deep continuity: the first Constitution of independent Kazakhstan (1993) declared national sovereignty, independence, the principle of separation of powers, the recognition of the President as the head of state. As the President of Kazakhstan, Nursultan Nazarbayev, noted in his speech on the results of amendments to the Constitution, "the main goal of the reforms is to preserve our unity, friendship, mutual understanding, equality of citizens on ethnic, linguistic and religious principles. Thanks to this cohesion, we have repeatedly won."[28]

Among other acts of the constitutional reform implementation, the draft Administrative procedural code, which has no analogues both in the continental legal family and in the legal tradition of the Republic of Kazakhstan, aroused considerable interest and even discussion in the Venice Commission. According to the Commission, "this draft is a very detailed and complex document".[29] It is intended to replace a number of laws,

[27] *Op cit., para 10.*

[28] *From press reports of the Republic of Kazakhstan dated 10 March 2017.*

[29] *Op cit., Introduction, 5. Hereinafter referred to as the «Draft» or the «Draft Code».*

including the Law on administrative procedures, adopted in 2000 with amendments of 2016.[30] The Venice Commission noted as a clear fact that the constitutional reform had also given impetus to a comprehensive reform of administrative law[31]. This reform was well prepared.[32]

The Draft Code submitted to the opinion of the Commission has an even broader subject of regulation than the Concept of the Legal Policy of the Republic of Kazakhstan intended: it both regulates the public relations arising in connection with the implementation of administrative procedures, and contains administrative procedural rules in the field of administrative proceedings. These rules are, in principle, inhomogeneous: the legislation on administrative offences is an independent branch in the Republic of Kazakhstan. Nevertheless, the comments of some members of the Venice Commission on the need to reject the Draft in principle as an attempt to "combine the incongruous" did not receive the support of the majority. The Commission assessed the Draft to be sufficiently clear and precise in both areas of regulation.[33] At the same time, the Commission expressed the opinion that since in the countries of the Romano-German legal family the laws on administrative procedures and administrative procedural legislation have serious features of legal regulation, a better solution would be to develop the projects of the Republic of Kazakhstan in this area in a similar way, i.e. separately. [34]

The Project developers took into account international standards in the field of administrative law, and most of the provisions of the new document, in the opinion of the Commission, comply with the recommendations of the Council of Europe in the field of human rights and freedoms and its relations with the state in the face of public administration and administrative justice. However, if the Draft Is adopted, it would require serious harmonization with the existing legislation. This applies to the very form of the code as a legal act (not yet provided for administrative procedures), a clear establishment in the code of the state bodies' functions. The Commission was for harmonizing and simplifying some general principles and specific procedural rules. The traditional comment of the Commission, which is usually addressed to all former socialist countries, is that the role of the Prosecutor's office is too broad and not always sufficiently defined. A very important point is the specification of the provisions on administrative discretion in order to prevent the administrative arbitrariness of the strongest party in relations with the person – i.e., the state.

It is quite clear that such a complex Project might require some improvement, and further promotion of the Project depends entirely on the discretion of the Supreme state bodies of the Republic of Kazakhstan. In general, the Commission noted the "excellent

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[30] *The new draft law was also considered by the Venice Commission – See CDL-AD(2017)008 – Opinion on the Draft Law of the Republic of Kazakhstan on administrative procedures, adopted be the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017). The idea of adoption of the Code regulating administrative procedures was contained in the Concept of Legal Policy in the Republic of Kazakhstan for 2010-2020, approved by the Decree of the President of Kazakhstan dated 24 August 2009, No. 858.*

[31] *CDL-AD (2018) 020, para 11*

[32] *CDL-AD (2018)020, para 90.*

[33] *The speaker on the Draft and on the 2017 constitutional amendments was a member of the Venice Commission of the Russian Federation, academician T.Y. Khabrieva.*

[34] *CDL-AD (2018) 020, para 17*

cooperation" with the authorities of the Republic of Kazakhstan in the preparation of the Commission's opinion on this Project, and it seems that such an assessment would remain fair for further interaction. The Venice Commission assessed the ongoing legal reform in Kazakhstan as another and clear step forward in the process of democratization of the state, followed by other steps[35].

[35] *CDL-AD (2017) 010-e, para 51*

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Two opinions prepared by the Venice Commission at the request of Kazakhstan

The cooperation between Kazakhstan and the Venice Commission takes many forms. The Venice Commission participates in the academic events and exchanges, but, most importantly, it assists the national authorities in designing legal reforms. In the recent years, the Venice Commission prepared several legal opinions at the request of the authorities of Kazakhstan. The first such opinion (on the Ombudsman institution), was delivered in 2007; few other opinions followed. Here we will describe two recent opinions: one on the Draft Code of Judicial Ethics (2016) and another on the draft law on administrative procedures (2018). One of the authors (Ms Bazy-Malaurie) participated as a rapporteur in the preparation of both of them.

In 2016 the President of the Supreme Court of the Republic of Kazakhstan, Mr K. Mami, requested an opinion of the Venice Commission on the Draft Code of Judicial Ethics of Kazakhstan. The new Draft Code was to replace the existing Code of Ethics, adopted by the Union of Judges in 2009. The new Code was developed in response to a program of a comprehensive reform of the State entitled "The Nation Plan of 100 Steps", proposed by President Nazarbayev.

In April 2016 a team of members of the Venice Commission visited Astana. The opinion was adopted by the Venice Commission at its 107th plenary session on 10 and 11 June 2016.

The Draft Code had been prepared on the basis of various international instruments which set ethical standards for judges in their professional and private life. Under Article

4 of the Draft Code, international standards in this sphere were to be directly applicable in cases where an issue is not regulated by the Code.

An ethical code is not a statute. In many European countries ethical codes are self-regulatory instruments, developed within the judiciary itself. Ethical rules of behaviour are quite distinct from disciplinary rules. The Venice Commission had previously expressed preference for a code of ethics which has only the force of a recommendation, not a binding document applicable directly in the disciplinary proceedings.

One of the focal points of the opinion was the border between ethics and discipline. While the codes of ethics are usually non-binding documents, developed within the judicial community itself, the Venice Commission understands that the border between unethical behaviour and a disciplinary offence is not watertight. Codes of conduct for judges "may give guidance to disciplinary authorities for their decisions in disciplinary matters". That being said, the process of codification may send a wrong signal: such code may be seen as a set of mandatory rules, which cover both professional behaviour and the behaviour in the private sphere. The main recommendation of our opinion was to define grounds for disciplinary liability in the law.

The Code suggests that a judge may turn to the Ethics Commission for a preliminary advice about how to behave in the future. This idea is praiseworthy. In some systems there are special "ethical officers" who may give advice to the judges about their behaviour. However, what is problematic is that such a commission is not separate from a disciplinary body, under the Draft Code. Therefore, the same body gives advice about future behaviour and then analysis this behaviour when it has already happened. In any event, advices given to the judge should have only the force of guidelines, recommendations, etc. and not be "mandatory".

The Code introduces another procedure where the Ethics Commission, at the request of a third party, conducts an *ex post facto* examination of the behaviour of a judge in a specific situation. Yet, it may open the door to an excessive number of procedures, which may have a chilling effect on the judges. The VC recommended to provide that only persons who have an interest in the case may introduce such a complaint, excluding the presidents of the courts. The Venice Commission also recommended to exclude the possibility for the Ethics Commission to start the examination of the case on its own initiative, since it may raise serious doubts as to its impartiality during the ensuing consideration of it.

Finally, the Venice Commission recommended to explain in the law the role which the proceedings under the Code play within the disciplinary proceedings before the Disciplinary Commission under Article 39 p. 1 § 3 (2) of the Constitutional Law.

Speaking of the content of the Code, in our opinion we noted that some of the provisions of the Draft Code go too far in regulating the judges' professional conduct, as well as their behaviour in public and in private. This presents a certain risk for the judicial independence and even for the judges' rights and freedoms – especially given that the breach of those provisions may serve as a ground for disciplinary liability.

Certain provisions of Chapter IV of the Draft Code regulated the judge's behaviour in private. Indeed, even outside the courtroom a judge should behave with dignity and be an example of a responsible member of the society. But some provisions were overly intrusive into the judge's private life. It is difficult to explain rationally why a judge should be obliged to inform the president of the court and the body of the judicial

community about a divorce and, in particularly, about the reasons thereof. The duty of the judge to maintain a healthy lifestyle was considered both unclear and excessive. Indeed, the judge should refrain from certain "unhealthy practices" – such as serious and persistent problems with the alcohol, use of prohibited substances, etc. Such behaviour may undermine the public image of the judiciary and may be considered as incompatible with the ethical standards, but we cannot force the judge to eat healthily or exercise regularly.

Equally, the reference made in the Draft Code to "immoral behaviour" was open to overbroad interpretation. The Venice Commission understands that some "catch-all" formulas are inevitable, especially when the questions of morality are at stake. But the norm (legal or ethical) should be sufficiently clear and foreseeable in its application. So, the opinion asked for a more simple and convenient way to embody ethics, by giving several most typical examples of immoral behaviour which the authors had in mind when drafting this provision and transform it in a recommendation. Actually, during the meetings in Astana we were given such examples, and most of them made sense. So the rapporteurs were sure that the Draft Code could be easily amended in this respect.

Another source of concern for the VC was an article that established the judge's liability for acts of his/her close relatives. The judge was required to avoid giving an impression that s/he might use the influence and the prestige of the judicial office to defend them. It is understandable why this norm appeared in the Draft Code, but, legally speaking, the judge cannot control an adult member of his or her family who might, in certain situations, boast about family ties with a judge or try to use it to his or her advantage.

The same can be said about the obligation to provide assistance to the disabled parents and other family members. Of course, this is a very sensitive issue which largely depends on the traditions of a given society. However a reference to the obligations of support opens way to possible intrusion in the judge's private life; only non-fulfilment of a *legal* obligations may raise an ethical question, and even such situations should be treated cautiously.

Moreover, the Code assimilates the situation of retired judges to that of active ones. It is understandable that retired judges be placed under obligations in the name of dignity of the judicial office, but some requirements would not be consistent with such an obligation. For instance, the involvement in the public life is probably one of the areas where drastic limitations which may be justified for the serving judges are not necessary in respect of former judges.

Some provisions related partly to labour discipline and managerial duties of the judge (the duty to start the hearings on time, the duty to oversee the work of the employees of the court, etc.) and partly to the quality of the judicial decision-making and procedural propriety (draft clear and well-reasoned texts, do not adjourn hearings because of poor knowledge of the case materials, etc.). They are more part of professional obligations, illustrating how a judge performs his/her function. These obligations should be circumscribed: thus, the Venice Commission always warned the States from disciplining judges for errors of law or of fact. In the opinion of the Venice Commission, the Code should make it clear that procedural errors are to be corrected primarily through the system of appeals, and not through disciplinary liability.

Again, it is not excluded that a code of ethics may regulate the behaviour of the judges in the professional sphere. But the VC stressed again that the focus of any ethical code should be not so much on the actual breaches of procedural rules, but on the "appearances", on the image which a judge may leave on the parties and on the general public.

In some places the Code was introducing not an ethical standard of behaviour but a genuine legal obligation. For example, the obligation to report on the facts of illegal interference in judicial activity and "direct or indirect pressure" on a judge is not only an ethical norm but is a legal obligation : because it is a crime and must be reported to the prosecuting authorities in all cases.

This question brings us back to the main recommendation: the necessity for the constitutional law itself to describe in more detail the grounds on which a judge may be brought to disciplinary liability for the breach of "ethical rules" and to specify to what extent the findings of the Ethics Commissions are mandatory in the disciplinary proceedings against the judges.

Finally, the third group of recommendations was about the limits to the judges' involvement in politics and in the civic life.

This question is a difficult one; the extent of those limitations varies from country to country. It belongs to the Kazakh legislator to define the extent to which political involvement of judges must be restricted. However, the law should nevertheless be precise. Certain duties of the judges – for example, to cease membership in political parties or in their organs upon appointment to a judicial position – should be directly mentioned in the law. As to the Draft Code, it appeared necessary to ensure that it does not regulate the rights and obligations of the judges but rather provides them with specific guidelines which will allow them to know which conduct to adopt where there is no clear legal rule, but where the judge should show *self-restraint and moderation.*

Some provisions are of this sort : one prevents the judge from publicly demonstrating his/her religious affiliation. Another provides that a judge is not entitled to comment on court decisions not entered into legal force. This rule is sound, but it should not be interpreted as giving the judge an absolute freedom to attack publicly final court decisions. And as regards more abstract criticism, not connected to the adjudication in a specific case, indeed, the judge should speak with caution, especially when expressing him/or herself on a *fora* accessible to the general public (as opposed to more closed discussions amongst the professionals of the law); thus, the exception covering "the scientific and practical conferences, round tables, seminars and other events of educational character" where it is possible for a judge to express critical views, is reasonable.

As a conclusion, one may underline that ethics is both a very important and a very sensitive topic. The rapporteurs' wish was to help the legislator to avoid the rules being either too rigid or too vague. There is a risk that ethical rules may be misinterpreted; thus, precision in the formulations is required, but it should be accompanied by the moderation in their application. Probably, not everything can be settled at the level of the written rules, and only the experience will be the last bastion against unrealistic requirements.

As I know, in November 2016 the Assembly of Judges of Kazakhstan adopted a new Code of Judicial Ethics. The original draft has been significantly re-worked and certainly improved, in particular, by removing overly restrictive formulas used by the

Draft Code, and improving the overall structure. It remains to be seen how this new improved code will be applied in practice, but that may require the analysis of the specific cases, which the Venice Commission does not do. We would encourage the authorities of Kazakhstan to monitor the implementation of the Code.

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In 2017 a delegation of the rapporteurs of the Venice Commission visited Kazakhstan at the invitation of Mr Donakov, Deputy Head of the Presidential Administration of the Republic of Kazakhstan, in order to give an opinion on the draft law on administrative procedures. The opinion was adopted by the Venice Commission at its 110th Plenary Session on 10 and 11 March 2017.

In recent years the authorities of Kazakhstan engaged in a number of legal reforms aimed at modernising procedural legislation. The new draft law regulating various administrative actions on the basis of a uniform procedure was a part of this ambitious process.

The 2016 draft law introduced a number of concepts for the operation of public administration and modified some previously existing procedural rules. The need for ensuring legal certainty and a transparent legal framework for relations between individuals and public administration seems to be the main objectives of the draft. This text had an ambition to bring radical changes to the way the administrative bodies deal with individuals and private entities. The rapporteurs could find in a specific document entitled "the concept of the draft law" the information on the reasons for adoption and the logic of the draft law. This was very helpful.

Two main considerations guided the work, due to this novelty : to bring in the law as much precision as possible, and to make it a reference for administrative bodies in their day to day work for and with individuals and legal persons, without creating unnecessary bureaucratic procedures that would compromise the confidence of the population in the reform. We referred to the general minimum standards for a proper administrative procedure, developed in the framework of the Council of Europe, to formulate our comments.

The rapporteurs found that the text integrates a wide range of legal provisions filling existing gaps in national legislation, introducing new mechanisms and procedures, some which are inspired by best practices from other countries, and providing additional guarantees in the field of administrative law. But the rapporteurs also concluded, however, that the draft could be improved through a number of adjustments, additional references to other legal acts applicable in the field of administrative procedures, and, in particular, the clarification of the terminology used. It would also be useful to complete the text with a clearer link to the existing legal framework on judicial proceedings on administrative matters.

One of the areas where more precision was needed concerned the distinction between the applications and requests from private individuals and entities (in their various versions) and administrative complaints. Another area where the draft could be more precise was the reference to "other applicable principles", to be applied in administrative proceedings. Only some of them were referred to in the clarifications provided by the drafters (objectivity, impartiality of public administration or protection of the right to private life). More clarity on such applicable additional principles would be

necessary, and that could be described in the law itself. The opinion also identified some other instances where the terms used by the draft law should be clarified ("legislation", "harm", "confidence", etc.).

Another observation concerns a very delicate theme – the need for coherent and non-discriminatory administrative practice. A provision prohibited the administrative authority to take different decisions in different cases where essential factual circumstances are the same, or take identical decisions were essential factual circumstances were different. On the one hand, this principle may contribute to the uniformity of the judicial practice in the country where the doctrine of judicial precedent is not applied. On the other hand, this norm does not reflect sufficiently the principle of proportionality. The principle of equality of treatment could also be compromised, because the burden of evaluation of the similarities or differences of the significant circumstances of the case falls on the administrative body, however, neither legal doctrine nor legal act establish any criteria or methods for such assessment. We recommended to establish a duty of the administration to give a reasoned decision and present its findings, in order to enable public scrutiny of such decisions.

The Venice Commission in this opinion also considered procedural rules, and, in particular, rules on evidence. The draft law aimed at bringing the administrative procedure closer to other procedures already operating in the national legal system, taking into account, among other issues, the generally recognized standards used in the judicial proceedings. This was reflected in the rules of evidence used in the administrative procedure, expert opinions, etc. Such an approach is positive and contributes to the development of common principles of procedural law while respecting the specific characteristics of each procedure. The detailed provisions of the draft law allow the effective practical application of these rules respecting the balance between rights and obligations of individuals and ensuring a fair settlement of different administrative cases. At the same time it should be remembered that an administrative body is not a court, and cannot, therefore, have the same power of obtaining evidence, summoning witnesses etc. as a court would have.

The opinion of the VC concluded that the reform was well prepared and the draft of good quality. However, the draft could be further improved through a number of adjustments, clarification of terminology used. It could also be useful to complete the text with a clearer link to the existing legal framework on judicial proceedings on administrative matters.

Following our opinion, adopted in March 2017, the draft was afterwards integrated into a more ambitious Code on administrative procedure and justice. In this new Code two types of procedures were regulated – the administrative procedures (i.e. those taking place within the administrative bodies), and proceedings before administrative courts (i.e. court proceedings opposing a private individual and the administration). This is a completely new approach in the legal tradition of Kazakhstan.

At the request of Mr Beketayev, the Minister of Justice of the Republic of Kazakhstan, in October 2018 the Venice Commission has issued a new opinion on this Code. The member of the VC signatory of the present paper could not take part in the preparation of this document; however, it is important to recall, in brief, the most interesting findings of this follow-up opinion which was adopted by the plenary commission in October 2018.

Generally speaking, the Venice Commission concluded that the reform was well prepared and the draft Code was of good quality. However, it noted a number of gaps and inconsistencies in the draft Code.

For example, the Venice Commission pointed at the difference between principles and the procedural rules, and invited the Kazakh authorities to separate them by putting into respective parts of the Code.

Speaking of the overall structure of this document, the Venice Commission considered that administrative procedures and administrative court proceedings should be regulated in different documents. Furthermore, the Code should not regulate internal administrative procedures (i.e. those which do not involve private individuals and entities but rather regulate decisions between different administrative bodies and officials).

The Venice Commission recommended to regulate in the Code the access of private persons to the information and documents held by the administrative bodies, and describe exceptions from the principle of transparency. It called for a very limited role of the prosecutors in the administrative procedure. The Venice Commission invited the authorities of Kazakhstan to develop the notion of "administrative discretion" in more detail.

The opinion commented on procedural equality of the parties in the administrative proceedings and on the active role of the courts in seeking evidence and establishing the facts; it was noted that administrative proceedings should take into account the actual inequality of the parties (public authority against the individual).

The Venice Commission also recommended the authorities of Kazakhstan to consider the practice of administrative agreements, which help the administration to delegate some of its functions to a private entity and gain efficiency.

The Venice Commission examined the rules on the proceedings before the administrative courts. It noted that provisions which regulate burden of proof, collection of evidence, pre-trial hearing etc. are largely influenced by the rule of the civil procedure; they should be adapted to the needs of the administrative justice. The Commission also called to clarify rules on the suspensive effect of an complaint about an administrative act before a court, noting that there are exceptional cases when an administrative act cannot be suspended, and observing that the duration of such interim measures should be specified.

The opinion also contained a detailed analysis of a number of specific articles of the Draft Code.

At the plenary session of the Venice Commission in October 2018, Mr Beketayev said that the recommendations of the Venice Commission's were greatly appreciated by the authorities and would undoubtedly help to improve the text. This is very inspiring; even though Kazakhstan is not a member-State of the Council of Europe, its authorities are clearly interested in the European standards, experiences and best practices. Without any doubt, we have a lot of sympathy for the efforts of Kazakhstan to modernise its legal system, and the Venice Commission is always available to support this trend by a friendly advice.

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Kazakhstan and Venice Commission

The European Commission for Democracy through Law of the Council of Europe (Venice Commission) has provided significant support to the process of constitutional and legislative change in Kazakhstan. In Resolution of the Parliamentary Assembly 1526 (2006) on the situation in Kazakhstan and its relations with the Council of Europe, the Assembly recognized the importance of Kazakhstan as one of the pillars of stability in the Euro-Asian region and called for co-operation with this country to be stepped up.

The work of the Commission includes scrutinizing the laws and draft legislation to ensure that "European standards" of democracy are upheld across the world, as well as offering counsel and recommendations when approached for advice. For Kazakhstan, at the request of the Kazakh Government the Venice Commission develops the legal system, taking into account the generally accepted principles of the European constitutional heritage.

Kazakhstan is Party to the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS No. 165, since 1999), the European Cultural Convention (ETS No. 18, since 2010), the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, since 2015), and the Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127, since 2015).

Since the beginning of the implementation of the Action Plan – Neighborhood Cooperation Priorities for Kazakhstan: Cooperation Activities on Council of Europe's Conventions in Criminal Matters which was successfully implemented in July 2018, Kazakhstan has acceded to three legal documents of the Council of Europe in the field of criminal justice, namely Convention No. 141 (Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime), Convention No. 127 (Convention on Mutual Administrative Assistance in Tax Matters) and its Protocol No. 208 (Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters). In this

way, Kazakhstan strengthens its commitment to more active participation in international cooperation in criminal matters and harmonizes its criminal justice legislation with European norms.

In 2018, Kazakhstan gained an observer status in the Council of Europe European Commission for the efficiency of justice (*CEPEJ*) and the Consultative Council of European Judges (*CCJE*).

Since 1998, Kazakhstan had observer status and in 2012 became an official member of the Venice Commission. Kazakhstan's joining the Venice Commission allows the country to adopt a practical experience of Europe in the field of constitutional law, elections and referendums, cooperation with constitutional courts and comparative studies on the democracy application.

During this time at the request of the Kazakh Government, the Venice Commission has repeatedly provided expert and methodological assistance in reforming legal institutions in Kazakhstan by adopting several Opinions on various pieces of legislation of Kazakhstan including:

Kazakhstan – Opinion on the Concept Paper on the reform of the High Judicial Council, adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018).

Kazakhstan – Opinion on the Administrative Procedure and Justice Code, adopted at the 116th Plenary session (Venice, 19 -20 October 2018).

Kazakhstan – Opinion on the amendments to the Constitution of Kazakhstan, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

Kazakhstan – Opinion on the draft law of the Republic of Kazakhstan on administrative procedures, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

Republic of Kazakhstan – Opinion on the Draft Code of Judicial Ethic, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016).

Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

Amicus Curiae Brief on the Interpretation of the Kazakh Constitution concerning the participation in the Customs Union within the Euro-Asian Economic Community for the Constitutional Council of Kazakhstan endorsed by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009).

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

As a rapporteur, I acted on behalf of the Venice Commission and drafted opinion on such issues as Opinion on the Constitutional reform and opinion on Administrative Procedure and justice Code as well at the Ak-Bulak International Conference.

It should be stressed that during the period of my work with Kazakh authorities I witnessed a strong motivation and willingness to cooperate with the Commission from different relevant counterparts. Notably I would stress the active role in effective collaboration of the Member of the Venice Commission and former Chairman of the Constitutional Council – Igor Rogov; Zhakip Asanov, Chairman of the Supreme Court (also in his former position of Prosecutor general); Talgat Donakov, Chairman of High

Judicial Council (also in his former position of Deputy head of Administration of President); Kairat Mami, Chairman of the Constitutional Council (also in his former position of Chairman of the Supreme Court); Marat Beketayev, Minister of Justice and others.

Opinion on the amendments to the Constitution of Kazakhstan, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

The authorities of Kazakhstan requested an opinion of the Venice Commission on the draft law on the constitutional reform. In its Opinion adopted on 11 March 2017, the Venice Commission concluded as follows (paragraph 51): "The proposed constitutional amendments submitted for review represent a step forward in the process of democratization of the state. Revision of the competences of the branches of power and setting up a system of checks and balances is a difficult task. Many aspects of these efforts can only be assessed over time, when practical experience has revealed the most appropriate approach, taking into account historical development and traditions, societal development, the society's attitude towards the processes around, as well as international developments. But there can be no doubt that the reform goes in the right direction and constitutes a clear step forward. Other steps should follow in the future."

The constitutional reform in Kazakhstan, adopted in March 2017, changed the distribution of powers between the President and other branches of state power. The role of the Parliament was increased and some of the powers previously in the hands of the President were distributed between the Government and Parliament. The Constitutional Council received additional competencies (to examine draft constitutional amendments and questions to be submitted to a referendum), which was welcomed by the Venice Commission.

In its conclusion, the Commission indicated that the constitutional changes of Kazakhstan represent a step forward in the process of democratization of the state and correspond to the logic of previous constitutional reforms carried out in 1998 and 2007.

Opinion on the Administrative Procedure and Justice Code, adopted at the 116th Plenary session (Venice, 19-20 October 2018). The Minister of Justice of the Republic of Kazakhstan requested the opinion of the Venice Commission on the "Draft Code of Administrative Procedures" (CDL-REF(2018)037).

In general, the draft Administrative Procedural Procedure Code is commented favorably. In particular, it was noted that the draft law unites a wide range of legal provisions filling a number of existing gaps in national legislation and introducing new mechanisms and procedures representing positive international experience.

According to the document, the administrative reform launched in Kazakhstan is stipulated 'by the authorities' will to optimize and simplify administrative procedures and this is an important step in establishing clear rules in the field of administrative procedures and administrative justice.

According to the Opinion, the examined draft "Administrative procedure and justice code" (hereinafter, the draft Code) has a broader subject of regulation than was intended by the 2009 Concept. It integrates administrative procedures, as well as administrative court proceedings on resolving disputes in the field of public relations.

In addition, different levels and spheres of interaction between administration and individuals are regulated through a large variety of legal instruments. According to the Government Decree of 26 December 2002, N° 1378, "On the classification of legislation

branches of the Republic of Kazakhstan" the issues of public administration are referred to the legislation on the state and social order, and the legislation on administrative offenses is an independent branch.

It was decided to integrate in a single Code both the administrative procedures and administrative court proceedings which is a completely new approach in the legal tradition of Kazakhstan. This represents a major challenge since the text has to provide a solid and sensible legal background for regulating the relations between individuals and public administration and dispute resolution mechanisms in line with the Constitution of Kazakhstan and international standards.

According to the Report, the draft could be further improved through a number of adjustments and changes. The Venice Commission's main recommendations are as follows:

a) The Code gives an extensive list of definitions and principles applicable in administrative procedures and judicial proceedings, however in some provisions there is a clear confusion between principles and procedural rules. Venice Commission recommends to simplify the principles and to place the procedural rules into respective articles of the Code. This approach could contribute to normative consistency, simplicity and transparency of the text.

b) The functions of public authorities concerning the administrative procedures should be as detailed as possible in the text of the Code in accordance with the requirements of Article 3.

c) The role of the prosecutors in the administrative procedures and process could be further reconsidered, limiting their intervention to exceptional cases clearly indicated in specific articles of the Code. Current provisions lack clarity.

d) Provisions on administrative discretion should be reviewed and clarified in order to avoid misinterpretation in future application of the Code.

e) The role and procedural status of witnesses and experts in administrative procedures could be further developed in the text of the draft.

f) Provisions on the suspension of an administrative act pending the adoption of an appropriate decision should be clarified.

Ak-Bulak International Conference

In cooperation with the Constitutional Council, Venice Commission, the Public Prosecutor General's Office and the Supreme Court of the Republic of Kazakhstan, I participated in the International Conference "Effective criminal policy and optimal model of criminal justice – a priority direction of development of modern law enforcement system" which was held on 17-18 March 2017 in Ak-Bulak, Kazakhstan.

The conference was opened with a session on "The principles of case law and its role in protecting human rights and freedoms in criminal proceedings." Subsequent panels dealt with the investigation process, the registration of business offences and their investigation and the modernization of criminal sanctions in the fight against individual crimes in IT, business and corruption. The second day of the conference was devoted to the topic "Establishing criteria for the classification of criminal offences and crimes". The purpose of the conference was a broad discussion of the practical implementation of innovations in criminal, criminal procedural and penal enforcement

legislation adopted in 2014.

Under this Conference I prepared report on "Criminal justice reforms aimed at fighting corruption: Georgian Case".

Both domestic and foreign observers widely agree that Georgia has come a long way in creating a regulatory and institutional framework for fighting corruption.

Although every country has a unique set of initial conditions and the nature of the corruption problem and the type of political economy differ, many elements of Georgia's story can be replicated in other countries. Georgia's success destroys the myth that corruption is cultural and gives hope to reformers everywhere who aspire to clean up their public services.

Philip DIMITROV,
Judge of the Constitutional Court
of the Republic of Bulgaria,
member of the Venice Commission

Comments with respect to the recent constitutional changes in the Republic of Kazakhstan

When a country starts seeking a more desirable constitutional structure and tries to establish better interrelations among its instituton fitting this effort in a coherent conceptual framework and even finding a model to follow is of paramount importance. Therefore it was highly appreciated that by the end of the year 2015 the Head of the Working Group on the Redistribution of Powers between Branches of Government, formed by the President of Kazakhstan Mr. N.Nazarbayev, asked in a letter to Mr. Buquicchio for an opinion of the Venice Commission on the proposed amendments to the Constitution of Kazakhstan.

The Venice Commission prepares opinions only when specifically requested by the interested countries and institutions. The Commission is well known for its consistency in basing its opinions on established doctrine of constitutional democracy and the constant democratic practices in the countries-members of the Council of Europe. The members of the Commission are prominent lawyers in these countries, known for their contribution to the development of the democratic practices and establishing and maintaining the democratic standards. The very name of the Commission: Commission for Democracy Through Law clarifies the conceptual ground on which it is based. Its guiding principles are democracy, rule of law and respect for human dignity and rights.

I had the privilege of being one of the members of the Venice Commission who were asked to work on the draft of the opinion on the proposed amendments to the Constitution of the Republic of Kazahstan.

The very title of the working group that approached the Venice Commission was expressing the desire of the Kazahstan's authorities to initiate reforms that would enhance the division of power. The division of power was mentioned as early as 1789 in art.16 of the Declaration of the Rights of Man and of the Citizen as a cornerstone

of constitutionalism. The improvement of the legal (and constitutional) provisions connected with the division of power is commendable.

The proposed amendments to the Constitution of the Republic of Kazakhstan should be estimated against the background of the present constitutional provisions. The Republic of Kazakhstan has a very strong presidential institution whose powers generally exceed the presidential prerogatives in most of the countries of the Council of Europe. For this reason it does not make much sense to compare some specific proposals to similar institutes of other European countries (like Italy, which was mentioned in the Comments of the Kazakh working group or Poland, Lithuania, Romania, Bulgaria or other in which a directly elected President has little executive prerogatives). A closer point of reference might be the French Republic and still direct parallels with respect to prerogatives were not recommendable and are in fact unproductive.

On the other hand it is not the strength of the presidential institution per se, but the weakness of the other branches of power that may render the division of power problematic. The Constitution of the United States provides for a very strong president but its democratic character is beyond doubt, because the other branches of power are supplied wifh predogatives that can balance its strength successfully and thus avoid any monopolization of powers.

Democracy is by definition representative. There may be situations in which the direct vote of people on particular issues can be deemed necessary. However political representation is not invented only for practical reasons and Rousseau is wrong when he „permits“ representation only when it is impossible to get all the people together for a vote. In the judicial branch direct democracy i.e. the court of Lynch, is completely banned. In the executive it makes little sense except in local communities where a purely executive decision (like building a municipal road or raising or demolishing a controversial local monument) has to be made. When it comes to an issue of great importance like for example BREXIT, direct democracy may deepen the divide in the country and serve the ends of the different groups of people rather clumsily. The problematic character of direct democracy is best revealed in the legislative domain. A popular decision on taxes often proves to be a disaster as it happened in California around the beginning of the century. And when quite resonable legislation is put to a referendum this act may sometimes be mixed with populism and have negative effects in terms of diminishing the public trust in the institutions.

Modern Constitutions try to define most clearly the distribution of the prerogatives (powers) among the representative institutions and to clarify the interrelations among them. This is exactly the field in which the Working group has evidently decided to concentrate most of its efforts.

Among the amendnents made to the Constitution it is worth mentionig a few, which evidently express the desire of the introducing authorities to bring the constitutional system more in compliance with the established European democratic standards. Such are for example:

The amendments to art.44 paragraph 3 improve the balance of powers by:

- transferring to the Government some presidential prerogatives like: “form, abolish and reorganize the central executive bodies of the Republic, which are not included into the Government” (paralleled by proposed amendment to art.66.p.8);

- including consultations with the Majilis as a procedural requirement for decision-making like: "following a proposition by the Prime Minister made with the consultations with the Majilis determine[s] the structure of the Government".

The removal of p.p.(8) and (9) of art.44 paragraph 3 and the parallel amendment of art.66 p.8) moves to the prerogatives of the Government: the adoption of state programs (8) and of the unified system of payment on all levels and branches of administration (art.66 proposed subparagraph 9-(1). Having in mind the vast prerogatives of the President this is commendable as it improves the balance between the executive institutions.

The amended art.44 paragraph 3 (18) removes "the formation" of a National Guard from the President's prerogatives and establishes a general State Security Service under the President, which would better fit into the European democratic standards.

Commendable is the removal of art.45 (2) and art.53 p.3) (establishing the right if the Parliament in a joint session of the two Chambers to delegate to the President the right to legislate for one year period) as well as the proposed amendment to art.61 (2) (removing the president's right "to issue decrees having the force of law"). By these amendments all legislation is brought back within the prerogatives of the legislature, which fits into the European democratic standards.

The amendments to art.64 (2), to art.65 (2) and to art.67 (4) tend to enhance the role of the Parliament by providing for responsibility and accountability of the Government before it. No matter what the practical effect of the first two might be they are evidently aimed at giving more prestige to the Parliament/Mazhilis.

The amendment to art.70 (1) by providing for resignation of the Government to the newly elected Parliament enhances the role of the Parliament and is a natural (though limited) expression of the need for confidence that the Cabinet needs from the Legislature. It is in accordance with the concept embodied in the amendment to art.57 p.6), which was already discussed.

The new paragraph 3 of the same article introduces preliminary confirmation by the Constitutional Council of the constitutionality of proposed amendments to the Constitution with respect to the requirements mentioned in art.91 (2), which is commendable.

Recently Kazahstan introduced a new Code on Administrative Procedure and Justice (which was also send for an opinion to the Venice Commission) and a conceptual paper on the High Judicial Council. Both have been discussed in the Commission. On the conceptual level they have been estimated as not being in contradiction with the standards and principles followed by the Commission.

This all gives good grounds to believe that the direction taken by the Kazahstan authorities in their approach to the improvements of the constitutional system of the country can end up with positive results.

On a more general note: It is worth remembering that with all the peace-loving attitudes towards government, politics has always been and remains a competitive business. A good part of the constitututional provisions – and this is the meaning of Constitutional justice – are not mere declarations of how things should go, but mainly an establishment of instruments to solve dispute and reduce tensions between the institutions and between the institution and the citizens.

It should be kept in mind too that the second issue – proclamation of the rights of the citizens has little value if the constitutional structure of the institutions does not have the necessary checks and balances, which can guarantee these rights.

The institutions are expected to compete. If they don't we have either reached the perfection of paradise (which is not very likely) or something is going wrong with their functioning. In order to compete efficiently they need to be supplied with prerogatives that make them capable to do this.

We often listen to concerns about too strong institutions (mainly when it comes to the executive) but the real problem is not the strength of the institution but rather the weakness of those that compete with it. As mentioned above the US President is an example of a very powerful institution but the powers of Congress are capable of restraining it and thus the checks and balances work.

The competitive character of political power in a democratic country, i.e. in a country where there is division of power, makes it necessary to imagine situations of conflict. The relative strength of the institutions in other words can be measured by the efficiency of their weapons, i.e. the instruments they have at hand to oppose and block their competitors. This is what makes a democratic system really work.

I believe that having all this in mind the reforms of the Constitutional system of Kazakhstan can give good fruits.

Slavica BANIĆ,
Former Substitute member
of the Venice Commission,
Former Justice of the Constitutional Court
of the Republic of Croatia, Editor-in-Chief of the
Croatian Legal magazine «Informator»

Guiding principles of the administrative procedure and administrative court proceedings

Almost for three decades Venice Commission, the Council of Europe's advisory body on constitutional matters, has been striving in unifying democratic values and upbuilding the democratic institutions of its member states and all other states which ask for its assistance in achieving the rule of law state. Through its reports, opinions, studies or guidelines, Venice Commission shapes the universal standards as expressions of a common constitutional heritage that is created on the basis of a number of international agreements, conventions and treaties whose aim is protection of human rights and freedoms and common values.

The strength and reputation of Venice Commission derives from its neutrality and professional approach. Its work is freed from political affiliations or influences and is directed in providing legal aid which will help decision-makers of respective countries to choose solutions which will the best respond to their legal tradition and needs. This approach has been recognized by Kazakh's authorities and Venice Commission has become its valuable partner in a number of different projects whose aim is to improve Kazak's legal environment. In relation to position of the Republic of Kazakhstan as a member state of Venice Commission, it has been noted how Kazakh's authorities entrusted Venice Commission legal assistance in the course of drafting legislation related to constitutional amendments, judiciary, administrative procedures and institution of ombudsman, issues that are of the vast importance for the protection of human rights of citizens and issues that are necessary for creation of the society *„dedicated to the ideals of freedom, equality and concord"*[1], *and country „wishing to take a worthy place in the world community"*[2] *as it is foreseen by the Constitution of the Republic of Kazakhstan.*

[1] *Preamble of the Constitution of the Republic of Kazahkstan*
[2] *Ibid*

Dedication to the ideals of freedom, equality and concord requires attention and observance on the functioning of public authorities since their relationship to citizens shows how and to what extent are respected their rights when dealing with administration. In that regard, it is important that proper „tools" for functioning of public authorities are secured in order to reduce the arbitrariness and unacceptable limitation of citizens' rights. It is quite clear that these „tools" refer to legislation which will ensure that conduct of the authorities in their relationship with citizens will be guided by the principle of legality, equality, social justice and be deprived of arbitrariness.

The authorities of the Republic of Kazakhstan have recognized the need to work on improving the legislation on administrative procedure and to establish the administrative justice as a separate branch of justice with the aim to develop a confidence of citizens in public power when dealing with matters of public nature. This intention for sure came out of the awareness how only a proper system of administrative law may ensure the right functioning of the public authorities and reduce discretional decision making, protecting at the same time public interest.

The work on the Draft Code on Administrative Procedure and Justice that was presented to Venice Commission in 2018 for the opinion revealed manifold aspects of public administration functioning and organization. The Draft Code put forward the issues of internal and simplified administrative procedure next to the regular one as well as the regulation of administrative justice. All of them show that a body of administrative law is complex, extensive and multi-layered.

Out of the complexity and diversity of administrative law institutes, the aim of this brief contribution is to direct the attention to the principles that govern administrative procedure and court proceedings. The principles set out in the Draft Code are not only the norms from which other norms derive, but they also form the identity of this Code in terms of embodied legal values in it. How important they are for application of the Code clearly stems from the provision which states that „*violation of the principles depending on their nature and importance entails the rendering of decisions, actions (inactions) as illegal ones "*. [3]

The Draft Code foresaw a number of principles[4] expressively alleging how „*principles of the administrative procedures and administrative court proceedings are interlinked and form their own system*"[5] and that each of them "*is implemented in conjunction with other principles"*[6]. Nevertheless, the legislator, wisely, did not limit procedures solely to the prescribed principles. The openness to acceptance of principles which could contribute to a higher level of protection of citizens' rights was expressed in the statement how established principles "*are not exhaustive and cannot be an obstacle to the application of other principles of law."*[7]

In that regard, it can be said how this statement and openness have already found their place in the Draft Code. A thorough overview of the course of the administrative

[3] *Article 7 of the Draft Code*
[4] *Articles 8 – 23 of the Draft Code*
[5] *Ibid 3*
[6] *Ibid 3*
[7] *Ibid 3*

procedure and court proceedings rules shows that Kazakh's legislation on administrative procedure and court proceedings took into account a number of principles that are common or present in other countries' administrative procedures and court proceedings such as a principle of material truth, principle of protection of citizens' rights and public interest, principle of the right to be heard, the adversarial principle and principle of equality of arms, principle of effectiveness and efficiency, principle of independent and free evaluation of evidence, principle of the right to appeal against the administrative act, etc. becoming thus a part of community whose aim is the respect of the rule of law.

The obligation of the administrative body from the Article 80 of the Draft Code to „examine comprehensively, completely and objectively all the actual circumstances that are important for the proper consideration of the administrative case" is the expression of the principle of material or substantive truth as a principle which is in close connection to the principle of legality since only establishment of all necessary facts and circumstances can result with lawful decision.

In the same Article it is, further on, promoted the principle of independent and free evaluation of evidence. Namely, it is expressively determined that „*the subject and scope of the examination of facts and circumstances are determined by the administrative body"* which is "*not bound by arguments and information about the factual data submitted by participants of the administrative procedure"*. Of course, the assessment of the administrative body must stem from careful and contentious evaluation of all submitted and provided evidence.

Principle of the right to be heard is another principle which found its place in the Draft Code. As a precondition of lawful decision, this principle stems from the Article 81 which clearly states that a participant of an administrative procedure has the right to be heard and that an administrative body, the official, next to explanation of his or her rights and obligations, must provide him or her the opportunity to express own position on factual circumstances.

The adversarial principle and principle of the equality of arms are applied in the second part of the same provision in the Article 81 by ruling that a participant, by being heard, has the right to provide additional, i.e. new arguments and information on the factual data. Furthermore, this principle is incorporated in the Article 82 of the Draft Code, by which the participant is entitled to get acquainted with materials that affect his or her rights and obligations.

The principle of effectiveness and efficiency is another common principle for legislation on administrative procedure and administrative justice in other countries. State bodies, i.e. public authorities and the courts are obliged to enable efficient and flexible procedure which will be deprived of unnecessary costs or unreasonable and excessive demands and will result in justified decisions and actions. In relation to administrative justice, this principle is expressed by the notion of observance of a reasonable term. Speaking of the administrative procedure, it should be noted how established time limits for communication with participants, flow of information and documents as well as time limits for rendering solutions are expressions of the requirements established by this principle.

The principle of the right to appeal is foreseen in the Article 16 as a freedom to appeal against judicial acts. However, it should be noted that twenty articles of the Draft Code (Articles 99 to 109) related to the administrative procedure regulate the manner

and exercise of the right to appeal against the administrative act, enabling thus effective protection of the rights of citizens in the administrative procedure and at the same time securing the legality of the administrative act as such. The effective exercise of the right to appeal in the administrative procedure is the precondition of the judicial protection in the administrative dispute.

Last but not least, a very important principles for both procedures is the principle of protection of rights of citizens and protection of public interest. This principle in practice means a double obligation of state bodies: firstly, citizens should be enabled to easily protect and realize their rights, and secondly, realization of those rights should neither infringe the right of others nor the public interest. Speaking of latter, it should be noted that it is the role of the state bodies to protect public interest which aims to protect common values of the respective society. In that regard, in weighing the correct balance between these two opposed interests – public and private, the application of principle of proportionality as it is foreseen by the Draft Code is of utmost importance.

In conclusion, this short observance shows how principles, whether directly or indirectly foreseen in the Draft Code ensure decision-making process which ought to reflect the general legal values such as fairness, equality, predictability, transparency and protection of citizens' rights on one side, and on another side, a good administration. The awareness of their existence and purpose in future application of the administrative procedure and court proceedings legislation will contribute to protection of citizens' rights for the benefit of the Kazakh's society.

Opinion on the possible reform of the ombudsman institution in Kazakhstan

Adopted by the Venice Commission at its 71st Plenary Session
(Venice, 1-2 June 2007)

on the basis of comments by
Mr Peter PACZOLAY (Member, Hungary)
Mr Hjortur TORFASON (Member, Iceland)

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1. By letter dated 25 December 2006 addressed to the President of the Venice Commission, the Commissioner for Human Rights (Ombudsman) of Kazakhstan, Mr Baikadamov, requested an opinion on certain questions relating to the possible reform or development of the institution of Ombudsman for Human Rights of the Republic of Kazakhstan.

2. Within the framework of its Joint Programme with the European Commission, a delegation of the Venice Commission composed of Mr. Torfason and Mr. Colliard, accompanied by Mr. Buquicchio and Mr. Durr met on 15 May 2007 in Astana with Mr. Kalyuzhnii, the head of the National Centre for Human Rights, which provides the staff support for the Human Rights Ombudsman to discuss the issues raised in the request.

3. The present opinion was drawn up on the basis of comments by Mr. Peter Paczolay and Mr. Hjortur Torfason.

4. This opinion was adopted at the 71st Plenary Session of the Venice Commission (Venice, 1-2 June 2007) in the presence of Ms Saule Mektepbayeva, Head of Expert Department, National Ombudsman Office of Kazakhstan.

General remark

5. The questions or issues are six in number, and will be commented on in order below. The comments are given in the light of the existing legal provisions for the institution, which are embodied in a Statute on the Commissioner for Human Rights established by a Decree of the President of the Republic of Kazakhstan No. 947 of 19th September 2002 (CDL(2007)054), but do not deal with the Statute in its entirety.

I. Constitutional and Statutory Underpinning for the Office of the Ombudsman

6. The Constitution of 30 August 1995 of the Republic of Kazakhstan contains extensive provisions concerning human rights, especially within its Section II on the *Individual and Citizen* (Articles 10-39). In particular, Article 12(2) declares that "*human rights and freedoms shall belong to everyone by virtue of birth, be recognised as absolute and inalienable, and define the contents and implementation of laws and other regulatory legal acts",* and in the same vein, Article 13(1) provides that *"everyone shall have the right to be recognised as a subject of the law and protect his rights and freedoms with all means not contradicting the law".* In Section VII on the *Courts and Justice,* it is also expressly provided that the judicial power "shall be intended to protect the rights, freedoms *and legal interests of the citizens and of organisations for ensuring the observance of the Constitution* ...". Under the Constitution, therefore, a recourse to the courts of law is appropriately seen as the basic means to be available for the protection of human rights and freedoms, and the Constitution does not contain any express reference to a non-judicial recourse or process of which individuals and legal entities might avail themselves for purposes of such protection.

7. In order to promote and preserve the independence and neutrality of an Ombudsman or Human Rights Defender as well as the respect in the nation and the place of importance among other institutions which are vital to the effective functioning of this institution, it is essential that the status of this institution should rest on a firm legislative foundation. Accordingly, **it is highly desirable that the existence of the institution be guaranteed at the constitutional level, by express provisions in the constitution setting for the essence of the characteristics and powers of the office of Ombudsman or Human Rights Defender and the basic terms of his/her appointment.** Such provisions need not be very extensive, as the characteristics and functions of the office should be further elaborated and safeguarded in an enabling legislation or statute providing comprehensively for the framework and activity of the institution, by relegation in the constitution. It is also desirable that the constitutional provisions should not be framed in such narrow terms as to prevent a reasonable development of the institution proceeding from its essential basis. Especially, the provision in the constitution for an Ombudsman or Human Rights Defender at the national level should not be seen as preventing the establishment of similar institutions at a local or regional level or within specific fields.

8. A number of constitutions do contain provisions on the ombudsperson: Albania (Articles 60 – 63), Austria (Articles 148a – 148j), Croatia (Article 93), Estonia (Articles 139 – 145), Finland (Articles 108-113), Georgia (Article 43), Hungary (Article 43/B), Poland (Articles 208 – 212), Romania (Articles 58-60), Russia (Article 103 on appointment by Parliament), Slovakia (Article 151a), Slovenia (Article 159), Spain

(Article 54), Sweden (Institute of Government, Chapter 13, Article 6), "the former Yugoslav Republic of Macedonia" (Article 77) and Ukraine (Article101).

9. The desirability of a constitutional guarantee of existence is generally recognised among nations favouring the establishment or maintenance of the institution of Ombudsman or Human Rights Defender. Nonetheless, the principle involved is not universally regarded as indispensable, and it is well known that in many countries, the institution is in fact being maintained on the basis of ordinary enabling legislation. It is fair to say, however, that this may partly be explained in historical terms, i.e. by the fact that the legislation dates back to a period when the significance of the role of the Ombudsman in relation to human rights and freedoms was not as strongly recognised as it is today. A further explanation lies in the fact that the procedure for constitutional amendment is naturally quite cumbersome in many countries, so that provision for an institution such as the Ombudsman is difficult to make except in the course of a wider constitutional revision process.

10. According to current European and international standards, therefore, a constitutional guarantee for the Ombudsman is distinctly considered as preferable. It has been advocated in such declarations of the organs of the Council of Europe as the Recommendation 1615 (2003) 1 of the Parliamentary Assembly on the Institution of Ombudsman. And in opinions of the Venice Commission relating to constitutions and/or to rules on the Ombudsman or Human Rights Defender in various countries, the provision for a constitutional guarantee has been consistently proclaimed as the preferable solution as compared with provision for the institution by ordinary legislation or statute.

11. As a final matter under this head, it is to be noted that according to the above general standards, the normative text regulating the status and functions of the Ombudsman for Human Rights should be embodied in legislation of the national parliament, and the person of **the Ombudsman should be elected by the parliament by a majority large enough to ensure a reasonable consensus, i.e. by a qualified majority of all members.**

II. The Ombudsman's Right to Petition the Constitutional Review Body to Rule on the Constitutionality of Legislation Concerning Human Rights

12. The model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration. To achieve this, it is imperative for the institution to preserve its neutrality, and accordingly, the institution should not involve itself in litigation or intervention in court cases, although it certainly should have the power to advise those who seek its assistance as to the legal remedies which may be available to them.

13. Quite a number of countries do allow the ombudsman to challenge a legislative act before the Constitutional Court (e.g. Albania, Armenia, Georgia, Estonia, Moldova, Poland, Portugal, Romania, Russia, Spain). Thus, the power to challenge laws before

the Constitutional Court is not alien from the institution of the ombudsman. On the other hand it is not its necessary attribute. If the ombudsman's competence within the general mandate of protecting human rights covers also the defence against possible violations of those rights by the legislature, then it is appropriate to enable the ombudsman to challenge those laws through constitutional review.

14. Consequently, 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.

15. Accordingly, **the question whether the Human Rights Ombudsman of Kazakhstan should be endowed with a mandate to make appeal to the Constitutional Council as above related should be positively considered.** In this connection, it is to be noted that as the jurisdiction of the Constitutional Council is defined within the Constitution (Article 72), the measure would seem to call for a constitutional amendment.

III. The Ombudsman's Right to Introduce Legislation

16. It may generally be seen as consistent with the mandate of an Ombudsman or Human Rights Defender according to the model most widely accepted that the institution should have the power to make recommendations to the parliament or legislature for the introduction of amendments or additions to existing laws or other legislative innovation in respect of matters related to his mandate, in the annual report on its activities which the institution is expected to deliver or otherwise. This is the more so as in most countries, the Ombudsman/Defender is appointed by the parliament and expected to report to the legislative body. At the same time, it is generally seen as inconsistent with the neutrality essential to the institution to take the matter further and enable the Ombudsman/Defender to initiate legislation in his/her own right, as this might tend to compromise his/her independence of political pressures and other social forces. It would politicise the ombudsman's functioning because without the support of considerable political forces within the legislature the proposals could not be successful. Thus the ombudsman would be constrained to seek for the support of political forces, and thus put at risk his or her authority.

17. Under the Constitution of the Republic of Kazakhstan (Article 61), the right of legislative initiative is vested exclusively in the deputies of the Parliament and the Government of the Republic. Accordingly, no provision is made for such direct initiative in the existing Statute for the Human Rights Ombudsman of Kazakhstan. The Statute also does not address the position of the institution towards the legislative body in terms of the Ombudsman having the power to make recommendations for legislative amendments to the Parliament, but such power presumably is implied within Article 19, which provides importantly that the Ombudsman within his/her competence shall

contribute to the improvement of legislation of the Republic relating to human rights and freedoms and the manner and means of their protection.

18. In line with the general views above referred to, it is **to be doubted that the institution of the Human Rights Ombudsman of Kazakhstan would gain by being endowed with a right of legislative initiative.** In view of the neutrality and independence which the institution needs to possess in the pursuit of its functions, it is believed that **the nation would be better served by having the mandate of the Ombudsman limited to the power of issuing recommendations for legislative reform to the Parliament and/or to the Government or the President of the Republic** (to whom the Ombudsman reports according to the present Statute), without a direct initiative. Such recommendations in the annual or ad hoc reports obviously do not have binding effect, and do not oblige the state organs to act, but can influence them and might draw the attention of the public opinion to the issue in question.

IV. The Ombudsman's Right to Interpret Existing Legislation and Ratified Human Rights Treaties

19. This question relates to the issue whether it might be desirable to vest the Human Rights Ombudsman with the power to issue authentic interpretations of domestic legislation and ratified international treaties in the field of human rights and freedoms. Here again, it is to be observed that the key to the success of the Ombudsman institution among the nations lies in his/her power to convince by reasoning on the basis of law and equity, rather than a power to hand down orders or issue directives. In the course of such reasoning, the Ombudsman will be able to express opinions as to the meaning of legislative provisions and the proper interpretation of ratified treaties, whether in connection with the handling of complaints brought before the institution or with matters which the Ombudsman may be able to take up on his/her own motion. On balance, the preferable view is that the ability to state such opinions is appropriate and sufficient to the general purposes of the Ombudsman, and that endowing them with binding authenticity would go beyond the scope of the ideal role for the institution. At the same time, it would raise the possibility of conflict with the competences and independence of the Constitutional Court and of the judicial power in general.

V. Establishment and Operation of Specialised Ombudsman Offices

20. This question is prompted by the fact that the development of the Ombudsman institution in many states has led to the emergence of similar offices or institutions having the special purpose of protecting the rights of particular sections of the population, or safeguarding rights in relation to a particular field of activity. It is noted that a process of this kind is currently under way in Kazakhstan, with plans e.g. for appointing an Ombudsman for children's rights.

21. The establishment of Ombudsmen for special fields is a relatively recent phenomenon, but growing in popularity. The concept for these institutions generally is related to the concept for the traditional parliamentary or national Ombudsman monitoring the administration and the observance of human rights in general terms, and these other institutions normally will benefit from the relationship and from the similarity of working methods which may be followed. However, the basic requirement for independence from the administration and other authorities does not necessarily

make itself as strongly felt in these cases, and the issue of guaranteeing the existence of the institutions by constitutional provisions in the interest of democratic government and human rights protection in general does not have the same essential weight as discussed under Question I above in relation to the national Ombudsman or Defender. On the other hand, the establishment by legislation will remain a clear requisite.

22. While these specialised institutions will need to have competences similar to those of the national Ombudsman/Defender as regards the capacity for requiring information and access to institutions, as well as the ability to address governmental authorities by way of recommendations and reports and informing the general public of his/her activities, the competences and the background are not necessarily the same in all respects. Thus as regards the protection of children's rights, the background in several countries (including Norway and Iceland, where the laws on the institution are very similar) is that the Ombudsman for Children is established as an independent official within and not outside of the state administration (in Norway appointed by the Social Minister, in Iceland by the Prime Minister). Also in many countries (again including Norway and Iceland), this Ombudsman operates more as an advocate and general protector of children's rights than as an official engaging directly in conflict resolution in the interest of individual claimants. Thus the Ombudsman for children certainly will hear complaints from individuals and advise the complainants as to the remedies available to them. In most countries, however, the institution generally will not involve itself in the resolution of conflicts between private individuals in relation to children (though Ireland provides an exception or alternative in this respect), and will need to avoid taking sides among individuals in its approach to the authorities, even though the approach is by recommendation rather than an order. Among other things, it may be noted that the assistance to the individual complainant may take the form of advice to make appeal to the national Ombudsman.

23. In the Republic of Kazakhstan, the question may arise whether the prospective Ombudsman for Children (or other such special offices) should be wholly independent and operating in parallel with the Human Rights Ombudsman, or whether the office should operate in liaison with the latter or even as a specialised department or bureau within the office of the Human Rights Ombudsman (which is the approach taken in Greece and certain other countries). Under the first named alternative, the view generally held is that the special ombudsman should be independent also to the extent of not being subordinated to the national ombudsman by way of a hierarchical relationship.

24. A further possibility which might also be considered would be to follow the second named alternative, according to which the specialized ombudsman would be appointed independently, but would be expected to operate in liaison with the general Ombudsman by sharing the same office facilities and supporting staff. This approach has e.g. been taken in Hungary.

25. On balance, however, it would seem preferable to follow the third-named alternative in Kazakhstan, where the Ombudsman institution is presently in a stage of consolidation and development, and to organise the functions of the specialised ombudsperson within the overall institution of the national Ombudsman, by way of establishing a special department and/or appointing a deputy ombudsman for the special field. The special function presumably could then benefit directly from the status and legitimacy of the general Ombudsman, and the connection could in fact lend added

strength and efficiency both to the special function and the national institution. If this approach is followed, it would be appropriate to have the deputy ombudsperson or head of department appointed either by the Ombudsman or by the appointing authority (Parliament/President) upon recommendation of the Ombudsman.

VI. Staffing and regional Ombudsman Offices

26. Under the establishing Statute of 19th September 2006 (Section 6), the staff and other support of the office of the Human Rights Ombudsman of Kazakhstan are provided by the National Centre for Human Rights, a state agency established under a presidential Statute of its own. The Ombudsman appoints the Head of the Centre and its other staff, who have the status of civil servants, and the activities of the Ombudsman and the Centre are funded by the national budget. The above final question is firstly prompted by the fact that the staff of the institution (14 members) is relatively small considering the population and size of the country, and has been faced with a growing number of applications over its recent initial years of activity.

27. It does seem clear that in practical terms, a staff of the present number is insufficient and needs to be substantially increased. As well known, this basically involves a budgetary question with corresponding political implications, and it is difficult to provide by general legislation for criteria or methods of budgeting which are effective enough to ensure that the staffing of the Ombudsman institution and its other recourse to assistance is satisfactorily provided for at all times. This has been attempted in several countries, however, and should similarly be considered in Kazakhstan.

28. Thus the law or statute regulating the Ombudsman could prescribe that the budgetary allocation of funds for the operations of the institution should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution, and take into account such matters of reference as the number of complaints lodged with the institution in the previous year. The law or statute could also provide for a relative budgetary independence of the Ombudsman, by prescribing that the institution itself should submit a proposal for its budget to the governmental authority responsible for presentation of the national budget to the parliament, and that this proposal should be included within the national budget without changes, either as a proposal of the government or for purposes of comparison with the eventual proposal of the governmental authority, if the government should find it necessary to make reductions in the allocation requested. Finally, if the Human Rights Ombudsman is constituted as a parliamentary ombudsman in the ordinary sense (i.e. appointed by the legislature and reporting to the legislature), this may serve to strengthen the assumption that the parliament will in fact regularly provide the institution with financial means adequate to ensure its proper functioning.

29. The above question secondly refers to the issue whether there might be reason to establish regional offices for human rights protection in Kazakhstan. In view of the size and population of the country, this clearly would seem desirable, at least in order to facilitate the investigative and monitoring functions of the national Ombudsman and the personal access to the institution. Referring again to the comments under Question V. above, it is to be noted that the alternative of appointing regional or local ombudspersons who are not subordinated to the national Ombudsman is preferred in many countries and has advantages of its own. Unless specific conditions in certain regions otherwise

indicate, however, it would seem preferable in Kazakhstan to organise regional or local offices manned by representatives of the national Ombudsman, with or without being designated as Deputy ombudspersons.

Conclusions:

30. The six questions raised by the Human Rights Commissioner (Ombudsman) of Kazakhstan can be answered as follows:

I. The institution of the Human Rights Commissioner (Ombudsman) should be guaranteed at the constitutional level, setting out the essence of the characteristics and powers of the office of Ombudsman or Human Rights Defender and the basic terms of his/her appointment providing for an election by a qualified majority in parliament.

II. The Human Rights Ombudsman of Kazakhstan should be endowed with a mandate to make an appeal to the Constitutional Council.

III. The Human Rights Ombudsman of Kazakhstan would not gain by being endowed with a right of legislative initiative but should remain limited to the power of issuing recommendations for legislative reform to the Parliament and/or to the Government or the President of the Republic.

IV. While the Ombudsman should express his or her opinion on the interpretation of legislation and ratified human rights treaties, such opinions should not have binding force.

V. In Kazakhstan, where the Ombudsman institution is presently in a stage of consolidation and development, the functions of specialised ombudspersons should be established within the overall institution of the national Ombudsman.

VI. The legislation on the Ombudsman should provide that the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution taking into account such matters of reference as the number of complaints lodged with the institution in the previous year. The law or statute could also provide for a relative budgetary independence of the Ombudsman by prescribing that the institution itself should submit a proposal for its budget.

31. The Venice Commission remains at the disposal of the Ombudsman of Kazakhstan and the Kazakh authorities in general for the implementation of the reform of the Ombudsman institution and any other reforms promoting democracy, human rights and the rule of law.

Amicus curiae brief on the interpretation of the Constitution of the Republic of Kazakhstan concerning the participation in the Customs Union within the Euro-Asian economic community

Endorsed by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009)

on the basis of comments by
Ms. Angelika NUSSBERGER (Substitute member, Germany)
Mr. Evgeni TANCHEV (Member, Bulgaria)

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I. Introduction

1. At the 80th Plenary Session of the Venice Commission (9-10 October 2009), the Chairman of the Constitutional Council of Kazakhstan, Mr. Rogov, requested the Venice Commission to provide an amicus curiae brief on a case pending before the Constitutional Council on the conformity of the Treaty on the Customs Union Commission with the Constitution of Kazakhstan.

2. The Commission invited Ms Nussberger and Mr Tanchev to act as rapporteurs. Their comments figure in documents CDL(2009)177 and 178 respectively. The Constitutional Council provided Russian versions of the Constitution, relevant treaties and decisions of the Council. In view of the urgency of the case to be decided by the Kazakh Constitutional Council, Mr. Rogov asked for the comments by the rapporteurs by 26 October 2009 at the latest. The Council handed down its decision, available in Russian, on 5 November 2009.

3. The present amicus curiae brief was approved by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009).

II. The request

4. According to Article 72, para. 4 of the Constitution of Kazakhstan, the Constitutional Council has the competence to give an official interpretation of the Constitution. This procedure has been initiated by the Prime Minister of the Republic of Kazakhstan asking for an official interpretation of Article 4 the Constitution of Kazakhstan.

5. Article 4 of the Constitution of Kazakhstan reads as follows:

"Article 4

1. The provisions of the Constitution, the laws corresponding to it, other regulatory legal acts, international treaty and other commitments of the Republic as well as regulatory resolutions of Constitutional Council and the Supreme Court of the Republic shall be the functioning law in the Republic of Kazakhstan.

2. The Constitution shall have the highest juridical force and direct effect on the entire territory of the Republic.

3. International treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases when the application of an international treaty shall require the promulgation of a law.

4. All laws, international treaties of which the Republic is a party shall be published. Official publication of regulatory legal acts dealing with the rights, freedoms and responsibilities of citizens shall be a necessary condition for their application."[1]

6. The official interpretation of this article is required in the context of the implementation of the Customs Union Treaty between Belarus, Kazakhstan and the Russian Federation, signed in Dushanbe on 6 October 2007. The Treaty on the Customs Union Commission was ratified by the Republic of Kazakhstan on 24 June 2008. According to Article 7 of the Treaty, within its competence the Customs Union Commission takes decisions, which are binding for the Parties to the Treaty.

7. According to the Prime Minister of Kazakhstan, the question on how to implement the binding decisions of the Customs Union Commission has to be solved on the basis of Article 4 of the Constitution of the Republic of Kazakhstan. The official interpretation requested from the Constitutional Council therefore focuses on this question.

8. The main controversial issue is if and to what extent decisions issued by the Customs Union Commission and can be part of the constitutional and legal system of the Republic of Kazakhstan.

III. Types of norms in the legal system of Kazakhstan – the possible nature of the decisions of the Customs Union Commission

9. Article 4 of the Constitution enumerates all types of valid legal acts ("dejstujuscie) in the Republic of Kazakhstan: the provisions of the Constitution, laws, other normative legal acts, obligations based on international treaties and other commitments of the Republic as well as normative resolutions of the Constitutional Council and the Supreme Court of the Republic. Decisions of a Commission based on an international treaty are not explicitly mentioned. Therefore it is necessary to analyse in how far the legal acts enumerated in Article 4 can be interpreted in such as way as to include the decisions taken by the Customs Union Commission.

10. According to Article 4, international law can be part of the law of the Republic of Kazakhstan. This provision mentions norms of international treaties and "other commitments": *("normy ... mezdunarodnych dogovorov i inych objazatel'stv").* The problem is that the decisions taken by the Customs Union Commission are not themselves part of an "international treaty" concluded by Kazakhstan, but arise out of a mechanism

[1] *Available at the web-site of the Parliament of Kazakhstan: http://www.parlam.kz/Information.aspx?doc=2&lan=en-US.*

set up by a treaty. It is therefore necessary to interpret the notion "international treaties and other commitments".

11. While it can be assumed that the clause "international treaty" [obligations] only refers to the obligations contained directly in an international treaty, the Constitution also provides for "other commitments" that are not specified in detail.

12. One (narrow) interpretation would be that the article refers to international commitments not based on a treaty but on international agreements (as opposed to ratified treaties). Such an interpretation would be comparable to the regulation in the Constitution of the Russian Federation enumerating "the universally-recognised norms of international law and international treaties and agreements of the Russian Federation" as "a component part of its legal system" (Article 15 of the Russian Constitution).

13. However, decisions taken by an international Commission within its competence are not comparable to international agreements. This means that a narrow interpretation of Article 4 would not allow the direct implementation of the Commission's decisions as they are not part of the catalogue of legal sources in the Republic of Kazakhstan.

14. Another possibility would be to interpret the notion "other [international] commitments" in a broad sense such as to encompass all international obligations of the Republic of Kazakhstan, whatever their origin. Such an interpretation would be covered by the open wording of the provision. The implementation of the decisions of the Customs Union Commission can be considered as an international "commitment" as it is based on an international treaty, which has been ratified by Kazakhstan. Consequently, decisions of the Customs Union Commission could be directly applicable norms in Kazakhstan.

IV. The nature of the decisions of the Customs Union Commission

15. The Customs Union Commission is composed of representatives of the contracting parties. Its members are not independent but represent their country (on the level of deputy prime ministers or ministers, Article 4 of the Treaty).

16. The competence of the Customs Union Commission to take decisions is set out in Article 7 of the Treaty on the Customs Union Commission, which reads:

"Article 7

Within its competence the Commission takes decisions, which are binding on the Parties.

The Commission may adopt recommendations of a non-binding nature.

Each member shall have one vote. The decisions of the Commission shall be taken by simple majority, while decisions on sensitive issues are taken by consensus. The list of issues to be adopted by consensus is approved by the Supreme Body of the Customs Union in accordance with the treaties forming the legal basis of the Customs Union.

Each Party shall have the right to make a proposal to the Supreme Body of the Customs Union to revise a decision of the Commission.

If a decision has not achieved the required number of votes, the Commission may refer the matter to the Supreme Body of the Customs Union."[2]

[2] *Non-official translation by the Venice Commission. Russian Text of the treaty available at http://www.ipaeurasec.org/docsdown/komissia tam soyuz.pdf.*

17. Thus, Article 7 provides for two methods of decision making. According to the first one, decisions can be taken unanimously. In this case each contracting party has a *de facto* right to a veto. However, Article 7 also provides for the possibility for decisions to be taken by a majority of two-thirds of the votes and such a decision could be taken against the vote of the Kazakh representative in the Commission. *A priori*, such a decision could imply a transfer of sovereign powers to the Customs Union Commission and could be in contradiction to Article 3 para. 1 of the Constitution of Kazakhstan ("The people shall be the only source of power"). Other Articles of the Constitution, which could be affected are Article 40, paragraph 1, according to which the President determines the main directions of foreign policy and represents Kazakhstan in international relations and Article 66 according to which the Government develops measures for the conduct of the foreign policy of the Republic of Kazakhstan.

18. However, Article 7 also provides for an appeal procedure in case of disagreement. Each party can request that the issue be referred to the Supreme Organ of the Customs Union, the Heads of States.

19. According to Article 16 of the Treaty on the Customs Union Commission disputes connected with the interpretation or enforcement of the treaty are to be decided in consultation of or negotiation with the parties. However, if an agreement cannot be achieved they are referred to the Court of the Eurasian Economic Community, which has been established according to Article 8 of the Treaty Establishing the Eurasian Economic Community signed in Astana on 10 October 2000.

20. The Court has jurisdiction to secure uniform interpretation and enforcement of the treaties and to adjudicate disputes between the Parties on issues of enforcement of the Eurasian Economic Community institutions' decisions. The Court has also been vested with the power to decide on the conformity of the acts issued by the Customs Union's institutions with the founding treaties and to interpret the treaties forming the basis of the Customs Union and acts adopted by the Customs Union's institutions. The Court is also vested with the power to decide disputes between the Customs Union Commission and the Contracting Parties and on the obligations of the Parties according to the treaties.

21. Again, if a final decision of the Court of the Eurasian Economic Community were directly binding on Kazakhstan, this could imply a transfer of sovereignty.

22. It may be useful to look into how other countries have dealt with the transfer of sovereign powers to international bodies, especially the legal order of the European Union, which is often described as 'supranational', distinguishing it from the relationship between national and international law in general.

V. The Relationship between national and supranational legal orders

23. The implementation of EU legislation with a supranational direct, immediate and horizontal effect is quite different from that of the obligations stemming from other treaties, which require ratification and often implementing national legislation (unless the treaties are self-executing and the constitutional system allows direct effect – monism).[3]

[3] *These characteristics of European Union law were formulated by the European Court of Justice as early as the beginning of the 1960s, N.V. Algemene Transport – en Expeditie Onderneming van*

24. According to the case-law of the European Court of Justice,[4] the treaty law or primary law (forming the so called 'unwritten constitution of the EU'), and even the secondary law enacted by EU institutions (regulations and under certain conditions also directives), prevail over national constitutional norms. Contrary to international treaties, secondary EU law (regulations, directives after the elapse of the time given for their transformation) applies directly in the member states; the implementation of regulations through national law is even excluded.

25. Generally, it can be said that the transfer of sovereign rights to the EU is made explicit in the Constitutions of the EU member states. Thus, in the context of the accession of the new member countries to the European Union in 2004 almost all the constitutions have been changed in such a way as to include a specific clause on the transfer of sovereign rights on an international body[5]. Older member states too

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Gend & Loos, v. Netherlands Fiscal Administration; Case 26/62; Costa v. ENEL; Case 6/ 64. See *in detail, E. Stein, Lawyers, Judges and the Making of a Transnational Constitution,* American Journal of International Law, *vol.75, January 1975, N. 1, 1-27; P. Pescatore, The Doctrine of Direct Effect,* European Law Review, *8, 1983, 155-157; J. Weiler, The Community System: the Dual Character of Supranationalism,* Yearbook of European Law *1, 1981; A. Easson, Legal Approaches to European Integration in Constitutional Law of the European Union, F. Snyder, EUI , Florence, 1994-1995.*

[4] *Not all national constitutional courts share this interpretation.*

[5] *Cf. e.g. Article 90 para. 1 Constitution of Poland: The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters., Article 3 a Constitution of Slovenia: Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values…., Article 10 a Constitution of the Czech Republic: (1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.(2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum, Article 7 para. 2 Constitution of Slovakia: (2) The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulationof the Government according to Art. 120, para. 2., § 2 a Constitution of Hungary: (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities; these powers may be exercised independently and by way of the institutions of the European Union. (2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament, Article 68 para. 2 Constitution of Latvia: Upon entering into international agreements, Latvia, with the purpose of strengthening democracy, may delegate a part of its State institution competencies to international institutions. The Saeima may ratify international agreements in which a part of State institution competencies are delegated to international institutions in sittings in which at least two-thirds of the members of the Saeima participate, and a two-thirds majority vote of the members present is necessary for ratification.*

have introduced special "EU clauses" in their Constitution providing for a transfer of sovereign powers to the EU and its institutions[6].

VI. The relationship between the legal system established by the Eurasian Economic Community and the Kazakh legal system

26. The intensity of the penetration of national law by the decisions of the Customs Union Council cannot be compared to that of secondary EU legislation in the national law of EU member states. However, an analysis of the founding treaties of the Eurasian Economic Community[7], reveals the intention of the parties to provide for a direct application of the decisions of the Customs Union Commission in the legal systems of the Contracting Parties.

27. Decisions issued by the Customs Commission are in a certain sense less and in another sense more legally binding than usual international treaties. Their direct legal force is more intense and less 'mediated' by national bodies than that of international treaties. Article 2 of the Treaty on the Customs Commission provides for a voluntary, gradual stage by stage transfer of parts of powers of the contracting parties' governments to the Commission. On the other hand, the safeguards in Article 7 (referral to the Supreme Body of the Customs Union) provide for some protection of sovereignty, although a final decision may be taken by an independent court.

28. Two interpretative decisions of the Kazakh Constitutional Council on Article 4, para. 3 (see postanovlenie N18/2 2000 and postanovlenie N2 2006[8]) explicitly state that only ratified international treaties have priority over national legislation and are directly enforceable and, in case of conflict, should prevail over a provision of national legislation. Two important conclusions that can be related to the current case have been made in these two decisions of the Kazakh Constitutional Council.

If there is a contradiction between the international treaty and the Kazak Constitution, the Constitution should prevail and the treaty provision not be enforced.

If a treaty has not been ratified, international law should be obeyed and enforced as long as it does not contradict the domestic legislation. In case of contradiction between domestic legislation and a treaty provision, national law should prevail and international law should not be enforced.

This case-law of the Constitutional Council emphasises the significance of ratification under a monist system. It is necessary to clarify contradictions between the treaty, the Constitution and domestic legislation before the entry into force of the treaty as a *sine qua non* to the principle of primacy of international law.

VII. Conclusions

29. It is suggested to differentiate according to the legal nature of the decisions taken by the Customs Union Commission: In as far as the Republic of Kazakhstan has a right to veto the Commission's decisions and cannot be bound against its will, the decisions

[6] *e.g. Article 23 of the German Basic Law, Articles 88-1 to 88-7 of the French Constitution.*

[7] *Available in Russian on the website of the Eurasian Economic Community: Евразийское экономическое сообщество (ЕврАзЭС) – Договор об учреждении Евразийского экономического сообщества www.ipaeurasec.org/evra/?data=evra*

[8] http://www.constcouncil.kz

taken by the Commission can be considered as "other international obligations" in the sense of Article 4 of the Republic of Kazakhstan. They are not subject to ratification themselves, but are based on a ratified treaty. Therefore they are enforceable even if they contradict national legislation.

30. However, in as far as the Republic of Kazakhstan is bound by the Commission's decisions against its will, it is doubtful if such a transfer of sovereign powers could be covered by Article 4 of the Constitution. In such a case, it would be recommendable to change the Constitution accordingly and include an explicit provision on the transfer of power to an independent international body.

Joint opinion on the Constitutional law on the judicial system and status of judges of Kazakhstan

Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011)

on the basis of comments by
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Mr James HAMILTON (Substitute Member, Ireland)
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Appeals on Disciplinary Decisions

1. INTRODUCTION

1. By letter dated 25 April 2011, the Chairman of the Supreme Court of the Republic of Kazakhstan requested the OSCE/ODIHR to co-ordinate a review together with the Venice Commission on the Constitutional Law of the Republic of Kazakhstan on the Judicial System and Status of Judges of the Republic of Kazakhstan (hereinafter referred to as the "Law on the Judicial System and Status of Judges" or the "Constitutional Law").

2. The review of the Law on the Judicial System and Status of Judges was requested against the background of efforts undertaken to enhance the independence and effectiveness of the judiciary and strengthen the rule of law in Kazakhstan. A new draft of the Law on the Judicial System and Status of Judges is planned to be elaborated later in 2011 and in order to enhance the quality of the draft law, the request was put forward to receive expert opinions and assistance on amendments and additions to the existing Constitutional Law.

3. In response to the above-mentioned request, the OSCE/ODIHR and the Venice Commission have prepared this joint Opinion.

4. The OSCE previously provided an assessment of the Constitutional Law (hereinafter "OSCE's 2001 Assessment") upon the request of the OSCE Centre in Almaty in 2001, based on earlier consultations with the Supreme Court of Kazakhstan. The assessment, also conducted by Professor Karoly Bard, was presented in the same year to the Chair of the Supreme Court. The Venice Commission invited Messrs Hamilton and Vardzelashvili to act as rapporteurs in this issue.

5. The present opinion was adopted by the Venice Commission at its 87th plenary session (Venice, 17-18 June 2011).

2. SCOPE OF REVIEW

6. This Opinion covers only the Law on the Judicial System and Status of Judges, as requested. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing the judicial system and related aspects in the Republic of Kazakhstan.

7. The Opinion is based on an unofficial translation of the Law on the Judicial System and Status of Judges (CDL-REF(2011)027). Errors from translation may result.

8. This Opinion is without prejudice to any written or oral recommendations and comments to this or other related provisions that the OSCE/ODIHR or the Venice Commission may make in the future.

3. EXECUTIVE SUMMARY

9. The OSCE Office for Democratic Institutions and Human Rights and the Venice Commission welcome the initiative of the Supreme Court to seek an international assessment of the current Constitutional Law on the Judicial System and Status of Judges in view of indentifying areas for possible reform. The Constitutional Law has a number of positive aspects, which contribute to judicial independence. Nonetheless, in order to ensure the compliance of the Constitutional Law with international and domestic standards pertaining to the independence of the judiciary, it is recommended as follows:

3.1. Key Recommendations

a. That the High Judicial Council should be composed of a substantial amount of judges, who are to be appointed, or at least proposed, by their peers [par 20];

b. To limit the discretion of the executive authorities to appoint judge candidates nominated by the High Judicial Council to the nominated candidates and ensure that a decision to refuse appointment is reasoned [par 35];

c. To amend the principle of irremovability in Article 24 so that it also entails protection against transfer, except when disciplinary sanctions are applicable or there is a change in the organisation of the judicial system [par 45];

d. To specify that the decision of an authority of the executive to discharge a judge should only be taken pursuant to a decision or recommendation by a disciplinary body after due procedure [par 48];

e. To reform the system of suspension, termination of powers and discharge of a judge, under careful consideration of the principles of independence and irremovability [par 50];

f. To clarify and distinguish between the disciplinary and evaluating functions respectively in relevant provisions of the Constitutional Law [par 58];

g. To revise Article 38 so as to ensure that the disciplinary boards mentioned therein are independent and free from any influence of executive authorities [par 65];

3.2. Additional Recommendations

h. To stipulate the exclusive competence of the courts to determine their jurisdiction in the Constitutional Law [par 15];

I. In the case that it is not regulated by other provisions of law; to clarify in the Constitutional Law the type of liability that contempt of court entails [par 16];

j. To consider establishing in the Constitutional Law a specific section on administrative courts, which preferably should reflect the regular court system with three instances [par 17];

k. To clarify Article 22 par 1 (3-1) so that it does not in any way infringe the individual independence of judges [par 18];

l. To clarify the nature, status and functions of the Authorized Body [par 22];

m. To reconsider transferring powers of judicial administration from the Chairperson of the Supreme Court and the Authorized Body to the High Judicial Council, which shall then have the main competence to represent the judiciary in relation to the executive branch and other authorities [par 23];

n. That the High Judicial Council is provided with a role in the budgeting process [par 25];

o. To amend the Constitutional Law so as to clarify that case distribution should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated. [par 27];

p. To clarify Articles 9 par 1 (1) and 14 par 1 (1) to ensure that they do not in any way empower the Chairperson to direct or supervise individual judges while adjudicating a case [par 28];

q. To consider restricting the voting rights of Chairpersons in the High Judicial Council so as to avoid potential conflict of interest [par 29];

r. To specify in which situations the Chairperson of a court may receive individuals and to clarify that these visits may not in any way affect the substantial adjudication of individual court cases [par 30];

s. To clarify whether individual judges have a right to receive visits from parties to the proceedings [par 31];

t. To clarify in the Constitutional Law the purpose and content of the orders that Chairpersons are authorised to give [par 32];

u. To clarify who is authorised to chair the sessions of the Judicial Boards of the Regional Courts and the Supreme Court [par 33];

v. To clarify the obligations resting on the Chairperson of a court in preventing corruption [par 34];

w. That the Constitutional Law should state that vacancies for all judicial posts should be publicly announced and widely disseminated [par 36];

x. To provide opportunities for mid-career entry into the judiciary [par 37];

y. To specify which paid positions are incompatible with the office of a judge [par 38];

z. To define in the Constitutional Law the diseases, which could exclude a person from exercising the profession of a judge and confine them to those which may affect clear reasoning of a person [par 39]

aa. That the High Judicial Council's recommendations on the appointments of Chairpersons can only be rejected by reasoned decisions [par 40];

bb. To consider providing the judges with the opportunity to provide an opinion on the candidate for the Chairperson of their court [par 41];

cc. To consider whether the appointment as a Court Chairperson may be renewed and if so, to limit this to one possible re-appointment [par 42];

dd. To amend Article 34 par 1 so that the Chairperson of the Supreme Court is no longer able to extend the retirement age of judges [par 44];

ee. To consider limiting the immunity of judges to actions performed within the exercise of their judicial functions (functional immunity) [par 47];

ff. To clarify the role of the High Judicial Council in the discharge of Chairpersons and judges [par 49];

gg. To define the scale of the remuneration in the Constitutional Law [par 52];

hh. To consider, in the long term, whether the privileges provided to judges could be replaced by an increase in salary guaranteeing an adequate living standard [par 53];

To elaborate further Article 55 par 1, so that it describes in greater detail which offence or misdemeanour may trigger which sanction [par 54];

jj. To amend Article 38 par 1 on the Judicial Jury so as to clarify that the evaluation of judges should be based on qualitative, rather than quantitative criteria, such as professional skills, and personal and social competence [par 56];

kk. To ensure that judge members of the Judicial Jury are chosen by their peers [par 57];

ll. That the Constitutional Law should contain provisions on regular and free training for judges [par 59];

mm. To amend Article 39 par 1 to clarify that an incorrect application of the law shall not entail disciplinary liability [par 60];

nn. To remove gross violation of the "labor discipline" stipulated in Article 39 par 1 (3) from the list of grounds based on which disciplinary proceedings may be instigated [par 61];

oo. To amend Article 39 par 2 in order to link the concept of judicial ethics to a specific code of ethics, which can be set out in a sub-legal regulation [par 62];

pp. To amend Articles 39 par 3, 16 par 1 (9-1) and 22 par 1 (7-1) so that appellate courts are limited in indicating gross violations of the law in a judicial act as grounds for disciplinary action as well as in reporting "low justice performance or systematic violation of law in legal proceedings" to the Judicial Jury [pars 63-64];

qq. To ensure that the person(s) that have initiated disciplinary procedures under Article 41 cannot take part in the final decision considering the case under Article 43 [par 66];

rr. To state specifically in the Constitutional Law that fair trial principles shall be followed in disciplinary proceedings [par 66]; and

ss. That a procedure is put in place to seek review of a decision of a disciplinary board when the Republican Disciplinary and Qualification Board decides as first instance and to consider whether all disciplinary measures should be appealable to a court of law [par 67].

10. The OSCE Office for Democratic Institutions and Human Rights and the Venice Commission remain available for any further assistance to the Kazak authorities.

4. ANALYSIS AND RECOMMENDATIONS

4.1. International and Domestic Standards on Judicial Independence

11. The independence of the judiciary is a fundamental principle in any democratic nation based on the rule of law. A well-functioning, efficient and independent judiciary is an essential requirement for a fair, consistent and neutral administration of justice. In order for the judiciary to be truly independent, there needs to be a clear separation of powers between the executive power and the judiciary; a judge should be able to decide disputes and deliver judgments without being subject to external pressure. Also within the judicial system, safeguards should be put in place to guarantee that there is no undue interference with the work of each judge. While the Constitutional Law already contains certain safeguards to ensure judicial independence, this Opinion will focus on those areas where the Constitutional Law would benefit from amendments that would ensure greater conformity with international standards on the independence of the judiciary. In order to ensure that the initiatives to reform the Constitutional Law are successful in enhancing the independence and effectiveness of the judicial system, it is imperative that the legislative reform process is open and transparent and that it includes a wide variety of relevant stakeholders.

12. On an international level, the independence of the judiciary has been laid down in various human rights instruments, including the Universal Declaration of Human Rights[1] (Article 10) and the International Covenant on Civil and Political Rights[2] (hereinafter "the ICCPR") (Article 14). On the European level, the independence of the judiciary has become an additionally binding principle for many countries after accession to the European Convention on Human Rights[3] (hereinafter "the ECHR") (Article 6). OSCE participating States have committed to ensuring the independence

[1] *The Universal Declaration of Human Rights was adopted and proclaimed by the UN General Assembly on 10 December 1948, available at: <http://www.un.org/en/documents/udhr/>.*

[2] *The International Covenant on Civil and Political Rights (ICCPR) was adopted by UN General Assembly UN General Assembly resolution 2200A (XXI) on 16 December 1966 and entered into force on 23 March 1976, available at: <http://www.hrweb.org/legal/cpr.html>. The Republic of Kazakhstan ratified the ICCPR on 24 January 2006.*

[3] *The European Convention on Human Rights and Fundamental Freedoms was adopted by the Council of Europe on 4 November 1950, available at: <http://www.echr.coe.int/NR/rdonlyres/D5C-C24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.*

of the judiciary in the Copenhagen Document[4] (1990), the Moscow Document[5] (1991) and the Istanbul Document[6] (1999). These Commitments were recalled and specified in the Brussels Declaration on Criminal Justice Systems[7] and in the Ministerial Council's Brussels Decision on Organized Crime, in which OSCE participating States were urged to pay due attention to the independence of the judiciary. At a Ministerial Council meeting in Helsinki in 2008, OSCE participating States were encouraged to enhance their efforts to strengthen the rule of law, in particular in the area of, *inter alia,* judicial independence.[8] In the Council of Europe framework, the Committee of Ministers adopted the Recommendation on Judges: Independence, Efficiency and Responsibilities, in 2010[9].

13. Against the background of the above-mentioned international standards, a number of recommendations have been elaborated in various international forums. These contain a higher level of detail and are able to prescribe on a more practical level the steps that need to be taken to ensure the independence of the judiciary.[10] The request for this Opinion specifically mentions one of these instruments, namely the OSCE/ ODIHR's Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia[11] (hereinafter "the Kyiv Recommendations").

14. The main principles of the independence of the judiciary are also enshrined in the Constitution of the Republic of Kazakhstan. Section VI of the Constitution is devoted to court and justice (Articles 75-84). It is clear from Article 75 par 1 that justice in the Republic of Kazakhstan shall only be exercised by the courts. According to Article

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[4] *The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen, 5 June – 29 July 1990) (Copenhagen Document), available at: <http://www.osce.org/odihr/elections/14304>, par. 5.*

[5] *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), pars. 19 and 20.*

[6] *Document of the Istanbul Meeting (19 November 1999), Charter for European Security: IV. Our Common Instruments, par. 45*

[7] *Brussels Declaration on Criminal Justice Systems, Ministerial Council of the OSCE (MC.DOC/4/06) (5 December 2006).*

[8] *Decision on Further Strengthening the Rule of Law in the OSCE Area, Ministerial Council of the OSCE (Decision No. 7/08) (5 December 2008).*

[9] *Recommendation No. R (2010)12 of the Council of Europe Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010.*

[10] *See e.g. UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders (26 August – 6 September 1985), The Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), the European Charter on the Statute for Judges (1998) (DAJ/DOC (98) 23), Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, (23 November 2001) (CCJE (2001) OP N°1), OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (23-25 June 2010), CDL-AD(2010)004 Report on the Independence of the Judicial System, Part I: the Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (12-13 March 2010) and the Magna Charta of Judges, adopted on the 11th Plenary Meeting of the Consultative Council of European Judges (Strasbourg, 17-19 November 2010).*

[11] *Kyiv Recommendations, op. cit., note 10.*

77(1), a judge shall, when executing justice, "be independent and subordinate only to the Constitution and the law". Furthermore, any interference in the activity of a court is prohibited according to Article 77 par

4.2. The Judicial System and Administration of Courts

4.2.1. The Court System

15. Article 1 of the Constitutional Law provides basic rules on the powers of courts in the Republic of Kazakhstan. The provision stipulates a number of relevant rule of law principles; in particular it states that courts are the only entities entitled to administer justice and that court acts are binding on all state actors. At the same time, an issue not covered by this provision is how to resolve disputes of competence between the court and other state entities. In accordance with international principles on the judiciary, courts should have exclusive competence to decide whether a case falls under their competence as defined by law.[12] It is therefore recommended that this principle be clearly stated in the Constitutional Law.

16. Contempt of court shall entail liability according to Article 1 par 3 of the Constitutional Law. This is in principle a commendable provision. However, the Law does not stipulate what kind of liability this entails, nor does it refer to any other relevant acts, where this may be found. Therefore, unless clearly regulated in other provisions which fall outside the scope of this opinion, it should be clarified what kind of liability this entails (administrate or criminal) in order to increase the foreseeability of the law.

17. The court system laid out in Article 3 of the Constitutional Law follows a three instance system (district courts, regional courts and the Supreme Court). The law allows for the establishment of "specialized courts" for certain types of cases. In particular, a system for administrative courts, deciding on appeals of administrative acts, can be very beneficial for the development of respect for the rule of law and good governance in public administration. When revising the Constitutional Law, following the draft law on Administrative Procedures that ODIHR has recently commented on,[13] it may be considered beneficial to draft a specific section on administrative courts, preferably establishing a system similar to the regular court system with three instances.

18. According to Article 22 par 1 (3-1) of the Constitutional Law, the Supreme Court plenary session shall "review, in order of supervision, the previous court cases, as prescribed by law". It is not clear what this provision means; if it refers to powers to supervise the lower courts by issuing directives, explanations or resolutions, binding on the lower court judges, then this could well represent an infringement of the individual independence of judges.[14] It is recommended to clarify this provision so as to exclude any possibility of violations of the independence of lower court judges.

4.2.2. Judicial Administration

19. An independent judicial administrative body may serve as a safeguard against outside influence on the judiciary. However, judicial administration should never

[12] *UN Basic Principles on the Independence of the Judiciary, op. cit., note 10, par. 3.*

[13] *OSCE/ODIHR Opinion the draft Law of the Republic of Kazakhstan on Administrative Procedures, Nr.: GEN – KAZ/170/2010 Warsaw, issued on 29 December 2010*

[14] *Kyiv Recommendations, op. cit., note 10, par. 35.*

influence the content of judicial decision-making in individual cases – this should always be left to the individual judge.[15] In order to ensure that the judiciary has well-functioning and independent representative bodies, it is important that their functions and composition are clear.

20. Article 36 of the Constitutional Law regulates the formation of a High Judicial Council, which shall consist of a Chairperson, a secretary and other members appointed by the President of the Republic. As the provision stands today, the President has unlimited powers to appoint members of the High Judicial Council, which could raise issues with regard to judicial independence. Members of the High Judicial Council appointed by the President may not be perceived as independent and representing the interests of the judiciary. It is recommended that the Constitutional Law be amended so that the High Judicial Council is composed of a substantial number of judges from both the first instance and appellate level courts, who are to be elected, or at least proposed, by their peers, following a transparent procedure laid down in the Constitutional Law[16]. Apart from judge members, other representatives such as law professors and members of the bar could also be represented in order to promote inclusiveness.

21. All regulation on the status and organisation of the work of the High Judicial Council shall be elaborated in law according to Article 36 par 2 of the Constitutional Law. However, Article 20 of the Constitutional Law clearly reveals that certain functions normally entrusted to a judicial council are instead performed by the Chairperson of the Supreme Court. In particular, the Chairperson, according to Article 20 par 2, represents the judiciary of Kazakhstan in relation to agencies of other branches of state power and international organizations. He/she also has the power to coordinate the work of judicial boards under Article 20 par 1(8) and submit proposals for legislation as well as for candidates for Court Chairperson posts in Article 20 pars 2 (3) and (4). Furthermore, the Chairperson of the Supreme Court is also directly involved in court administration as according to Article 6 par he/she proposes the total number of judges for the district courts.

22. The so-called "Authorized Body for organizational and logistic support to the Supreme Court" also has powers of judicial administration, as it selects the number of judges for each court on the proposal of the Chairperson of the Supreme Court under Article 6 par 3. It is further noted that the Chairperson of the Supreme Court has substantial powers over the Authorized Body, in particular the authority to appoint and dismiss the head of this body according to Article 20 par 1 (9-2) of the Constitutional Law. The nature, status and the functions of the Authorized Body are not clear. It is therefore recommended that the Constitutional Law is amended as to clarify these aspects.

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[15] *Kyiv Recommendations, op. cit., note 10, art 1, and the Council of Europe's Committee of Ministers Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 29.*

[16] *See e.g. Kyiv Recommendations, op. cit., note 10, par. 1, the Consultative Council of European Judges' Magna Charta of judges, op. cit., note 10, Article 13, and Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 32. It can be noted that the Council of Europe's Committee of Ministers Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 27, recommends that at least half of the members of the judicial councils should be judges.*

23. The division of competences in the field of judicial administration between the High Judicial Council, the Chairperson of the Supreme Court and the Authorized Body needs to be clarified. Generally, the High Judicial Council, preferably consisting of a substantial amount of judge members chosen by their peers, would be the ideal body to represent the interests of an independent judiciary. Most of the powers of general judicial administration could be vested in such a body. It is therefore recommended to consider transferring such powers from the Chairperson of the Supreme Court and the Authorized Body to the High Judicial Council, so that this latter body will assume a key position in representing the judiciary in relation to the executive branches and other authorities.

4.2.3. Funding

24. One important aspect related to judicial administration is proper funding. In order to guarantee judicial independence, it is paramount that the courts receive sufficient funds to live up to their obligations to ensure fair trials in accordance with international standards.[17] The judiciary shall, according to Article 4 par 6 and Article 57 par 1 of the Constitutional Law, be financed directly from the Republic's budget, which is commendable. Furthermore, Article 57 par 2 states that sufficient funds should be provided for the courts' exercise of their constitutional powers.

25. In order to ensure that the funds allocated to the judiciary are sufficient, it would be advisable to ensure that the views of the judiciary are taken into consideration in budgetary procedures. The High Judicial Council could represent the judiciary in this regard and have some influence on budgetary decisions regarding the needs of the judiciary.[18] This influence could be exercised by preparing a draft budget or by commenting on a draft received from a competent ministry. Against this background, it is recommended that the Constitutional Law be amended by adding certain provisions on the budgeting process that would envisage a role for the High Judicial Council.

4.2.4. The Role of Court Chairpersons

26. The role of Court Chairpersons is imperative in creating a functioning working environment in which individual judges receive appropriate support to work efficiently and independently. Designing the functions of Chairpersons is a delicate task as on the one hand they need to organise the work of the court, but on the other hand they should not be able to (or seen to be able to) interfere in the adjudication work of other judges.[19] Administrative decisions that directly affect adjudication should therefore not be within the exclusive competence of Chairpersons.[20] Furthermore, a plethora of Chairpersons' competencies potentially affecting the career of judges could be perceived as a type of pressure that could call into question the independence of judges and should thus be avoided.

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[17] *See ECHR, op. cit., note 3, Article 6, and ICCPR op. cit., note 2, Article 14.*

[18] *See the Kyiv Recommendations, op. cit., note 10, art 6, the Recommendation on Judges: Independence, Efficiency and Responsibilities op. cit., note 9, par. 40, and Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, pars. 54-55.*

[19] *Kyiv Recommendations, op. cit., note 10, par. 11.*

[20] *Kyiv Recommendations, op. cit., note 10, par. 12.*

27. Case assignment to the judges of the court should not be at the discretion of the Chairperson, but should be decided according to clear and pre-determined criteria.[21] The removal of individual influence on the distribution of cases is in practice a very important issue and key to guaranteeing to every person the right to an impartial judge. Random and neutral case distribution can be performed in a number of different ways (by drawing lots, by alphabetical order etc.) as long as the criteria are pre-established, clear and transparent. In the Constitutional Law, the Court Chairpersons are responsible for the organisation of the review of court cases by judges of the court according to Article 9 par 1(1) and Article 14 par 1 (1). It is not clear exactly what powers this provision entails or if it also involves the assignment of cases to judges of the court. It is recommended to clarify the Constitutional Law in this regard so as to clearly state that case distribution should be performed randomly according to clear and pre-determined principles, taking into account each judge's case-load. This does not exclude the possibility of assigning particular types of cases to specialised judges or panels of judges in appropriate cases. Of course, the criteria for and method of doing so should be transparent and pre-determined.

28. At the same time, the powers of the Chairpersons to organise the review of court cases in Articles 9 par 1(1) and 14 par 1 (1) should not in any way authorise the Chairpersons to direct or supervise individual judges in the adjudication of their cases. It is therefore recommended that the above-mentioned articles be clarified in this regard.

29. Considering their role as representatives and managers of the courts, and to avoid excessive concentration of powers in their hands, it has been considered that Chairpersons should not have excessive control over the High Judicial Council. In order to achieve this goal, it is important that the High Judicial Council has an adequate participation of judges that are mainly performing the core functions of a judge (adjudication). In cases where the Chairman of a court would be a member of the High Judicial Council his/her right to vote may be restricted, for instance, in cases of conflict of interest. Alternatively, it may be considered for a Chairperson appointed to a High Judicial Council to resign.

30. One of the tasks of Court Chairpersons is receiving individuals under Articles 9 par 1 (3), 14 par 1 (10) and 20 par 1 (10) of the Constitutional Law. As the representative of a court, it is normal for a Chairperson to receive members of the public and represent the court externally. Indeed, this could be very useful in that it might make the court more accessible for the public, while at the same time preventing parties to proceedings from directly trying to influence or disturb trial judges in charge of their particular case by paying personal visits. However, it must be clear that the Chairperson can only represent the official view of the court and does not have any power to affect the adjudication of the judge assigned to a certain case. It is therefore recommended to specify in which circumstances the Chairperson may receive individuals and clarify that these visits cannot in any way affect the substantial adjudication of individual court cases.

31. The current provisions on the Court Chairperson's right to receive individuals imply that he/she can receive persons who are parties to an ongoing court case. However,

[21] *Kyiv Recommendations, op. cit., note 10, par. 12, Recommendation on Judges: Independence, Efficiency and Responsibilities op. cit., note 9, art 24, and Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 81.*

it is not clear if this limits the rights of other judges to receive such persons (who are party to ongoing court cases) and whether a judge who receives an individual may be subject to liability under the Constitutional Law. Therefore, it is recommended to clarify Articles 9 par 1 (3), 14 par 1 (10) and 20 par 1 (10) of the Constitutional Law in this regard.

32. Court Chairpersons also have the authority to issue orders, according to Articles 9 par 1 (6), 14 par 1 (8) and 20 par 1 (11). It is not clear what type of orders these provisions refer to and to whom they are addressed. Presumably, the orders concern administrative matters that are within the competencies described in the foregoing paragraphs of the relevant articles, but it would be advisable to clarify this in these provisions. It is recommended that the purpose and content of the orders be clarified in the Constitutional Law.

33. The Judicial Boards of the Regional Court and the Supreme Court are to be chaired by their respective Chairperson according to Articles 15 par 1 (2) and 21 par 1 (1). However, the Chairpersons of the regional and Supreme courts appear to have the same authority to chair the meetings of the judicial Boards according to Articles 14 par 1 (2) and 20 par 1 (2). This is an unclear division of authority and it is recommended to clarify who is authorised to chair the sessions of the Judicial Boards.

34. According to Article 9 par 1 (5), the Chairman of the Court should "ensure measures on preventing corruption". It is not entirely clear how the Chairman of the Court, who has no power over and is not superior to other judges, can ensure effective anti-corruption measures to be taken and be enforced. Furthermore, it is not clear whether responsibility would rest with the Chairperson if corrupt practices of some of the judges were to be revealed and whether this could lead to disciplinary (or other) liability of the Chairperson. It is therefore recommended to clarify the obligations of the Chairperson of a court to prevent corruption.

4.3. Appointment and Dismissal of Judges

4.3.1. Appointment of Judges

35. A key element in the establishment of an independent judiciary is the establishment of a fair and transparent recruitment process. The selection procedure in the Constitutional Law has incorporated many good qualities for fair selection, such as the principle of nondiscrimination under Article 30 par 1, and a competitive selection procedure with a test (Article 29 par 1). The High Judicial Council selects the candidates meeting the requirements "on a competitive basis", according to Article 30 par 2. The High Judicial Council then recommends candidates for the posts and the final appointments are then performed by the Senate, as regards the judges of the Supreme Court, and the President, as regards all other judges. An issue not regulated in the text of the Constitutional Law is how the situation will be resolved if the President or the Senate disagree with the recommendations of the High Judicial Council. It is recommended that the discretion of the President and the Senate to appoint judges should be limited to the candidates nominated by the High Judicial Council and that a decision to refuse appointment should be reasoned.[22]

[22] *Kyiv Recommendations, op. cit., note 10, par. 23.*

36. In order to increase transparency and openness in the selection procedure, it is recommended that the Constitutional Law should state that vacancies for all judicial posts, including those of Court Chairpersons, should be publicly announced and widely disseminated.[23]

37. The selection procedure for district court judges foreseen in the Constitutional Law appears to be directed at recent graduates with some but not extensive working experience. In order to enrich the judiciary with legal practitioners from other branches of law (e.g. lawyers or prosecutors) it might be considered to permit midcareer entry into the judiciary by expanding the selection criteria accordingly.[24] Article 29 par 2 appears to envisage such a possibility of midcareer entry into the judicial profession; however, the language of this provision is unclear as it merely refers to the fulfilment of the requirements of Article 29 par 1, entailing an examination and an internship.

38. According to Article 28, the "office of a judge shall be incompatible with a deputy's mandate, any paid position except teaching, research or other creative activity, business activity, or being a member of the management body or supervisory board of a commercial organization." Unless by reason of translation, the wording of provision implies that judges are allowed to engage in a business activity or be a members of the management in a company, which would be problematic. It is recommended to clarify which paid positions are incompatible with the office of a judge and in case the understanding of the provision is correct, re-assess the compatibility of taking the office of a judge and serving on the management or supervisory body of a commercial organisation.

39. Article 29-1 requests a medical examination of a candidate "to confirm absence of the diseases interfering [with the] execution of professional duties as a judge". Par 2 of the same Article states that the "list of the diseases interfering [with the] execution of professional duties of a judge, shall be developed pursuant to the regulatory act issued by the authorized government body". It is strongly advisable to clarify in the Constitutional Law which types of diseases could obstruct the candidate from becoming a judge. Unless a disease prevents a person from clear reasoning, it should not constitute an impediment to fulfilling the function of a judge. Furthermore, handicapped persons must not be discriminated against. It is also not clear which agency will be empowered to define such a list. This is especially important in light of the Article 34 of the Constitutional Law, which states that existence of certain diseases (medical opinion) could become a reason for the suspension and discharge of the judge. It is therefore recommended to define the type of diseases, which would interfere with the profession of a judge and confine them to those which clearly may affect clear reasoning of a person.

4.3.2. Appointment of Court Chairpersons

40. Court Chairpersons are appointed by the President of the Republic upon recommendation of the High Judicial Council, according to Article 31 of the Constitutional Law. It is not uncommon for the Presidential and executive authorities to have a decisive influence in this appointment procedure. However, in order for these authorities not to have excessive influence it would be recommendable to stipulate

[23] *Kyiv Recommendations, op. cit., note 10, pars. 16 and 21.*

[24] *Kyiv Recommendations, op. cit., note 10, par. 17.*

that recommendations of the High Judicial Council can only be rejected by a reasoned decision. Upon rejection of the recommended candidate, the High Judicial Council could propose a different candidate or additionally be vested with powers to override the veto by a qualified majority vote[25].

41. According to Article 30 par 3 of the Constitutional Law, the regional courts' plenary sessions will give an opinion on candidates for positions as Chairperson in the district courts and the Supreme Court's plenary session will have the corresponding authority as regards candidates for Chairpersons of the regional courts. This process reflects a more hierarchic model. In general, in relation to all courts it might instead be considered to provide those judges who will work under the supervision of the Chairperson with the opportunity to provide an opinion on the Chairperson candidate.

42. If executive authorities are to have a decisive influence on the appointment procedure for Chairpersons, appointments should be for a fixed term and there should be a limit to possible renewals.[26] This is important in order to reduce the influence on judges through Chairpersons, which will grow ever stronger over a longer period of time. Further, renewable terms of office may also substantially jeopardise the independence of a Chairperson, who may at some point be influenced in his/her work by the desire to be reappointed by the executive. According to Article 31 of the Constitutional Law, Court Chairpersons are appointed for a 5-year term. Article 31 par 7 would appear to indicate that re-appointments are possible and does not mention any limit on the number of reappointments. It is thus recommended to consider whether the renewed appointment of a Chairperson should be possible at all. If so, then the Constitutional Law should limit this possibility to one re-appointment.

4.3.3. The Principle of Irremovability

43. The irremovability of judges forms a vital part of their independence as it guarantees that a judge perceived as uncomfortable by outside forces cannot be suspended or removed in order to effectively stop his or her work on certain cases.[27] Article 24 of the Constitutional Law enshrines the principle of irremovability and states that the powers of judges may only be suspended or terminated in accordance with the rules of the Constitutional Law. The tenure of a judge is permanent until the compulsory retirement age of 65 according to Article 34-1 of the Constitutional Law.

44. In order to ensure full independence and impartiality, it is recommended to remove the possibility for the Chairperson of the Supreme Court to extend the retirement age of judges in Article 34-1 of the Constitutional Law. This power could rest with the High Judicial Council as the neutral and impartial representatives of the judiciary.

45. An important aspect of the principle of irremovability is that a judge should not be transferred from his or her court without consent, unless in exceptional circumstances, e.g. following disciplinary sanctions or in case of a reform of the organisation of the

[25] *Kyiv Recommendations, op. cit., note 10, par. 16*

[26] *Kyiv Recommendations, op. cit., note 10, par. 15.*

[27] *See the Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 39-43.*

judicial system.[28] It is commendable that the Constitutional Law in Article 31 par 8 stipulates that the consent of a judge is needed in order to recommend him or her for a position at another court in the case of reorganisation or liquidation of a court. However, this appears to conflict with Article 34 par 1 (8), whereby the refusal to accept a vacant position is already a ground for discharge. It is therefore not clear on what grounds a judge can be transferred to another court. Furthermore, according to Article 33 par 1 (4), the powers of a judge will effectively be suspended upon transfer. It needs to be clarified under which circumstances a judge can be transferred and who is entitled to make this decision. It is therefore recommended that the provision on the principle of irremovability in Article 24 is amended to specify that it also entails protection against transfer, except when disciplinary sanctions are applicable or there is a change in the organisation of the judicial system.

4.3.4. Immunity

46. The Venice Commission has consistently argued that only a functional immunity should be conferred on the judge. Article 27 of the Constitutional Law appears to go much further. It provides wide immunity: "A judge may not be arrested, taken into custody, subjected to administrative punishments imposed in the judicial procedure, or charged with criminal liability without the consent of the President of the Republic of Kazakhstan, based on the opinion of the Supreme Judicial Council of the Republic [...] except for cases of detention at the scene of the crime or the commission of a serious crime. Inviolability of the judge shall include inviolability of his/her personality, property, private premises and offices, both personal and office vehicles used by him/her, documents belonging to him/her, luggage and other property."

47. The very idea of immunity for judges may be questioned; however, the current Constitutional Law acknowledges the need to introduce some safeguards in this regard. It seems that a higher degree of protection is offered if a judge is charged with a relatively minor offence. However, no protection is offered if the/she allegedly commits a ''serious crime". If the need for immunity is acknowledged, it should be provided in all circumstances, with the exception of minor administrative offences, such as lesser violations of traffic rules, etc., which seems not to be the case according to the current Constitutional Law. Furthermore, the extension of immunity to all premises, property and documents would make criminal investigation very difficult. In addition, the procedures envisaged in the Article are unclear – does the General Prosecutor have to petition the High Judicial Council for an opinion on the measures listed in Article 27(1)? It seems delicate to give the function of lifting judicial immunity to a judicial council consisting largely of judges elected by their peers. For these reasons, it is recommended to consider limiting the immunity of judges to actions performed within the exercise of their judicial functions (functional immunity).

[28] *European Charter on the Statue of Judges, op. cit., note 10, article 3.4, the Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 43, the Recommendation on Judges: Independence, Efficiency and Responsibilities op. cit., note 9, par. 52.*

4.3.5. The Suspension, Termination of Powers and Discharge of a Judge

48. The reasons for termination of the powers of a judge are outlined in Article 34. The powers of a judge can be terminated pursuant to the decision of a disciplinary and qualification board according to Article 34 par 2, presumably following a disciplinary procedure. However, according to Article 34 par 4, the Senate can discharge the Chairperson and the judges of the Supreme Court pursuant to the proposal of the President and the President can discharge judges of the other levels. It is not clear whether or not the Senate's and the President's powers to discharge a judge are directly linked to the decision of the disciplinary boards in Article 34 par 2. Since there is no clear link between the two, the present wording implies an unfettered right for the Senate and the President to discharge any judge. This raises serious concerns as regards the judicial independence of the judges and the principle of irremovability. It is therefore recommended that the authority of the executive to discharge a judge should only be exercised pursuant to a decision or recommendation by a disciplinary body after due procedure.

49. Article 34 par 6 stipulates a number of circumstances in which the recommendation of the High Judicial Council is *not* required prior to discharging a judge from office or terminating the powers of judges. This provision appears somewhat confusing as the Constitutional Law does not indicate circumstances in which a recommendation from the High Judicial Council is actually required prior to discharge or termination of the powers of a judge. It is noted that the Chairperson of the Supreme Court can, according to Article 20 par 2 (5), submit materials and proposals to discharge Chairpersons or judges; however, it is not clear how the High Judicial Council is authorised to act on these proposals. It is recommended that the role of the High Judicial Council in the discharge of Chairpersons and judges is clarified.

50. Against the background of the findings above, the provisions in the Constitutional Law concerning suspension, termination of powers and discharge from office appear to be somewhat inconsistent, both as regards the grounds for action and as regards who has the final authority to take certain decisions. It is recommended to reform this system, while giving careful consideration to the principle of irremovability and the general recommendations on such matters found in international instruments, including the issues raised above.

4.4. Remuneration and Benefits

51. Reasonable remuneration is an important factor in securing the independence of the judiciary as it increases the ability of the judges to withstand outside pressure. In this regard, it is commendable that Article 47 of the Constitutional Law states that financial support to a judge should "conform to his status and ensure the possibility of full and independent administration of justice".

52. According to Article 47 par 2 of the Law "Judges' remuneration shall be determined by the President of the Republic of Kazakhstan in accordance with Article 44 par 1 (9) of the Constitution taking into account the status of the judge, procedure of his/her assignment and election, and also functions s/he exercises." In addition, Art 44 par 1 (9) of the Constitution of the Republic of Kazakhstan[29], provides no further guidance

[29] *Constitution of the Republic of Kazakhstan (adopted on 30 August 1995, entered into force on 5 September 1995).*

with regard to the scale of remuneration. Although there is no strict international requirement in this regard, it would be advisable to define the scale of the remuneration for the different types of positions within the judiciary, in the Constitutional Law.

53. Furthermore, the Constitutional Law regulates housing provisions in Article 51, medical care in Article 53, and compensation in the event of injury in Article 54. In the long run, it may be beneficial to consider replacing these privileges with an increase in salary guaranteeing an adequate living standard.[30]

54. All of the privileges provided to a judge, as well as retirement benefits, can be withdrawn pursuant to a decision terminating the powers of a judge by the Disciplinary and Qualification Board or a decision by the Judicial Jury according to Article 55-1. The termination of all benefits may be justified in certain cases, however, the sanction imposed should be proportionate to the violation in the individual case.[31] The present provision does not in sufficient detail outline the connection between the breaches of ethics or other offences and the sanction. It is recommended that the provision is further elaborated and describes in more detail which offence or misdemeanour can trigger which sanction.

4.5. Evaluation of Judges

4.5.1. Evaluation Procedure

55. Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation.[32]

56. The Constitutional Law establishes a Judicial Jury in order to evaluate the professional competence of an operating judge according Article 38-1. This body is made up of judges and thus constitutes a body for peer review. The details of the evaluation could also be set out in a separate law, but it is recommended that the basic principles on evaluation criteria stated above, should be incorporated in the Constitutional Law.

57. The Constitutional Law is silent on how the Judicial Jury should be appointed. In order to ensure its independence and credibility among judges, it is recommended that the judge members should be chosen by their peers in a fair and transparent procedure.[33]

58. Also, the role of the Judicial Jury in the Constitutional Law is not altogether clear; it is to evaluate judges, however there are other indications that it also deals with disciplinary cases. The Judicial Jury is to be informed when the appellate court finds that a judge is not behaving correctly (Article 16 par 1 (9-1)) and the recommendations of the Judicial Jury can form grounds for suspension or dismissal of judges according

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[30] *See Kyiv Recommendations, op. cit., note 10, par. 13.*

[31] *Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 69.*

[32] *Kyiv Recommendations, op. cit., note 10, pars. 28 and 34.*

[33] *Recommendation on Judges: Independence, Efficiency and Responsibilities op. cit., note 9, par. 52*

to Articles. 33 par 1 (3-1) and 34 par 1 (9). Evaluating the performance of judges is profoundly different from conducting disciplinary proceedings and it is essential that these mechanisms are kept separate. It is therefore recommended that the provisions on the disciplinary and evaluating bodies are enhanced so that their competences are clarified and distinct from one another[34].

4.5.2. Training of Judges

59. Regular training of judges is important in order for them to be well informed about recent developments of the national and internal law, especially human rights law, which is an essential element of their possibility to resist outside pressure and remain independent, as well as their public perception as a professional and independent branch of power. The judges should therefore be provided with initial and in-service training, entirely funded by the state[35]. Training of judges is not dealt with in the Constitutional Law. It is recommended that the Constitutional Law should contain provisions on regular and free training of judges.

4.6. Liability and Appeals

4.6.1. Disciplinary Proceedings

60. Disciplinary proceedings should deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the law or judicial mistakes[36]. The basic rules on disciplinary misconduct are outlined in Article 39 of the Constitutional Law. The first ground mentioned therein, namely "breaching the law while reviewing court cases", is open to a very wide application. In 2007, the Venice Commission made the following comment on a similar provision in the Georgian law: "In this provision, the grounds on which a judge may face disciplinary responsibility centre exclusively on a judge's conduct whilst discussing a case and when handing down a verdict or ruling. They therefore apply to the judicial process itself, to the judge's interpretation of the law while considering a case and to the very essence of a judge's function i.e. independent adjudication. It encroaches on the extremely delicate sphere of judges' independent decision making in accordance with constitution and law"[37]. Against this background, it is recommended that Article 39 par 1 (1) is amended in order to clarify that it only refers to gross and inexcusable misbehaviour and not to the incorrect application of the law.

61. It is recommended to delete Article 39 par 1 (3), according to which the judge may be subject to the disciplinary proceedings for a gross violation of the "labor discipline". It is not clear what is implied under "labor discipline", who defines the principles of the labor discipline and where these may be found?

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[34] *Kyiv Recommendations, op. cit., note 10, par. 28.*

[35] *Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 56.*

[36] *Kyiv Recommendations, op. cit., note 10, art. 25, and Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 68.*

[37] *Venice Commission Opinion on the law on disciplinary responsibility and disciplinary prosecution of judges of common courts of Georgia adopted by the Venice Commission at its 70th Plenary Session (Venice, March 2007), par. 18.*

62. Article 39 par 2 stipulates the second ground for disciplinary misconduct, namely misdemeanours contradicting "judicial ethics". The provision does not refer to any particular standards of judicial ethics. In order to prevent abusive application of this provision, it is recommended that the Constitutional Law is amended in order to link the concept of judicial ethics to a specific code of ethics, which can be laid out in a sub-legal norm.

63. Involving appellate courts in the disciplinary system might increase internal pressure within the judiciary, which would be detrimental to the independence of the individual judges. Appeal proceedings should therefore not be combined with disciplinary actions and appellate courts should not be vested with powers to penalise judges personally for judicial errors. Instead, this should be entrusted to an independent authority outside the court system[38]. It is therefore commendable that Article 39 par 3 states that the reversal of a judicial act shall not entail liability of the judge. However, as an exception to this principle, the second part of this sentence provides the higher instance courts with the opportunity to indicate when a gross violation of law has been committed. This is a problematic combination of appeals proceedings and disciplinary action which should be avoided. It is therefore recommended that the second part of Article 39 par 3 be removed from the text of the Constitutional Law.

64. The appellate courts are also vested with the possibility to transfer materials to the Judicial Jury against a judge deemed to have a "low justice performance" or who allows "systematic violation of law in legal proceedings" according to Article 16 par 1 (9-1) and Article 22 par 1 (7-1). This would appear to permit penalising judges on the basis of the content of their decisions or rates of reversals. Such a wide application of the Constitutional Law would greatly endanger the independence of these judges and should not be permitted[39]. For these reasons, as well as for the reasons mentioned in the paragraph above, it is recommended that these provisions be limited in the text of the Constitutional Law.

65. Disciplinary boards should be impartial and independent from the executive authorities[40]. They can be composed not only of judges, but also of members from outside the judicial profession. However, they must not be controlled by the executive branch or politically influenced. The Republican and Regional Disciplinary Boards are in charge of disciplinary actions under the Constitutional Law. They are appointed in accordance with regulations promulgated by the President according to Article 38 of the Constitutional Law. Against the background of the principles stated above, the appointment to the disciplinary boards should be regulated in a different manner, possibly in a way that involves input from the High Judicial Council. It is therefore recommended that Article 38 on the disciplinary boards is revised so as to ensure that the boards are independent and free from excessive influence from executive authorities.

66. As a part of general fair trial principles, the body entrusted with initiating disciplinary proceedings should not be composed in an identical manner as the one responsible for considering the case[41]. In the Constitutional Law, the Republican and

[38] *Kyiv Recommendations, op. cit., note 10, par. 26.*
[39] *Kyiv Recommendations, op. cit., note 10, par. 28.*
[40] *Kyiv Recommendations, op. cit., note 10, par. 9.*
[41] *Kyiv Recommendations, op. cit., note 10, par. 26.*

Regional Disciplinary and Qualification Boards are entitled to both initiate disciplinary proceedings and consider the cases according to Articles 41 and 43 respectively. In this regard, it is recommended that the person(s) that initiate a disciplinary proceeding, as member(s) of the disciplinary and qualifications boards, are not allowed to also take part in the final decision considering the case. It is also recommended to clearly state that fair trial principles shall be followed in these proceedings, including the possibility for the accusedjudge to present a defence[42].

4.6.2. Appeals on Disciplinary Decisions

67. There should be a possibility for an independent review against a decision following the completion of a disciplinary procedure, unless the decision is taken by the highest court in the country[43]. Preferably, the appeal should be to a court of law[44]. According to Article 46, the decision of the Regional Disciplinary and Qualification Board can be appealed to the Republican Disciplinary and Qualification Board, which will then issue a final decision. However, in the case of the judges from Regional Courts, the Republican Disciplinary and Qualification Boards is the first instance, whose decisions may not be appealed (Article 46 par 2). It is therefore recommended that a procedure is put in place whereby judges may seek review of a decision of a disciplinary board, preferably to a court of law, at least in cases where the Republican Disciplinary and Qualification Board decides as first instance.

[42] *Kyiv Recommendations, op. cit., note 10, par. 26, and Recommendation on Judges: Independence, Efficiency and Responsibilities, op. cit., note 9, par. 69.*

[43] *Basic Principles on the Independence of the Judiciary, op. cit., note 10, par. 20.*

[44] *Report on the Independence of the Judicial System, Part I: the Independence of Judges, op. cit., note 10, par. 43.*

Opinion on the draft Code of Judicial ethic

Adopted by the Venice Commission at its 107th Plenary Session
(Venice, 10-11 June 2016)

on the basis of comments by
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Mr Nicolae ESANU (Member, Republic of Moldova)
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I. Introduction

1. On 20 January 2016 the President of the Supreme Court of the Republic of Kazakhstan, Mr K. Mami, requested an opinion of the Venice Commission on the Draft Code of Judicial Ethics of Kazakhstan (hereinafter – "the Draft Code"). The Venice Commission was informed that the Draft Code had been prepared by the Union of Judges of Kazakhstan with the view to its intended adoption at the Conference of Judges of Kazakhstan in October 2016. The new Draft Code is to replace the existing Code of Ethics, adopted by the Union of Judges in 2009.

2. A working group was set up, composed of Ms C. Bazy-Malaurie, Mr N. Esanu and Mr J. Hirschfeldt. On 4 and 5 April 2016 the rapporteurs visited Astana and met with the Union of Judges, relevant State institutions, and with representatives of the expert community. The delegation is grateful to the Supreme Court of Kazakhstan for the excellent organisation of the visit and very useful exchanges it had in Astana.

3. This Opinion is based on the English translation of the Draft Code provided by the Kazakh authorities. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

4. This opinion was adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016)

II. The Draft Code and the questions of disciplinary liability of judges

5. The first question to be discussed is the relevance of the Draft Code for the disciplinary procedures and sanctions which may be applied to judges in Kazakhstan. The request by the Kazakh authorities concerned only the provisions of the Draft Code. However, as it will be shown below, those provisions cannot be examined separately from the provisions of the Constitutional Law on the system of courts and the status of judges of 2000 (hereinafter the "Constitutional Law"),[1] which *inter alia* regulates the disciplinary liability of the judges. Therefore, in commenting on the Draft Code the Venice Commission will inevitably touch upon relevant provisions of the Constitutional Law.

A. Judicial ethics and disciplinary liability of judges – approach of the Venice Commission

6. In many European countries ethical codes are self-regulatory instruments generated by the judiciary itself and quite distinct from disciplinary rules (for example, in Italy, France, Estonia, Lithuania, Ukraine, Republic of Moldova, Slovenia, the Czech Republic and Slovakia)[2]. In its two opinions on the codes of the judicial ethics of Tajikistan and Kyrgyzstan, the Venice Commission expressed preference for a code of ethics which has only the force of a recommendation, not a binding document applicable directly in the disciplinary proceedings. The Venice Commission stressed that *"[...] a code of ethics should not be directly applied as a ground for [...] disciplinary sanctions![...]. The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for disciplinary procedure has grave potential implications for judicial independence"*[3].

7. That being said, the Venice Commission is aware that the distinction between discipline and professional ethics is not watertight. The same type of behaviour, depending on its gravity and effects, may result in a simple reprimand by a body on the matters of ethics representing the judicial community, or in a more serious sanction imposed by a competent disciplinary body.

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[1] *A "constitutional law" in the legal tradition of Kazakhstan refers to a piece of legislation which does not amend the Constitution but develops some of its provisions. Such "constitutional laws" are adopted under a special procedure and have higher legal force than ordinary laws.*

[2] *See Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, pp. 41 et seq.; https://wcd.coe.int/ViewDoc.isp?p=&id=1046405&Site=CQE&direct=true*

[3] *CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§15 and 16; see also CDL-AD(2014)018, Joint Opinion of the Venice Commission and OScE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §§25-27.*

8. The Venice Commission thus acknowledged that codes of conduct for judges adopted by the professional associations of judges "may give guidance to disciplinary authorities for their decisions in disciplinary matters".[4] It observed that "there will always be a certain interplay between the principles of ethical conduct and those of disciplinary regulations. In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice." [5] Thus, the Venice Commission is in favour of enumerating *in the law* an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague.

B. Short outline of the current regulations

9. Disciplinary proceedings against judges in Kazakhstan are conducted by a body created by virtue of Article 38-1 of the Constitutional Law: the Disciplinary Commission (hereinafter – the "Disciplinary Commission").

10. Under Article 39 p. 1 § 2 of the Constitutional Law, a judge may be brought to disciplinary liability by the Disciplinary Commission if s/he acted in breach of the Constitutional Law or contrary to the code of judicial ethics, which resulted in damaging the authority of the judiciary and the reputation of the (a) judge. Article 39 p. 1 § 3 (2) further provides that a judge may be brought to the disciplinary liability for having committed a "disreputable offence contrary to the judicial ethics".

11. However, the Constitutional Law does not develop the notion of "disreputable offence". What may be considered "disreputable" for a judge is, in practice, specified by the Code of Ethics, adopted by the Union of Judges. The Union is not a State authority but a private-law entity: according to its Statute, the Union is defined as a non-commercial public association (p.1.1 of the Statute), which is registered as a legal entity by the Ministry of Justice (p. 1.4 of the Statute). Each regional branch of the Union creates an Ethics Commission which examines complaints about the judges' behaviour. The first question to be addressed in the present opinion is what force the Code of Ethics has in the proceedings before the Disciplinary Commission, and what is the relationship between the Ethics Commission (a body of the Union of Judges) and the Disciplinary Commission (a disciplinary body established by the Constitutional Law).

C. The Draft Code as the only source of ethical standards

12. The Code of Ethics is repeatedly mentioned both in the Constitutional Law and in the Statute of the Union of Judges of Kazakhstan.[6] The Statute refers to the Code of Ethics several times, without, however, explaining who adopts the Code. Similarly, the Constitutional Law refers to the Code in Article 30 § 1 and Article 39 § 1, but, again,

[4] *CDL-AD(2015)018, Report on the Freedom of Expression of Judges, §23*

[5] *CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §31; see also CDL-AD(2014)006, Joint Opinion of the Venice Commission, the OSCE/ODIhR, and of the Directorate of Human Rights of the Council of Europe on the draft Law on disciplinary liability of Judges of the Republic of Moldova, §15*

[6] *A copy of the Statute in Russian has been provided by the Kazakh authorities*

there is no indication as to which body adopts it. In addition, the Constitutional Law occasionally refers to "ethical norms" the judges must follow,[7] but does not explain whether those "norms" are fixed exclusively by the Code of Ethics or there may be other sources containing ethical standards. The question is whether the ethical standards for judges may be set not only in the Code of Ethics but elsewhere.

13. Although the Union of Judges is not a State institution *stricto sensu,* it is not similar to other professional associations in that it is specifically mentioned in the Constitutional Law. Thus, Article 37 of the Constitutional Law speaks of the "bodies of judicial community". This provision does not refer directly to the Union of Judges as the *only* association competent to represent the interests of judges; neither does the law describe the composition and functions of such bodies. The membership in the Union is voluntary (p. 3.2 of the Statute). Therefore, in theory nothing prevents the judges from forming other associations to defend their interests and develop ethical standards.

14. However, in practice, since its creation in the early 1990s, the Union has been the *only* public association representing the interests of the judicial community as a whole.[8] One may therefore assume that, as a matter of legal tradition, the Union of Judges is the "body of the judicial community" to which Article 37 of the Constitutional Law refers. It also appears that the Code of Ethics remains the *only* collection of ethical norms governing the behaviour of judges in Kazakhstan, and that, according to the prevailing interpretation of the Constitutional Law by the legal professionals in the country, the provisions of the Code should be followed not only by the members of the Union, but by other judges as well. In such conditions practical application of Article 39 p. 1 §3 (2) should not raise any difficulty.

15. That being said, the Constitutional Law does not explicitly exclude the existence of other organisations representing judges, which might develop their own standards of ethical behaviour. The Venice Commission recalls that a draft to Article 39 of the Constitutional Law has already been commented by the Venice Commission in an earlier opinion on Kazakhstan.**[9]** In that opinion the Venice Commission recommended as follows:

"Article 39 par 2 stipulates the second ground for disciplinary misconduct, namely misdemeanours contradicting "judicial ethics". The provision does not refer to any particular standards of judicial ethics. In order to prevent abusive application of this provision, it is recommended that the Constitutional law is amended in order to link the concept of judicial ethics to a specific code of ethics, which can be laid out in a sub-legal norm."

16. This recommendation is still valid now. In order to avoid any conflicting interpretations of Article 39 p. 1 § 3 (2) in future, it is advisable to align the Constitutional Law with the *de facto* situation and specify that ethical standards

[7] *See Article 9 p. 1 (5), Article 14 p. 1 (4), Article 20 p. 1 (6-1), Article 28 p. 1 (2), Article 31 p. 2 (2), Article 39 p. 1 (2), and Article 55-1 of the Constitutional Law*

[8] *According to the information received by the rapporteurs of the Venice Commission during the visit, over 95% of all sitting and retired judges are members of the Union. Furthermore, at least once the Constitutional Law mentions the Union explicitly (see Article 16-1).*

[9] *CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and the status of judges of Kazakhstan, §§60 – 67*

are set solely by the Code of Ethics which is adopted by the Union of Judges and which is applicable to all judges.[10]

D. To what extent a breach of the Code of Ethics may lead to a disciplinary liability of a judge?

1. Using the Draft Code in the proceedings before the Ethics Commission of the Union of Judges

17. Under Article **6** of the Draft Code, a "violation of ethical principles and rules of conduct" may be "established only by a decision of the authorized body of the judiciary". As it has been explained to the rapporteurs, the "authorised body" is one of the regional Ethics Commissions. According to the Statute on the Ethics Commissions of 5 February 2010,[11] an Ethics

18. Commission may either limit itself to simply discussing the judge's behaviour, or issue a "public reprimand".

In the opinion of the Venice Commission, in cases of *less serious* breaches of judicial ethics, it is legitimate for the Ethics Commissions to rely on the standards developed by the Union in the Code, provided that conclusions of the Ethics Commission do not go beyond a reprimand or other similar "soft" sanctions imposed as a result of the "peer review" of the actions of the judge concerned.

19. However, it appears that the applicability of the Code does not stop there. During the visit to Astana the rapporteurs of the Venice Commission understood that the provisions of the Code may also be relied upon in the disciplinary proceedings. This dimension of the Code deserves particular attention.

2. Using the Draft Code in the proceedings before the Disciplinary Commission

20. Article 7 of the Draft Code stipulates that the Ethics Commission may "raise an issue of bringing the judges to disciplinary liability" for "gross violation" of ethical standards. Apparently, "raising an issue" means transferring the case from the Ethics Commission to the Disciplinary Commission.

21. The Draft Code itself defines the rules set by it as "mandatory" (see Article 3). It thus appears that the Draft Code will have relevance in the disciplinary proceedings against judges, and a breach of every provision of the Code might lead to a real disciplinary sanction.[12]

22. In its opinion on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine the Venice Commission observed as follows**:**[13]

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[10] *This is not the only possible way of setting ethical standards for the judiciary. The currently existing mechanism is an acceptable solution; however, it must be more clearly described in the Constitutional Law.*

[11] *Provided by the Kazakh authorities in Russian*

[12] *This reading of the Constitutional Law and the Draft Code is confirmed by a program document proposed by President Nazarbayev, entitled "The Nation Plan of 100 Steps'". As it has been explained to the rapporteurs in Astana, the adoption of the Nation Plan triggered the development of the new Code of Ethics. Indeed, p. 19 of the Plan provides that the new Code of Ethics will be used in the proceedings before the Judicial Jury.*

[13] *CDL-AD(2015)007, Join opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law, §50*

"According to Article 92(1)3 the disciplinary liability may also arise in case of 'systemic or gross violation of judicial ethics rules that determine the authority of justice'. [...] [I]n this clause it is unclear whether reference is made to an existing Code of Ethics or to general, unwritten rules. In a number of opinions, the Venice Commission has criticised the general penalisation of breaches of codes of ethics as too general and vague and insisted that much more precise provisions are needed where disciplinary liability is to be imposed."

23. This analysis is well-beseeming *in casu*. Article 39 p. 1 § 3 (2) of the Constitutional Law allows punishing a judge for unethical behavior, but it does not develop the concept of judicial ethics in more detail. Instead the Constitutional Law relegates the detailed description of the ethical standards to the Code (see the analysis above). The Venice Commission considers that such method of regulating disciplinary liability is, in the circumstances, inappropriate.

24. The Venice Commission recalls that the rules on disciplinary liability have direct effect on the independence of the judges. Vague provisions (such as the "breach of oath" or "unethical behavior") increase the risk of their overbroad interpretation and abuse, which may be dangerous for the independence of the judges. This is why the Venice Commission has always been in favor of a more specific definition of disciplinary offences in the legislation itself.[14] **"The obligation to typify disciplinary offences on the level of the law [emphasis added] also stems from the judgment *Oleksandr Volkov v. Ukraine* of the European Court of Human Rights**".[15]

25. At the same time, it is not realistic to expect that the legislation would be capable of giving a very precise and exhaustive definition of unethical behavior. The Venice Commission agrees with the CCJE which noted, with reference to the situation in the European countries, that all national regulations ultimately have to "resort to general 'catch-all' formulations which raise questions of judgment and degree. [...] [It is not] necessary [...] or even possible to seek to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings and sanctions."[16] That being said, in the case at hand it is evident that, taken alone, Article 39 p. 1 § 3 (2) is too vague to serve as a legal basis for bringing the judges to disciplinary liability.

26. The Venice Commission believes that it is inappropriate to allow the Union of Judges – an association which has limited democratic legitimacy, no accountability

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[14] *"[...] In general, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague, is a good practice/approach in conformity with international standards" (CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §15). See also CDL-AD(2014)018, cited above, § 24, and CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §90*

[15] *CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §55*

[16] *Consultative Council of European Judges (CCJE), Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, p. 63*

before the general public, and which is likely to pursue essentially the interests of the judicial profession – to regulate nearly all aspects of the judge's behavior at work and in private life, given that this instrument may eventually be applied in disciplinary proceedings as a binding set of norms. The Constitutional Law sets virtually no limits for the Code: as it will be shown below, it does not prevent the Code from regulating private life of judges, their professional performance and their civil rights. It is not clear to what extent the provisions of the Code are susceptible to a judicial review and whether the judges may contest those provisions.

27. In sum, the Venice Commission believes that the types of unethical behavior which may lead to a disciplinary liability should be described in sufficient detail *in the Constitutional Law itself*. Naturally, it belongs to the Kazakh authorities to decide how precise the definition of unethical behavior in the law should be. There are multiple techniques which may help specifying the inevitable "catch-all" formulations of the law in the subordinate legislation or in the case-law of the disciplinary bodies. Thus, a more general statement may be illustrated with certain specific examples of the most common examples of unethical behavior. Furthermore, regular publication of the decisions of the Disciplinary Commission may help understanding the legislative provisions. Finally, the Code of Ethics may serve as a *supplementary tool* of interpretation of the law. However, the Code should not be used as the *one and only* instrument regulating the disciplinary liability of the judges – it should be, at the best, a subsidiary mean of interpretation of the legislative provisions.

28. Finally, the Constitutional Law should reflect the principle of proportionality. Most importantly, the law should make it clear that a judge may be brought to disciplinary liability only for "gross violations" of ethical standards. While Article 7 of the Draft Code stipulates that disciplinary proceedings may only be triggered in the cases of "gross violations", Article 39 of the Constitutional Law does not make this distinction. This creates an impression that *any* violation of ethical standards may lead to a disciplinary liability of a judge under the law. This is wrong: discipline takes the floor only when ethical recommendations have been *repeatedly* or *seriously* infringed, and the fault of the judge must be *gross and inexcusable* (done or omitted intentionally or with gross negligence) to entail serious disciplinary sanctions, such as the removal from office[17]**.** The text of the Constitutional Law should be coordinated with the correct provision of the Draft Code: a disciplinary liability should only be applied by the Disciplinary Commissions only in cases of *serious* and *flagrant* misbehaviour by the judge, and the gravity of the disciplinary sanction should be proportionate to the seriousness of the misbehaviour.

[17] *See p. 25 in the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: "Disciplinary proceedings against a judge shall deal with alleged instances of professional misconduct that are gross and inexcusable and that bring the judiciary into disrepute." See also CDLAD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§42: "As concerns 'removal from office' [it] should be reserved to most serious cases or cases of repetition. It could also be applied in cases of incapacity or behaviour that renders judges unfit to discharge their duties."*

E. Opinion of the Ethics Commissions as a pre-condition for disciplinary proceedings

29. During the visit to Astana the rapporteurs have learnt that, as a matter of practice, the Disciplinary Commission never decides on bringing judges to disciplinary liability for unethical behavior without first obtaining an opinion of the competent Ethics Commission.

30. This *modus operandi* does not clearly follow from the law. The Venice Commission is not aware of any legal provision which would prevent the Disciplinary Commission from proceeding with the case without obtaining an opinion of the Ethics Commission. This should be made clearer: the Constitutional Law must specify to what extent the examination of the case by the Ethics Commission is a pre-condition for any disciplinary proceedings under Article 39 of the Constitutional Law.

31. Furthermore, the Constitutional Law should specify whether the opinions of the Ethics Commissions are binding on the Disciplinary Commission. In other words, is it possible to bring the judge to disciplinary liability if the Ethics Commission did not establish any serious breach of ethical rules by that judge and refused to bring the case to the attention of the Disciplinary Commission? The Venice Commission recommends solving this matter in the Constitutional Law.

32. As a general remark, the Venice Commission notes that both the Ethics Commissions and the Disciplinary Commission seem to be composed solely of judges. This may give an impression that the question of disciplinary liability is decided within the judicial corporation by bodies which have no external elements and no links to the democratically elected bodies or the broader legal community. The Venice Commission often warned against the risks of corporatism;[18] however, it is not its task to assess the composition of the Disciplinary Commission, so, for the purposes of the present opinion, this issue may be left open.

III. Analysis of the specific provisions of the Draft Code

33. On the whole, the Draft Code is well conceived and internally coherent. The very idea of codification of ethical rules is praiseworthy. As mentioned before, the development of the new Code is apparently inspired by a large-scale institutional reform (called "The Nation Plan of 100 steps'"), proposed by President Nazarbayev.

34. As the rapporteurs learnt in Astana, the Draft Code had been prepared on the basis of various international instruments which set ethical standards for judges in their professional and private life. Furthermore, such international instruments, as follows from Article 4 of the Draft Code, may be directly applicable in cases where an issue is not regulated by the Draft Code. This is commendable. It reflects the intention of the authors of the Draft Code to ensure that the judiciary in Kazakhstan is in line with the highest international standards. In the opinion of the Venice Commission, relevant international standards should be applicable not only to fill in *lacuna* in the domestic regulations, but also as an additional authority applicable together with the Constitutional Law and the Code.

[18] *See, for example, CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §9*

35. That being said, although the idea of codification is commendable, some of the provisions of the Draft Code seem to go too far in regulating the judges' professional conduct, their behaviour in public and in private. This presents a certain risk for the judicial independence and even for the judges' rights and freedoms – especially given that the breach of those provisions may serve as a ground for disciplinary liability. The following analysis, while not being comprehensive, will highlight the most problematic provisions of the Code.

A. Structure and language of the Draft Code

36. The Draft Code contains a preamble and five chapters. There are no explanatory notes. There is always a need to find good balance between clarity of written ethical rules and the space for certain discretion in the assessment of individual cases. The technic of explanatory notes or commentaries could here be a useful tool giving specific examples to flesh out more general rules and principles.

37. The Draft Code often uses quasi-synonymic expressions in the same phrase: "morality" and "ethics" in Article 4, "behaviour" and "action" in Article 5. It appears that this is done for stylistic purposes only. If these terms are semantically identical, it would be better to choose one term and use it consistently throughout the text.

38. Two terms used by the Draft Code are particularly unclear: thus, Articles **6** and 7 speak of "ethical principles" and "rules of conduct", as if they were two different classes of norms. In the Draft Code "principles" and "rules of conduct" are put in different chapters – thus, Chapter II is entitled "Ethical principles of Judicial Conduct", the title of Chapter III is "Ethical rules of conduct for judges in the performance of professional duties" and the Chapter IV has the title "Ethical rules for judges' behaviour in their family and in everyday life"[19]. However, it is difficult to see any difference between the norms formulated in Chapters II and III, for example – their language and their level of precision are very similar. Is there any hierarchy between "principles" and "rules of conduct"? Are "principles" more important for the disciplinary liability than "rules of conduct"? All of the "principles" formulated in Chapter I relate to the professional duties of the judge; does it mean that there are no principles applicable to conduct of the judge in the private sphere (to which Chapter IV is dedicated)? It is particularly important to know the answers to these questions, since Article 39 of the Constitutional Law does not make any distinction between different types of ethical norms. Probably, there is no real need to distinguish between "principles" and "rules of conduct", and the chapters may simply follow the logic of the text (rules of professional behaviour, limitations on civil and political rights, behaviour in private context, etc.).

39. Finally, for some reason, the terms used in the Code are explained in Article **8**. It would be more logical to place these explanations in the beginning. It is also necessary to analyse if all the terms deserve to be defined in the Draft Code. Are the terms "judge" and "wife (husband)", for example, used in the Draft Code, have a meaning different from the other normative texts?

[19] *Another question is the difference between "conduct" and "behaviour"; in the subsequent analysis we would presume that these words are used essentially as synonyms, since in the Russian text both titles use the same term (правила поведения).*

B. Application of the Draft Code to former judges

40. Article 3 of the Draft Code provides that "principles and rules established by the Code are mandatory for all judges [...], as well as for the judges who are in retirement".

41. First, when it is the Union of Judges and not the legislator that decides on ethical standards, it seems preferable to use a wording that would reflect that those standards are recommendations rather than "mandatory" legal rules (cf. paragraph **21** above).

42. Second, as to the retired judges, their behaviour may affect the image of the judiciary and may, at least to some extent, be regulated by the Code. However, the requirements for a retired judge cannot be the same as for an active judge, and this should be properly reflected in the Draft Code. For example, the involvement in the public life is probably one of the areas where drastic limitations which may be justified for the serving judges are not necessary in respect of former judges. The Venice Commission reiterates its position expressed in the opinion of the code of judicial ethics of Tajikistan, cited above (§41):

"There are a number of restrictions imposed by this draft Code (including relations with the media, political activities, legal practice, limits related to acceptable remuneration, etc.), which should logically not be applicable to individuals after they retire from judgeship."

C. Procedures before the Ethics Commission

43. There are two types of procedures provided for by the Draft Code. Within the first type a judge him/herself turns to the Ethics Commission for an advice about how to behave in future (Article 5). Another procedure is where the Ethics Commission, at the request of a third party, conducts an *ex post facto* examination of the behaviour of a judge in a specific situation (Article 6).

44. The very idea that a judge may turn to the Ethics Commission for a preliminary advice is praiseworthy. For example, certain State institutions in France appoint nowadays a "deontologue" – a person who may give advice about how to behave in certain situations. But such officer (or a collective body) should be completely separate from a disciplinary body, which is not the case under the Draft Code[20].

45. Even more so, advices given under Article 5 of the Draft Code are "mandatory for execution", and this is very problematic. It is very difficult to assess ethical appropriateness of somebody's behaviour *in abstracto,* without taking in consideration particular circumstances of a given case. Therefore, advices given to the judge under Article 5 should have only the force of guidelines, recommendations, etc.

46. As regards the *ex post facto* examination of complaints about the judge's behaviour (Article 6), it seems that such procedure may be triggered by any citizen or organization and by any government agency, even by those which are not affected in any way by the judge's behaviour. If this is a correct understanding, it may open the door to an excessive number of procedures, which may have a chilling effect on the judges and may overburden the Ethics Commissions. It is thus recommended to provide that only persons who have an interest in the case may introduce such a complaint.

[20] *See the above-cited opinion on Tajikistan, CDL-AD(2013)035, §46.*

47. The Venice Commission expresses its concern with the power of the presidents of the courts to introduce such requests before the Ethics Commission.[21] **In many post-soviet countries the presidents of the courts retain excessively strong influence on the carrier of judges, which is detrimental to the internal judicial independence. The Venice Commission thus recommends removing from the Draft Code the power of the presidents to trigger proceedings before the Ethics Commission. Equally, the Venice Commission has previously warned against provisions giving the Minister of Justice the right to initiate disciplinary proceedings against judges**.[22]

48. The Venice Commission also recommends excluding the possibility for the Ethics Commission to start the examination of the case on its own initiative, since it may raise serious doubts as to its impartiality during the ensuing consideration of it. A possible solution would be to give the right to bring proceedings to interested persons and to any member of the Ethics Commission, who in this case should not sit on a panel deciding on the issue.

49. The provision of the Draft Code in Article 7 that the issue of disciplinary responsibility of judges for violation of ethical standards may be raised only "in cases provided by law" and only for "gross violations" of ethical standards, must be welcomed. However, the uncertainty remains as to whether a decision of the Ethics Commission is mandatory in those cases where the disciplinary case is also initiated on "ethical grounds". Is it possible for an aggrieved person to go to the Disciplinary Commission directly, without first obtaining an opinion of the Ethics Commission? The Constitutional Law is silent on this point. The Venice Commission thus reiterates its recommendation to explain *in the law* the role which the proceedings under the Code play within the disciplinary proceedings before the Disciplinary Commission under Article 39 p. 1 § 3 (2) of the Constitutional Law.

D. Rules of professional behaviour contained in the Draft Code

50. Articles 9 – 21 regulate the behaviour of judges in the professional context.[23] The Venice Commission observes that in this part the Draft Code reproduces certain basic principles of fair trial. Thus, Article 9 proclaims that the judge should base his/her conclusions solely "on the evidence and data verified at the court hearing"[24], while Article 10 requires the judge to "ensure the principle of equality before the courts and the law".

51. In principle, such rules are more suitable for a procedural code than a code of ethics: a *serious* breach of the principle of equality of arms should normally lead to the quashing of a judgement on appeal. On the other hand, similar approach (reaffirming

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[21] *See CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17.*

[22] *See CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §68).*

[23] *These Articles are contained in two Chapters – one is entitled "Principles" and another is "Ethical rules of judges' behaviour ..."*

[24] *By itself this requirement is not entirely exact: a judge may also rely on the facts established in other court proceeding, or on the commonly known facts which do not need to be formally verified in the hearing.*

certain basic principles of fair trial in a code of ethics) may be found in some other countries[25]. Probably, it is a question of degree and nature of the breach: the Draft Code is intended to regulate only such inequality in treatment of the parties which, albeit regrettable, does not affect the validity of the judgment.

52. The Venice Commission recalls in this respect that in its opinion on the code of judicial ethics of Tajikistan, cited above, it often referred to the "appearances" (see §§6, 48, 53, 54, 55, and 68). Probably, the focus of any ethical code should be not so much on the actual breaches of procedural rules, but on the "appearances", on the image which a judge may leave on the parties and on the general public.

53. The Venice Commission admits that *manifest, gross and deliberate* disregard of procedural rights of one of the parties which resulted in a denial of justice may exceptionally lead to a disciplinary liability. That being said, the Venice Commission always warned the States from disciplining judges for errors of law or of fact – see the previous opinion on Kazakhstan.[26] If these provisions are to remain in the Code as "ethical obligations", and if they may ultimately lead to the disciplinary liability, the Code should make it clear that procedural errors are to be corrected primarily through the system of appeals, and not through disciplinary liability. It is only when a judge has roughly and systematically infringed his/her own competence that such procedural errors can be considered as a ground for a disciplinary sanction.[27]

54. The provision in Article 9 p. 3 reads as follows: "public discussion of the activities of judges, criticisms against him/her, no matter where they come from, shall not affect the [lawfulness and substantive reasonableness] of the court decision on the case [under consideration]". Indeed, the judge should be able to withstand pressure by the public opinion or the media. However, this norm should not be interpreted as regulating behaviour of the public or the media – the Code may only regulate the behaviour of the judges themselves. And, *a fortiori*, this norm should not be seen as limiting the public discussion about the pending cases. The Venice Commission recommends reformulating this provision in order to make it clear.

55. The obligation to report on the facts of illegal interference in judicial activity (Article 9 p. 4) is not only an ethical norm but should be regarded as a legal obligation. The "illegal interference" and "direct or indirect pressure" on a judge is a *crime* and must be reported to the prosecuting authorities in all cases. Moreover, the judge should report to the competent authorities even in cases where there is only an *appearance* of "interference" or "pressure" and let them decide whether there is a case to answer.

56. As regards Article 9 p. 5, it was explained to the rapporteurs that this provision speaks of internal meetings within a court, usually called at the initiative of the president**,**[28] where particular decisions of a specific judge may be discussed. Indeed, fellow-judges should only criticise decisions of their colleagues with caution, in order

[25] *See, for example, the Ethical principles for Norwegian judges, adopted in 2010, http://www.coe.int/t/dghl/cooperation/CCJE/cooperation/Ethical%20 principles Norwegian judges.pdf*

[26] *Joint Opinion by the Venice Commission and OSCE/ODIHR, CDL-AD(2011)012, §60.*

[27] *See also the OSCE Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus and Central Asia, p. 25; http://www.osce.org/odihr/KyivRec?download=true*

[28] *Referred to in the text as the "official of judicial system endowed with institutional powers".*

to maintain constructive and friendly working atmosphere.[29] It would be wrong to ban such discussions completely; however, even where a particular judicial decision has been quashed by a higher court, it should not be the reason to call a meeting in order to chastise the judge concerned before his/her colleagues.

57. As regards Article 10, the Venice Commission repeats that the choice to state the principle of equality and non-discrimination as an ethical principle is questionable (even if it can be found in the Bangalore principles and some other ethical codes). To treat the parties without discrimination is, first of all, a legal obligation of the judge. Furthermore, it is unclear why, when speaking of discrimination, the authors of the Draft Code preferred a closed list of the grounds for distinction which are considered as discriminatory. This provision should be redrafted in order to provide expressly that discrimination is not accepted on any ground.

58. Article 11 establishes the duty of a judge to inform competent authorities about attempts to bribe him/her. Again, this should be a *legal obligation,* not only a moral duty. Failure to report about such "offers" should entail legal liability (disciplinary and even criminal), even if the judge has ultimately refused the offer. As to the gifts "in connection with his/her professional activities, not related to the administration of justice", it is not clear what it means. Indeed, there should be a limit to the maximum amount of gifts a judge may receive, for example, from his colleagues, from the academic institutions, etc. (i.e. arguably the gifts "in relation to professional activities"). Gifts which are "related to the administration of justice" are, in essence, bribes, and should be prohibited outright. But even private gifts (i.e. not related to the administration of justice) may be regulated by the ethical rules – especially when they do not come from very close relatives or friends. Even when a person making an expensive gift has no intention to corrupt the judge, such gifts may create an *appearance* of corruption, which makes it perfectly legitimate to regulate such gifts, at least at the level of ethical rules.

59. Article 11 p. 2 prohibits disclosing private information which the judge may learn through working on a case. However, such disclosure may take procedural forms – for example, private information may become known from the testimony of a witness, or from the court judgement itself. When disclosure serves a specific procedural purpose (for example, to establish the facts of the case), and is in the interests of justice, it should be allowed (with some exceptions which may be justified by the interests of minors, protection of witnesses etc.). The Code may only regulate "non-procedural" disclosures (such as relating "spicy details" of a criminal case to the press, where there is no procedural need for doing it).

60. Articles 14 – 16 contain provisions which relate partly to labour discipline and managerial duties of the judge (the duty to start the hearings on time, the duty to oversee the work of the employees of the court, etc.) and partly to the quality of the judicial decision-making and procedural propriety (draft clear and well-reasoned texts, do not adjourn hearings because of poor knowledge of the case materials, etc.). However, these rules should be applied with caution: the judge should enjoy wide discretion in conducting the proceedings, and there is no single standard of "convincing, logical and

[29] *See the Venice Commission Opinion on Tajikistan, cited above (CDL-AD(2013)035), where the Venice Commission held that "the judges should indeed exercise caution while discussing or criticizing the work of their colleagues" (§65).*

well-reasoned" decisions. And, again, the judge should not be disciplined and even reprimanded for the sole reason that the higher instance disagreed with his or her position in a given case.[30]

E. Limitations on the freedom of speech, assembly, etc.

61. The regulations related to the judges' involvement in "politics" (Article 17) is another example of a rule which is rather a legal obligation than an ethical standard. Certain duties of the judges – for example, to cease membership in political parties or in their organs upon appointment to a judicial position – should be directly mentioned in the law.[31] As to the Draft Code, it is necessary to ensure that it does not regulate the rights and obligations of the judges but rather provides them with specific guidelines which will allow them to know which conduct to adopt where there is no clear legal rule, but where the judge should be recommended to show *self-restraint and moderation*.

62. The question of the judges' involvement in politics and in the civic life is a difficult one; the extent of those limitations varies from country to country.[32] It belongs to the Kazakh legislator to define the extent to which political involvement of judges must be restricted. However, the law should nevertheless be precise. The Venice Commission considers that it is rather difficult to make the difference between what is and what is not "politics". It is easy to accept that a judge should not be a member of a political party or speak publicly at political meetings (i.e. those which are organised by the political parties or their leaders or closely associated with them). It is reasonable to expect that a judge would avoid from publishing an article in support of a particular candidate at the elections.[33] But what if a judge participates in an academic discussion regarding a reform of a particular State institution – does it amount to the involvement in "politics" or not? Even defending constitutional values in a public statement may arguably be regarded as a political (yet loyal) statement. In any event, the total prohibition for a judge to express publicly his/her political views and beliefs must be reconsidered as it limits excessively the freedom of expression of judges[34].

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[30] *See the Kyiv Recommendations, cited above, p. 25 and, in particular, p. 28: «How a judge decides a case must never serve as the basis for a sanction."*

[31] *In some jurisdictions simple membership of the judges in political parties is allowed. It belongs to the Kazakh legislator to define the extent to which political involvement of judges may be allowed.*

[32] *See CDL-AD(2015)018, Report on the Freedom of expression of Judges, §82: «In comparative law, the level of restriction of the exercise of the above freedoms for judges differs from country to country according to their respective legal cultures. Although judges can be member of a political party in Germany and Austria, this is prohibited in Turkey, Croatia or in Romania. Whereas in Lithuania, judges should avoid publicly declaring their political views and in Ukraine, they should not participate in any political activity, there are much less restrictions on political speeches by judges in Sweden also as a consequence of the principle of «reprisal ban". In Germany, although political statements by judges are not ruled out, they are expected not to enforce those statements by emphasising their official position."*

[33] *CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §62*

[34] *The Venice Commission reiterates what it has said in the opinion on Kyrgyzstan, sited above (CDL- AD(2014)018), §34: "[...] [I]t is unclear whether the prohibition of 'speaking in support or against any political party' should be understood as a complete ban on expressing views on any political matter, including the functioning of the justice system. The ECtHR pointed out the 'chilling*

63. Probably, the Draft Code should use another technique and rather give several examples of the most typical cases of "political involvement" which a judge should avoid,[35] while leaving a space for the participation of judges in academic and similar discussions. Such model is used by Article 21 in respect of statements which "criticise the laws and legal policy of the State" but which, are, apparently, allowed as not being "political". A provision might also be made allowing the judge's participation in the work of non-political associations (such as, for example, a wildlife protection foundation or an archaeology club).[36]

64. Article 18 prevents the judge from publicly demonstrating his/her religious affiliation. In principle, this is a sound rule. In an opinion on Bosnia and Herzegovina the Venice Commission held as follows (§35):[37]

"This Article is intended to prevent the judge from showing any signs of religious, political, ethnic or other affiliation and is to be welcomed. The references to 'signs' and to 'such insignia' suggest that it is only physical emblems which are covered. The prohibition should also extend to conduct such as praying or religious gestures or utterances."[38]

65. Articles 18 and 19 prevent the judges from giving legal advice to political parties and members of religious associations. Probably, the judge should refrain from acting as a legal advisor in all situations, and not only on political and religious matters (a possible exception may cover informal legal advice given to the members of the judge's family in purely private matters).

66. Article 20 of the Draft Code provides that a judge is not entitled to comment on court decisions not entered into legal force. This rule is sound, but it should not be interpreted as giving the judge an absolute freedom to attack publicly court decisions which did enter into legal force. While a judge may participate in academic discussions about the case-law, s/he should be very careful when criticising *specific decisions* on public *fora*, since virulent criticism may undermine the credibility of the judiciary and do more harm than good. This provision should not, however, prevent the judges from engaging in the legal analysis of conflicting judicial decisions for the purposes of adjudicating a case.

67. Article 21 prevents judges from criticizing publicly the laws and legal policies of the State. First of all, every judge will inevitably have to interpret legal norms which are

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effect' that the fear of sanctions such as dismissal has on the exercise of freedom of expression, for instance for judges wishing to participate in the public debate on the effectiveness of the judicial institutions. Consequently, should the expression 'speaking in suppo rt or against any political party' be interpreted as including speech on the functioning of the judicial system, the fact that this may lead to dismissal would constitute a disproportionate interference."

[35] *The formula describing the participation of a judge in the events of religious organisation may be used as an example.*

[36] *See, for example, CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §53*

[37] *CDL-AD(2013)015, Opinion on the Draft Law on the Courts of Bosnia and Herzegovina.*

[38] *Indeed, this prohibition should not be seen as preventing the judge from attending a mosque or a church, or, for example, wearing a cross or another insignia in a manner not visible to others. Indeed, any limitation should be proportionate and should primarily concern expression of religious beliefs in the professional setting; however, the ECtHR seems to accept more serious limitations in respect of judges – see Kalag v. Turkey, judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV.*

not clear or which contradict other norms. "Critical assessment" of such norms which is a necessary part of the process of adjudication is perfectly admissible, and the Draft Code should expressly allow it (even when it is expressed in open procedural documents). As regards more abstract criticism, not connected to the adjudication of a specific case, indeed, the judge should speak with caution, especially when expressing him/or herself on a *fora* accessible to the general public (as opposed to more closed discussions amongst the professionals of the law; thus, the exception covering "the scientific and practical conferences, round tables, seminars and other events of educational character", where it is possible for the judge to express critical views, is reasonable). However, judges should not be excluded from sharing experiences and giving voice to opinions on legislative matters. It may be particularly useful for the Government, within or before a legislative process, to invite judges to take part in a general discussion on legal matters at a conference or through submitted opinions (not just from courts as such or from courts presidents but also from individual judges).

F. Limitations in the private sphere

68. Chapter IV of the Draft Code regulates the judge's behaviour in private. Indeed, even outside the courtroom a judge should behave with dignity and give an example of a responsible member of the society. That being said, certain provisions of this Chapter are overly intrusive into the judge's private life.

69. Articles 22-24 of the Code may be interpreted as establishing the judge's liability for acts of his/her close relatives. While the judge may be held legally responsible for the behaviour of his/her *minor* children, the Draft Code should make it clear that the judge should not answer for his/her grown-up kids and other adults. At the same time a judge might be required to distance him/herself from those family members who infringed the law, and avoid even giving an impression that s/he might use the influence and the prestige of the judicial office to defend them (see Article 25 which speaks of such situations, which seemingly fall short of the clear "abuse of office" but are very close to it).

70. The obligation to provide assistance to the disabled parents and other family members (Article 22) is not linked to the limits set by law or, at least, to some reasonable limits. Of course, this is a very sensitive issue which largely depends on the traditions of a given society. However, it is necessary to ensure that this is not an overburdening requirement; probably, a reference to the legal obligations of support should serve as a benchmark.

71. Article 22 of the Draft Code goes too far when it requires that the judge should inform the president of the court and the judicial community body about the fact of the divorce and, in particularly, about the reasons thereof. The Venice Commission does not see any justification for this rule. On the one hand, it may create a wrong impression that the judge's private life is fully controlled by the presidents of the courts, and that divorcing is an unethical act, which is not. The Venice Commission recalls that a judge may divorce because of circumstances which are not due to his or her moral fault or even nobody's fault at all. On the other hand, even if this duty to inform exists and is properly enforced, realistically speaking there is nothing a president of the court can lawfully do to prevent the divorce. And, in any event, it should not be the president's business to decide whether the divorce is justified or not.

72. Finally, the duty of the judge to maintain a healthy lifestyle (see Article 29) is both unclear and excessive. The "healthy lifestyle" is a very vague definition: for example, smoking is clearly a not healthy habit, but it would be excessive to consider that smokers cannot be good judges. Probably, the Draft Code might refer to particular "unhealthy practices" – such as serious and persistent problems with the alcohol, use of prohibited substances, etc. – which may undermine the judge's public image and may be considered as incompatible with the ethical standards. Reference to "immoral behaviour" is open to overbroad interpretation and should be avoided. Again, as with the "healthy lifestyle", the authors of the Draft Code might simply give several most typical examples of immoral behaviour which they had in mind when drafting this provision.

IV. Conclusions

73. The Venice Commission welcomes the initiative of developing a new ethical code for the judges of Kazakhstan. It is an important step which may help reinforcing public trust in the judiciary. However, the rules of ethical behaviour contained in the Draft Code, and related procedures, should not replace the legal provisions on the disciplinary liability of judges and corresponding disciplinary procedures. It is therefore important that the Draft Code is developed and adopted in parallel and consistently with the revision of the Constitutional Law and other laws applicable in this area.

74. Amongst the most important recommendations, aimed at improving further the legislation and the Draft Code, the Venice Commission would like to stress the following:

* the Constitutional Law should describe in more detail the grounds on which a judge may be brought to disciplinary liability for the breach of "ethical rules"; in addition, it should specify that disciplinary sanctions may be imposed only for manifest and gross violations of judicial ethics; finally, the Constitutional Law should specify to what extent the findings of the Ethics Commissions are mandatory in the disciplinary proceedings against the judges;

* the Draft Code should specify that professional errors may be punishable with disciplinary liability only when a judge has roughly and systematically infringed his/her owncompetence;

* while certain limitations on the freedom of speech of judges contained in the Code are permissible, the Court should specify that the judge should be able to express, *with necessary moderation*, critical opinions about the State's policies; application of the Draft Code to former judges should be limited to the strict minimum;

* in regulating the behaviour of the judges in the private context the Draft Code should avoid relying on vague concepts such as "immoral behaviour" or "healthy lifestyle"; certain most intrusive regulations (such as, for example, the duty to report to the president of the court on the grounds of divorce) should be removed.

75. The Venice Commission remains at the disposal of the authorities of Kazakhstan and is ready to offer its help in the further revision of legislation on the status of judges, their independence and accountability.

Opinion on the draft Law of the Republic of Kazakhstan on Administrative procedures

Adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)

On the basis of comments by
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I. Introduction

1. By a letter dated 10 November 2016, Mr Donakov, Deputy Head of the Presidential Administration of the Republic of Kazakhstan requested the opinion of the Venice Commission on the "Draft law on administrative procedures" (CDL-REF(2017)009), hereinafter "the draft".

2. Ms C. Bazy-Malaurie, Ms T. Khabriyeva and Mr J. Hirschfeldt acted as rapporteurs on behalf of the Venice Commission.

3. The authorities provided the Commission with a specific document entitled "the concept of the draft law" (hereinafter "the concept note") which included the information on the reasons for adoption and the logic of the draft law. In February 2017 the Commission addressed to the authorities a list of issues which needed clarification. The replies to this questionnaire were taken into consideration during the preparation of the final version of the opinion. Representatives of the Venice Commission had an opportunity to exchange with the authorities on these issues during the visit to Astana on 21-22 February 2017. The delegation is grateful to the Kazakh authorities for the excellent co-operation before and during the visit.

4. This Opinion is based on the English translation of the draft law provided by the Kazakh authorities, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

5. The present opinion of the Venice Commission, which was prepared on the basis of the comments submitted by the rapporteurs and following the exchange of views with Mr Talgat Donakov, Chairman of the Council on Legal Policy under the President of the Republic of Kazakhstan, and was adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

II. Preliminary remarks

6. In recent years the authorities of Kazakhstan engaged in a number of legal reforms aimed at modernising the procedural legislation in the country. The new draft law regulating various administrative actions on the basis of a uniform procedure is part of this ambitious process. According to the concept note provided by the authorities the law on administrative procedures which had been adopted in 2000[1] revealed a number of shortcomings that led to the preparation of the examined draft.

[1] *In 2010, OSCE/ODIHR prepared an opinion of the 2010 version of the draft law on administrative procedure. http://www.leqislationline.org/topics/country/21/topic/83.*

7. The 2016 draft law introduces a number of concepts for the operation of public administration as well as brings new procedures compared to the previous acts in this field. The need for ensuring legal certainty and a transparent legal framework for relations between individuals and public administration seem to be the main objectives of the draft. This text has an ambition to bring radical changes to the way the administrative bodies deal with individuals and private entities; however, the very short time limits introduced by this law for different administrative actions will certainly be challenging and put additional pressure on civil servants. On the other hand, and considering the detailed nature of the law, it is also important that the reform does not create unnecessary bureaucratic procedures that would compromise the confidence of the population in the reform.

8. The Republic of Kazakhstan is not a member of the Council of Europe. However the concept, the subject and the main provisions of the draft are consistent with the Council of Europe objectives and recommendations in the sphere of legal enforcement of the rights and freedoms of individuals in their relations with the state through effective public administration. General minimum standards for a proper administrative procedure, developed in the framework of the Council of Europe, are embodied in such documents as the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome,XI.1950), Recommendation No. R (87) 16 of the Committee of Ministers to Member States on administrative procedures affecting a large number of persons (adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies), the Council of Europe Convention on Access to Official Documents (CETS No.205), Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials (Adopted by the Committee of Ministers at its 106th Session on 11 May 2000), the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108) (Strasbourg, 28/01/1981), Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties (Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies), Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies), Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies), Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration.

9. The analysis of the draft suggests that there is a positive effort aimed at bringing the administrative procedure closer to the ones other procedures already used in the national legal system, taking into account, among other issues, the generally recognized standards used in the judiciary. This is reflected in the rules of evidence used in the administrative procedure, expert opinions, etc. Such an approach is positive and contributes to the development of common principles of procedural law in the Republic of Kazakhstan (while respecting the specific characteristics of each procedure). The detailed provisions of the draft law allow the effective practical application of these

rules respecting the balance between rights and obligations of individuals and ensuring a fair settlement of different administrative cases.

10. The provisions of the draft law will be considered article by article, providing where necessary references to other parts of the law and relevant legislation already in force. The detailed nature of some comments serves the only purpose of assisting the authorities in improving the provision of the draft using the positive experiences from other legal systems and international standards in the field of administrative procedure.

III. Specific comments on the provisions of the law

A. Concepts and terminology used in the draft

11. The list of the basic concepts set forth in Article 1 of the draft needs to be extended, in particular by including the definitions of the various types of applications filed by citizens. The draft does not provide a clear distinction between the procedure of consideration of citizens' applications (in their various versions) and dealing with citizens' complaints in the special administrative procedures. This appears also in terminology used in different articles of the examined draft.

12. For example, in accordance with subparagraph 1 of par. 2 of Article 3 of the draft law, it will not cover the "appeals of individuals and legal entities, containing proposals, requests or comments". In order to avoid unjustified refusals on formal grounds, it would be useful to include clear definitions of "proposal", "request" and "comment". The same observation can be made in relation to paragraph 1 of Article 32 which makes a distinction between "application by natural or legal person" (par. 1) and "administrative complaint "(par. 3). It would be useful to include in Article 1 of the draft the definition of "application" and "administrative complaint", specifying the legal difference between them. The Law does not include the formal requirements on the registration of complaints. Detailed provisions on applications appear in Article 33 of the draft. However, subsequent articles 35, 36, 48 of the draft on different procedures deal only with applications of physical and legal entities without providing any important specific procedural rules for "complaints"[2].

13. In this context it should be observed that the Law of the Republic of Kazakhstan of 12 January 2007 N° 221-III «On the order of consideration of applications of physical and legal persons (with changes and amendments as of December 4, 2015) provides that «a complaint» may also be considered according to the procedure established by the Law N 221-IN. Thus, the scope of application of the examined draft and the Law N 221-III should be clearly defined.

14. There are two synonyms in par. 1 of article 3 of the Draft «the activities of administrative bodies» and «concrete actions of administrative bodies». There are no provisions in the draft establishing the distinction between them. In this regard, it is recommended to clarify the corresponding provisions of the draft.

[2] *In their clarifications provided to the rapporteurs, the authorities insisted that the law would be covering all administrative procedures with the exception of:*

1. *administrative offences which fall under criminal or civil procedure legislation;*
2. *strategic, budget and economic planning regulated by specific laws of Kazakhstan;*
3. *drafting of different legal acts covered by specific legislation on legal acts.*

Timeframe

15. In par. 2 of article 6 it could be useful to clarify if running of the time period of consideration of the case starts from the moment when the first administrative authority receives the case or from the moment when the case is transferred to the competent authority. This uncertainty seems to reappear in par. 2 of article 48 which stipulates that "the administrative procedure starts from the date of registration of the application in the administrative body or from the first action taken by the administrative authority". In addition par. 1 provides that "administrative procedures shall be conducted in thirty calendar days, unless otherwise provided by the legislation of the Republic of Kazakhstan". Thus the clarification of the moment when the actual administrative procedure begins (the start of the thirty days timeframe) would have real legal significance.

Interaction between different administrative bodies

16. Provisions of articles 8, 9 and 10 of the draft regulating the mutual assistance between the administrative authorities might need clarification as to an obligation of providing an answer to a request for mutual assistance within three days. It remains unclear when this timeframe starts and what are the consequences if the request is not answered.

17. The drafters could also consider, for a better understanding of the interaction between administrative bodies, to put articles 4, 6 and articles about mutual assistance (8 to 10) in a more coherent way.

Treatment of cases and applicable principles

18. Article 14 of the draft prohibits the administrative authority to take a) different resolutions for different cases with the same essential factual circumstances (part 3), and b) identical resolutions at different cases with different essential factual circumstances (part 4). On the one hand, this may contribute to the unity of the judicial practice in the country where the doctrine of judicial precedent is not applied. On the other hand, these provisions do not ensure compliance by the administrative authority with the principle of proportionality in the administrative procedure. The principle of equality of treatment could also be compromised. The burden of evaluation of the similarities or differences of the significant circumstances of the case should fall on the administrative body, however, neither legal doctrine nor legal act establish any criteria or methods for such assessment. Moreover, item 5 of article 14 of the draft empowers the administrative authority to reverse its earlier decisions in the case if there are new significant circumstances and to take other discretionary decision (i.e. sets the particular discretion). It would also be appropriate to deal in this article with the duty to present the findings and to add reference to the principle of transparency.

19. Par. 1 of article 15 of the draft allows to burden persons with obligations or to refuse to grantany right for the purpose of meeting the formal requirements only in cases "as the mandatory condition provided by law".

20. This clarification makes sense since the Law of the Republic of Kazakhstan No. 480V "On legal acts" adopted on April 6, 2016 (article 1) makes a distinction between "law" and "legislation", specifying that the latter, in addition to the laws, also includes "the decree of the President of the Republic of Kazakhstan having the force of law, the

resolution of the Parliament of the Republic of Kazakhstan, resolutions of the Senate and the Majilis of the Parliament of the Republic of Kazakhstan" and others[3].

21. An uncertain term «harm» included in part 2 of article 15 of the draft should also be specified. According to this article the failure by a person to follow formal requirements should not «be used to his/her harm «. The concept of «harm» is fairly clearly established in civil law, but it is hardly applicable in this case. This norm could be redrafted with the aim of achieving greater legal certainty.

22. Article 16 of the draft establishes the principle of the protection of the right to confidence. However, the term «confidence» and the content of this right are not disclosed in the article or in any other law. Therefore the protection of such unclear public relations by the law is questionable.

23. The wording of par. 1 of article 20 of the draft does not meet the principle of legal certainty (including the legality and predictability of action). According to this article «the administrative authorities may not require individuals to take such actions which they have already taken as part of other activities.» It is advisable to clarify the meaning of «other activities».

24. Article 22 makes reference to «other applicable principles". Some of them were referred to in the clarifications provided by the drafters – objectivity, impartiality of publicadministration or protection of the right to private life. The text of the draft would benefit from more clarity on such applicable additional principles.

Main procedural provisions

B. Participation of minors

25. Par. 2 of Article 25 provides that "the administrative authority has the right to involve in such cases juveniles or individuals engaged in recognized partial capability". The UN Convention on the Rights of the Child[4] provides that:

Art. 3.1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Art. 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

26. It could be argued that the right for the administrative authority stipulated in article 25 rather should be provided for as an obligation.

[3] *The text of the law can be consulted on: http://online.zakon.kz/Document/7doc id=37312788#pos=104;-153.*

[4] *http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx*

Participation of the applicant in the procedure and representation

27. It would be advisable to add in article 26 (and perhaps also in article 39) to stipulate that the administrative authority has the right to demand the applicant etc. to be present in front of the authority.

28. Par. 1 of article 27 establishes a mandatory rule, imposing an obligation for a person without permanent residence in the Republic of Kazakhstan to appoint a representative "authorised" to receive documents related to the administrative procedure. The administrative authority is bound to send to this authorised person all documents concerning the person involved in the administrative procedure.

29. In this regard, it is possible that the establishment of mandatory rules and the wording "should appoint an authorised person" creates unequal conditions for persons permanently residing on the territory of the Republic of Kazakhstan and persons without a permanent place of residence. Meanwhile, according to part 4 of article 12 of the Constitution of the Republic of Kazakhstan "foreigners and stateless persons in the Republic shall enjoy rights and freedoms as well as bear responsibilities established for citizens unless otherwise stipulated by the Constitution, laws and international treaties".

30. For the purpose of the respect of constitutional principle of equality it would be better to use "*may*" instead of "*should*". On the one hand, such a change would allow a person without permanent residence on the territory of the Republic of Kazakhstan to appoint an authorised representative to receive documents. On the other hand, it does not preclude such a person to defend his or her own interests and make a personal appeal to the administrative authorities for obtaining necessary documents (for example, during the period of temporary stay in the territory of Kazakhstan).

Information about the applicant and access to information concerning the application

31. The wording of par. 1 of article 33 says that the application «may» include related information. This wording is in the line with the recommendations of par. 1, 2 of article 4 of the Council of Europe Convention on access to official documents (CETS No. 25), according to which «An applicant for an official document shall not be obliged to give reasons for having access to the official document», «Parties may give applicants the right to remain anonymous except when disclosure of identity is essential in order to process the request». In those countries where such a right exists, it is considered unnecessary to require the applicant to reveal his/her identity in cases where the applicant is not obliged to specify the reasons for her/his request.

32. At the same time it is unclear how an administrative body may prepare a response to an application, if it does not include, for example, an address of the applicant, or a brief summary of his or her request. It would be useful to establish the list of basic information materials that an application must include in order to have his/her request processed.

33. Article 35 would be the main article dealing with registration. A paragraph could be added about evidence of dates of sending the application and/or required data. (See also article 58).

34. Article 39 does not provide any indications as to the proof confirming an administrative act adopted *"in the oral or tacit form"*. The provision in the law about

tacit acceptance of applications or appeals could be further clarified. The existing reference in article 58 does not seem to be sufficient.

35. Par. 5 of article 41 of the draft establishes the right of parties to administrative procedures to get copies of documents and other materials related to the case. It would be appropriate to indicate (at least in general terms) any situations when this right could be restricted (for example, in connection with the need to protect state secrets, commercial secrets, secrecy of private life of other individuals, etc.). Moreover, par. 4 of the same article provides for the possibility to refuse access to documents which include state secrets or other restricted information protected by law.

36. The list of grounds for restricting the access to official documents is provided in particular in par. 1 of article 3 of the Council of Europe Convention on access to official documents (CeTS No. 25).

37. It would be advisable if the draft includes a more detailed and comprehensive (detailed) regulation of the following issues: a) the order of review the information classified as state secrets for persons with appropriate security clearance to this kind of information (according to the legislation of Kazakhstan state secrets are divided into state secret and official secret); b) clarify the phrase «other secret information protected by law ». This provision of the draft seems too uncertain. It will be better to include more detailed differentiation of provisions concerning the access of participants of the administrative procedures to specific types of restricted information.

38. Par. 2 of article 44 requires an administrative body to request evidence and to make it available for the case if the person involved in the administrative procedure has no possibility to obtain such information (as stated in a specific petition). It would be useful to consider possible exceptions to this rule, since it is not clear, how an administrative body (which is not a court) could perform such action, for example, in respect of the property of other citizens or documents of legal entities which might include commercial secrets.

Length of procedure

39. The first article in the draft that refers to judicial proceedings is article 50. It stipulates that if the administrative authority does not adopt an administrative act (during a fixed period of the administrative proceedings) initiated on the basis of an application, the person can apply directly to the court. The draft provides maximum 90 days, including two possible renewals, for the duration of administrative procedures (see par. 1 and 3 of article 48). Does this wording mean that prior to the expiration of the 90-day period the applicant cannot go to court? This rule could be interpreted as limitation to the right to access to a court of law.

40. Recommendation Rec (2001) 9 of the Committee of Ministers of the Council of Europe to Member States on alternatives to litigation between administrative authorities and private parties (adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies) authorises the use of alternative ways (such as the "internal review") as necessary condition for the start of the proceedings (see par. 78 of the Recommendation). This is seen as a way to reduce the workload of the court and bring the administration closer to individuals.

41. It appears that the period for completing the administrative procedure preventing a person to go to court, should not be excessively long. For example, the above

mentioned Recommendation explicitly states that *«the choice between litigation and alternative procedure is compensated by... recommendation that national legislation prescribes a rigid and reasonable time of completion of the alternative procedures in order to provide the widest possible access to the courts in accordance with the European Convention on Human Rights».*

42. Various Member States of the Council of Europe use different procedural timeframes before there is an opportunity to appeal to the court. The explanatory memorandum to Recommendation (2004) 20 of the Committee of Ministers of the Council of Europe to Member States on judicial review of administrative acts states that «applicants are usually granted a period of 30 days in Albania, Azerbaijan, Finland, Hungary, Romania and Switzerland, 60 days in Belgium and Italy, 6 months in Malta and Norway and 6 weeks in Austria and the Netherlands». Thus, there is certain discretion in the choice of options of legal regulation by the legislator.

43. As regards administrative and judicial proceedings, the draft law would clearly benefit from provisions (in addition to articles 50, 63, 70 and 72) explaining the link between administrative appeal and litigation proceedings.

Different forms of an administrative act

44. The norm of part 1 of article 53 requires further clarification. This provision allows adopting the administrative act in a conclusive form[5] – in the form of light, sound signals and signs, pictures and «other». Such edition includes a significant opportunity for legal uncertainty. In addition, under part 4 of article 58 of the Draft the conclusive administrative act declares by bringing it to the attention of the person by making this act of visible nature or « made available for perception by another way». This uncertain rule could contribute to its subjective interpretation by law enforcement officials. So it seems necessary to stipulate the methods of bringing the accepted conclusive administrative act to the attention of the persons concerned more clearly. The law should be very precise and should avoid such formulations as «other ways» or «otherwise», especially in the field of conclusive management action.

Complaints and appeals against administrative acts

45. Article 60 would have to include a provision concerning the suspension of the execution of an administrative act for the period prior to the adoption of a decision by a competent administrative authority or court in case of appeal by the person concerned.

46. It seems the second sentence of par. 5 of article 62 could be put in a separate paragraph or even in a separate article of the draft because of its significance for the interests of the participants of administrative procedure.

47. Article 74 of the draft would benefit from more clear and detailed provision on the procedure and conditions of implementation of monetary and direct enforcement using the financial and direct coercion in the execution of administrative acts.

IV. Conclusions

48. The new law on administrative procedures represents an important step in establishing clear rules in the field of administrative law. The reform is well prepared

[5] *In the meaning «konkludent» in German or «конклюдентная форма» in Russian.*

and the draft is of good quality. Such an act may become an important tool for the executive and local self-government bodies of the Republic of Kazakhstan.

49. The text integrates a wide range of legal provisions filling a number of existing gaps in national legislation and introducing new mechanisms and procedures introducing positive international examples and providing additional guarantees in the field of administrative law.

50. However, the draft could be further improved through a number of adjustments, clarification of terminology used and additional references to other legal acts applicable in the field of administrative procedures. It could also be useful to complete the text with a clearer link to the existing legal framework on judicial proceedings on administrative matters.

51. The Venice Commission remains at the disposal of the authorities of Kazakhstan for any further co-operation in this field.

Opinion on the amendments to the Constitution of the Republic of Kazakhstan

Adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)

On the basis of comments by
Mr Osman CAN (Member, Turkey)
Mr Philip DIMITROV (Member, Bulgaria)
Mr Gagik G. HARUTYUNYAN (Member, Armenia)
Ms Taliya KHABRIEVA (Member, Russia)
Mr Gunars KUTRIS (Substitute member, Latvia)
Mr George PAPUASHVILI (Former member, Georgia)

I. Introduction

1. By a letter dated 31 January 2017, Mr Jaxybekov, Head of the Presidential Administration of the Republic of Kazakhstan requested the opinion of the Venice Commission on the draft law "On Introduction of Amendments to the Constitution of the Republic of Kazakhstan" CDL- REF(2017)016), hereinafter "the draft".

2. Ms T. Khabriyeva and Messrs O. Can, P. Dimitrov, G. Kutris, G. Harutyunyan, G. Papuashvili acted as rapporteurs on behalf of the Venice Commission.

3. The authorities provided the Commission with a specific document entitled "Comment on the draft amendments to the Constitution of Kazakhstan" which explains the reasons for introducing amendments to different chapters of the Constitution. Representatives of the Venice Commission had an opportunity to exchange with the authorities on these issues during the visit to Astana on 21-22 February 2017. The delegation is grateful to the Kazakh authorities for the excellent co-operation before and during the visit.

4. The Commission was informed that the President of Kazakhstan had submitted the revised text of the draft constitutional amendments to the Parliament on 1 March and that the text was adopted on 6 March 2017. This text did not include amendments to Article 26 and 65 and introduced some changes to Articles 2, 4, 10, 49, 55 and 74. The rapporteurs did not have time to consider the latest additions and they will not be examined in detail in this opinion.

5. This Opinion is based on the English translation of the draft law provided by the Kazakh authorities, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

6. The present opinion of the Venice Commission, which was prepared on the basis of the comments submitted by the rapporteurs and following the exchange of views with Mr Talgat Donakov, Chairman of the Council on Legal Policy under the President of the Republic of Kazakhstan, and was adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

II. The scope of the amendments

7. On 11 January 2017 the President of the Republic of Kazakhstan signed a decree on the establishment of the Working Group on the redistribution of powers between branches of State power. This act marked the start of the process of a constitutional reform in the Republic of Kazakhstan.

8. One of the main purposes of the current constitutional reform is to make changes in the distribution of powers between the President and other branches of state power. The examined draft law "On amendments and changes to the Constitution of the Republic of Kazakhstan" should increase the role of the whole Parliament and the Majilis of the Parliament (the lower chamber) and redistribute some of the powers currently in the hands of the President of the Republic of Kazakhstan between the Government and the Parliament. This shift does not represent a change in the nature of the constitutional system of Kazakhstan – the President of the Republic of Kazakhstan is not only the head of state and arbiter between different branches of powers, he keeps his role as the highest official determining the main directions of the domestic and foreign policy of the country, represents Kazakhstan within the country and in international relations, ensures the inviolability of the Constitution, ensures the respect of fundamental rights and freedoms.

9. However, the changes proposed in the draft amendment concerning the executive branch reduce some of the executive presidential powers in favour of the government, and the government is gaining more weight in carrying out the main policies. The decrease in the powers of the President also leads to the strengthening of the legislative power.

10. The second important change is related to the judiciary and concerns both the Supreme Court and the Constitutional Council. The fact that the Constitutional Council will examine draft constitutional amendments and questions to be submitted to a referendum before they enter into force can, of course, be regarded as an important step in the protection of the constitution and constitutional rights and freedoms.

11. The third area focuses on the Prosecutor's office. The drafters propose to limit the constitutional provision to a general reference to the institution and to move provisions on its main powers to the relevant legislation on the Prosecutor's office.

12. The fourth change proposed in the draft examined by the Venice Commission was that the right to property would be no longer reserved to the citizens of Kazakhstan – the new provision also covered foreigners and non-residents. It is regrettable that the draft adopted by the Parliament on 6 March did not include this positive change.

13. The draft amendments also contain new provisions relating to local governments and the procedure of amending of the constitution.

III. Preliminary remarks

14. There is no common standard in Europe or elsewhere for governmental models. While the parliamentary system is predominantly preferred in Europe, there are also countries that prefer a semi-presidential system. For this reason, the Venice Commission does not recommend any specific government model. However, whichever model is preferred, participatory democratic governance, the rule of law and fundamental rights and freedoms must be preserved.

15. The most important rule of a democratic constitutional order is that political power is divided among different institutions. Power sharing must be considered together

with democratic balance and control mechanisms in order to guarantee a democratic political system. Finally, those in power must respect the constitutional boundaries; the rule of law and fundamental rights and freedoms.

16. Kazakhstan has a semi-presidential system of government with very strong presidential powers – the President plays a crucial role in forming, controlling, dismissal and oversight of the government. His powers generally exceed the presidential prerogatives in most of the countries of the Council of Europe. In this context, the aspiration of Kazakhstan's authorities to operate a redistribution of some of the powers from the president to the parliament and the government and to provide a more balanced system should be welcomed.

17. The objective of enhancing the role of the Parliament, in general, and the Majilis of the Parliament, in particular is a positive development which seems to follow the logic of previous constitutional reforms adopted in 1998 and 2007. It is suggested to achieve this aim by widening the role of the Majilis of the Parliament and its different political factions in the process of the formation of the Government, as well as by strengthening the supervisory powers of the Parliament and its Chambers over the activities of the Government. However, the President continues to play an important role in this process.

18.The Government automatically resigns after the new Majilis of the Parliament is elected although the President retains the right to adopt a decision to terminate the powers of the Government on his own initiative.

19. The draft proposes to abolish the right of the President to issue decrees having the force a law, which will certainly strengthen the legislative power. However, the possibility to establish priorities in the adoption of different pieces of legislation might somewhat reduce the positive impact of this important change.

20. In the Constitution of Kazakhstan the President is equipped with strong powers. With the draft, some of the powers are transferred to the Government. This step brings the system closer to the semi-presidential system and thus it is to be welcomed. The abolition of the right of the President to cancel or suspend the acts of the Government and the Prime Minister is a positive development.

21. The President receives the power to appeal directly to the Constitutional Council on the constitutionality of a law or any other legal act on issues related to the protection of the rights and freedoms of man and citizen, national security, sovereignty and integrity of the state. In addition the Constitutional Council is granted the power to review all constitutional amendments before their adoption as to their compliance with the requirement of the unitary nature of the state, territorial integrity, its form of governance and its independence. This amendment is also a positive move.

22. There are several changes in the constitutional provisions on the judiciary and on the Prosecutor's office which represent a positive trend in the legal order of Kazakhstan. The Supreme Court does no longer exercise the supervision over the activities of local and other courts. New provision on Prosecutor's office entrusts the institution with the "highest supervision over the legality", the task to represent the State interests in court and to criminal prosecution. This replaces the much wider definition of the powers of the prosecutor's office in the current constitution.

23. The initially proposed amendment to Article 26 on the protection of the property rights would have covered every person regardless of her/his origin, citizenship or status on the territory of Kazakhstan. This could have been an important change in addressing

the universal protection of fundamental rights. It is regrettable that it was excluded in the final version of the constitutional amendments adopted on 6 March.

24. The legal framework for the activities of the local administration and local government is also modified. Although it is suggested that the President keeps the power to appoint the akims of regions, cities of republican level and the capital, the procedure of appointment or election of the akims of other administrative-territorial units is to be established by law, which implies to a certain extent, the transmission of this function to the Parliament. The pre-term termination of powers of maslikhats (local representative bodies) by the President of the Republic requires consultations with the Prime Minister and Chairpersons of the two chambers of Parliament. This means that such decisions integrate some elements of collegiality, which is a positive step to ensure their legitimacy and relevance.

IV. Analysis of specific amendments

25. The present section of the opinion will deal with the individual amendments in the order they appear in the text of the draft law "On amendments and changes to the Constitution of the Republic of Kazakhstan" (hereinafter "the draft law").

Human rights

26. Human rights and freedoms are usually not exclusively linked to citizenship or affiliation to a specific state. An exception could be the rights which are linked to the individual's special affiliation with their state, that is, an individual's civil rights to participate in state governance. At times, guaranteeing the extent of these rights may be related to the state's positive obligations and its economic opportunities.

27. The amendment to Article 26 of the Constitution of Kazakhstan on the protection of property rights proposed in the draft examined by the Venice Commission aimed at changing the words *"citizens of the Republic of Kazakhstan''* to the word *"everybody',* in order to ensure the right of ownership of foreign citizens and stateless persons. The proposed amendment in Paragraph 2 put a stronger emphasis on the inviolability of property rights, which included specific cases indicated in Paragraph 3 of this same Article and the criteria for restricting rights as indicated in Article 39. It excluded any limitations or restrictions on legally obtained property rights by laws "unless otherwise provided for by the constitution", which is fully in line with the European democratic standards.

28. The proposed amendment to Article 26 of the Constitution complied with international acts on human rights, and significantly increases state protection of property rights in the Republic of Kazakhstan. The elimination of this difference of the constitutional status of citizens of the Republic of Kazakhstan and the constitutional status of foreign citizens and persons without citizenship in respect to the protection of property rights would give new possibilities for further improvement of Kazakhstan's legal system.

29. This amendment was directly linked to the provision of Par. 4, Article 12 of the Constitution of the Republic of Kazakhstan which states that *"foreigners and stateless persons enjoy the rights and freedoms and bear the responsibilities established for its citizens, unless otherwise provided by the Constitution, laws or international treaties."This* provision embodies the general principle that defines the legal status of

foreign citizens and stateless persons and distinguishes these individuals from citizens. Foreign citizens and stateless persons enjoy the same rights and bear the same obligations as citizens of the Republic of Kazakhstan; however, laws and international *treaties may establish exceptions from this rule.*

30. The presence of this general rule requires the legislator's strict adherence to its principle: only in case of special clauses relating to the status of foreign citizens and persons without citizenship in the legislation or in international agreements the legal status of these persons can change compared to that of citizens of the Republic.

31. This initial proposal to extend the protection of the property rights to every person regardless of her/his origin, citizenship or status on the territory of Kazakhstan was a very positive step. This important change in addressing the universal protection of fundamental rights would give a possibility to review other constitutional articles in the context of the current reform. The Commission regrets that the drafters decided to remove this important amendment from the text adopted on 6 March 2017.

Separation of power and checks and balances within the executive

32. As it has been mentioned in the previous sections of this opinion, redistribution of some Presidential powers to other bodies increases the responsibility of these branches of state power, whilst retaining the general features of a presidential state. The President remains in charge of strategic development planning, representation of the state and foreign affairs, as well as national security and defence.

33. Based on the proposed amendments to Article 44, the President will henceforth decide on the structure of the Government, as well as appoint and dismiss almost all ministers (except for the ministers for foreign affairs and defence) only after consultation with the Majilis of the Parliament. Furthermore, the Prime Minister of the Republic will have to consult with the Parliament before submitting proposals to the President regarding the composition of the Government, and this increases the role of the Parliament. However, it remains to be seen if this will also improve the balance among the branches of state power.

34. The proposed amendments to remove the President's power to "appoint central executive bodies outside of the Government, instruct the Government to prepare draft laws and submit them to the Majilis of the Parliament, approve state programmes, as well as approve the common state institution financing and employee salary system" can be considered as a positive step. These tasks should belong to the Government (relevant amendments are also proposed to Article 66, which sets out the responsibilities of the Government).

35. In this respect special attention should be given to the Governments authority to decide on a common system for remunerating employees of budget institutions foreseen in Article 66.9. Deeper understanding is necessary on what is meant by the term "common system" and to what categories of employees it applies to. The Parliament, courts and possible other independent state institutions that are financed from the state budget may lose their functional independence if the remuneration system for their employees is determined by the executive power. At the least, the remuneration system for courts ought to be set out in a specific law.

Relation of the Executive to Legislative power

36. The checks and balance system is not established only within the executive. The relationship of executive, legislative and judicial powers to one another should be regulated according to this understanding. Presidential or semi-presidential models require more rigid and precise lines separating executive and legislative powers. The set of amendments affecting the powers of the President (Par. 2, Article 45) goes in this sense and contains a proposal that the laws are the prerogative of the legislature alone. The President will have no longer the power to issue decrees having the force of law. This change is in line with Par. 4, Article 3 of the Constitution of the Republic of Kazakhstan and the principle of functional separation of powers into legislative, executive and judicial branches and their balanced interaction in accordance with the principle of checks and balances.

37. The amendment increasing the quorum (from 1/2 to 2/3) required for a chamber of the Parliament to propose to the President to remove from office any member of the Government (amendment of Par. 6, Article 57) seems problematic. This procedure actually forces the President to dismiss a member of the Government, but practice tells us that the balance of political power in parliaments is not so clear cut. If 2/3 of the members of a chamber consist of a single party or bloc of political parties, then for a minister to be dismissed there is even no need of a parliamentary vote, as the prime minister can initiate the removal. On the other hand, if the spectrum of political parties in the Parliament varies, opposition parties should give very serious arguments to convince the majority to adopt a motion of no confidence in a minister.

38. Although the amendments improve the provisions of Par. 2, Article 61, it is difficult to agree with the rule that the President may indicate to the Parliament which draft laws are to be examined as a matter of priority. In all countries, the legislature is not only independent in its work, but also a reasonable guardian of public interests. In turn, cooperation among constitutional bodies is based on mutual respect, e.g., the legislature would certainly pay special attention to a draft law even if the President were to voice concerns over insufficient regulation of certain issues in a public address.

39. The amendments to Par. 4, Article 67 and Article 70 are well-considered and welcome as they improve the check and balance system of the branches of state power. The Prime Minister reports on the work of the Government not only to the President, but also to the Majilis of the Parliament (lower chamber). In turn, the Government steps down upon the election of a new convocation of the Majilis of the Parliament.

Amendments in the field of control of constitutionality

40. The President has the right to turn to the constitutional oversight institution and request its opinion about compliance of a law or another legal act or regulation with the Constitution. This approach has been included also in the proposed amendments, i.e. Par. 10.1, Article 44) of the Constitution on the rights of the president, as well as in Article 72 on the powers of the Constitutional Council. This proposal can be supported. Further consideration could be given to a possibility to extend this right to appeal on already enacted legislation to the Parliament and to a relevant number of members of the Parliament as well to develop stronger constitutional review system in the country.

41. Paragraph 3 of article 91 of the draft gives the Constitutional Council the power to review all the Constitutional amendments before their adoption in regard to

their compliance with requirement of Par. 2, Article 91 providing that the provisions on the unitary nature of the state, its territorial integrity, its form of governance and independence cannot be changed. This amendment is also a positive step; however, it would be advisable to complete this list with a reference to the democratic form of government and unalienable constitutional rights.

Amendments concerning the judiciary and the Prosecutors office

42. The proposed amendment to Par. 3, Article 79 that leaves the requirements for the appointment of judges to be provided by law can hardly be considered as an improvement *per se* but does not contradict the practice in a number of European countries. However, any constitutional law should be drafted with due consideration of potential risks to judicial independence.

43. The new wording of article 81 excludes the supervision power of the Supreme Court over lower courts. This is positive which will have to be reflected in the implementing legislation.

44. If compared to the existing constitutional provision, the powers of the Prosecutor's Office (still covered in the Constitution's Section on Judicial Power) covered by the provisions of Article 83 go in the right direction. Leaving the detailed description of the powers of the prosecution to the specific law facilitates any future reforms of the institution. However, certain considerations could be useful in respect of the proposed wording of the new Article. Firstly, the Prosecutor's Office is tasked with the oversight of conformity with the law (beginning of Article 83), which would imply that the Prosecutor's Office is primarily concerned about lawfulness, not solely the interests of the state. Secondly, in civil cases, and especially in administrative (public administration) cases, a prosecutor's defence of the interests of the state would definitely put the other party to the case in a vulnerable position (loss of procedural balance). Thirdly, in the relevant areas of law the interests of the state should be represented by an official from the public institution in question. Finally, the defined task of a prosecutor should be accepted only if it applied to special or exceptional cases. For instance, by maintaining not only an accusation in a criminal case, but also by claiming a compensation for the damages suffered by the state. Further consideration of limitation of supervision powers of the prosecutors not only in legislation but also on a constitutional level would be a positive step in line with the international standards.

Local self-government

45. The Constitution of the Republic of Kazakhstan is supposed to keep the current procedure for appointment of akims of regions, major cities and the capital. The procedure for appointment or election to the position of other administrative-territorial units' akims is to be established by law and not by a statutory act of the President.

46. Thus, certain centralization of public administration at the so-called "middle-level" is clearly preserved. It is still unknown what will be the procedure for filling vacancies of akim positions of other administrative-territorial units. However, referring this matter to the Parliament, which will make decision by adoption of a law, indicates as a whole a trend towards the democratisation of form and procedure of addressing this issue.

47. At the same time there is some inconsistence in the proposed wording of the Article 87. In accordance with the par. 4 of the Article 87 of the draft "the akims of other administrative- territorial units are appointed or elected to office pursuant to the procedure established by law. The President has the discretion to release akims from office".

48. However, if the procedure for the appointment or election of akims of other administrative- territorial units is determined by the law, it would be logical if the release of akims from office was the subject of legislative regulation too. It would be reasonable if it was the law that authorized the President to release akims from office in certain cases. This would improve the stability and certainty in the relationship between the authorities.

49. The draft proposes to revise the procedure for early termination of the powers of maslikhats. In this regard, the new paragraph 5 of the Article 86 of the Constitution, as opposed to the existing practice, proposes to establish that the powers of a maslikhat shall be terminated early by the President of the Republic after consultation with the Prime Minister and the Chairs of both chambers of the Parliament.

50. Undoubtedly, this procedure is in general more democratic in nature than the current one because there are elements of collegiality in the decision making process, and in this regard it can be supported. Engaging other public bodies in the procedure for the early termination of powers of maslikhats, will be a platform for a more objective assessment of the circumstances that require early termination of powers. Meanwhile it would be preferable if some statutory act (law) gave an indicative list of grounds for such early termination of maslikhat's powers.

V. Conclusions

51. The proposed constitutional amendments submitted for review represent a step forward in the process of democratization of the state. Revision of the competences of the branches of power and setting up a system of checks and balances is a difficult task. Many aspects of these efforts can only be assessed over time, when practical experience has revealed the most appropriate approach, taking into account historical development and traditions, societal development, the society's attitude towards the processes around, as well as international developments. But there can be no doubt that the reform goes in the right direction and constitutes a clear step forward. Other steps should follow in the future.

52. As announced by the representatives of different institutions of Kazakhstan during the visit of representatives of the Venice Commission to Astana in February 2017 the proposed amendments will be followed by significant changes in national legislation. The Commission remains at full disposal of the authorities for further co-operation in the field of constitutional reform and any further work concerning its implementation.

Opinion on the draft Administrative procedure and justice code

Adopted by the Venice Commission at its 116th Plenary Session
(Venice, 19-20 October 2018)

on the basis of comments by
Ms Taliya KHABRIEVA (Member, Russia)
Mr Johan HIRSCHFELDT (Substitute Member, Sweden)
Ms Slavica BANIC (Former Substitute Member, Croatia)
Mr George PAPUASHVILI (Former Member, Georgia)

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I. Introduction

1. By a letter dated 26 June 2018, Mr M. Beketayev, the Minister of Justice of the Republic of Kazakhstan requested the opinion of the Venice Commission on the "Draft Code of Administrative Procedures" (CDL-REF(2018)037).

2. Ms T. Khabriyeva, Mr J. Hirschfeldt, Ms S. Banic and Mr G. Papuashvili acted as rapporteurs on behalf of the Venice Commission.

3. In August 2018 the Commission addressed to the authorities a list of issues which needed clarification. The replies to this questionnaire were taken into consideration during the preparation of the final version of the opinion. On 28-29 August 2018, Ms S. Banic, Mr G. Papuashvili and Mr S. Kouznetsov from the Secretariat of the Venice Commission visited Kazakhstan and had an opportunity to exchange with Mr M. Beketayev, Minister of Justice, Mr. Z. Asanov, Chairman of the Supreme Court, Mr T. Donakov, Chairman of the High Judicial Council, Ms A. Rakisheva, Deputy Head of the Presidential Administration and national experts involved in the process of drafting of the Code on these issues. The delegation is grateful to the Kazakh authorities for the excellent co-operation before and during the visit, as well as during the preparation of the text of the opinion.

4. This Opinion is based on the English translation of the draft law provided by the Kazakh authorities, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

5. The proposed Draft Code is a very detailed and complex document. It is not the task of the Venice Commission to provide detailed comments on the entire text. It has to limit itself to the main recommendations in the light of the rule of law principle.

6. The present opinion of the Venice Commission, which was prepared on the basis of the comments submitted by the experts above, was subsequently adopted by the Venice Commission at its 115th Plenary Session (Venice, 19 October 2018).

II. National context

7. In recent years the authorities of Kazakhstan engaged in a number of legal reforms aimed at modernising the procedural legislation. The law on administrative procedures which had been adopted in 2000[1] revealed a number of shortcomings that led to the preparation of the examined text.

8. The idea of creating a codified act, regulating the administrative proceedings, was expressed eight years ago in the Concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020 adopted by the Decree of the President of the Republic of Kazakhstan on 24 August 2009[2]. In particular, the Concept noted that administrative proceedings should become a separate branch of justice, and the administrative procedure code will be "the most important piece in the development of administrative procedure law".

9. The examined draft "Administrative procedure and justice code" (hereinafter, the draft Code) has a broader subject of regulation than was intended by the 2009 Concept. It integrates administrative procedures, as well as administrative court proceedings on resolving disputes in the field of public relations. In addition, different levels and spheres of interaction between administration and individuals are regulated through a large variety of legal instruments. According to the Government Decree of 26 December 2002, N1378, "On the classification of legislation branches of the Republic of Kazakhstan" the issues of public administration are referred to the legislation on the state and social order, and the legislation on administrative offenses is an independent branch.

10. Currently, proceedings on administrative offences are regulated by section 4 of the Code of the Republic of Kazakhstan on Administrative Offences adopted on 5 July 2014 (N 235-V). According to the draft Code, it applies to "relations arising in the realisation of administrative procedures", with the exception of relations regulated ... by legislation on administrative offences" (par. 3 of article 3 of the draft). The establishment of administrative procedures to ensure the smooth functioning of state bodies, prompt management decisionmaking by public administration, respect for the rights and freedoms of citizens, protection of state interests, prevention of the use of public officials' powers for non-judicial purposes are also regulated by the Law

[1] *In 2010, OSCE/ODIHR prepared an opinion of the 2010 version of the draft law on administrative procedure. http://www.leaislationline.org/topics/country/21/topic/83.*

[2] *Decree N° 858. http://adilet.zan.kz/eng/docs/U090000858*

of the Republic of Kazakhstan of 27 November 2000 (N107-P) "On Administrative Procedures".

11. The administrative reform was driven by the desire of the authorities to optimise and simplify the administrative procedures. The draft Code regulating various administrative actions and administrative complaints on the basis of a uniform procedure is part of this ambitious process. The 2017 constitutional reform gave an additional impulse to these reforms.[3]

12. According to the information received by the rapporteurs the text of the draft administrative code was made available for comments from national legal community and non-governmental entities. The drafters informed the representatives of the Commission that the text would be sent to parliament in December 2018.

III. Council of Europe standards and recommendations

13. The Republic of Kazakhstan is not a member of the Council of Europe. However the drafters of the Code tried to take into account the international standards in the field of administrative law and most provisions of the draft are consistent with the Council of Europe objectives and recommendations in the sphere of legal enforcement of the rights and freedoms of individuals in their relations with the state through effective public administration and administrative justice. General minimum standards for a proper administrative procedure, developed in the framework of the Council of Europe, are embodied in such documents as the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, XI.1950), Recommendation No. R (87) 16 of the Committee of Ministers to Member States on administrative procedures affecting a large number of persons (adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies), the Council of Europe Convention on Access to Official Documents (CETS No.205), Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials (Adopted by the Committee of Ministers at its 106th Session on 11 May 2000), the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108) (Strasbourg, 28/01/1981), Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties (Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies), Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies), Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies), Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration.

[3] *In 2017 the Venice Commission has adopted an Opinion on the amendments to the Constitution of Kazakhstan CDL-AD(2017)010 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)010-e .*

14. In 2017 the Commission adopted an opinion on the draft law of the Republic of Kazakhstan on administrative procedures.[4] The text examined in this opinion integrates elements from this text and takes into account some of the recommendations made by the Commission last year. The joint OSCE/ODIHR and Venice Commission Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan (CDL- AD(2011)012) is also relevant for the purpose of the review of the draft Code.

15. During their work on the text of the opinion the rapporteurs also used other international standard-setting documents and recommendations of European and international organisations, notably the Charter of fundamental rights of the European Union,[5] UN Human Rights Committee General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial[6], OSCE/ODIHR Guidelines for monitoring administrative justice[7] and OSCE/ODIHR on the draft Law of the Republic of Kazakhstan on Administrative Procedures.[8]

16. Taking into consideration the complexity of the reviewed document, general issues of the structure and main approaches taken by the drafters will be examined first. Certain provisions of the draft will be considered article by article in a separate section of this opinion, providing where necessary references to other parts of the law and relevant legislation already in force. The detailed nature of some comments serves the only purpose of assisting the authorities in improving the provision of the draft using the positive experiences from other legal systems and international standards in the field of administrative procedure.

IV. General comments

17. The new Code takes a unified approach to the public administration and the administrative justice system by regulating the administrative procedures and administrative court proceedings together in one legal act. This is a completely new approach to law-drafting. Usually countries, especially those of continental (civil law) legal tradition, have separate administrative procedural laws and laws on administrative court proceedings. Since there are significant differences in principles governing the administrative procedure and administrative court proceedings, *the Venice Commission is of the opinion that a more appropriate solution would be to regulate them separately.*

18. The draft code provides a detailed description of the scope of the legal act at hand in articles 1-4. In particular, it lays down the rules of application of administrative provisions, also, the rules dealing with conflict between normative legal acts of equal force and the rules determining the application of legal analogy. It should be noted positively that such rules seem to be clear and they will help to avoid potential conflicts between legal norms or if that happens, they are likely to provide a framework for resolving of any inconsistencies in the procedure.

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[4] *Doc. CDL-AD(2017)008, Opinion on the Draft Law of the Republic of Kazakhstan on Administrative Procedures.*

[5] *Charter of fundamental rights of the European Union, Article 41 – Right to good administration and Article 47 – right to an effective remedy and to a fair trial.*

[6] *See http://www.un.org/en/ga/search/view doc.asp?symbol=CCPR/C/GC/32 .*

[7] *https://www.osce.org.*

[8] *Ibid. Opinion GEN – KAZ/170/2010 (AT).*

19. However, this Code, if adopted, will require harmonisation with other already existing pieces of legislation. For example, there will be a need, among other issues, to make correlating changes to the Article 8 of Law of the Republic of Kazakhstan of April 6, 2016 N 480-V "On Legal Acts". This article establishes a closed list of public relations, the legal regulation of which is carried out in the form of the code. According to this article, the code can be used only to regulate public relations related to the imposition of administrative responsibility; the possibility of adopting a code to regulate administrative procedures is not specified.

20. According to Article 3 of the draft Code, it should establish the functions of state bodies. But the content of the Code does not define the functions of state bodies; Article 63 only lists their types. Moreover, as follows from article 5 of the draft Code, "the competence, powers, functions and tasks of the state body are established in the Constitution, laws and other normative legal acts adopted by the President, the Government, the higher central state body in relation to it". In addition, the principle of "clear competence" of state bodies, existing in the administrative law of Kazakhstan, suggests that "all the powers of state bodies should be defined in the legislation or in other regulations (in other words, any actions not expressly provided by law are prohibited). Thus, this principle assumes the most complete description of the powers of state bodies at the level of the law. *In this regard, the Commission believes that the functions of public authorities concerning the administrative procedures should be as detailed as possible in the text of the Code in accordance with the requirements of article 3.*

a) The structure of the Code and main definitions used in its text

21. The draft Code envisages some of the key principles that are characteristic of administrative procedure and proceedings. In particular, the Commission welcomes the inclusion of the following principles: the principle of proportionality (Article 17), that of reliability (Article 21), observance of reasonable time (Article 11) etc. These principles would serve to establish common standards of application of administrative rules, which will help to ensure legal certainty.

22. Moreover, it should also be underlined that modern administrative law aims at fair and just procedure in the framework of good governance. This guarantee implies the right of an individual to access/petition an administrative body. Accordingly, while the Article 9 of the daft Code guarantees the right of access to court, it is also important to include in this context an individual right to petition administrative authorities, as a key element of a democratic state conceived in the rule of law. Furthermore, Article 16 of the daft Code deals with the right to appeal court decisions. As it already was mentioned above, it is no less important to ensure guarantees for effective participation in the procedure before an administrative body. *The Commission recommends including in the text in a clear way the right of the individual concerned by an act or a decision of a public authority to challenge it through an effective administrative procedure*.

23. The outline and the provisions of the draft Code are in general comprehensive and mostly clear. The main principles are well presented and drawn thoroughly. The draft is however characterised by a legislative technic in which the provisions are written very exhaustively with a lot of reiterations instead of the use of cross-references between chapters and single provisions. In addition, some provisions in the general part

(for example, see Article 10) go beyond the notion of legal principles and objectives and embrace concrete procedural rules which are later repeated in articles on concrete procedures. *The Venice Commission recommends to simplify the presentation of the legal principles and to place the procedural rules into respective articles of the Code. This approach could contribute to normative consistency, simplicity and transparency of the text.*

24. There are three kinds of administrative procedure in the Code: the internal administrative procedure (Chapter 10 – Articles 58 – 68), administrative procedure (Chapters

12 and 13, Articles 69 – 94) and simplified administrative procedure (Chapter 14, Articles 95 – 98). While the administrative procedure and simplified administrative procedure deal with "administrative cases concerning individuals" (the latter, though, in specific manner), the internal administrative procedure regulates the internal relationship, communication and flow of documents among the administration, i.e. state and other respective bodies. In spite of the fact that similar provisions exist in the current Code on Administrative Procedure (adopted in 2000), this kind of procedure by its content, structure and form, should not be part of the Code. Due to its normative particularities it "breaks" the structure of the Administrative Procedure Code as it refers to situations and relations that are not directly connected to the concept of administrative procedure or court proceedings directly concerning individuals and other private parties. *The Venice Commission recommends to review the possibility to extract this part of the draft Code into separate legislative act. This approach, if accepted, would entail changes in the Article 5, which gives the main definitions of the draft Code.*

25. It is widely accepted that public administration should be transparent and easily accessible to the public. This implies the guarantee of an individual to be able to freely access information, documents kept by administrative bodies save for instances when such information may contain state, professional or commercial secrets. It is of utmost importance to determine the rules of access to information in administrative bodies in some detail with the guarantee that any denial by an administrative authority has to be motivated *(the principle of publicity (transparency*).

b) The role of the prosecutors

26. Traditionally in Kazakhstan the prosecutors had a very strong procedural position, including in administrative procedure and court proceedings, also outside criminal procedure. Their powers to defend interests of individual persons resembled partly to the role of ombudsman. This was confusing and counterproductive in the sense of competences of these two bodies. The position of the prosecutor in the administrative procedure and/or proceedings could be the protection of the state interests and depending of the case, the public interest, like for example in extraordinary circumstances (protection of the rights of minors and individuals from certain particularly vulnerable groups).

27. The Venice Commission has always had a critical view on the public prosecutor competences outside the criminal procedure.[9] Several provisions of the draft Code give

[9] *See among other documents doc. CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, adopted by the Venice Commission – at its 85th plenary session (Venice, 17-18 December 2010).*

the prosecutors a number of powers within the administrative procedure (Articles 35, 36 or 99 par 2). It has to be noted that in the modern European administrative procedure legislation and practice, a prosecutor as part of administrative proceedings is largely unknown.

28. It is true that under the present draft Code, prosecutors are not empowered to be involved in administrative proceedings on their own initiative without judicial decision; however, *the Commission recommends to further reconsider whether prosecutors should play such a significant role on the side of citizens in administrative proceedings.*

c) Administrative discretion

29. "Discretion" could be seen as a term that mainly describes the area, within specific frames/limits prescribed in the legal provisions, in which the courts and other decision-making powers have been delegated a mandate to perform their assessments in substance but in a way that it lives up to the principles of equality, objectivity and proportionality. Discretion within such frames and under these principles is an important and necessary tool for the development under rule of law. The term "administrative discretion" is widely used throughout the draft Code with a rather peculiar legal meaning. Its meaning and application in the text of the draft Code should be further clarified. In the Article 5, par 1 sub paragraph 8 "administrative body's discretion» is defined as a) the right to adopt or not to adopt an administrative act, possibility to choose the type of such an act and its content, and c) right to perform an administrative act(ion). As it can be seen, the definition is rather wide and general and if it is given in terms of the exercise of administrative discretionary power, it is not completely accurate in the text of the draft Code.

30. In that regard, the principle of uniform application of law in the Article 20 expressively refers on the exercise of the administrative discretion; in the Article 23 which defines administrative discretionary procedure, it is provided the obligation of administrative body to exercise administrative discretion within the limits established by the legislation of the Republic of Kazakhstan and that adoption of administrative acts and committing actions on the basis of administrative discretion must be consistent with the purpose of this authority; in the Article 135 the reconciliation is possible if the public body has administrative discretion while in the Articles 131 and 172 the court is obliged to check whether the limits of administrative discretion are exceeded or whether the exercise of the discretion corresponds to the purposes of this power.

31. *Having in mind the sensitivity and complexity of this institute (in German theory* "Ermessen" *and in French* "pouvoir discretionnaire') *and the stage of development of the administrative justice in the Republic of Kazakhstan,* the Venice Commission strongly recommends to pay particular attention to this issue, review and clarify the provisions which deal with it, all in order to avoid misinterpretation in future application of the Code.

d) Time limits

32. Chapter 2 of the draft Code defines the main tasks and principles of legislation on administrative procedures and administrative proceedings, including the principle of observance of reasonable time limits. According to Article 11, the legal and factual complexity of the administrative case, the conduct of the participants in the administrative

process and the extent of the exercise of procedural rights and the performance of procedural duties, the procedural sufficiency and efficiency of the court's actions carried out for the prompt consideration of the administrative case, are to be taken into account in determining a reasonable time. The draft Code provides for the application of the category "reasonable time" in the following cases:

- judicial proceedings in the courts of first instance, appeal court, court of cassation shall be carried out within a reasonable time, unless otherwise established (Articles 162, 165);
- if the application does not meet the established requirements, the administrative body or the official return the application to the applicant and indicate what requirements the application does not meet, set a reasonable period for making corrections and explain the legal consequences of non-compliance (Article 73);
- preparation for trial on the received claim is carried out by the judge within a reasonable time, unless otherwise specified (Article 154).

33. In that regard it is recommended that the use of the notion of "reasonable time" does not create undue delays in a way to infringe the right to fair trial.

e) Equality before the law

34. The Venice Commission has always insisted on the application of the principle of equality before the law and the court, and its specification requires significant adjustments. Thus, equality before the courts is understood in the draft Code as a situation when «in the course of administrative proceedings none of the individuals, legal entities and state bodies may be given preference» (Article 13 par 2). However, the Code initially lays down the active role of the court in the administrative proceedings (Article 10) and implies active actions of the court to collect evidence regardless of the procedural activity of the parties. Thus, this type of administrative process acquires some features of investigation, when the search for objective truth prevails over the implementation of the principle of equality of the parties in the process. In addition, the administrative proceedings should take into account the actual inequality of the parties (public authority against the individual). This fact implies the court's efforts to establish equality of procedural rights and opportunities. As the Human Rights Committee rightly points out, *the equality of the parties before the court always implies "the right of equal access and equality of arms",*[10] *with differences of treatment being permissible if they are "provided for by law and can be justified on objective and reasonable grounds*",[11]

f) Definition of an administrative body

35. Article 5, par 1. sp 10 "The definition of state body" (defining functions and referring to regulation) goes beyond the usual definition in a legal act. In Article 30 paragraph 1 of the draft Code an administrative body is defined as "a public body, a local authority, as well as other organisations which are authorised under the laws of the Republic of Kazakhstan to perform activities in the sphere of state governance of

[10] *Human Rights Committee-General Comments No. 32 – right to equality before the courts and tribunals and to a fair trial, Para 8.*

[11] *Ibid, Para 13.*

aimed at ensuring the interests of state and public (public functions)".In that regard, the attention has to be drawn to the Article 63 which also defines "State body functions", however from a different point of view. *In order to avoid misinterpretation, the norms should be harmonised, supplemented or referred to each other respectively.*

36. It can be concluded from the Article 30 provision that its initial part provides an organisational definition of an administrative body ("a public body, a local authority"), whereas thesecond part encapsulates the functional notion of an administrative body ("other organisations"). It is important to specify the second part of the definition due to the broad nature of other organisations that may, in certain circumstances, perform administrative functions. *It is advised to change the words of "other organisations" with "any other legal persons". The latter would imply legal persons created under private law, which in accordance with existing legislation could be given (delegated) administrative functions.*

37. It is worth noting that in practice private entities are often delegated with public functions when special expertise is needed and the creation of extra public entity requires additional finances, when such functions are likely to be performed more efficiently by private bodies. Accordingly, it is hardly possible for a legal act to exhaustively define the list of such entities that would fall under the notion of administrative body. In this regard, the guiding factor should to be the functional notion of the administrative body, which would look at the entity (legal person) at hand in order to identify whether it performs public functions.

38. One of the possible ways to deal with the delegated administrative powers could be administrative agreements. In order to ensure public administration is more effective, administrative body is normally authorised to conclude administrative agreement. It should be noted that a major criterion to distinguish the nature of the administrative agreement is its objective, namely, whether it implies discharge of administrative functions. Hence, it is the subject matter of a given agreement that would distinguish the administrative agreement from other types of agreements. The administrative body utilises the administrative agreement to delegate administrative functions to the party – a private entity or an individual(s) – so that delegated functions are discharged in a more effective manner. Kazakhstan could consider this mechanism in the course of the reform of administrative legislation.

g) Administrative action (inaction)

39. Another term that is widely used is "administrative action (inaction)» which is occasionally shortened to "action" with, in the brackets set term, "inaction". According to the Article 99, it seems that the only case when the administrative action can be appealed is "in an administrative pre-trial order". The draft Code however does not contain detailed provisions on administrative pre-trial order.

40. The appeal procedure against administrative action to a large extent is the same as the appeal procedure against the administrative act, except for suspension effects of the complaint, which according to the Article 104 do not exist.

41. Review of the administrative court proceedings on the other hand, shows that there is a right to lodge a claim for the commission of an action (Article 150). Nevertheless, provisions which deal with this issue do not mention or refer to the administrative pre-trial order.

42. It is therefore recommended to take a closer approach to administrative pre-trial order since this "poor reference" or mentioning of it, in the appeal in the framework of an administrative procedure, and without proper determination in some more provisions, might cause misunderstanding on the rights of the participant related to the administrative action in general. Namely, there is an impression that all administrative actions are eligible for the claim in administrative court proceedings. This concern is well reflected in provisions which allow "other participants[11] in the administrative procedure to "lodge complaints against actions or inactions of administrative body pertaining to his or her rights and lawful interests".

43. There are some additional issues which could be important for the respect of the rights of the applicant unaddressed by the draft Code. For example, does a higher ranking official has the power to give instructions to the subordinate official on the way he/she should decide in a given case, overrule his or her decision or transfer the case to another official. The second question is whether a higher ranking official can take a decision which normally is part of the attributions of a lower level official.

44. Another important issue concerns the absence of any indication of the timeframe for consideration of an administrative complaint within different levels of public administration. *The Code should include provisions on the timeframe for this kind of review procedures.*

h) Initiating the administrative procedure

45. Article 5 providing a definition of terms *"recommendation, proposal, response"* combined with *"message"* from the Article 70, establishes the grounds for initiation of an administrative procedure. These actions are dealt with in the framework of a simplified administrative procedure. Although in their essence they resemble more to "civic actions", Article 98 assimilates them to the administrative case. Decisions by which they are solved are: "explanations on the substance of the appeal"; "taking to the notion" and "discontinuation of the simplified administrative procedure".

46. Simplified administrative procedure is usually foreseen for the cases which do not demand an oral hearing, which could be solved on the basis of generally known facts to the administrative body or which, according to the data available, are to be in favour of the applicant. This is confirmed partly in the provisions for administrative court proceedings which foresees that kind of court proceedings. The only explanation for such approach might relate to the invalidation of the Law "On the Procedure for Consideration of Appeals from Individuals and Legal Entities" (No. 221, 2007).

47. It is recommended to review whether these so-called actions and their solutions should be considered as an "administrative case" (since they do not correspond to its meaning from the Article 5), denying thus the possibility to provide the simplified administrative procedure for the situations which deserve easy and economical solution.

48. The draft Code expressly refers (Article 2 p. 2) to the application of Civil Procedure Code's provisions and a large part of administrative court proceedings provisions directly refers to the application of provisions of this Code. Still, the rest of the provisions that are regulated as administrative procedural ones, resemble to civil proceedings rules and are structured to form the impression that administrative dispute is conducted as two party legal relations with large freedom in disposition with

procedural rights. The representatives of the authorities explained this approach by the fact that administrative justice is a quite new institute in Kazakhstan's legal order and that adaptation to the new circumstances is bridged by this reference. Also, it was said that one part of judges who will be in charge with conduct of proceedings will stem from judges specialised in civil proceedings.

49. As much as this approach should facilitate the adaptation and will for sure enable the development of administrative justice, there is a strong impression that the core of administrative court proceedings – *the review of administrative act and its legality* came into second plan and that "dynamics" of civil proceedings took over the administrative one in too large extent. This can be well seen from the provisions which regulate burden of proof, collection of evidence, pre-trial hearing etc. As it has been pointed out in paragraph 34 of this opinion equality of the parties before the court *always implies "the right of equal access and equality of arms", with differences of treatment being permissible if they are "provided for by law and can be justified on objective and reasonable grounds".*

i) The jurisdiction of administrative courts

50. One of the most important aspects of administrative procedure is a clear determination of jurisdiction, which concerns not only territorial and judicial jurisdiction, as regulated by the present draft, but also jurisdiction based on subject matter.

51. The draft Code could specify in more detail which forms of administrative action fall within the scope of judicial review by administrative courts. Provided the forms of administrative actions as it is under the present draft remain, it would seem that administrative courts should be entitled to hear cases with respect to the legality of administrative – both general and individual- acts, conclusion, termination and consideration of administrative agreements, the obligation of administrative authorities to reimburse/undo damages, adoption/issuance of administrative acts or performance of other actions pertinent to administrative functions.

52. A specific provision concerning jurisdictional matters could include the rule according to which administrative courts will be entitled to consider cases that emanate from administrative legislation. This could help to ensure clarity as to delimitation of civil, criminal and administrative disputes. It is further advised in this context that separate provisions are included in the draft Code with respect to judicial review of the legality of each forms of administrative action. Correspondingly, different types of administrative claims should be addressed in different articles of the draft Code, and while the present draft differentiates between various types of claims in different articles, these provisions should also include admissibility criteria for each type of claim. Moreover, *the specific time limit should be introduced for the court to check the admissibility of a case, as well as respective procedures to consider a claim in this regard should be put in hand.*

V. Specific comments on the provisions of the draft Code

53. **Article 2, par 1** stating on the supremacy of the provisions of the Constitution as the basic and highest legal act within the legal order of the Republic of Kazakhstan does not allow neither conflict with ordinary legislation nor it brings into question the prevalence of its norms with it. *Therefore it is recommended to omit the second sentence*

of par 1 which reads "In case of conflict between the provisions of this Code and the Constitution of the Republic of Kazakhstan, the Constitution provisions will prevail".

54. **Article 15 par 5** provides that "judicial acts shall be sent by the court to the participants of the administrative process within three working days from the date of final production". In this regard, the Venice Commission noted that the time of preparing a judicial act depends on the technical capabilities and workload of the court, thus, the wording proposed by the Code, allows varying significantly the time of the beginning of the period – three days. *It is proposed to provide for a reasonable period of time, which begins from the moment of the final decision on the administrative case or from another precisely defined date.*

55. **Article 16** of the draft Code establishes the principle of freedom of appeal against judicial acts. At the same time, the draft Code does not mention the freedom to appeal an administrative act in court. According to Article 99, the participants of the administrative procedure have the right to appeal the administrative act, refusal to adopt an administrative act, administrative actions in the administrative (pre-trial) order. *It is recommended to include freedom of appeal against administrative acts in this article of the Code.* Although "the right of access to a court or tribunal is not absolute and may be subject to lawful restrictions",[12] the OSCE/ODIHR 2000 opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures stressed that "almost all administrative acts, including discretionary ones, should be open to judicial review".[13] *The Venice Commission fully shares this position.*

56. **Article 18** declares the principle of prohibition of abuse of formal requirements i.e. abuse of procedural rights. However, no further provision of the draft Code deals with the abuse of formal requirements. This principle remains purely declarative. The OSCE 2000 opinion on the draft Law of the Republic of Kazakhstan "On administrative procedures" pointed to the need to discuss and clarify the goals and principles provided for in the law",[14] so that they do not remain just statements that do not have legal force.» This position remains relevant for the text of the draft Code. Thus, in order to ensure the practical implementation of the principle enshrined in Article 18, one should include in the Code specific provisions concerning the meaning of "abuse of formal requirements", the allocation of typical cases of such abuses, as well as the development of a mechanism to respond to them.

57. **Article 20, par 1** of the draft Code prohibits the administrative authority to adopt: (a) different resolutions in different cases with the same substantive factual circumstances (par. 1); and (b) identical resolutions in different cases with different substantive factual circumstances (par 2). The Venice Commission, in its 2017 opinion on the draft law on administrative procedures of the Republic of Kazakhstan[15], has already expressed its position on these provisions: "on the one hand, it can contribute to the unity of judicial practice in a country where the doctrine of judicial precedent

[12] *In this case, the term «appeal» means the right to appeal administrative decisions to the court. See: OSCE/ODIHR. Guidelines for monitoring administrative justice. P. 59.*

[13] *OSCE ODIHR Opinion GEN – KAZ/170/2010 (AT) on the draft Law of the Republic of Kazakhstan on Administrative Procedures. Para 97.*

[14] *Ibid, para 27.*

[15] *Opinion CDL-AD(2017)008 on the Draft Law of the Republic of Kazakhstan on Administrative Procedures.*

is not applied. On the other hand, these provisions do not ensure compliance by the administrative body with the principle of proportionality in the administrative procedure. The principle of equal treatment could also be endangered. The burden of assessing the similarity or differences of the substantive circumstances of the case should lie with the administrative authority, but neither the legal doctrine nor the legal act establishes any criteria or methods for such assessment".[16] Any mandate delegated to courts and other decision-making powers within specific frames/limits prescribed in the legal provisions to perform their assessments in substance should respect the principles of equality, objectivity and proportionality. In its 2017 opinion the Venice Commission stressed the need to repeal or amend a similar provision in Draft Law of the Republic of Kazakhstan on Administrative Procedures. This recommendation remains valid for the text of the draft Code.

58. **Article 22** refers to the fundamental principle that "all unrecoverable doubts, contradictions and ambiguities arising during the administrative procedure shall be interpreted in favour of the applicant". However, the addition: "if it does not affect the interests of other participants in the administrative procedure", introduces uncertainty in the implementation of this fundamental right. The article should focus on the issue of how the administrative procedure should be carried out the interests of other participants in the administrative procedure might be affected. This provision could be redrafted in a more clear and unambiguous way.

59. **Article 24** of the draft Code, which defines the language of administrative procedures and administrative proceedings, does not provide for free translation in administrative proceedings. It is proposed to consider the possibility of free translation services for certain categories of applicants, for example, in a difficult situation and are unable to pay for such services. The draft Law on administrative procedures of 2010 provided for the right of all persons who do not have sufficient knowledge of the state language to free translation services.[17] The Venice Commission supports the renewal of this legal guarantee in the practice of administrative procedures.

60. In addition, the draft Code provides for the right of the translator to refuse to participate in an administrative case, if he does not possess the knowledge required for translation; in case of a deliberately wrong translation in the administrative process, the translator shall bear criminal liability (Article 46). Taking into account the possible negative consequences of incorrect translation, it seems that the refusal to participate in the administrative case in the absence of the necessary knowledge for the translation should be regulated not only as a right, but also as an obligation of the translator.

61. According to **article 27** of the draft Code, administrative cases in the court of cassation are heard by at least three judges, usually chaired by the Chairman of the Collegium. In the Supreme Court of the Republic of Kazakhstan, in cases provided for by the Code, administrative cases are considered under the rules of the court of first instance consisting of at least three judges, under the chairmanship, as a rule, of the Chairman of the Collegium. Thus, a general rule is established, according to which the Chairman of the Collegium is the Chairman of the cassation instance. *The objective*

[16] *Ibid, para 18.*
[17] *Ibid, para 41.*

criteria for dealing with (and allocation of) cases could be presented in a more clear way in par 5.[18]

62. **Article 28, par 1** provides that "all judges shall enjoy equal rights in the consideration and resolution of cases before a collegial court". It is proposed to consider a different wording of this provision, for example, pointing to the equality of procedural status or powers of the judges taking part except for the specific tasks of the chairman, since the concept of "equality of rights", "equality" might not be quite correct to apply to judges.

63. **Article 29** – While the Article 36 makes a thorough reference to the position of minors in the administrative proceedings, the Article 29 is silent about it. *It is therefore advised to harmonise the approach regarding the legal and dispositive capacity of persons with lack or with limited legal capacity both in administrative procedure and in court proceedings*.

64. **Article 31** – Since the par 3 assumes submission of appeal and the action of the official, the concern is raised in relation both to the form of resolving the appeal and its legal effect as they can trigger an administrative procedure and an adoption of an administrative act. *Therefore it is advised to consider the essence of this provision in relation to these concerns*.

65. **Article 33 par 3 sp 2** – It is recommended to supplement this provision with reference to the Article 83 which provides the cases when the applicant does not ought to or cannot be heard.

66. **Article 35** – In defining the participants of the administrative court proceedings (Article 36-61), the position of the public prosecutor is not elaborated, i.e. defined. The opinion on the role of the prosecutor has been given in general remarks. *It is advised to precisely define in which situations and to what extent the prosecutor could be a participant in the proceedings.* This recommendation is also valid for Article 36 paragraphs 5 and 6 (rights and liberties of minors).

67. **Article 36 par 3, 4 and 5** – These three paragraphs allow the minors to exercise their procedural rights. In par 3 it is in the case of "emancipation on grounds provided for by the law", in par 4 it is "in cases specified in the law in matters arising from public legal relations" and in par 5 it is *in the authority of the court* "to involve such minors ...themselves in the court proceedings". From the quotes it can be seen that there is no precise and predictable rule on the involvement of the minor in the proceedings. Reference to other laws is vague and the authority (discretional) of a judge to involve them on his/her own initiative could be against the best interest of minor.

[18] *For example, paragraph 27 of the Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) recommends the following: "Case assignment to the judges of the court should not be at the discretion of the Chairperson, but should be decided according to clear and predetermined criteria. The removal of individual influence on the distribution of cases is in practice a very important issue and key to guaranteeing to every person the right to an impartial judge. Random and neutral case distribution can be performed in a number of different ways (by drawing lots, by alphabetical order etc.) as long as the criteria are pre-established, clear and transparent. [...] This does not exclude the possibility of assigning particular types of cases to specialised judges or panels of judges in appropriate cases".*

68. **Article 43 par 3 sp 6** – According to this provision a witness is entitled to lodge complaints against actions or inactions of the administrative body pertaining to his or her rights and lawful interests. *This provision should be reviewed and clarified in order to avoid possible misunderstanding on the limited role of the witness in the procedure or proceedings which is to deliver the knowledge of the facts that are to be determined about in the respective case.*

69. **Article 44 par 2 sp 7** – By this provision the expert has the right to appeal against actions of individuals-parties to the procedure – this is here regarded as a violation of the procedural rights in the process of expert examination. It should however be noted that the expert has no procedural rights whatsoever in the administrative procedure and is a neutral participant. In that regard, the same like by the witness, this possibility of experts should be reconsidered and clarified. *If an expert is hindered in his or her work, the separate procedure could be foreseen and instituted for the protection of the neutrality of the expert, however not in relation of the respective administrative case.*

70**. Article 45 par 2 sp 7 and Article 46 par 2 sp 4** – These provisions refer to Specialist and Interpreter and the concerns expressed for the witness and experts related to submission of complaints or appeals are the same with respect to these two categories of participants in the administrative procedure or proceedings.

71. **Article 48 par 4** – According to this provision, "participants in the administrative proceedings are eligible to conduct their cases in court personally or via representatives". For the purpose of clarity and exclusion of any possible misinterpretation, *the Commission recommends to use the terminology from the Article 35 or refer to it, in order to avoid the opinion that even other participants, i.e. witnesses, experts, etc. could be represented via representatives.*

72. **Article 48 par 7** – The Venice Commission recommends to review the provision on the involvement of the prosecutor in the administrative proceedings on the side of the plaintiff. A very strong and quite independent position of the prosecutor on the side of the plaintiff raises the concern of both judicial and prosecutorial discretion which departs from the draft Code established principles. The judicial discretion is recognised and limited in the possibility of the court to "impose" prosecutor as the plaintiff's representative.

73. **Articles 50-57** – It is recommended to change or supplement the titles of these different articles by using the terminology of administrative procedure and administrative court proceedings. Namely, the title of Article 50 refers to "participation in administrative case" while it concerns the administrative procedure. So, it is recommended to change its title to "participation in administrative procedure". The title of Article 52 should be referring to administrative court proceedings in order to distinguish it from the articles which refer to administrative procedure. It is also recommended *to include experts as participants whose participation can be precluded due to the given reasons in Article 50*.

74. While the articles related to the challenge in the administrative court proceedings are elaborated in a clear manner, provisions providing the rules on application for challenge (Article 55), procedure or ruling on application, the challenge in the administrative procedure do not contain the rules on application for challenge. In that regard, it is recommended to supplement the respective articles on the challenge for administrative procedure as well.

75. **Article 72** – The requirement in subparagraph 8 of par 1, i.e. "any other information prescribed by law" is vague and it may produce indefinite return of application for correction or result with a rejection of the application.

76. **Article 73 par 9** – This provision allows the applicant to withdraw the application before a decision on the administrative matter is made. However, the Article 76 par 1 sp 3 provides that the administrative procedure will be terminated if the administrative body or the official have accepted the withdrawal of the application. It is recommended to review this discrepancy since the latter provision (Article 76 par 1 sp 3) implies *deciding* of the administrative body to accept withdrawal or not.

77. **Article 82 par 1** seems to be a repetition of the Article 33 par 3 sp 3.

78. **Article 83**: The minutes of the administrative procedure session should also contain the notion of presence of all documents submitted for the resolution of the administrative case. Also, it is recommended to review par 2 sp 6 which foresees that minutes of the session contain "decision made as a result of the session" since this phrase may be understood from "decision to postpone the session" up to "decision which is the solution of the case, i.e. administrative act". It is also recommended *to complete the provision with verification of the minutes of the session by the signatures of the participants in order to avoid any future misinterpretation or doubt on its content*.

79. **Article 99 par 2**: It is not quite clear what is meant by the consideration of complaints by the prosecution. The Code provides that complaints forwarded to the prosecutor will be considered according to the Law "On Prosecutor's office". *This raises the issue of the role of the prosecutor as suggested in the general remarks and should be further clarified.*

80. **Article 100 par 1** provides that "the complaint may be filed with the body considering the complaint within thirty calendar days from the day when the participant of the administrative procedure became aware of the adoption of an administrative act, the refusal to adopt an administrative act, the commission of an administrative action." *The Commission recommends to adjust the terminology for filing the complaint with provisions which regulate entry into force of the administrative act (Article 91) and omit the notion "become aware of...".*

81. **Article 100 par 2** – The recommendation is the same as for the Article 26 par 3.

82. **Article 103 par 3** – Submission of the complaint is usually subjected to a rather strict condition of time limit within which it can be exercised. While the complaint because of return could be justified to certain extent, the right of appellant to reinstitute appealing process in the case of previous withdrawal does not contribute to administrative discipline, weakens the appealing process as such and allows misuse of procedural rights.

83. **Article 104 par 1** sets forth that the filing of a complaint in effect entails the suspension of the operation of an administrative act pending the adoption of an appropriate decision, which is an important guarantee for individual rights. However, there can be exceptional cases when an administrative act cannot be suspended. In order to ensure the said provision is clearer it is advised to specify what is meant under "appropriate decision", namely, if the suspension continues until the decision of the court of first instance (trial court) or until the final decision of the case at hand (with effects of *res judicata*). *It might be appropriate to include a more detailed provision on such suspension of an impugned administrative act pending a final decision.*

84. **Article 105 par 1 second sentence** – It would appear as incompatible with the essence of the principle of the right to legal recourse to foresee that official who participated in the issuance of the administrative act could be in situation to consider the complaint against it regardless of the alleged reasons (even as a member of an administrative board).

85. **Article 110** stipulates that an administrative act shall be obligatory for execution within 5 working days. The draft Code does not deal with instances when an administrative act is not executed. There are plenty of examples in practice when administrative acts are not followed voluntarily, which mandates the coercive measure from the state. *Therefore, it is desirable for the present draft Code to determine the authority and extent of state action in this regard.*

86. In the last sentence of the Article 133 it is provided that "within administrative procedure, private interim orders cannot be made". It is recommended to review this sentence since the notion "private interim order" is a quite unclear and vague term.

87. **Article 134** – This article overlaps partly with the Article 15 which provides the obligatory nature of judicial acts. It should be reviewed whether it is necessary to have it here or the respective provisions could be added to the Article 15.

88. **Article 145 par 1** – The subject of the administrative court proceedings is an adopted (issued) administrative act. It is therefore quite burdensome for the plaintiff to *"prove the time when he became aware of a violation of his rights, freedoms and legitimate interests*". It is advised to reconsider this provision.

89. **Article 147 par 2 subpar 3** – According to the Article 38, the defendant is an administrative body or an official, to whom the claim is brought in court. In that regard, it is recommended to omit this part of the requirements for claim, since "the full name of the defendant, location, bank details, business identification number or subscriber's number of cellular communication and the electronic address of the defendant" are not necessary for public body and probably do not exist.

VI. Conclusions

90. The Code on administrative procedures and process will replace a number of laws in the field of administrative procedures and administrative justice, notably the current law on administrative procedures (adopted in 2000, with changes and amendments as to April 2016). It represents an important step in establishing clear rules in the field of administrative procedures and administrative justice. The reform is well prepared and the draft Code is of good quality. The text integrates a wide range of legal provisions filling a number of existing gaps in national legislation and introducing new mechanisms and procedures introducing positive international examples. The text if adopted, could give an important impulse to further reforms in the administrative field.

91. The drafters decided to integrate in a single Code both the administrative procedures and administrative court proceedings which is a completely new approach in the legal tradition of Kazakhstan. This represents a major challenge since the text has to provide a solid and sensible legal background for regulating the relations between individuals and public administration and dispute resolution mechanisms in line with the Constitution of Kazakhstan and international standards.

92. However, the draft could be further improved through a number of adjustments and changes. The Venice Commission's main recommendations are as follows:

a) The Code gives an extensive list of definitions and principles applicable in administrative procedures and judicial proceedings, however in some provisions there is a clear confusion between principles and procedural rules. Venice Commission recommends to simplify the principles and to place the procedural rules into respective articles of the Code. This approach could contribute to normative consistency, simplicity and transparency of the text.

b) The functions of public authorities concerning the administrative procedures should be as detailed as possible in the text of the Code in accordance with the requirements of Article 3.

c) The role of the prosecutors in the administrative procedures and process could be further reconsidered, limiting their intervention to exceptional cases clearly indicated in specific articles of the Code. Current provisions lack clarity.

d) Provisions on administrative discretion should be reviewed and clarified in order to avoid misinterpretation in future application of the Code.

e) The role and procedural status of witnesses and experts in administrative procedures could be further developed in the text of the draft.

f) Provisions on the suspension of an administrative act pending the adoption of an appropriate decision should be clarified.

93. The Venice Commission would like to thank the Ministry of Justice of Kazakhstan, the Supreme Court and other institutions for the excellent co-operation during the preparation of this opinion and remains at the disposal of the authorities of Kazakhstan for any further cooperation in this field.

Opinion on the Concept paper on the reform of the High Judicial Council

Adopted by the Venice Commission at its 117th Plenary Session
(Venice, 14-15 December 2018)

on the basis of comments by
Mr Gunars KUTRIS (Substitute Member, Latvia)
Mr Bertrand MATHIEU (Member, Monaco)
Ms Jasna OMEJEC (Member, Croatia)

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I. Introduction

1. By letter of 25 September 2018, Mr Talgat Donakov, the Chairman of the High Judicial Council of the Republic of Kazakhstan, requested an opinion from the Venice Commission on the Concept Paper on the reform of the High Judicial Council and of the system of selection, training and promotion of judges, hereinafter referred to as the Concept Paper (CDL- REF(2018)049).

2. On 15-16 November 2018 a delegation of the Venice Commission composed of Mr Gunars Kutris, Mr Bertrand Mathieu, Ms Jasna Omejec, accompanied by Mr Grigory Dikov, legal officer at the Secretariat, visited Kazakhstan. The delegation met with the Deputy Head of the Presidential Administration, the Minister and Justice, the Prosecutor General, the President of the High Judicial Council (the HJC), the President of the Constitutional Council, presidents of parliamentary committees, deputies and senators, the president of the criminal chamber of the Supreme Court and other judges of the Supreme Court, NGOs, advocates and other stakeholders. The Venice Commission is grateful to the authorities of Kazakhstan for the preparation of the visit.

3. The English translation of the Concept Paper and of the laws in force was provided by the authorities of Kazakhstan. Inaccuracies may occur in this opinion as a result of incorrect translation.

4. The present opinion was prepared on the basis of the contributions of the rapporteurs and of the information provided by the interlocutors during the visit. It was adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018).

II. Analysis

A. Scope of the opinion

5. As stated in the preamble to the Concept Paper, the goal of the reform is to "increase the level of public trust to the judicial system, to ensure independence of judges, to introduce mechanisms for the selection of judges based on recognized international standards and best international practices, thereby to carry out selection of professional and dedicated judges". This is a very ambitious plan, and most of the proposals contained in the Concept Paper are intended to contribute to achieving these goals, which is commendable.

6. This opinion is limited to the material scope of the Concept Paper, which covers questions related to the judicial careers (training, recruitment, promotion of judges and discipline) and to the internal structure of the HJC. The opinion does not examine all the proposals contained in the Concept Paper, but only the most important and/or problematic ones. Observations formulated in this opinion should not be understood as putting in question the generally positive assessment of the overall direction of the reform.

7. While remaining within the material scope of the Concept Paper, the Venice Commission will also comment, where appropriate, on the broader legal framework. This framework includes the Constitution, the constitutional law "On the judicial system and the status of judges of the Republic of Kazakhstan" (see CDL-REF(2018)051, hereinafter "the constitutional law on the judicial system"), the law "On the High Judicial Council of the Republic of Kazakhstan" (see CDL-REF(2018)050, hereinafter "the Law on the HJC"), and the updated Regulations of the HJC of 2018 (see CDL-REF(2018)60).[1]

8. That being said, this opinion is not a comprehensive evaluation of the system of judicial governance in Kazakhstan. The Venice Commission recalls that in 2011 it adopted, jointly with the OSCE/ODIHR, an opinion on the constitutional law on the judicial system and status of judges of Kazakhstan[2]. Most of the analysis contained in the 2011 opinion is still relevant, even though the Venice Commission notes with satisfaction that the Concept Paper implements some of the recommendations of the 2011 opinion.

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[1] *An overview of the organisation of the judiciary in Kazakhstan was made by a group of the Venice Commission experts in 2016; see the collection «Judicial Systems in Central Asia" (in Russian): https://www.venice.coe.int/images/SITE%20IMAGES/Publications/CApublication.pdf*

[2] *CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan*

9. The Concept Paper does not propose specific amendments to the existing laws. It contains a general outline of the reform, describes its goals and the main principles and ideas which will be implemented in future. Therefore, any critical or positive remark made in this opinion should be interpreted with this in mind: the Venice Commission is only analysing the overall direction of the reform, and not a specific legislative text. If the Concept Paper is ultimately transformed into a draft law, this law will require a separate examination.

10. Finally, the Venice Commission recalls that Kazakhstan is not a member State of the Council of Europe. Therefore, the "European standards" in this area do not have the same authority in Kazakhstan as they would have in a member State. However, as it has been repeatedly stressed during the meetings in Astana, the Kazakh authorities want to gradually move in the direction of the European model of judicial governance. The present opinion will therefore often refer to the European standards and best practices.

B. Institutional arrangements

11. Articles 77 § 1 and 79 § 1 of the Constitution of Kazakhstan proclaim the principle of judicial independence. This is positive. However, it is not sufficient to proclaim that the judges are (or should be) independent. To ensure that a judge is truly independent it is necessary to assess a combination of factors, in particular conditions of his or her appointment, promotion, and dismissal. The Concept Paper makes a number of proposals in this area, mostly concerning the procedure of recruitment of new judges. But before looking at *how* the appointment decisions are made, it is necessary to examine *who* is taking those decisions.

12. The Concept Paper contains several proposals which aim at transferring some functions from the Supreme Court to the HJC. For example, the powers in the disciplinary field (see p. 5 (2) of the Concept Paper) will pass to the HJC. The HJC will form a "reserve list" of candidates for promotions.[3] Furthermore, the Concept Paper proposes to strip the presidents of the respective courts of their power to participate in the plenary meetings deciding on the promotion of judges and give their feedback on the candidates (see p. 5 (7)). This will increase the role of the HJC in the matters related to the judicial careers.

13. In the opinion of the Venice Commission, re-distribution of functions in this area may be envisaged. However, in order to be useful, it should be accompanied by changes in the status of the HJC itself, strengthening its independence. The Concept Paper contains several proposals which go in this direction. For example, it is proposed to expand the HJC by including more judges (who will henceforth be in the majority in the HJC), and more representatives of the legal community. These proposals are consonant with the European approach to the composition of the judicial councils. However, while those amendments are praiseworthy, they are not sufficient to achieve greater independence of the HJC. A more comprehensive reform is required. This reform may be conducted at two levels – constitutional and legislative. In the following section the Venice Commission explores both options; it is understood, however, that a constitutional reform may not be, for political reasons, a realistic option in the near future.

[3] *Being on a reserve list gives the candidate additional chances to be promoted.*

1. The role of the President of the Republic in the questions of judicial governance under the Constitution

a. The role of the President of the Republic in judicial appointment/dismissals

14. Under the Constitution, the President of the Republic plays a central role in the judicial appointments, promotions and discipline. Indeed, certain questions are decided in partnership with other constitutional bodies, such as the HJC, Parliament, or the Supreme Court. For example, as regards the appointment of the lower courts' judges, the President acts on the basis of a proposal by the HJC.

15. However, nothing suggests that the President of the Republic is *bound* by this proposal. The Venice Commission previously expressed preference for the President's powers in this field being essentially ceremonial.[4] As it was explained to the delegation of the Venice Commission in Astana, in practice the President always follows the recommendation of the HJC. That is positive, but it would be better if the limits to the President's veto power be circumscribed in the law. At the very least, the law might provide that the President should give reasons before rejecting a candidate proposed by the HJC.[5]

16. As regards the dismissal of judges, here again the President plays a crucial role. As regards ordinary judges, they are revoked by a presidential decree, on the basis of a decision of the Judicial Jury.[6] Again, it is not clear to what extent the President is bound by the opinion of the Judicial Jury in this respect. In the opinion of the Venice Commission, when it comes to the dismissals, the President should follow the proposal of the Judicial Jury,[7] and, in case of disagreement, should at least be required to state reasons for this. In addition, there should be an appeal against the decision by Judicial Jury to a court.[8]

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[4] *See, for example, CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, § 16; see also CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, § 137.*

[5] *The Venice Commission has already made this recommendation in CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, § 35. See a similar recommendation given in respect of the powers of the President of Armenia in CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), § 35.*

[6] *The Judicial Jury is a body composed of judges of different levels, which is dealing with disciplinary cases and professional evaluations of judges. The decision to remove a judge of the Supreme Court is taken by the President also with the approval of the Senate.*

7 *The Concept Paper proposes to transfer disciplinary powers to the HJC, but this does not affect the conclusion about the role of the President of the Republic in this process.*

[8] *The need to have an appeal to an independent judicial instance becomes more important if the disciplinary functions, as provided by the Concept Paper, are transferred from the Judicial Jury to the HJC. As the Venice Commission held in CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 25 "[...] a judicial council should have a decisive influence on the [...] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available."*

b. The role of the President of the Republic vis-a-vis the HJC

17. Even more importantly, under the Constitution the President defines the composition and the number of members of the HJC.[9] This puts the HJC in a position of subordination vis-a-vis the President. This subordination is further strengthened by Article 4.8 on the HJC Law which prescribes that the members of the HJC are "independent and obey only the Constitution [...], laws [...], and *acts of the President of the Republic of Kazakhstan.''* (italics added). It is not clear what sort of "acts" the law means, whether these are the acts *ad personam,* or only normative acts, and what those acts may regulate.

18. It was explained to the rapporteurs in Astana that until recently the HJC was just a department within the presidential administration. Following a reform it became a separate State institution, but the institutional links with the President remained very strong.[10]

19. In some European countries – for example, in France – judicial councils were originally largely subordinated to the President, and became more independent only gradually. Kazakhstan seems to follow this path, with the HJC being *autonomous* but not yet enjoying the same degree of *independence* as many of the European judicial councils.[11]

20. In most European countries judicial councils have a mixed membership: some members are elected by Parliament (sometimes by a qualified majority), others are elected by the judges, and others are appointed by the President or sit there *ex officio*. The Venice Commission always insisted on the independence of this body, and on its pluralist composition.[12] The baseline is that a substantial proportion of the members of the judicial council should be judges elected by their peers[13] and that Parliament should be able to appoint a certain number of members (the latter guaranteeing democratic legitimacy of this body).

21. The Law on the HJC (Article 4 p. 2) provides that judges and retired judges elected by the Plenary Supreme Court should compose at least half of the composition of the HJC. The Concept Paper proposes to go further and provide that the judges should

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[9] *Article 82 § 4 provides that the HJC "shall consist of the Chairperson and other persons who are appointed by the President of the Republic." According to Article 4.1 of the 2015 HJC Law, the HJC consists of two groups of members, both appointed by the President of the Republic. The first group consists of State officials sitting there* ex officio *(the President of the Supreme Court, the Prosecutor General, the Minister of Justice, the Minister for Civil Service Affairs, chairpersons of respective standing committees of the Senate and the Mazhilis). The second group consists of "other persons", such as legal scholars, lawyers, foreign experts, representatives of the Union of Judges, etc.*

[10] *The subordination of the HJC to the President of the Republic is confirmed by Article 1 of the 2015 HJC law which defines the HJC as "an autonomous state institution established to* ensure constitutional powers of the President of the Republic of Kazakhstan*".*

[11] *This state of affairs has already been criticised in the 2011 opinion, § 20*

[12] *CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, § 30; CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, § 17*

[13] *The Committee of Ministers of the Council of Europe, in Recommendation CM/Rec(2010)12 ("Judges: independence, efficiency and responsibility") indicated as follows: "27. Not less than half of the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary".*

represent a majority of the members (p. 6 (1) of the Concept Paper). In a country where judicial independence is not deeply rooted, such increase of the proportion of judicial members is justified, but the election of the judicial members by a general assembly of all judges (and not only of the Supreme Court judges) would be a better option. However, the overall composition of the HJC is not described in the Constitution. And under the law the judicial members are still appointed by the President, even if the candidates are proposed by the Plenary Supreme Court.

22. In addition, the Constitution does not define precisely the *number* of members of the HJC. Accordingly, the 2015 HJC Law does not prescribe either the number of HJC members or their qualifications. As follows from the English and Russian translation of the 2015 HJC Law, the President has unfettered right to appoint additional members to the HJC from the ranks of legal scholars, advocates, foreign experts, etc. So, it seems that the appointment of the HJC members from the second group (non-judicial members) falls within the President's discretionary power, and their number may vary from one composition of the HJC to another. In the opinion of the Venice Commission, it is quite unusual for a constitutional body to exist without the number of its members being clearly fixed (or at least without having a clear method of defining this number). The very idea of an "institution" implies that its composition is defined either in the law or in the Constitution, and is not left to the discretion of one person, even if this is the head of the State. Absence of a fixed composition undermines the legitimacy of the decisions taken by the body.

23. Furthermore, the law provides for a very short mandate of the members of the HJC (three years) and does not guarantee their tenure. Quasi-total (excluding *ex officio* members) renewal of the composition of the HJC every three years may affect the institutional continuity of this body. The Concept Paper proposes a mid-term renewal of a part of the composition of the HJC (see p. 6 (2)); the Venice Commission is in favour of this proposal but recommends also to extend the duration of the mandate of the HJC members.

24. Finally, it is unclear who may remove members of the HJC before their term, and on which grounds (at least, Article 4 p. 10 of the HJC law is silent on this point, only referring in very general terms to other applicable legislation). Possibly, this power belongs to the President, as the appointing authority, but it is only a guess.

25. All that weakens the independence of the HJC vis-a-vis the President. The rapporteurs were told that in practice the President respects the autonomy of the HJC and that all members nominated by the Plenary Supreme Court were appointed by the President. Thus, there is a sort of a constitutional convention limiting the President's powers. However, there is no guarantee that this convention will be strictly followed by the next President, who will still have the formal powers to appoint and (seemingly) dismiss members of the HJC at his or her will.

26. In conclusion, the Kazakh authorities may consider a more fundamental reform of the HJC, which may require amendments to be made to Article 83 § 3 of the Constitution, in line with the standards outlined above. The new constitutional provision should ensure the pluralistic composition of this body and its institutional and functional independence. That being said, naturally, the national authorities are in principle better placed than the Venice Commission to appreciate whether such a constitutional amendment is, from a political perspective, a viable option.

27. As it was explained to the rapporteurs in Astana, the Kazakh authorities prefer a gradual, evolutionary approach to legal reforms. For example, the fact that the exact composition of the HJC was defined neither in the Constitution nor in the law was not an omission, but a conscious decision to leave this question open, in order to experiment with different compositions and find an optimal solution. This is a prudent approach, which may be appropriate in times of political stability where constitutional conventions are loyally followed. However, the political climate may become more troubled. Thus, even if the constitutional reform is not a viable option in the near future, it is necessary to set out certain basic characteristics of the HJC at least at the legislative level.

2. Possible changes at the legislative level

28. Article 85 § 5 of the Constitution provides that the status of the HJC is to be regulated by law. Thus, the legislator has a certain latitude in defining how the HJC is to be composed, and what status its members enjoy. The current law regulates a large array of questions related to the composition of the HJC (although with insufficient precision in some places, as noted above). This suggests that it should be possible to regulate a lot of issues in the law (without, however, encroaching on the essence of the power of the President to appoint members of the HJC, proclaimed in Article 85 § 4).

29. In the opinion of the Venice Commission, at the legislative level it is advisable to:

- define the exact number of the members of the HJC;
- provide for a longer mandate, with a partial renewal of the membership of the HJC (as proposed already by the Concept Paper);
- introduce guarantees against early removal of members of the HJC, which should be limited to cases of very serious misbehaviour and require a decision of the HJC;
- provide for the *nomination* (even if not the ultimate appointment) of a certain number of members by Parliament, and for the *nomination* of the judicial members by the general assembly of all judges, and not only the Plenary Supreme Court. Judicial members, as proposed by the Concept Paper, may represent the majority of the HJC;
- as to the representatives of the legal community outside of the judiciary (which is already proposed by the Concept Paper), they may be delegated by the respective organisations (the Bar Associations, law schools etc.), subject to the appointment by the President of the Republic.

3. Other institutional changes

30. The Concept Paper contains a number of other proposals related to the organisation and functions of the HJC, which can only be welcomed (see p. 6 of the Concept Paper). Thus, the idea of "digitalization" of the activities of the HJC is welcome (p. 6 (5)). It is reasonable to give the HJC a role in proposing legislative amendments, and the function to present annual reports on the situation within the judiciary (p. 6 (4)).

31. On the last point the Venice Commission notes that the 2018 Regulations on the HJC provide for a permanent Expert Advisory Commission under the HJC, which will advise the HJC on "the most significant issues for the judicial system, including those related to the improvement of national legislation". This Commission includes members of the HJC and some external experts; however, it would make more sense for this Commission to be composed of a majority of experts, who would provide their external point of view to the HJC.

32. Proposal contained in p. 6 (3) of the Concept Paper, namely the question of providing salaries for the members of the HJC representing other legal professions (advocates, legal scholars, etc.), may need a more thorough examination. On the one hand, it is reasonable for all members (except *ex officio* members) of the HJC to have the same status: either a full-time employment, or a part-time participation (in the latter case they may keep their jobs elsewhere). The question is whether the HJC will have enough work to justify full-time employment for all of its members. Moreover, it is unclear whether the salary proposed to the members of the HJC will be attractive enough to guarantee that the best advocates and legal scholars are competing for a position in this body. These factors should be kept in mind while implementing this proposal.

C. Recruitment, promotion and professional evaluation of judges

33. At the outset, the Venice Commission notes that some of the proposals contained in the Concept Paper are aimed at raising the bar for those who wish to become judges. President Nazarbayev, in his annual address to the nation, expressed concerns over the quality of young judges entering the system. That gave impetus to the reform, and explains the general direction taken by the Concept Paper.

34. The President's concerns are certainly well-founded, but it should be remembered that the severity of the selection process is not a goal in itself. It is the result that matters. The selection process should be organised in such a manner as to ensure that only the most knowledgeable, capable and honest candidates become judges. However, if the priorities are set wrongly, or if the method of selection is deficient, some good candidates may be eliminated.

35. There are many models of selection of judges, and, probably, none is perfect. The Venice Commission is not well-placed to propose one particular system, it will only formulate a few recommendations, leaving the rest to the wisdom of the national legislator. That being said, the Venice Commission underlines that the quality of the judiciary also largely depends on the attractiveness of the judicial career for young lawyers. During the meetings in Astana many interlocutors observed that judicial salaries at the level of local courts remain modest. As a result, the most competent lawyers prefer other legal professions. So, probably, the solution to the problem of the quality of the candidates lies partly in the financial sphere.

36. Another preliminary comment is called for. Under the current legislation the system of judicial appointments and promotions is very complex and involves many actors and procedures. This complexity may create an impression that the system is safe, and that it is virtually impossible for incompetent people to become judges. However, this complexity may also become a breeding ground for cronyism and corruption. If the bar is set too high, if the legal procedures are too intricate and if the final decision depends on too many actors, there will always be a temptation to take the path of informal arrangements.

37. In sum, in parallel with making adjustments to the recruitment procedures, as described below, the authorities of Kazakhstan should consider (1) the increase in the remuneration of judges, especially at the lower level, and (2) the simplification of the whole system of recruitment.

1. Recruitment and promotion procedures under the current rules

38. The currently existing system of recruitment of new judges is quite complex. Although the HJC plays a central role here, the opinion of the judiciary about the candidates is also very important; the candidates are appointed on the basis of the recommendations given by the "Council on cooperation with the courts", by the plenary sittings of the regional courts or of the Supreme Court, on the basis of the "personal sureties" of senior judges, etc. The last word in the appointments belongs to the President of the Republic.

39. In order to be eligible, a graduate of a law school has two options: (1) either to pass a "qualification exam", conducted by a qualification commission created by the HJC, or (2) to complete successfully a masters' programme at the Judicial Academy under the Supreme Court, which involves two exams (at the entry to the Academy and after the completion of the course). However, passing a qualification exam or obtaining a diploma from the Academy does not guarantee the appointment – it is only the beginning of the process.

40. After the qualification exam the candidate undergoes a paid one-year internship in courts of different levels. At the end of this internship the candidate has to obtain a positive recommendation from the plenary session of the regional court, which opens the way to his or her participation in a subsequent competition for a particular post. The candidates who obtained the diploma from the Academy of Justice may participate in the competition without the internship.

41. The competition to the judicial positions is conducted by the HJC, which then proposes the candidates for appointment to the President of the Republic. A candidate, before participating in the competition for the entry-level position, should receive a recommendation of the "Council on cooperation with the courts" and of the plenary session of the regional court. According to the figures received in Astana, only about 1/3 of candidates who completed the internship following the qualification exam and obtained a positive recommendation were later appointed as judges as a result of the competition.

42. To be promoted to a position in a regional court, the candidate should have, in addition to the pre-conditions for the initial recruitment, a 5-years' experience as a judge (Article 29 p. 2 of the constitutional law on the judicial system), and has to obtain a recommendation of a plenary session of the respective regional court and personal "sureties" of two regional court judges and one retired judge. To be promoted as a judge of the Supreme Court the candidate should have a 10-years' experience as a judge (including 5 years in a regional court) and similar recommendation of the Plenary Supreme Court and personal "sureties" of judges.

43. Candidates for the promotion to the position of presidents of regional courts and presidents of the chambers of the regional courts and the Supreme Court are proposed by the President of the Supreme Court to the HJC for approval.

2. The proposed reform of the recruitment and promotions

a. Qualification exam

44. The law does not describe the process of examination at the end of the master's program in the Academy. Apparently, those matters are left in the discretion of the

Academy. So, the Venice Commission will not comment on this avenue of obtaining access to the competition. By contrast, the law contains quite detailed rules on the alternative avenue – the "qualification exam". These rules the Concept Paper purports to modify.

45. Currently the qualification exam consists of several stages: a computer-based test of legal knowledge, an oral examination in which the future judge should analyse a hypothetical case, a "psychological test" (Article 13 § 10), and testing with the lie detector (Article 15). The results of the "psychological" and the "lie detector" testing are not binding on the HJC.

46. The Concept Paper proposes, in p. 1 (2), to introduce a new element of the qualification exam: a written essay. This is done in order to check writing skills of candidates, evaluate their literacy and overall intelligence. This is a reasonable proposal.

47. Another proposal (p. 1 (3)) is to broaden the scope of the computer-based test, by including questions related to 11 legal disciplines (and not 6, as it is the case now). The "hypothetical cases" will become interdisciplinary and thus more difficult as well. The Venice Commission does not have any comments on this proposal: this change may have either positive or negative effects, depending on how the questions/cases are selected and formulated. Those who formulate the questions should remember that modern lawyers have access to all sorts of legal databases, and, hence, do not need to memorise the texts of the statutes and precedents. It is more important to check analytical skills of candidates and their systemic understanding of the legal doctrine and the ability to find information quickly. From this perspective, the candidate may be given access to the legal databases during certain stages of the exam, for example when analysing hypothetical cases.

48. P. 1 (4) of the Concept Paper proposes to involve external observers in order to increase the transparency of the examination. It is not specified how these observers will be selected, and what procedural rights they may have. Nevertheless, this is an interesting idea, which is worth exploring further, since it may increase public trust in the selection process.

49. The most problematic proposal is made in p. 1 (1): to make the results of the psychological testing mandatory for the qualification commission of the HJC. As rightly noted in the Concept Paper (p. 1 (1)), a candidate cannot be assessed only on the basis of his or her knowledge; psychological characteristics are also important. However, as transpires from the HJC Regulations (p. 30), psychological testing is to be conducted by professional experts in psychology, not by the members of the qualification commission under the HJC. Furthermore, the methods of testing are unknown, and it is unclear whether they are scientifically sound and well-adapted to the specific context of the judicial work. The Venice Commission agrees that it is important to assess skills and attitudes of candidates, but it can be done by the experienced members of the HJC, in the course of personal interviews[14]. These interviews may be conducted during the competition (see below), or may be a part of the qualification exam.

50. As to the use of the "lie detector", even if the results of this test are not binding, it is a major source of concern for the Venice Commission, since the reliability of this method is open to discussion, and it is unclear how the answers received from

[14] *See CDL-AD(2017)019, Armenia – Opinion on the Draft Judicial Code, § 113*

the candidate in the course of this test may be used. There is a risk that this test will involve irrelevant questions (for example, questions about political preferences of the candidate). Moreover, a lie detector may at most establish whether a statement was accurate but is not useful to evaluate skills of a candidate. The Venice Commission calls on the authorities of Kazakhstan to be extremely cautious with this method; if there is no other way, the results of the "lie detector" test may only be used to trigger additional security checks in respect of the candidate, and should not become a part of the candidate's file accessible to the HJC. But a better solution would be to avoid the "lie detector" test altogether.

51. The Venice Commission observes that each stage of the qualification exam appears, from the law, to be eliminatory (i.e. based on the pass/fail principle). As a result, all successful candidates end up being essentially in the same position; it does not matter how good they were at each stage. What matters is that they all had a necessary minimum grade to pass each step.

52. The question is whether this system guarantees the selection of best candidates. According to the figures communicated to the rapporteurs in Astana, in the recent period only 5 out of 100 candidates passed the exam. One should remember that, in order to be admitted, all 100 candidates should have a law degree and a practical experience of 5 years (for law clerks and court secretaries) or 10 years (in other legal professions). So, only 5% of legal professionals with university diplomas were fit to be admitted to the competition – and, as shown above, not all those who pass the qualification exam succeed in the competition and are appointed as judges.

53. These figures may be a sign that the general system of legal education is not doing well. Therefore, in the first place, it may be necessary to pay attention to the law schools and to improve the quality of legal education there, so that their graduates are not eliminated at the early stages of the qualification exam.

54. Another explanation for those figures is that the bar was set too high, and that the requirements of the qualification exam were too demanding. However, the Venice Commission does not have sufficient information to develop this assumption: it does not know how the questions are formulated, how difficult the hypothetical cases are, etc.

55. Finally, it is not excluded that the very method of the exam is questionable, and that another exam system would give better results. For example, instead of each stage being eliminatory, it is possible to introduce a cumulative score, which would be calculated on the basis of several consecutive tests: written essay, computer-based test, analysis of hypothetical cases, interview (which may replace the psychological test).[15] The cumulative score will help to *grade* all winning candidates.[16] More importantly, the grade received as a result of the qualification exam may later become a major factor defining the success of this candidate in the phase of "competition" (now the results of the qualification exam are just an additional consideration of unknown weight – see Article 18 § 2 (3) of the law on the HJC).

[15] *The system of cumulative score does not exclude that at each stage of the exam the candidates should receive a certain minimum number of points in order to pass to the next level.*

[16] *The term "winning candidate" implies the possibility of elimination of a candidate who did not obtain a minimum number of points at each stage.*

56. The Venice Commission cannot propose a ready-made model of the qualification exam for Kazakhstan. It simply reiterates that the severity of the qualification exam should not become a goal in its own. As an alternative to the current system, where each stage of the qualification exam is eliminatory, it is possible to introduce a system which would result in the grading of all successful candidates.

57. As additional measure to ensure objectivity of the qualification exam, it is recommended to make certain parts of it anonymous, so that the evaluators do not know whose results they are checking. Of course, this would apply only to those parts of the exam where there is no need to have a direct personal contact between the evaluators and the candidate.

b. Internship

58. The constitutional law does not describe the process of internship in courts. The Concept Paper proposes to reform this process, apparently by adding new regulations at the sublegislative level. In particular, it is proposed to adjust the content of the internship in order to give the interns an insight into different specialised areas of law (p. 2 (1)); introduce an interim assessment of the progress of the interns, in addition to the final assessment (p. 2 (2)); introduce incentives for the interns and their mentors (p. 2 (3)), vary the length of the internship depending on the professional experience of the candidates (p. 2 (4)), and involve the Academy of Justice to the process of internship (p. 2 (5)). All those proposals appear on the face reasonable and do not require extensive comments.

c. Competition

59. Competition is regulated by Articles 16-18 of the Law on the HJC. Article 18 § 2 contains a list of criteria for selecting best candidates: solid legal knowledge, high ethical standards and impeccable reputation. With all matters being equal, preference is given to candidates who obtained a master's degree from the Academy of Justice, who have a greater work experience, who have better results of the qualification exam, who participated in the competition for more than 3 times, and who have the better grades in the general law school diploma.[17] However, the relative weight of criteria and of those additional arguments is not specified, at least not in the law.

60. The nomination decision is taken by voting, by a qualified majority of the HJC members present at the session. Following the voting the successful candidates must undergo a "special check", which is conducted by the secretariat of the HJC and, if necessary, by the prosecutor's office. Apparently, following such "special check" the HJC may cancel the nomination decision, although the law does not specify what could be the reasons for the cancellation.

61. The Concept Paper proposes to supplement the competition with several new elements. In particular, it is proposed to introduce *"objective and differentiated"* criteria for selecting best candidates (p. 3 (1)). It is also proposed to introduce *interviews* of

[17] *These additional criteria are applied to the candidates to the entry-level positions in the judicial system. As to the candidates to the positions in the regional courts or the Supreme Court, they have their own list of additional criteria for selection, which includes "the quality of the adjudication". This criterion will be discussed separately below.*

candidates with the members of the HJC as a mandatory step of the competition process (p. 3 (2)).

62. Pursuant to opinion No 1 (2001) of the CCEJ, "every decision relating to a judge's appointment or career should be based on objective criteria [...]." However, a lot depends on what sort of "objective" criteria are used, and how they relate to more "subjective" elements.

63. The qualification exam in Kazakhstan contains elements which can be regarded as "objective" (like, for example, the computer-based test of knowledge of the law). By contrast, the decision to nominate the candidate in the phase of competition is taken by the HJC *by voting*. This voting will necessarily reflect the sum of subjective perceptions (by the members of the HJC) of the moral and professional qualities of the candidate. There is nothing wrong in the appointment decision being based *partly* on such subjective perceptions. It is important, however, that the law describes the relation between more "objective" and more "subjective" elements in the overall assessment of the candidate.

64. The Venice Commission examined a similar situation in an opinion on Armenia,[18] where it reasoned as follows:

"§ 117. It is not excluded that a candidate who received a good grade at the written exam may be unsuccessful at the interview, and, as a result, be downgraded and even completely disappear from the list. A certain measure of discretion and subjectivism is unavoidable here. However, under the Draft Code, once the written exam is over, all candidates selected for the interview find themselves essentially in the same position, and the grades they received do not matter anymore. Or, at least, it is unclear how important the grades are: everything is decided at the interview.

§ 118. Under this system the strongest candidate may be replaced after the interview with the weakest one. That would create a strong impression of arbitrariness, and may jeopardize public trust in the process of recruitment. This would look particularly unfair if there was a big gap in grades between the best candidate who failed the interview and the worst one, who succeeded and was selected in place of the former. The Venice Commission invites the authorities to revisit the selection procedure and address those issues. [...][T]he authorities should reflect on a principle that would permit to commensurate the results of the written exam with the results obtained at the interview. The Draft Code does not necessarily need to address those issues in detail; the task of developing appropriate rule may be delegated to the [Supreme Judicial Council of Armenia]."

65. This analysis is relevant in the context of Kazakhstan. At present, the multi-step appointment process contains both objective and subjective elements.[19] Article 18 § 2 indicates which criteria are used for assessing candidates during the competition, but does not set out their relative weights. As a result, the results of the "objective" assessment may be lost amongst the results of the subjective assessment.

66. Here again, the Venice Commission does not have any magic formula. It is positive that the Concept Paper proposes to introduce more "objective and differentiated" criteria for the selection of judges. Rating of candidates on the basis of their graduation

[18] *CDL-AD(2017)019, Armenia – Opinion on the Draft Judicial Code, § 118*

[19] *Recommendations given by the courts and "personal sureties" given by the senior judges also reflect a more subjective assessment of the qualities of the candidates.*

exam in the Academy of Justice or the qualification exam may contribute to this goal. It is important, however, to specify the respective weight of different elements ("objective" and "subjective") in the final decision.

67. Other proposals of the Concept paper regarding the recruitment process do not raise any questions. The Venice Commission is in favour of making the recordings of the sessions of the HJC available on-line (p. 3 (3) of the Concept Paper): a candidate to a judicial position should be prepared to that kind of public scrutiny. The proposal to indicate in the law specific grounds which prevent appointment of a judge (p. 3 (4)) is also worth praise. At present the law speaks of a security check, but it does not identify factors (besides the candidate's criminal record) which may force the HJC to reverse its nomination decision. It would be good to specify those criteria in the law.

68. The Concept Paper attempts to make the competition procedure more "user-friendly": it is proposed to fix in advance an annual plan of the competitions (which will help candidates to prepare for such competitions more in advance), to shorten the duration of the competition and reduce the number of documents required to participate (p. 4 (2), (3), and (4)). These proposals appear on the face reasonable; indeed, just the description of documents to be presented by a prospective candidate, as enumerated in p. 46 of the current HJC Regulations, runs to three full pages.

3. Opening access to mid-career positions within the judiciary to other legal professionals

69. The judiciary of Kazakhstan is currently based on a so-called "civil service model": to make a career one have to enter the system at the lowest level, and then progress to the regional and then to the Supreme Court. It is impossible for a lawyer with no judicial experience to enter the judicial system directly at the level of a regional court or the Supreme Court. And, naturally, a successful lawyer of 40-50 years of age will not want to become a judge if his or her career is to start at the district court level.

70. The Concept Paper proposes to change this approach, by allowing experienced lawyers to enter the system at the level of the appellate courts (p. 4 (1)). In their 2011 opinion on Kazakhstan the Venice Commission and OSCE/ODIHR recommended that "in order to enrich the judiciary with legal practitioners from other branches of law (e.g. lawyers or prosecutors) it might be considered to permit midcareer entry into the judiciary by expanding the selection criteria accordingly" (§ 37), so, this proposal implements the earlier recommendation of the Venice Commission.

71. The legislator may consider a further opening up of the system, up to the level of the Supreme Court. In the Supreme Court, as a cassation instance, there is a special need for analytically-minded people familiar with complex interpretative techniques. People with other legal backgrounds (like very experienced barristers, for example, or renowned legal scholars, law professors etc.) may, potentially, be a useful addition to the career judges there.

72. Finally, p. 4 (2) of the Concept Paper proposes to introduce competitive selection of presidents of the judicial chambers of the courts of appeal. At present, the competition is organised only for a position of a judge, a president of a district or a regional court, and presidents of the chambers within the Supreme Court. The idea is that presidents of the chambers of the regional courts are also be appointed through the competition by the HJC is welcome.

4. Professional evaluations

a. Interrelation between ethical breaches, disciplinary offences and profession evaluations

73. Professional evaluations are governed by Article 30-1 of the constitutional law on the judicial system. Evaluations are conducted by the Qualification Commission of the Judicial Jury. This commission consists of seven members, all of them judges or retired judges. Between 2016 and 2018 the work of 1,541 judges has been evaluated, which resulted in the recommendation to dismiss five judges for professional ineptitude. The Qualification Commission also gives recommendations to the position of a higher court judge or a president of the court. In the recent period, the Qualification Commission gave positive recommendations to 84% of candidates to promotion, whereas 16% did not receive a recommendation.

74. The constitutional law seems to create a link between evaluation and disciplinary liability. Under Article 34 § 1 (11), the judge may be dismissed on the basis of a decision of the Qualification Commission for "professional ineptitude". It appears that the "ineptitude" may be established following an evaluation conducted under Article 30-1. As a part of the regular evaluations the Qualification Commission considers inter alia breaches of the work discipline and of the ethical rules committed by the judge (see Article 30-1 § 2 (2) of the constitutional la w) . Thus, a breach of ethical rules (as defined in the Code of Judicial Ethics – see Article e 39 § 1) may lead to a bad evaluation which may, in turn, result in the dismissal.

75. The Venice Commission recalls that "detecting wrongdoing should not be the main task of an evaluation".[20] In the 2011 opinion on Kazakhstan, the Venice Commission noted that "evaluating the performance of judges is profoundly different from conducting disciplinary proceedings and it is essential that these mechanisms are kept separate."[21] Furthermore, in a number of opinions, the Venice Commission has criticised the general penalisation of breaches of codes of ethics as too general and vague and insisted that much more precise provisions are needed where disciplinary liability is to be imposed.[22]

76. In a more recent opinion on "the former Yugoslav Republic of Macedonia" the Venice Commission acknowledged[23] that the border between disciplinary liability and bad evaluation is not watertight. A negative performance can originate from other factors than a disciplinary offence – for example, from the sudden increase in the work-load of the judge, shortage of court personnel etc. On the other hand, "this does not mean that bad evaluation can never lead to a disciplinary sanction. The CCJE acknowledges, in p. 29 of Opinion no. 17, that judicial tenure may be terminated where 'the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard, objectively judged.' Thus, for

[20] *CDL–AD(2014)007, § 105*

[21] *§ 58*

[22] *CDL-AD(2015)007, Join opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law, on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, § 50*

[23] *CDL-AD(2018)022, "The former Yugoslav Republic of Macedonia" – Opinion on the law amending the law on the Judicial Council and on the law amending the law on Courts, § 59*

the CCJE, this is a matter of degree: to serve as a ground for dismissal, 'bad evaluation' should convincingly demonstrate total ineptitude of the judge to perform judicial functions." To become a ground for dismissal, the "total ineptitude" should be assessed over a considerable period of time, and the reasons for sub-standard performance of the judge should be carefully examined.

77. Indeed, the standard of "total ineptitude" is a very high one. In the countries where the lack of professionalism of judges is a major problem, one may be think of introducing a gradual system of more lenient sanctions which would be applied to unprofessional behaviour falling short of the "total ineptitude". The question, however, remains how those sanctions should relate to the process of professional evaluation of judges. While some disciplinary breaches may result from the lack of professionalism, in the opinion of the Venice Commission, professional evaluations should be kept separate from the disciplinary proceedings: they have different purpose and are based on different principles. Where there is a risk of a sanction, the situation should be analysed in terms of the disciplinary liability: in particular, the body imposing the sanction should demonstrate the fault of the judge. As the Venice Commission held previously, "[…] only failures performed intentionally or with gross negligence should give rise to disciplinary actions.[24] […]".24 In addition, if there is a risk of a sanction, the proceedings shouldbe accompanied by the appropriate procedural safeguards. In particular, there should be a possibility for the judge to contest the sanction before a judicial body.[25]

78. A fortiori, there may be an overlap between breaches of judicial ethics and disciplinary offences. What is important for the Venice Commission is that the grounds for disciplinary liability are described with sufficient precision in the law itself. The Code of Ethics adopted by the Union of Judges of Kazakhstan cannot be the source of law here; at the best, it may serve as a tool for interpreting the norms of the law on the grounds of disciplinary liability. The Venice Commission discussed this issue at some length in the 2016 opinion on the Draft Code of Judicial Ethics of Kazakhstan.[26]

79. The constitutional law on the judicial system is still flawed in this respect: it does not distinguish clearly between simple ethical breaches, disciplinary offences (which should always entail the examination of the fault of the judge concerned), and bad evaluations. All of these situations may lead, under the constitutional law, to the dismissal of the judge. The Venice Commission invites the legislator to revisit the text of the law in order to distinguish these three types of situations, and to explain how they relate to each other.

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[24] *CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, § 19*

[25] *See CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 23; CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, § 76; the CCJE Opinion no. 3 of 2002 recommends to introduce "an appeal from the initial disciplinary body (whether that is itself an authority, tribunal or court) to a court" (p. 72). The Committee of Ministers requires to provide for an appeal in the case of bad evaluation (see Recommendation CM/Rec(2010)12, p. 58 of the appendix): "the procedure [of assessment] should enable judges to express their view on their own activities and on the assessment of these activities, as well as to challenge the assessment before an independent authority or a court".*

[26] *CDL-AD(2016)013, §§ 20 et seq.*

b. Evaluation criteria

80. The 2011 opinion recommended to include in the constitutional law "basic principles on evaluation criteria". Those criteria are now set out in Article 30-1 § 2; they include: "indicators of the quality of the administration of justice", and compliance with the working discipline and with the norms of the judicial ethics. The Concept Paper proposes to go in the direction of the recommendations of the 2011 opinion by "limiting the grounds for conducting professional assessment of judges and introducing more objective standards, methods and criteria for assessing the performance of judges by the judiciary community" (p. 5 (3)).

81. The Venice Commission supports the idea that the notion of "indicators of the quality of the administration of justice" needs to be developed further in the law. At present, it is not clear what is measured in the course of the professional evaluations, what those "indicators" are. Two observations are called for, however.

82. In some countries, where the judiciary became independent relatively recently, professional evaluations rely heavily on the rate of reversals. The Venice Commission has concerns about this approach: "There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation".[27]

83. This does not mean that the number of reversals is completely irrelevant, but the threshold here should be set particularly high,[28] to become a factor in the evaluation result – otherwise, the risk is to produce a very timid judiciary.

84. An alternative solution would be not to look at the ratio of reversals, but to concentrate at the essence of the decisions taken by the judge and the gravity of errors committed by him or her. A manifestly fallacious legal analysis or irrational assessment of facts in a particular case may tell more about the professionalism of a judge than the average ratio of reversals. But such a system has its weaknesses as well. It will require an in-depth examination of the judgments, which will be more time-consuming and, inevitably, more subjective. What is more important, in such a system one should have trust in the professionalism and impartiality of the evaluators. So, in the light of those considerations, a particularly high and persistent "rate of reversals" may be a more objective evaluation criteria than the quality of the judicial reasoning. That being said, it belongs to the national legislator to select indicators of the judge's professionalism (or a mixture of them), provided that the chosen model does not penalize judges for the reasonable exercise of judicial discretion, even when their decisions are overturned on appeal.[29] Simply put, a judge should have a right to err.[30]

85. As to the individual productivity levels of each judge (i.e. the numerical output of cases), it is reasonable to have it as one of the indicators of professionalism. The rapporteurs of the Venice Commission were told in Astana that, in average, judges of

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[27] *CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, § 55*

[28] *CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 40*

[29] *See, for example, CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, § 18*

[30] *See CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, § 60*

Kazakhstan have around 140 cases and other "materials" per month to be processed. The judges in Kazakhstan are seen as overworked, and the legislator is looking for solutions to decrease their workload (by simplifying certain procedures, introducing mediation, etc.). This is positive. However, as the Venice Commission held in another opinion, "productivity levels set in advance by the Judicial Council may prove to be unfeasible; hence, they should be applied with due regard to the real situation the judge faced".[31]

86. Two other elements of the professional evaluations mentioned in Article 30-1 § 2 of the constitutional law are more problematic. The Venice Commission has already commented on the relation between ethical breaches and the professional evaluations. As to the "working discipline", it is understood as the compliance with the general requirements of the labor law (such as, for example, respecting working hours). The Concept Paper proposes not to impose disciplinary liability for breaches of the "working discipline" (p. 5 (5)). This is positive. However, compliance with the "working discipline" requirements is also mentioned as one of the criterion for professional evaluations. The question remains whether the working discipline could be taken into account in the process of the professional evaluation. Probably, the breaches of the "working discipline" may affect the results of the professional evaluation not by themselves, but only to the extent that they resulted in a significant loss of productivity or had other negative consequences on the quality of the judge's work.

87. With those observations in mind, the Venice Commission supports the proposal of the Concept Paper to describe the evaluation criteria in more detail. There are other aspects of the professional evaluation system which may need to be addressed in future – for example, the composition of the Qualification Commission of the Judicial Jury and the method of selection of its members, the possibility for the judge concerned to contest the results of the professional evaluation, etc. However, the Concept Paper does not contain proposals in this respect, and the Venice Commission considers it possible to leave those questions open.

5. Role of the court hierarchy in the judicial governance

88. Some proposals contained in the Concept Paper aim at reducing the role of the Supreme Court and of the court presidents in the system of judicial governance. In principle, the core function of the Supreme Court is to maintain consistency of the case-law through cassation review of the lower courts' judgments. It is not excluded that the Supreme Court may perform some other functions, more of an administrative character and not related to the adjudication. However, those non-core functions may be quite burdensome and hinder the performance of the Court's main function – adjudication of individual cases and harmonization of the case-law. Thus, in the States which created a separate Judicial Council, functions related to the judicial governance should rather be transferred to the latter, provided that the Judicial Council is independent and has an appropriate composition.

89. Some of the interlocutors told the rapporteurs in Astana that the judiciary in Kazakhstan has an informal vertical hierarchy. If this is the case, this is dangerous

[31] *CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of «The Former Yugoslav Republic of Macedonia", § 103*

for judicial independence. The Venice Commission has always underlined that judicial independence is not limited to external independence from outside influence but includes internal independence of judges.[32] Even though higher courts have the power to annul decisions of the lower courts, judges of the higher courts should not be seen as hierarchical superiors of the lower courts' judges. Thus, assuming that the proposed reform may reduce this informal influence of the courts' presidents and of the most senior judges, this reform is welcome.

90. The Concept Paper makes several steps in this direction: for example, the candidates for the promotion will not need to obtain "personal sureties" from more senior judges (p. 5 (5)). Second, the Concept Paper proposes to exclude the presidents of the courts from the plenary sessions of those courts which give recommendations to the candidates to the judicial positions, and to introduce secret voting at those sessions (p. 5 (7)). Third, the Concept Paper suggests that the court presidents cannot be appointed to their positions or to similar positions in other courts for more than two terms consecutively (p. 5 (2)). These are welcome proposals which may weaken the informal vertical hierarchy and contribute to the internal independence of the judiciary.

91. The proposal to transfer the disciplinary functions to the HJC (see p. 5 (2) of the Concept Paper) has been already analysed above: such transfer makes sense, but only if the HJC is reformed and its independence is increased.

92. There is also a proposal to abolish the presidiums of the regional courts and of the Supreme Court (p. 5 (6)), in order to exclude their influence in the matters of promotion. However, the exact role of the presidiums in practice in this and in other areas is not very clear to the Venice Commission,[33] so it is hard to assess all pros and cons of this idea.

93. The Venice Commission notes that the Concept Paper did not touch upon many other elements of the current system of judicial governance, which reinforce the hierarchical model of the organisation of the judiciary of Kazakhstan. In particular, the powers of the court presidents and of the plenary sessions of higher courts in disciplinary sphere and the power to give recommendations to candidates to the judicial positions remain unchanged. Given the overall direction of the reform, set out in the Concept Paper, it would be useful to assess critically those powers and their effect on the internal independence of judges.

III. Conclusions

94. The Concept Paper on the reform of the High Judicial Council aspires to ensure independence of judges, raise their professionalism and increase public confidence in them. Most of the proposals formulated therein contribute to these goals, and are in line with the European standards. The Venice Commission hopes that the proposals of the Concept Paper will be soon incorporated in the legislation.

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[32] *CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, § 68*

[33] *Under Articles 16-1 and 22-1 of the constitutional law, the Presidium have the function of bringing a disciplinary case against the judge before the Judicial Jury, and may perform other functions which do not belong to the exclusive competency of other bodies of the court.*

95. However, the Concept Paper has some gaps or, in places, is not ambitious enough. This risks to reduce the efficiency of the reform. That being said, the Venice Commission understands that the authorities of Kazakhstan prefer an evolutionary approach, and that a comprehensive revision of the legal framework may not be on the political agenda of today, but be envisaged for a longer perspective.

96. The Venice Commission notes, at the outset, that the system of recruitment of judges in Kazakhstan is very complex, involves many procedures and different actors, and will certainly benefit from some simplification. Furthermore, besides reforming the system of recruitment of judges, it may be necessary to make the judicial career more attractive for young lawyers, financially or otherwise.

97. The Concept Paper proposes to redistribute some powers and functions related to the judicial careers from the Supreme Court and its bodies to the High Judicial Council (the HJC) and its bodies. It is a reasonable approach, but it should be accompanied by the corresponding change in the status of the HJC. It should become more independent, which will require either an amendment to the Constitution, or at least some legislative amendments, if constitutional entrenchment is impossible.

98. In particular, the law must define the exact number of the members of the HJC, introduce guarantees against their early removal, provide for the nomination of a certain number of members by Parliament, and for the nomination of the judicial members (who should be in the majority) by the general assembly of all judges. The law should also provide that the President is normally bound by the proposal of the HJC as regards judicial appointments, and that the rejection of such proposal by the President should be reasoned.

99. Most of the proposals of the Concept Paper regarding judicial careers deserve praise. In addition, the following recommendations should be considered:

- the qualification exam should not involve psychological testing by external experts; assessment of strengths and weaknesses of candidates may be done at the interview in the "competition" phase. It is better not to use the "lie detector" test altogether;

- the severity of the qualification exam should not be a goal in its own. The legislator may consider introducing a system which would result in grading all successful candidates after the exam. These grades should play a major role in the phase of the competition; the law should define the relative weight of "objective" and "subjective" criteria for selection of judges;

- the law should distinguish clearly between ethical breaches, disciplinary offences, and bad evaluations. Indicators for professional evaluations should be clearly defined in the law; evaluations should not rely heavily on the rate of reversals. As to the underperformance, judges should not be penalised for not reaching unrealistic goals;

- in addition to the proposals already contained in the Concept Paper, it is necessary to reconsider the role of court presidents and of the higher courts in the matters related to the judicial careers (appointments, promotion and discipline);

100. The Venice Commission remains at the disposal of the authorities of Kazakhstan for further assistance in this matter.

Code of good practice in Electoral Matters

Guidelines and explanatory report

Adopted by the Venice Commission at its 51st and 52nd sessions
(Venice, 5-6 July and 18-19 October 2002)

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Introduction

On 8 November 2001 the Standing Committee of the Parliamentary Assembly, acting on behalf of the Assembly, adopted Resolution 1264 (2001) inviting the Venice Commission:[1]

i. to set up a working group, comprising representatives of the Parliamentary Assembly, the CLRAE and possibly other organisations with experience in the matter, with the aim of discussing electoral issues on a regular basis;

ii. to devise a code of practice in electoral matters which might draw, inter alia, on the guidelines set out in the appendix to the explanatory memorandum of the report on which this resolution is based (Doc. 9267), on the understanding that this code should include rules both on the run-up to the election, the elections themselves and on the period immediately following the vote;

iii. as far as its resources allow, to compile a list of the underlying principles of European electoral systems by co-ordinating, standardising and developing current and planned surveys and activities. In the medium term, the data collected on European elections should be entered into a database, and analysed and disseminated by a specialised unit.

The following guidelines are a concrete response to the three aspects of this resolution. They were adopted by the Council for Democratic Elections – the joint working group provided for by the Parliamentary Assembly resolution – at its second meeting (3 July 2002) and subsequently by the Venice Commission at its 51st Session (5-6 July 2002); they are based on the underlying principles of Europe's electoral heritage; lastly and above all, they constitute the core of a code of good practice in electoral matters.

The explanatory report explains the principles set forth in the guidelines, defining and clarifying them and, where necessary, including recommendations on points of detail. The report was adopted by the Council for Democratic Elections at its 3rd meeting (16 October 2002), and subsequently by the Venice Commission at its 52nd Session (18-19 October 2002).

As requested in the Parliamentary Assembly's resolution, this document is based on the guidelines appended to the explanatory memorandum to the report on which the Assembly resolution was based (Doc. 9267). It is also based on the work of the Venice Commission in the electoral field, as summarised in Document CDL (2002) 7.

[1] *Item 6; see Doc. 9267, Report by the Political Affairs Committee; Rapporteur: Mr Clerfayt.*

GUIDELINES ON ELECTIONS

adopted by the Venice Commission at its 51st Plenary Session
(Venice, 5-6 July 2002)

I. Principles of Europe's electoral heritage

The five principles underlying Europe's electoral heritage are *universal, equal, free, secret and direct suffrage.* Furthermore, elections must be held at regular intervals.

1. Universal suffrage

1.1. Rule and exceptions

Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions:

a. Age:

i. the right to vote and to be elected must be subject to a minimum age;

ii. the right to vote must be acquired, at the latest, at the age of majority;

iii. the right to stand for election should preferably be acquired at the same age as the right to vote and in any case not later than the age of 25, except where there are specific qualifying ages for certain offices (e.g. member of the upper house of parliament, Head of State).

b. Nationality:

i. a nationality requirement may apply;

ii. however, it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence.

c. Residence:

i. a residence requirement may be imposed;

ii. residence in this case means habitual residence;

iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;

iv. the requisite period of residence should not exceed six months; a longer period may be required only to protect national minorities;

v. the right to vote and to be elected may be accorded to citizens residing abroad.

d. Deprivation of the right to vote and to be elected:

i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

ii. it must be provided for by law;

i. iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;

ii. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.

v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

1.2. Electoral registers

Fulfilment of the following criteria is essential if electoral registers are to be reliable:

i. electoral registers must be permanent;

ii. there must be regular up-dates, at least once a year. Where voters are not registered automatically, registration must be possible over a relatively long period;

iii. electoral registers must be published;

iv. there should be an administrative procedure – subject to judicial control – or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place at the polling station on election day;

v. a similar procedure should allow voters to have incorrect inscriptions amended;

iv. a supplementary register may be a means of giving the vote to persons who have moved or reached statutory voting age since final publication of the register.

1.3. Submission of candidatures

i. The presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures;

ii. The law should not require collection of the signatures of more than 1% of voters in the constituency concerned;

iii. Checking of signatures must be governed by clear rules, particularly concerning deadlines;

iv. The checking process must in principle cover all signatures; however, once it has been established beyond doubt that the requisite number of signatures has been collected, the remaining signatures need not be checked;

v. Validation of signatures must be completed by the start of the election campaign;

vi. If a deposit is required, it must be refundable should the candidate or party exceed a certain score; the sum and the score requested should not be excessive.

2. Equal suffrage

This entails:

2.1. Equal voting rights: each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes.

2.2. Equal voting power: seats must be evenly distributed between the constituencies.

i.This must at least apply to elections to lower houses of parliament and regional and local elections:

ii. It entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged.

iii. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration.

iv. The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity).

v. In order to guarantee equal voting power, the distribution of seats must be reviewed at least every ten years, preferably outside election periods.

iv. With multi-member constituencies, seats should preferably be redistributed without redefining constituency boundaries, which should, where possible, coincide with administrative boundaries.

vii. When constituency boundaries are redefined – which they must be in a single-member system – it must be done:

- impartially;
- without detriment to national minorities;
- taking account of the opinion of a committee, the majority of whose members are independent; this committee should preferably include a geographer, a sociologist and a balanced representation of the parties and, if necessary, representatives of national minorities.

1.3. Equality of opportunity

aa. Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to:

i. the election campaign;

ii. coverage by the media, in particular by the publicly owned media;

iii. public funding of parties and campaigns.

bb. Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. Equality of opportunity applies in particular to radio and television air-time, public funds and other forms of backing.

cc. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.

dd. Political party, candidates and election campaign funding must be transparent.

ee. The principle of equality of opportunity can, in certain cases, lead to a limitation of political party spending, especially on advertising.

1.4. Equality and national minorities

aa. Parties representing national minorities must be permitted.

bb. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.

cc. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.

1.5. Equality and parity of the sexes

Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis.

1. Free suffrage

3.1. Freedom of voters to form an opinion

a. State authorities must observe their duty of neutrality. In particular, this concerns:

i. media;

ii. billposting;

iii. the right to demonstrate;

iv. funding of parties and candidates.

b. The public authorities have a number of positive obligations; inter alia, they must:

i. submit the candidatures received to the electorate;

ii. enable voters to know the lists and candidates standing for election, for example through appropriate posting.

iii. The above information must also be available in the languages of the national minorities.

Sanctions must be imposed in the case of breaches of duty of neutrality and voters' freedom to form an opinion.

1.2. Freedom of voters to express their wishes and action to combat electoral fraud

i. voting procedures must be simple;

ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:

iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;

iv. electronic voting should be used only if it is safe and reliable; in particular, voters should be able to obtain a confirmation of their votes and to correct them, if necessary, respecting secret suffrage; the system must be transparent;

v. very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;

vi. mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud;

vii. at least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box;

viii. voting slips must not be tampered with or marked in any way by polling station officials;

ix. unused voting slips must never leave the polling station;

x. polling stations must include representatives of a number of parties, and the presence of observers appointed by the candidates must be permitted during voting and counting;

xi. military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station;

xii. counting should preferably take place in polling stations;

xiii. counting must be transparent. Observers, candidates' representatives and the media must be allowed to be present. These persons must also have access to the records;

xiv. results must be transmitted to the higher level in an open manner;

xv. the state must punish any kind of electoral fraud.

4. Secret suffrage

a. For the voter, secrecy of voting is not only a right but also a duty, non-compliance with which must be punishable by disqualification of any ballot paper whose content is disclosed.

b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.

c. The list of persons actually voting should not be published.

d. The violation of secret suffrage should be sanctioned.

5. Direct suffrage

The following must be elected by direct suffrage:

i. at least one chamber of the national parliament;

ii. sub-national legislative bodies;

iii. local councils.

6. Frequency of elections

Elections must be held at regular intervals; a legislative assembly's term of office must not exceed five years.

II. Conditions for implementing these principles

1. Respect for fundamental rights

a. Democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties.

b. Restrictions of these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality.

2. Regulatory levels and stability of electoral law

a. Apart from rules on technical matters and detail – which may be included in regulations of the executive -, rules of electoral law must have at least the rank of a statute.

b. The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law.

3. Procedural guarantees

3.1. Organisation of elections by an impartial body

a. An impartial body must be in charge of applying electoral law.

b. Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

c. The central electoral commission must be permanent in nature.

d. It should include:

i. at least one member of the judiciary;

ii. representatives of parties already in parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.

It may include:

iii. a representative of the Ministry of the Interior;

iv. representatives of national minorities.

e. Political parties must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality may be construed strictly or on a proportional basis (see point I.2.c.bb).

f. The bodies appointing members of electoral commissions must not be free to dismiss them at will.

g. Members of electoral commissions must receive standard training.

h. It is desirable that electoral commissions take decisions by a qualified majority or by consensus.

3.2. Observation of elections

a. Both national and international observers should be given the widest possible opportunity to participate in an election observation exercise.

b. Observation must not be confined to the election day itself, but must include the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting.

c. The places where observers are not entitled to be present should be clearly specified by law.

d. Observation should cover respect by the authorities of their duty of neutrality.

1.3. An effective system of appeal

a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.

b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.

c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.

d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.

e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.

f. All candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.

g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).

h. The applicant's right to a hearing involving both parties must be protected.

i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

4. Electoral system

Within the respect of the above-mentioned principles, any electoral system may be chosen.

EXPLANATORY REPORT

adopted by the Venice Commission at its 52nd Plenary Session
(Venice, 18-19 October 2002)

General remarks

1. Alongside human rights and the rule of law, democracy is one of the three pillars of the European constitutional heritage, as well as of the Council of Europe. Democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status.

2. These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the "European electoral heritage". This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, and the second the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met. The text which follows – like the foregoing guidelines – is therefore in two parts, the first covering the definition and practical implications of the principles of the European electoral heritage and the second the conditions necessary for their application.

I. The underlying principles of Europe's electoral heritage

Introduction: the principles and their legal basis

3. If elections are to comply with the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, they must observe five fundamental rules: suffrage must be universal, equal, free, secret and direct. Furthermore, elections must be held periodically. All these principles together constitute the European electoral heritage.

4. Although all these principles are conventional in nature, their implementation raises a number of questions that call for close scrutiny. We would do well to identify the "hard core" of these principles, which must be scrupulously respected by all European states.

5. The hard core of the European electoral heritage consists mainly of international rules. The relevant universal rule is Article 25 (b) of the International Covenant on Civil and Political Rights, which expressly provides for all of these principles except direct suffrage, although the latter is implied[1]. The common European rule is Article 3 of the Additional Protocol to the European Convention on Human Rights, which explicitly provides for the right to periodical elections by free and secret suffrage[2]; the other principles have also been recognised in human rights case law[3]. The right to direct

[1] *See Article 21 of the Universal Declaration of Human Rights.*

[2] *Article 3, Right to free elections: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".*

[3] *Where universality is concerned, cf. ECHR No. 9267/81, judgment in Mathieu-Mohin and Clerfayt vs. Belgium, March 1997, Series A vol. 113, p. 23; judgment in Gitonas and others vs. Greece, 1 July 1997, No. 18747/91, 19376/92; 19379/92, 28208/95 and 27755/95, Collected Judgments and*

elections has also been admitted by the Strasbourg Court, at least implicitly[4]. However, the constitutional principles common to the whole continent do not figure only in the international texts: on the contrary, they are often mentioned in more detail in the national constitutions[5]. Where the legislation and practice of different countries converge, the content of the principles can be more accurately pinpointed.

1. Universal suffrage

1.1. Rule and exceptions

6. Universal suffrage covers both active (the right to vote) and passive electoral rights (the right to stand for election). The right to vote and stand for election may be subject to a number of conditions, all of which are given below. The most usual are age and nationality.

a. There must be a minimum age for the right to vote and the right to stand for election; however, attainment of the age of majority, entailing not only rights but also obligations of a civil nature, must at least confer the right to vote. A higher age may be laid down for the right to stand for election but, save where there are specific qualifying ages for certain offices (senator, head of state), this should not be more than 25.

b. Most countries' legislations lay down a nationality requirement. However, a tendency is emerging to grant local political rights to long-standing foreign residents, in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level[6]. It is accordingly recommended that the right to vote in local elections be granted after a certain period of residence. Furthermore, under the European integration process European citizens have been granted the right to vote and stand for election in municipal and European Parliament elections in their EU member state of residence[7]. The nationality criterion can, moreover, sometimes cause problems if a state withholds citizenship from persons who have been settled in its territory for several generations, for instance on linguistic grounds. Furthermore, under the European Convention on Nationality[8] persons holding dual nationality must have the same electoral rights as other nationals[9].

c. Thirdly, the right to vote and/or the right to stand for election may be subject to residence requirements[10], residence in this case meaning habitual residence. Where local and regional elections are concerned, the residence requirement is not incompatible

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Decisions, 1997-IV, p. 1233; re. equality, cf. aforementioned judgment of Mathieu-Mohin and Clerfayt, p. 23.

[4] *ECHR No. 24833/94, judgment in Matthews vs. the United Kingdom, 18 February 1999, Collected Judgments and Decisions 1999-I, para. 64.*

[5] *E.g. Article 38.1 of the German Constitution, Articles 68.1 and 69.2 of the Spanish Constitution and Article 59.1 of the Romanian Constitution.*

[6] *ETS 144.*

[7] *Article 19 of the Treaty establishing the European Community.*

[8] *ETS 166, Article 17.*

[9] *9The ECHR does not go so far: Eur. Comm. HR No. 28858/95, judgment 25.11.96 Ganchev vs. Bulgaria, DR 87, p. 130.*

[10] *See most recently ECHR No. 31891/96, judgment 7.9.99, Hilbe vs. Liechtenstein.*

a priori with the principle of universal suffrage, if the residence period specified does not exceed a few months; any longer period is acceptable only to protect national minorities[11]. Conversely, quite a few states grant their nationals living abroad the right to vote, and even to be elected. This practice can lead to abuse in some special cases, e.g. where nationality is granted on an ethnic basis. Registration could take place where a voter has his or her secondary residence, if he or she resides there regularly and it appears, for example, on local tax payments; the voter must not then of course be registered where he or she has his or her principal residence.

The freedom of movement of citizens within the country, together with their right to return at any time is one of the fundamental rights necessary for truly democratic elections[12]. If persons, in exceptional cases, have been displaced against their will, they should, provisionally, have the possibility of being considered as resident at their former place of residence.

d. Lastly, provision may be made for clauses suspending political rights. Such clauses must, however, comply with the usual conditions under which fundamental rights may be restricted; in other words, they must[13]: – be provided for by law; – observe the principle of proportionality; – be based on mental incapacity or a criminal conviction for a serious offence.

Furthermore, the withdrawal of political rights may only be imposed by express decision of a court of law. However, in the event of withdrawal on grounds of mental incapacity, such express decision may concern the incapacity and entail ipso jure deprivation of civic rights.

The conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them, as the holding of a public office is at stake and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest.

1.2. Electoral registers

7. The proper maintenance of electoral registers is vital in guaranteeing universal suffrage. However, it is acceptable for voters not to be included automatically on the registers, but only at their request. In practice, electoral registers are often discovered to be inaccurate, which leads to disputes. Lack of experience on the part of the authorities, population shifts and the fact that few citizens bother to check the electoral registers when they are presented for inspection make it difficult to compile these registers. A number of conditions must be met if the registers are to be reliable:

i. There must be permanent electoral registers.

ii. There must be regular updates, at least once a year, so that municipal (local) authorities get into the habit of performing the various tasks involved in updating at the same time every year. Where registration of voters is not automatic, a fairly long timeperiod must be allowed for such registration.

[11] *See Eur. Comm. HR No. 23450/94, judgment 15.9.97, Polacco and Garofalo vs. Italy (re. Trentino-Alto Adige).*

[12] *See Chapter II.1 below*

[13] *See e.g. ECHR No. 26772/95, judgment in Labita vs. Italy, 6 April 2002, paras. 201 ff.*

iii. The electoral registers must be published. The final update should be sent to a higher authority under the supervision of the impartial body responsible for the application of the electoral law.

iv. There should be an administrative procedure – subject to judicial control – or a judicial procedure enabling electors not on the register to have their names included. In some countries, the closing date for entry in the supplementary register may be, for example, 15 days before the election or election day itself. The latter case, whilst admirably broad-minded, relies on decisions made by a court obliged to sit on polling day, and is thus ill-suited to the organisational needs on which democracies are based. In any event polling stations should not be permitted to register voters on election day itself.

v. Furthermore, inaccuracies in electoral registers stem both from unjustified entries and from the failure to enter certain electors. A procedure of the kind mentioned in the previous paragraph should make it possible for electors to have erroneous entries corrected. The capacity for requesting such corrections may be restricted to electors registered in the same constituency or at the same polling station.

vi. A supplementary register can enable persons who have changed address or reached the statutory voting age since the final register was published to vote.

1.3. Submission of candidatures

8. The obligation to collect a specific number of signatures in order to be able to stand is theoretically compatible with the principle of universal suffrage. In practice, only the most marginal parties seem to have any difficulty gathering the requisite number of signatures, provided that the rules on signatures are not used to bar candidates from standing for office. In order to prevent such manipulation, it is preferable for the law to set a maximum 1% signature requirement[14]. The signature verification procedure must follow clear rules, particularly with regard to deadlines, and be applied to all the signatures rather than just a sample[15]; however, once the verification shows beyond doubt that the requisite number of signatures has been obtained, the remaining signatures need not be checked. In all cases candidatures must be validated by the start of the election campaign, because late validation places some parties and candidates at a disadvantage in the campaign.

9. There is another procedure where candidates or parties must pay a deposit, which is only refunded if the candidate or party concerned goes on to win more than a certain percentage of the vote. Such practices appear to be more effective than collecting signatures. However, the amount of the deposit and the number of votes needed for it to be reimbursed should not be excessive.

2. Equal suffrage

10. Equality in electoral matters comprises a variety of aspects. Some concern equality of suffrage, a value shared by the whole continent, while others go beyond this concept and cannot be deemed to reflect any common standard. The principles to be are numerical vote equality, equality in terms of electoral strength and equality of chances.

[14] *CDL (99) 66, p. 9.*

[15] *5CDL-INF (2000) 17, pp. 4-5; CDL (99) 67, pp 7-8.*

On the other hand, equality of outcome achieved, for instance, by means of proportional representation of the parties or the sexes, cannot be imposed.

2.1 Equal voting rights

11. Equality in voting rights requires each voter to be normally entitled to one vote, and to one vote only. Multiple voting, which is still a common irregularity in the new democracies, is obviously prohibited – both if it means a voter votes more than once in the same place and if it enables a voter to vote simultaneously in several different places, such as his or her place of current residence and place of former residence.

12. In some electoral systems, the elector nonetheless has more than one vote. In, for example, a system that allows split voting (voting for candidates chosen from more than one list), the elector may have one vote per seat to be filled; another possibility is when one vote is cast in a small constituency and another in a larger constituency, as is often the case in systems combining single-member constituencies and proportional representation at the national or regional level[16]. In this case, equal voting rights mean that all electors should have the same number of votes.

2.2 Equal voting power

13. Equality in voting power, where the elections are not being held in one single constituency, requires constituency boundaries to be drawn in such a way that seats in the lower chambers representing the people are distributed equally among the constituencies, in accordance with a specific apportionment criterion, e.g. the number of residents in the constituency, the number of resident nationals (including minors), the number of registered electors, or possibly the number of people actually voting. An appropriate combination of these criteria is conceivable. The same rules apply to regional and local elections. When this principle is not complied with, we are confronted with what is known as electoral geometry, in the form either of "active electoral geometry", namely a distribution of seats causing inequalities in representation as soon as it is applied, or of "passive electoral geometry", arising from protracted retention of an unaltered territorial distribution of seats and constituencies. Furthermore, under systems tending towards a non-proportional result, particularly majority (or plurality) vote systems, gerrymandering may occur, which consists in favouring one party by means of an artificial delimitation of constituencies.

14. Constituency boundaries may also be determined on the basis of geographical criteria and the administrative or indeed historic boundary lines, which often depend on geography.

15. The maximum admissible departure from the distribution criterion adopted depends on the individual situation, although it should seldom exceed 10% and never 15%, except in really exceptional circumstances (a demographically weak administrative unit of the same importance as others with at least one lower-chamber representative, or concentration of a specific national minority)[17].

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[16] *See, for example, Article 64 of the Albanian Constitution and Section 1 of the German Federal Elections Act.*

[17] *See CDL (98) 45, p. 3; CDL (99) 51, p. 8; CDL (2000) 2, p. 5; CDL-AD (2002) 9, para. 22.*

16. In order to avoid passive electoral geometry, seats should be redistributed at least every ten years, preferably outside election periods, as this will limit the risks of political manipulation[18].

17. In multi-member constituencies electoral geometry can easily be avoided by regularly allocating seats to the constituencies in accordance with the distribution criterion adopted. Constituencies ought then to correspond to administrative units, and redistribution is undesirable. Where a uninominal method of voting is used, constituency boundaries need to be redrawn at each redistribution of seats. The political ramifications of (re)drawing electoral boundaries are very considerable, and it is therefore essential that the process should be nonpartisan and should not disadvantage national minorities. The long-standing democracies have widely differing approaches to this problem, and operate along very different lines. The new democracies should adopt simple criteria and easy-to-implement procedures. The best solution would be to submit the problem in the first instance to a commission comprising a majority of independent members and, preferably, a geographer, a sociologist, a balanced representation of the parties and, where appropriate, representatives of national minorities. The parliament would then make a decision on the basis of the commission's proposals, with the possibility of a single appeal.

2.3 Equality of opportunity

18. Equality of opportunity should be ensured between parties and candidates and should prompt the state to be impartial towards them and to apply the same law uniformly to all. In particular, the neutrality requirement applies to the electoral campaign and coverage by the media, especially the publicly owned media, as well as to public funding of parties and campaigns. This means that there are two possible interpretations of equality: either "strict" equality or "proportional" equality. "Strict" equality means that the political parties are treated without regard to their present strength in parliament or among the electorate. It must apply to the use of public facilities for electioneering purposes (for example bill posting, postal services and similar, public demonstrations, public meeting rooms). "Proportional" equality implies that the treatment of political parties is in proportion to the number of votes. Equality of opportunity (strict and/or proportional) applies in particular to radio and television airtime, public funds and other forms of backing. Certain forms of backing may on the one hand be submitted to strict equality and on the other hand to proportional equality.

19. The basic idea is that the main political forces should be able to voice their opinions in the main organs of the country's media and that all the political forces should be allowed to hold meetings, including on public thoroughfares, distribute literature and exercise their right to post bills. All of these rights must be clearly regulated, with due respect for freedom of expression, and any failure to observe them, either by the authorities or by the campaign participants, should be subject to appropriate sanctions. Quick rights of appeal must be available in order to remedy the situation before the elections. But the fact is that media failure to provide impartial information about the election campaign and candidates is one of the most frequent shortcomings arising during elections. The most important thing is to draw up a list of the media organisations

[18] *CDL-AD (2002) 9, para. 23.*

in each country and to make sure that the candidates or parties are accorded sufficiently balanced amounts of airtime or advertising space, including on state radio and television stations.

20. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.

21. The question of funding, and in particular of the need for it to be transparent, will be considered later[19]. Spending by political parties, particularly on advertising, may likewise be limited in order to guarantee equality of opportunity.

2.4 Equality and national minorities

22. In accordance with the principles of international law, the electoral law must guarantee equality for persons belonging to national minorities, which includes prohibiting any discrimination against them[20]. In particular, the national minorities must be allowed to set up political parties[21]. Constituency delimitations and quorum regulations must not be such as to form an obstacle to the presence of persons belonging to minorities in the elected body.

23. Certain measures taken to ensure minimum representation for minorities either by reserving seats for them[22] or by providing for exceptions to the normal rules on seat distribution, eg by waiving the quorum for the national minorities' parties[23] do not infringe the principle of equality. It may also be foreseen that people belonging to national minorities have the right to vote for both general and national minority lists. However, neither candidates nor electors must be required to indicate their affiliation with any national minority[24],[25].

2.5 Equality and parity of the sexes

24. If there is a specific constitutional basis[26], rules could be adopted guaranteeing some degree of balance between the two sexes in elected bodies, or even parity. In the absence of such a constitutional basis, such provisions could be considered contrary to the principle of equality and freedom of association.

25. Moreover, the scope of these rules depends on the electoral system. In a fixed party list system, parity is imposed if the number of men and women who are eligible is the same. However, if preferential voting or cross-voting is possible, voters will not necessarily choose candidates from both sexes, and this may result in an unbalanced composition of the elected body, chosen by voters.

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[19] *See below, Chapter II.3.5.*

[20] *Article 4.1 of the Framework Convention for the Protection of National Minorities (ETS 157).*

[21] *Re. bans on political parties and similar measures, see CDL-INF (2000) 1.*

[22] *As is the case in Slovenia and Croatia*

[23] *As is the case in Germany and Poland. Romanian law even provides for representation of minorities' organisations if they have secured a number of votes equivalent to 5% (only) of the average number of validly cast votes required for the election of a deputy to the lower house country-wide*

[24] *Article 3 of the Framework Convention for the Protection of National Minorities (ETS 157).*

[25] *Re. electoral law and national minorities, see CDL-INF (2000) 4.*

[26] *See Article 3.2 of the French Constitution; cf. judgment of 18 November 1982, Recueil des décisions du Conseil constitutionnel, 1982, pp. 66 ff.*

3. Free suffrage

26. Free suffrage comprises two different aspects: free formation of the elector's opinion, and free expression of this opinion, i.e. freedom of voting procedure and accurate assessment the result.

3.1 Freedom of voters to form an opinion

a. Freedom of voters to form an opinion partly overlaps with equality of opportunity. It requires the state – and public authorities generally – to honour their duty of evenhandedness, particularly where the use of the mass media, billposting, the right to demonstrate on public thoroughfares and the funding of parties and candidates are concerned.

b. Public authorities also have certain positive obligations. They must submit lawfully presented candidatures to the citizens' votes. The presentation of specific candidatures may be prohibited only in exceptional circumstances, where necessitated by a greater public interest. Public authorities must also give the electorate access to lists and candidates standing for election by means, for instance, of appropriate billposting. The information in question must also be available in the languages of national minorities, at least where they make up a certain percentage of the population.

Voters' freedom to form an opinion may also be infringed by individuals, for example when they attempt to buy votes, a practice which the state is obliged to prevent or punish effectively.

c. In order to ensure that the rules relating to voters' freedom to form an opinion are effective, any violation of the foregoing rules must be punished.

3.2. Freedom of voters to express their wishes and combating electoral fraud

3.2.1. In general

27. Freedom of voters to express their wishes primarily requires strict observance of the voting procedure. In practice, electors should be able to cast their votes for registered lists or candidates, which means that they must be supplied with ballot papers bearing their names and that they must be able to deposit the ballot papers in a ballot box. The state must make available the necessary premises for electoral operations. Electors must be protected from threats or constraints liable to prevent them from casting their votes or from casting them as they wish, whether such threats come from the authorities or from individuals; the state is obliged to prevent and penalise such practices.

28. Furthermore, the voter has the right to an accurate assessment of the result of the ballot; the state should punish any election fraud.

3.2.2. Voting procedures

29. Voting procedures play a vital role in the overall electoral process because it is during voting that election fraud is most likely to occur.

30. In some countries the implementation of democratic practices requires a radical change of attitudes, which must be actively promoted by the authorities. In this respect some measures have to be taken to control the habits and reflexes which have a negative

impact on the elections. Most of these irregularities, such as "family voting"[27] occur during the voting procedure.-

31. All these observations lead us to the following conclusion: *the voting procedure must be kept simple. Compliance is therefore recommended with the criteria set out in the ensuing paragraphs.*

32. If the polling station officials represent a proper balance of political opinion, fraud will be difficult, and the fairness of the ballot should be judged by two main criteria alone: the number of electors who have cast votes compared with the number of ballot papers in the ballot box. The first measure can be determined by the number of signatures in the electoral register. Human nature being what it is (and quite apart from any intention to defraud), it is difficult to achieve total congruity between the two measures, and any further controls such as numbering the stubs of ballot papers or comparing the total number of ballot papers found in the ballot box plus those cancelled and unused with the number of ballot papers issued to the polling station may give some indication, but one should be under no illusion that the results of these various measures will coincide perfectly. The risk in multiplying the measures used is rather that the differences in the totals, and in the end the real irregularities, will not be taken seriously. It is better to have strict control over two measures than slack – and hence ineffective – control over a larger number of variables.

33. Any unused ballot papers should remain at the polling station and should not be deposited or stored in different premises. As soon as the station opens, the ballot papers awaiting use must be in full view on the table of the senior station official for instance. There should be no others stored in cupboards or other places.

34. The signing and stamping of ballot papers should not take place at the point when the paper is presented to the voter, because the signatory or the person affixing the stamp might mark the paper so that the voter could be identified when it came to counting the votes, which would violate the secrecy of the ballot.

35. The voter should collect his or her ballot paper and no one else should touch it from that point on.

36. It is important that the polling station officials include multi-party representatives and that observers assigned by the candidates be present.

37. Voters should always have the possibility of voting in a polling station; other means of voting are, however, acceptable on certain conditions, as indicated below.

3.2.2.1. Postal voting or proxy voting in certain circumstances

38. Postal voting and proxy voting are permitted in countries throughout the western world, but the pattern varies considerably. Postal voting, for instance, may be widespread in one country and prohibited in another owing to the danger of fraud. It should be allowed only if the postal service is secure – in other words, safe from intentional interference – and reliable, in the sense that it functions properly. Proxy voting is permissible only if subject to very strict rules, again in order to prevent fraud; the number of proxies held by any one elector must be limited.

39. Neither of these practices should be widely encouraged if problems with the postal service are added to other difficulties inherent in this kind of voting, including the

[27] *See section I.4 below.*

heightened risk of "family voting". Subject to certain precautions, however, postal voting can be used to enable hospital patients, persons in custody, persons with restricted mobility and electors resident abroad to vote, in so far as there is no risk of fraud or intimidation. This would dispense with the need for a mobile ballot box, which often causes problems and risks of fraud. Postal voting would take place under a special procedure a few days before the election.

40. The use of mobile ballot boxes is undesirable because of the attendant serious risk of fraud. Should they nonetheless be used, strict conditions should be imposed to prevent fraud, including the attendance of several members of the polling station election commission representing different political groupings.

3.2.2.2. Military voting

41. Where servicemen cannot return home on polling day, they should preferably be registered at polling stations near their barracks. Details of the servicemen concerned are sent by the local command to the municipal authorities who then enter the names in the electoral list. The one exception to this rule is when the barracks are too far from the nearest polling station. Within the military units, special commissions should be set up to supervise the preelection period, in order to prevent the risk of superior officers' imposing or ordering certain political choices.

3.2.2.3. Mechanical and electronic voting methods

42. Several countries are already using, or are preparing to introduce mechanical and electronic voting methods. The advantage of these methods becomes apparent when a number of elections are taking place at the same time, even though certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. Clearly, with this kind of voting, it is important to ensure that ballot papers are designed in such a way as to avoid confusion. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. Whatever means used should ensure the confidentiality of voting.

43. Electronic voting methods must be secure and reliable. They are secure if the system can withstand deliberate attack; they are reliable if they can function on their own, irrespective of any shortcomings in the hardware or software. Furthermore, the elector must be able to obtain confirmation of his or her vote and, if necessary, correct it without the secrecy of the ballot being in any way violated.

44. Furthermore, the system's transparency must be guaranteed in the sense that it must be possible to check that it is functioning properly.

3.2.2.4. Counting

45. The votes should preferably be counted at the polling stations themselves, rather than in special centres. The polling station staff are perfectly capable of performing this task, and this arrangement obviates the need to transport the ballot boxes and accompanying documents, thus reducing the risk of substitution.

46. The vote counting should be conducted in a transparent manner. It is admissible that voters registered in the polling station may attend; the presence of national or inter-

national observers should be authorised. These persons must be allowed to be present in all circumstances. There must be enough copies of the record of the proceedings to distribute to ensure that all the aforementioned persons receive one; one copy must be immediately posted on the notice-board, another kept at the polling station and a third sent to the commission or competent higher authority.

47. The relevant regulations should stipulate certain practical precautions as regards equipment. For example, the record of the proceedings should be completed in ballpoint pen rather than pencil, as text written in pencil can be erased.

48. In practice, it appears that the time needed to count the votes depends on the efficiency of the presiding officer of the polling station. These times can vary markedly, which is why a simple tried and tested procedure should be set out in the legislation or permanent regulations which appear in the training manual for polling station officials.

49. It is best to avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter's intention.

3.2.2.5. Transferring the results

50. There are two kinds of results: provisional results and final results (before all opportunities for appeal have been exhausted). The media, and indeed the entire nation, are always impatient to hear the initial provisional results. The speed with which these results are relayed will depend on the country's communications system. The polling station's results can be conveyed to the electoral district (for instance) by the presiding officer of the polling station, accompanied by two other members of the polling station staff representing opposing parties, in some cases under the supervision of the security forces, who will carry the records of the proceedings, the ballot box, etc.

51. However much care has been taken at the voting and vote-counting stages, transmitting the results is a vital operation whose importance is often overlooked; it must therefore be effected in an open manner. Transmission from the electoral district to the regional authorities and the Central Electoral Commission – or other competent higher authorities – can be done by fax. In that case, the records will be scanned and the results can be displayed as and when they come in. Television can be used to broadcast these results but once again, too much transparency can be a dangerous thing if the public is not ready for this kind of piecemeal reporting. The fact is that the initial results usually come in from the towns and cities, which do not normally or necessarily vote in the same way as rural areas. It is important therefore to make it clear to the public that the final result may be quite different from, or even completely opposite to, the provisional one, without there having been any question of foul play.

4. Secret suffrage

52. Secrecy of the ballot is one aspect of voter freedom, its purpose being to shield voters from pressures they might face if others learned how they had voted. Secrecy must apply to the entire procedure – and particularly the casting and counting of votes. Voters are entitled to it, but must also respect it themselves, and non-compliance must be punished by disqualifying any ballot paper whose content has been disclosed.[28]

[28] *CDL (2000) 2, p. 9.*

53. Voting must be individual. Family voting, whereby one member of a given family can supervise the votes cast by the other members, infringes the secrecy of the ballot; it is a common violation of the electoral law. All other forms of control by one voter over the vote of another must also be prohibited. Proxy voting, which is subject to strict conditions, is a separate issue[29].

54. Moreover, since abstention may indicate a political choice, lists of persons voting should not be published.

55. Violation of the secrecy of the ballot must be punished, just like violations of other aspects of voter freedom.

5. Direct suffrage

56. Direct election of one of the chambers of the national parliament by the people is one aspect of Europe's shared constitutional heritage. Subject to such special rules as are applicable to the second chamber, where there is one, other legislative bodies, like the Parliaments of Federate States[30], should be directly elected, in accordance with Article 3 of the Additional Protocol to the European Convention on Human Rights. Nor can local selfgovernment, which is a vital component of democracy, be conceived of without local elected bodies[31]. Here, local assemblies include all infra-national deliberative bodies[32]. On the other hand, even though the President of the Republic is often directly elected, this is a matter for the Constitution of the individual state.

6. Frequency of elections

57. Both the International Covenant on Civil and Political Rights[33] and the Additional Protocol to the European Convention on Human Rights[34] provide that elections must be held periodically. General elections are usually held at four- or five-yearly intervals, while longer periods are possible for presidential elections, although the maximum should be seven years.

II. Conditions for implementing the principles

58. The underlying principles of European electoral systems can only be guaranteed if certain general conditions are fulfilled.

• The first, general, condition is respect for fundamental human rights, and particularly freedom of expression, assembly and association, without which there can be no true democracy;

• Second, electoral law must enjoy a certain stability, protecting it against party political manipulation;

• Last and above all, a number of procedural guarantees must be provided, especially as regards the organisation of polling.

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[29] *See above, Chapter I.3.2.2.1.*

[30] *See ECHR No. 9267/81, judgment Mathieu-Mohin and Clerfayt vs. Belgium, 2 March 1997, Series A No. 113, p. 23; Eur. Comm. HR No. 27311/95, Timke vs. Germany, DR 82, p. 15; No. 7008/75, 12.7.76, X vs. Austria, DR 6, p. 120.*

[31] *Article 3 of the European Charter of Local self-government (ETS 122).*

[32] *Article 13 of the European Charter of Local self-government.*

[33] *3Article 25 b.*

[34] *Article 3.*

59. Furthermore, elections are held not in a vacuum but within the context of a specific electoral system and a given party system. This second section will conclude with a number of comments on this aspect, particularly on the relationship between electoral and party systems.

1. Respect for fundamental rights

60. The holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect for these freedoms is vital particularly during election campaigns. Restrictions on these fundamental rights must comply with the European Convention on Human Rights and, more generally, with the requirement that they have a basis in law, are in the general interest and respect the principle of proportionality.

61. The fact is that many countries have legal limitations on free speech, which, if restrictively interpreted, may just be acceptable – but may generate abuses in countries with no liberal, democratic tradition. In theory, they are intended to prevent "abuses" of free speech by ensuring, for example, that candidates and public authorities are not vilified, and even protecting the constitutional system. In practice, however, they may lead to the censoring of any statements which are critical of government or call for constitutional change, although this is the very essence of democratic debate. For example, European standards are violated by an electoral law which prohibits insulting or defamatory references to officials or other candidates in campaign documents, makes it an offence to circulate libellous information on candidates, and makes candidates themselves liable for certain offences committed by their supporters. The insistence that materials intended for use in election campaigns must be submitted to electoral commissions, indicating the organisation which ordered and produced them, the number of copies and the date of publication, constitutes an unacceptable form of censorship, particularly if electoral commissions are required to take action against illegal or inaccurate publications. This is even more true if the rules prohibiting improper use of the media during electoral campaigns are rather vague.

62. Another very important fundamental right in a democracy is freedom of movement within the country, together with the right for nationals to return to their country at any time.

2. Regulatory levels and stability of electoral law

63. Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy[35]. Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections.

64. In practice, however, it is not so much stability of the basic principles which needs protecting (they are not likely to be seriously challenged) as stability of some

[35] *On the importance of credibility of the electoral process, see for example CDL (99) 67, p. 11; on the need for stability of the law, see CDL (99) 41, p. 1.*

of the more specific rules of electoral law, especially those covering the electoral system per se, the composition of electoral commissions and the drawing of constituency boundaries. These three elements are often, rightly or wrongly, regarded as decisive factors in the election results, and care must be taken to avoid not only manipulation to the advantage of the party in power, but even the mere semblance of manipulation.

65. It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before (within one year of) elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests.

66. One way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution would be to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that.

67. For the rest, the electoral law should normally have the rank of statute law. Rules on implementation, in particular those on technical questions and matters of detail, can nevertheless be in the form of regulations.

3. Procedural safeguards

3.1. Organisation of elections by an impartial body

68. Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.

69. In states where the administrative authorities have a long-standing tradition of independence from the political authorities, the civil service applies electoral law without being subjected to political pressures. It is therefore both normal and acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior.

70. However, in states with little experience of organising pluralist elections, there is too great a risk of government's pushing the administrative authorities to do what it wants. This applies both to central and local government – even when the latter is controlled by the national opposition.

71. This is why independent, impartial electoral commissions must be set up from the national level to polling station level to ensure that elections are properly conducted, or at least remove serious suspicions of irregularity.

72. According to the reports of the Bureau of the Parliamentary Assembly of the Council of Europe on election observations, the following shortcomings concerning the electoral commissions have been noted in a number of member States: lack of transparency in the activity of the central electoral commission; variations in the interpretation of counting procedure; politically polarised election administration; controversies in appointing members of the Central Electoral Commission; commission members nominated by a state institution; the dominant position of the ruling party in the election administration.

73. Any central electoral commission must be permanent, as an administrative institution responsible for liaising with local authorities and the other lower-level commissions, e.g. as regards compiling and updating the electoral lists.

74. The composition of a central electoral commission can give rise to debate and become the key political issue in the drafting of an electoral law. Compliance with the following guidelines should facilitate maximum impartiality and competence on the part of the commission.

75. As a general rule, the commission should consist of:

- a judge or law officer: where a judicial body is responsible for administering the elections, its independence must be ensured through transparent proceedings. Judicial appointees should not come under the authority of those standing for office;

- representatives of parties already represented in parliament or which have won more than a certain percentage of the vote. Political parties should be represented equally in the central electoral commission; "equally" may be interpreted strictly or proportionally, that is to say, taking or not taking account of the parties' relative electoral strengths[36]. Moreover, party delegates should be qualified in electoral matters and should be prohibited from campaigning.

76. In addition, the electoral commission may include:

- representatives of national minorities; their presence is desirable if the national minority is of a certain importance in the territory concerned;

- a representative of the Ministry of the Interior. However, for reasons connected with the history of the country concerned, it may not always be appropriate to have a representative of the Ministry of the Interior in the commission. During its election observation missions the Parliamentary Assembly has expressed concern on several occasions about transfers of responsibilities from a fully-fledged multi-party electoral commission to an institution subordinate to the executive. Nevertheless, co-operation between the central electoral commission and the Ministry of the Interior is possible if only for practical reasons, e.g. transporting and storing ballot papers and other equipment. For the rest, the executive power should not be able to influence the membership of the electoral commissions[37].

77. Broadly speaking, bodies that appoint members to electoral commissions should not be free to recall them, as it casts doubt on their independence. Discretionary recall is unacceptable, but recall for disciplinary reasons is permissible – provided that the grounds for this are clearly and restrictively specified in law (vague references to "acts discrediting the commission", for example, are not sufficient).

78. In the long-standing democracies where there are no electoral commissions but where another impartial body is competent in electoral matters, political parties must be able to observe the work of that body.

79. The composition of the central electoral commission is certainly important, but no more so than its mode of operation. The commission's rules of procedure must be clear, because commission chairpersons have a tendency to let members speak, which the latter are quick to exploit. The rules of procedure should provide for an agenda and a

36 *See above, Chapter I.2.3.*

[37] *Cf CDL-AD (2002) 7, para. 5, 7 ff, 54.*

limited amount of speaking time for each member – e.g. a quarter of an hour; otherwise endless discussions are liable to obscure the main business of the day.

80. There are many ways of making decisions. It would make sense for decisions to be taken by a qualified (e.g. 2/3) majority, so as to encourage debate between the majority and at least one minority party. Reaching decisions by consensus is preferable.

81. The meetings of the central electoral commission should be open to everyone, including the media (this is another reason why speaking time should be limited). Any computer rooms, telephone links, faxes, scanners, etc. should be open to inspection.

82. Other electoral commissions operating at regional or constituency level should have a similar composition to that of the central electoral commission. Constituency commissions play an important role in uninominal voting systems because they determine the winner in general elections. Regional commissions also play a major role in relaying the results to the central electoral commission.

83. Appropriate staff with specialised skills[38] are required to organise elections. Members of central electoral commissions should be legal experts, political scientists, mathematicians or other people with a good understanding of electoral issues. There have been several cases of commissions lacking qualified and trained election staff.

84. Members of electoral commissions have to receive standardised training at all levels of the election administration. Such training should also be made available to the members of commissions appointed by political parties.

85. The electoral law should contain an article requiring the authorities (at every level) to meet the demands and needs of the electoral commission. Various ministries and other public administrative bodies, mayors and town hall staff may be directed to support the election administration by carrying out the administrative and logistical operations of preparing for and conducting the elections. They may have responsibility for preparing and distributing the electoral registers, ballot papers, ballot boxes, official stamps and other required material, as well as determining the arrangements for storage, distribution and security.

3.2. Observation of elections

86. Observation of elections plays an important role as it provides evidence of whether the electoral process has been regular or not.

87. There are three different types of observer: partisan national observers, non-partisan national observers and international (non-partisan) observers. In practice the distinction between the first two categories is not always obvious. This is why it is best to make the observation procedure as broad as possible at both the national and the international level.

88. Observation is not confined to the actual polling day but includes ascertaining whether any irregularities have occurred in advance of the elections (e.g. by improper maintenance of electoral lists, obstacles to the registration of candidates, restrictions on freedom of expression, and violations of rules on access to the media or on public funding of electoral campaigns), during the elections (e.g. through pressure exerted on electors, multiple voting, violation of voting secrecy, etc.) or after polling (especially

[38] *See CDL (98) 10, p. 5.*

during the vote counting and announcement of the results). Observation should focus particularly on the authorities' regard for their duty of neutrality.

89. International observers play a primordial role in states which have no established tradition of impartial verification of the lawfulness of elections.

90. Generally, international as well as national observers must be in a position to interview anyone present, take notes and report to their organisation, but they should refrain from making comments.

91. The law must be very clear as to what sites observers are not entitled to visit, so that their activities are not excessively hampered. For example, an act authorising observers to visit only sites where the election (or voting) takes place could be construed by certain polling stations in an unduly narrow manner[39].

3.3. An effective system of appeal

92. If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

93. There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;

- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experience with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

94. Appeal to parliament, as the judge of its own election, is sometimes provided for but could result in political decisions. It is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible.

95. Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections. In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

39 *Re. election observation, see Handbook for Observers of Elections, Council of Europe, 1996.*

96. The procedure must also be simple, and providing voters with special appeal forms helps to make it so[40]. It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.

97. It is also vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission, or where the powers of different courts – e.g. the ordinary courts and the constitutional court – are not clearly differentiated.

Example:

Central Election Commission → Supreme Court
↑
Regional commission → Appeal Court
↑
Constituency Election commission
↑
Polling station (on election day)

98. Disputes relating to the electoral registers, which are the responsibility, for example, of the local administration operating under the supervision of or in co-operation with the electoral commissions, can be dealt with by courts of first instance.

99. Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.

100. The appeal procedure should be of a judicial nature, in the sense that the right of the appellants to proceedings in which both parties are heard should be safeguarded.

101. The powers of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.

102. Where higher-level commissions are appeal bodies, they should be able to rectify or annul ex officio the decisions of lower electoral commissions.

103. Some points deserve to be developed.

[40] *CDL (98) 45, p. 11.*

3.4. Organisation and operation of polling stations

104. The quality of the voting and vote-counting systems and proper compliance with the electoral procedures depend on the mode of organisation and operation of the polling stations. The reports of the Bureau of the Assembly on the observation of elections in different countries have revealed a series of logistical irregularities. For example, significant differences between polling stations across different regions of the same State were noted.

105. Assembly observation missions have also noticed several cases of technical irregularities such as wrongly printed or stamped ballot boxes, overly complex ballot papers, unsealed ballot boxes, inadequate ballot papers or boxes, misuse of ballot boxes, insufficient means of identification of voters and absence of local observers.

106. All these irregularities and shortcomings, in addition to political party electioneering inside the polling station and police harassment, can seriously vitiate the voting process, or indeed undermine its integrity and validity.

3.5. Funding

107. Regulating the funding of political parties and electoral campaigns is a further important factor in the regularity of the electoral process.

108. First of all, funding must be transparent; such transparency is essential whatever the level of political and economic development of the country concerned.

109. Transparency operates at two levels. The first concerns campaign funds, the details of which must be set out in a special set of carefully maintained accounts. In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled. The second level involves monitoring the financial status of elected representatives before and after their term in office. A commission in charge of financial transparency takes formal note of the elected representatives' statements as to their finances. The latter are confidential, but the records can, if necessary, be forwarded to the public prosecutor's office.

110. In unitary states, any expenses incurred by local authorities in connection with the running of a national election, the payment of election commission members, the printing of ballot papers, etc, should normally be borne by the central state.

111. It should be remembered that in the field of public funding of parties or campaigns the principle of equality of opportunity applies ("strict" or "proportional" equality)[41]. All parties represented in parliament must in all cases qualify for public funding. However, in order to ensure equality of opportunity for all the different political forces, public funding might also be extended to political formations that represent a large section of the electorate and put up candidates for election. The funding of political parties from public funds must be accompanied by supervision of the parties' accounts by specific public bodies (e.g. the Auditor General's Department). States should encourage a policy of financial openness on the part of political parties receiving public funding[42].

[41] *See section I.2.3 above.*

[42] *For further details on funding of political parties, see CDL-INF (2001) 8.*

3.6. Security

112. Every electoral law must provide for intervention by the security forces in the event of trouble. In such an event, the presiding officer of the polling station (or his or her representative) must have sole authority to call in the police. It is important to avoid extending this right to all members of the polling station commission, as what is needed in such circumstances is an on-the-spot decision that is not open to discussion.

113. In some states, having a police presence at polling stations is a national tradition, which, according to observers, does not necessarily trigger unrest or have an intimidating effect on voters. One should note that a police presence at polling stations is still provided for in the electoral laws of certain western states, even though this practice has changed over time.

Conclusion

114. Compliance with the five underlying principles of the European electoral heritage (universal, equal, free, secret and direct suffrage) is essential for democracy. It enables democracy to be expressed in different ways but within certain limits. These limits stem primarily from the interpretation of the said principles; the present text lays out the minimum rules to be followed in order to ensure compliance. Second, it is insufficient for the electoral law (in the narrow sense) to comprise rules that are in keeping with the European electoral principles: the latter must be placed in their context, and the credibility of the electoral process must be guaranteed. First, fundamental rights must be respected; and second, the stability of the rules must be such as to exclude any suspicion of manipulation. Lastly, the procedural framework must allow the rules laid down to be implemented effectively.

Referendums in Europe – an analysis of the legal rules in European States

Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005)

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Introduction

1. Since it was established, the Venice Commission has taken an interest in electoral issues, including the use of direct-democracy procedures, such as referendums, which are becoming increasingly common as democracy spreads through Europe.

2. Against this background, the Commission adopted Guidelines for constitutional referendums at national level (CDL-INF(2001)010) at its 47th plenary meeting (Venice, 6-7 July 2001).

3. Recent experience in Europe prompted the Council of Europe's Parliamentary Assembly to consider referendums and good practices in this field, in co-operation with

the Venice Commission[1]. Its work led to the adoption, on 29 April 2005, of Assembly Recommendation 1704 (2005) on "Referendums: towards good practices in Europe[2]". At the Committee of Ministers' request, the Venice Commission submitted comments on this recommendation (document CDL-AD(2005)028).

4. At its 8th meeting (Venice, 11 March 2004), the Council for Democratic Elections decided to carry out a new study on referendums and compile a questionnaire on their use. Based on a contribution by Mr Frangois Luchaire (member of the Commission, Andorra) (document CDL(2004)031), this questionnaire was adopted by the Council for Democratic Elections at its 9th meeting (Venice, 17 June 2004), and by the Venice Commission at its 59th plenary session (Venice, 18-19 June 2004) (document CDL(2004)031).

5. Replies to the questionnaire have been submitted by Commission members from thirty-three countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia " and Turkey.

6. The Commission secretariat has used these replies to prepare this summary report, appending a draft summary table of the replies themselves. Like the questionnaire, the report comprises three parts, covering national referendums, regional and local referendums and the future of referendums.

7. This report was adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and by the Commission at its 64th plenary session (Venice, 21-22 October 2005).

8. Following adoption of this report, the Council for Democratic Elections and the Venice Commission may wish to draw up guidelines on referendums in general.

General comments

9. As democracy has spread throughout the European continent, the forms it should take have naturally been discussed, both nationally and internationally. The utility of direct democracy and the limits to its use are a fundamental aspect of this debate.

10. The constitutions and constitutional practice of many of the new democracies give referendums a prominent role – sometimes more so than those of the older democracies.

11. This means that the pros and cons of direct democracy can be gauged with reference to concrete examples. It would, however, be unwise to draw conclusions or make general recommendations on a purely empirical or, conversely, over-theoretical basis.

12. Direct consultation of the people via referendum has long been the subject of heated discussion between legal and political experts, sociologists, politicians, and indeed the general public.

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[1] *See Parliamentary Assembly document 9874 of 10 July 2003, Motion for a resolution presented by Mr Gross and others, Guidelines for good practices in the holding of referenda.*

[2] *See also doc. 10498, containing the Political Affairs Committee's report (rapporteur: Mr Mikko Elo, Finland, Socialist Group), to which is appended a working paper prepared by the Research and Documentation Centre on Direct Democracy in Geneva.*

13. This study sets out to identify the fundamental aspects of referendums, as used in European countries, and also points of convergence and divergence between national traditions – in short, to answer the main legal questions raised by direct consultation of the people in European democracies. This will give the basis needed to draw up general guidelines.

- National referendums

A – Legal basis of the referendum

14. In the vast majority of states that replied to the questionnaire, the constitution provides for the organisation of national referendums. Only four states have no provision for this.

15. In *Belgium.,* there is no constitutional or even legislative basis for a referendum and a decision-making (legally binding) referendum is considered unconstitutional. A consultative referendum – the constitutionality of which has been strongly disputed – was organised in 1950 further to a specific decision of Parliament. The fact that the constitution does not mention referendums could accordingly be regarded as ruling out a referendum.

16. In the *Netherlands,* no national referendum has been organised to date on the basis of the (temporary) General Law on Referendums. A consultative referendum concerning approval by the Netherlands of the Constitutional Treaty of the European Union (the "European Constitution") was held on 1 June 2005, but that referendum was based upon an *ad hoc* law. Provision for a referendum was introduced by means of a temporary law that was in force from 2002 to 2004, although it was never applied. It should be stressed that Parliament recently opposed the introduction of the referendum into the constitution. It is because no final decision has yet been taken on the introduction of referendums that there is no provision for them as yet in the constitution.

17. In *Norway,* as there were no relevant provisions in the constitution, two referendums (both on accession to the European Economic Community and then the European Union) were organised on the basis of specific acts of parliament (in 1972 and 1994). Here, the fact that there is no provision in the constitution on the subject does not rule out a referendum, but the latter is so exceptional that a general provision is not appropriate.

18. In *Cyprus,* the institution of the referendum is dealt with at legislative level. It has been used only once.

19. To sum up, the general practice in Europe is for a national referendum to be provided for in the constitution. Where there is no such provision, referendums have either not been introduced on a permanent basis or are quite exceptional.

20. Constitutions do not necessarily provide for all forms of referendum, even national ones. In *Malta,* for example, only the constitutional referendum is dealt with in the constitution.

21. The existence of constitutional rules providing for a referendum clearly does not preclude *implementing legislation.* On the contrary, it is natural for the constitution to set out the principles and for the other rules to be specified in ordinary legislation. In some states, the constitutional rule is implemented by a legal instrument that ranks higher than the ordinary law (in *Andorra* this is a "qualified" law, in *Spain, Georgia* and *Portugal* an "organic" law or implementing Act). In *Russia*, whose constitution contains

only a few rules on referendums, the subject is regulated by a constitutional law. The situation is in theory the same in the *Czech Republic*, although such a constitutional law has not been passed there except with regard to the country's accession to the European Union, and it has accordingly not yet been possible to organise national referendums on other subjects. When the referendum is rarely used, a special law may have to be passed each time one is organised (as in *Finland*, which has held two referendums).

B – Types of referendum – bodies competent to call referendums

22. The nature of the referendum varies according to whether it is mandatory or optional and depends on the body competent to call it. This will be considered in this section.

1. *Mandatory referendum*

23. A referendum is *mandatory* when certain texts are automatically submitted to referendum, perhaps after their adoption by Parliament.

24. A mandatory referendum generally relates to constitutional revisions. In some states, any constitutional revision is submitted to a mandatory referendum, with the result that the people itself becomes the constitution-making body (*Andorra, Armenia, Azerbaijan, Ireland, Switzerland* – where a majority of the people and of the cantons is required -, *Denmark* where a precondition for a constitutional revision is the holding of general elections). In other states *(Austria, Spain),* only total revisions are submitted to a mandatory referendum. A mandatory referendum may also be restricted to changes to certain provisions or rules: basic constitutional provisions *(Estonia* – the chapters of the Constitution on general provisions and the revision of the Constitution as well as the law complementing the Constitution, on accession to the European Union -, *Latvia* – democratic and sovereign nature of the state, territory, official language and flag, election of the Parliament by universal, equal, direct, secret and proportional suffrage, a rule providing for a referendum to be called for the revision of previous provisions -, *Lithuania* – an independent and democratic republic, chapters on the state and revision of the constitution, constitutional law on the country's non-alignment with post-Soviet alliances -); three provisions relating to constitutional revisions and the duration of Parliament (Malta).

25. A mandatory referendum may also be conditional on a preliminary procedure, as in the case of *France,* where it concerns only constitutional revisions initiated by Parliament (there has been no actual case in which it has been used) and *Turkey*, where it concerns only constitutional amendments adopted by at least three-fifths but less than two-thirds of the members of the Grand National Assembly and not returned to the Assembly by the President of the Republic for reconsideration, although such a case is unlikely. In *Russia*, the mandatory referendum may be provided for only by an international treaty.

26. Other very important instruments are sometimes submitted to mandatory referendum. Such instruments are, firstly, quasi-constitutional rules, such as, in *Switzerland*, emergency laws derogating from the Constitution for more than one year and, secondly, instruments that involve a considerable limitation of sovereignty, especially in the context of European integration, such as accession to the European Union (*Latvia*), joining collective security organisations or supranational communities

(*Switzerland*), joining international organisations in the case of a transfer of powers (*Lithuania*), association with other states (*Croatia*) or joining or leaving a community with other states *("the former Yugoslav Republic of Macedonia*"). In *Denmark*, a referendum must take place when constitutional powers belonging to the national authorities are delegated to international bodies, unless Parliament approves this by a five-sixths majority. Also submitted to mandatory referendum are changes to a country's territorial integrity, such as a redefinition of borders (*Azerbaijan, "the former Yugoslav Republic of Macedonia*"). Finally, other states provide for mandatory referendums in specific fields: in *Denmark*, a change in the voting age; in *Portugal*, regionalisation.

2. *Referendums at the request of an authority*

27. Referendums at the request of an authority – or *extraordinary referendums* – exist in quite a number of states. The state body that calls for such a referendum may be the executive (in particular, the President), in which case the citizens' confidence in this body may be concerned (plebiscitary aspect) or the legislative (or part of it). If the call for a referendum comes from the majority or, indeed, the opposition, it too may have a plebiscitary character, which will not be the case if the legislative takes the decision by common consensus to hold a referendum.

28. The remarks below refer only to referendums at the request of an authority. Most of the states concerned also have provision for mandatory referendums or referendums at the request of part of the electorate.

29. In fact, very few states provide for only the executive to call a referendum. This is the case in *Turkey*, where the President can submit to the people amendments that he or she has sent back to Parliament and have been subsequently adopted by the latter by a two-thirds majority. In *Albania*, on the other hand, the President can call on the people to decide only at the request of voters. It has to be emphasised that these two states have a parliamentary system.

30. In *France,* the President can call a referendum on the proposal of the Government or (except for constitutional revisions) a joint proposal by the two assemblies. In the case of a Government proposal, a debate must be held by the two assemblies. In the case of constitutional revisions, Parliament can decide to organise a referendum. It should be noted that the Government's involvement precludes, in principle, a call for a referendum against the advice of the parliamentary majority. In *Portugal,* there also has to be an agreement between the President and Parliament, or the President and the Government. In *Croatia*, an issue may be put to the vote either by Parliament or the President, but the latter can only call a referendum on the Government's proposal and with the Prime Minister's counter-signature.

31. In some cases (such as *Azerbaijan* and *Georgia*), the President or Parliament may each have the general right to call a referendum.

32. In other states, however, the executive and the legislative have to agree before a referendum is called. In *Armenia,* this is case with the President and the Parliament (the President can also call a referendum at the Government's request with the consent of Parliament). In *Andorra*, the Head of Government and the Council General have to agree, and in *Cyprus* there must be agreement between the Prime Minister and Parliament – which should not pose any problem given

the parliamentary nature of the political system. In *Ireland,* the President calls a legislative referendum on a joint proposal of the Senate majority and at least one-third of the lower house (Dail).

33. The *Polish lower house (Sejm)* alone has the power to call a referendum, the President being able to do so only with the consent of the Senate.

34. In many countries, however, Parliament is the only authority able to call a referendum (*Estonia, Finland*, *Latvia* – on modifications of the terms of membership of the European Union -, *Lithuania, Luxembourg, Malta, Sweden*). In *Belgium* and *Norway*, where the constitution does not provide for referendums, Parliament has acted on the basis of a decision or specific acts of Parliament. In *Austria,* the National Council decides whether to hold a legislative or consultative referendum on issues of national importance; one-third of members of Parliament can submit a partial revision of the constitution to a popular vote. In *Bulgaria*, it is Parliament that decides, but the proposal to call a referendum may come not only from a quarter of members of Parliament but also the Council of Ministers or the President. In *Hungary*, Parliament decides following a proposal by the President, the Government, one-third of its members or 100,000 voters, while in *"the former Yugoslav Republic of Macedonia"* it decides in response to a proposal by the Government, a member of Parliament or 10,000 citizens. In *Spain,* a consultative referendum on an issue of particular importance is called by the King on the proposal of the Prime Minister following the authorisation of the Congress. In *Greece*, the President formally calls a referendum but the decision must be taken by a majority of members of Parliament on the proposal of the Government (on crucial national issues) or three-fifths of members of Parliament (on laws relating to important social issues).

35. In *Russia,* if a constituent assembly is convened, it can adopt a new constitution by a majority of two-thirds of its members or submit a proposal to referendum.

36. Sometimes, a minority of parliamentarians can refer partial revisions of the constitution to the people, as in *Denmark* (1/3 of members of Parliament) or *Spain* (10% of the members of either chamber).

37. In some states, a referendum can be requested by a number of constituent entities – in *Switzerland*, eight cantons, or regional entities – in *Italy*, five regions (by decision of the Regional Council).

38. In very few states, the legislative may call a referendum on the dismissal of the executive or vice versa. Each of these two possible cases appears once in the replies to the questionnaire. In *Austria*, a referendum on the dismissal of the President can be called by a two-thirds majority of the National Council; in *Latvia*, by contrast, it is the President who can call a referendum on the dissolution of Parliament.

3. <u>*Referendum at the request of part of the electorate*</u>

39. Provision for a referendum at the request of part of the electorate is less common than that for a mandatory referendum or referendum at the request of an authority.

40. Referendums at the request of part of the electorate must be divided into two categories: the *ordinary optional referendum* and the *popular initiative* in the narrow sense. Both result in a popular vote without an authority taking a decision in this respect, but the authorities are least involved in the case of the popular initiative. An ordinary optional referendum challenges a text already approved by a state body, while a popular

initiative enables part of the electorate to propose a text that has not yet been approved by any authority.

41. It is in *Switzerland* that the mechanisms of the ordinary optional referendum and the popular initiative are the most highly developed. A referendum can be requested by 50,000 citizens against specific laws (except for emergency laws adopted for less than one year), certain international treaties and certain federal orders – decisions adopted by Parliament. A popular initiative can be presented by 100,000 citizens with the aim of revising the constitution and a general popular initiative, which can also lead to a change in the law, will be introduced shortly. Parliament decides solely on the validity of the popular initiative.

42. A request for an ordinary optional referendum or a popular initiative requires 500,000 signatures in *Lithuania* and 150,000 in *"the former Yugoslav Republic of Macedonia*". In *Latvia*, 10% of voters can launch a constitutional or legislative popular initiative or request a referendum if the President suspends a law at the request of one-third of Parliament, if the law is not passed again by the latter by a three-quarters majority of its members.

43. *Italy* has both optional constitutional referendums and abrogative legislative referendums, at the request of part of the electorate (500,000 signatures are necessary). Parliament can, however, rule out a referendum by revising the basic principles and key content of the old law. *Albania* and *Malta* also have provision for abrogative legislative referendums. The system in the *Russian Federation* provides for a referendum at the request of 2,000,000 voters. This is more akin to a popular initiative, even though it may relate to a text already adopted as it is not suspensive.

44. *Croatia* has a popular initiative (at the request of 10% of the voters) but not an ordinary optional referendum. The same applies to *Georgia* (at the request of 200,000 voters). As we shall see later, in these two countries the referendum cannot relate to the text of a law.

45. Ordinary optional referendums exist in *Hungary* but not the type of popular initiative described here (200,000 signatures). The temporary law in force in the *Netherlands* from 2002 to 2004 was along the same lines (600,000 voters, following an introductory request by 40,000 voters).

46. In several states, there is also a limited form of popular initiative, with a number of voters being able to propose that another body call a referendum. This is accordingly an extraordinary referendum organised at the request of part of the electorate. In *Poland,* 500,000 citizens can ask the Sejm to organise a referendum; in *Portugal*, such a request can be submitted to Parliament by 75,000 voters; in *Hungary,* 100,000 signatures are necessary and in *"the former Yugoslav Republic of Macedonia"* 10,000 (it should be pointed out that the referendum must take place if there are 200,000 or 150,000 signatures respectively). On the other hand, 50,000 voters can ask the President of *Albania* to organise a referendum, while 300,000 can do so in *Azerbaijan*.

47. Otherwise, the *role of the authorities,* and especially Parliament, is limited in the case of the popular initiative. As pointed out above, the *Italian* Parliament can rule out an abrogative referendum by revising the basic principles and key content of the old law. *Maltese* law is similar: the referendum does not take place if Parliament repeals the impugned legislation. The *Lithuanian* Parliament debates the initiative, but cannot

refuse to submit it to the people unless it is unconstitutional. In *Switzerland,* Parliament examines the validity of the popular initiative and must recommend its acceptance or rejection within 30 months of its being presented. It can make a counter-proposal to the popular initiative aimed at a partial revision of the constitution, which will then be put to the vote at the same time as the initiative. Parliament may also declare the initiative invalid and refuse to submit it to the people's vote.

C – Content

Constitutional referendums

48. A referendum is often used to amend the *constitution.* In a number of states, as noted above, this is a *mandatory referendum*, either for any constitutional provision or only for certain provisions judged particularly important.

49. *Optional constitutional referendums,* either *at the request of an authority* or part of the electorate, exist in most states that do not have mandatory constitutional referendums. For example, the *French* President or Parliament can submit to the people a constitutional amendment approved by the two assemblies. In *Azerbaijan* and *Turkey* also, the President or Parliament can call a constitutional referendum, while in *Armenia* the agreement of the President and Parliament is required. A constitutional referendum can take place on the initiative of Parliament in *Estonia*, *Lithuania* and *Malta* (subject to cases of mandatory referendums in the latter two states) and one-third of the members of one of the chambers in *Austria.* In *Russia,* it can relate to a new constitution as a whole, on the initiative of the constituent assembly.

50. The optional constitutional referendum at the *request of part of the electorate* is used in *Italy* (500,000 signatures are required), *Lithuania* (300,000 signatures) and *Hungary* (200,000 signatures; if there are only 100,000, the consent of Parliament is necessary).

51. The constitutional *popular initiative* is very common in *Switzerland* (100,000 signatures) and also exists in *Lithuania* (300,000 signatures) and *"the former Yugoslav Republic of Macedonia"* (150,000 signatures).

52. By contrast, several states exclude constitutional issues from the scope of the referendum: *Bulgaria, Greece, Luxembourg, Netherlands* – temporary law applicable up to 2004 -*, Portugal*.

Legislative referendums

53. Quite a number of states provide for legislative referendums. In most cases, this is an extraordinary referendum held on the initiative of the President *(Azerbaijan, France),* Parliament (*Albania, Austria*, *Azerbaijan, Lithuania, Luxembourg*), a number of members of Parliament (*Denmark*, *Greece*) or on the basis of an agreement between the President and Parliament *(Armenia, Ireland* – where the agreement of a majority of the Senate and one-third of the Dail is required). In *Portugal*, the President decides on the basis of a proposal by Parliament or Government.

54. The *ordinary* legislative referendum is very common in *Switzerland* (at the request of 50 000 voters). It also exists in *Hungary*, *Lithuania* and *"the former Yugoslav Republic of Macedonia*". In these states, it is suspensive, which increases its chances of success as voters are always more willing to oppose a legal instrument that is not in force than one they have seen applied.

55. The popular legislative initiative is less common. It exists in *Lithuania, Russia* and *"the former Yugoslav Republic of Macedonia*". *Albania, Italy* and *Malta* provide for *abrogative legislative referendums,* on the initiative of part of the electorate. This type of referendum may however terminate a statute's validity, not lead to its adoption.

Treaty-related referendums

56. Several states have provision for treaty-related referendums (on international treaties). They are mandatory in some states in the case of accession to the European Union *(Latvia)* or, more generally, to a supranational community *(Switzerland),* international organisations in the case of a transfer of powers *(Lithuania, Denmark*, except when a decision is taken by a five-sixths majority of members of Parliament) or in the case of joining or leaving a community with other states *("the former Yugoslav Republic of Macedonia*") or of an association with other states *(Croatia)*. It should be noted that the accession of *Austria* to the European Union was considered a total revision of the constitution and was consequently submitted to mandatory referendum. *Switzerland* also opts for a mandatory referendum in the case of joining collective security organisations.

57. The ordinary optional treaty-related referendum exists in *Switzerland* – at least for the most important treaties – and in *"the former Yugoslav Republic of Macedonia"*, and is subject to the same conditions as the ordinary legislative referendum.

58. The treaty-related referendum may also be extraordinary. In *France,* it is initiated by the President, in *Portugal* by the President on a proposal by Parliament or the Government, and in *Malta* by Parliament. This type of referendum is also possible in *Azerbaijan* and *Russia.*

59. Certain *other instruments* may be submitted to referendum, such as *Swiss* federal orders (without general scope) in the cases provided for in the constitution or the law (ordinary optional referendum). *Azerbaijani, Estonian* and *Maltese* law provide for other instruments to be submitted to the people by Parliament (or the President in the case of Azerbaijan).

60. States that do *not* provide for a referendum on a *specifically-worded draft (Croatia, Georgia, Sweden*)[3] do not provide for a vote on the actual text of the Constitution (or other texts). However, they do provide for a vote on important issues that may clearly be constitutional in nature or related to laws or treaties. In *Croatia,* for example, voting can take place on any issue falling within the competence of Parliament or any matter that the President considers important.

Matters to which referendums may relate

61. A number of states limit the matters to which referendums may relate, doing so either by drawing up an exhaustive list or excluding certain areas from the popular vote.

62. An exhaustive list is drawn up in *France* in the case of legislative or treaty-related referendums, which can relate to the organisation of the public authorities, economic and social policy reforms and the relevant public services and, finally, the ratification of a treaty not contrary to the constitution but liable to influence the operation of the institutions. In practice, this is a very wide area.

[3] *See I.D.*

63. Apart from elections and questions submitted to the decision of judicial or administrative bodies, which are expressly excluded from referendums by *Armenian, Austrian and Azerbaijani* law and implicitly excluded by the law of many other countries, the principal matters in respect of which national law rules out a referendum are financial, budgetary and tax issues *(Albania, Azerbaijan, Denmark, Estonia, Greece, Hungary, Italy, Malta*, *Poland* on the initiative of the citizens, *Portugal,* and *"the former Yugoslav Republic of Macedonia"),* amnesties and pardons *(Albania, Azerbaijan, Georgia, Italy, Poland* on the initiative of the citizens, and *"the former Yugoslav Republic of Macedonia")* and restrictions on fundamental rights *(Albania, Armenia, Georgia*). It may also relate to territorial integrity (*Albania*), states of emergency (*Albania, Estonia),* the powers of Parliament, judicial bodies and the Constitutional Court *(Bulgaria),* texts concerning the civil service, naturalisation and expropriations (*Denmark*), the monarchy and the royal family *(Netherlands* under the temporary law applicable up to 2004*, Denmark* to a certain extent), legislative acts that are submitted to a special procedure and whose content is imposed by the constitution or acts constitutionally necessary for the operation of the state (*Italy, Portugal*), and appointments and dismissals *("the former Yugoslav Republic of Macedonia*"). The implementation of international treaties cannot be submitted to the decision of the people in *Denmark, Hungary, Malta* and the *Netherlands* (temporary law), so as to avoid a breach of international law. Similarly, *Swiss* law allows for (but does not make compulsory) an international treaty and its implementing provisions (constitutional or legislative) to be put to a single vote.

D – Form of the text submitted to referendum (formal validity)[4]

64. The text submitted to referendum may be presented in various forms :

- a *specifically-worded draft* of a constitutional amendment, legislative enactment or other measure
- *repeal* of an existing provision
- a *question of principle* (for example: "Are you in favour of amending the constitution to introduce a presidential system of government ?") or
- a *concrete proposal*, not presented in the form of a specific provision and known as a *"generally-wordedproposal"* (for example: "Are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?").

65. A number of states do not have any rules on the form of texts submitted to referendum (*Azerbaijan, Belgium, Cyprus, Finland, Latvia, Luxembourg, Norway, Poland, Russia, "the former Yugoslav Republic of Macedonia*"). Moreover, some of these states (*Belgium, Finland, Luxembourg, Norway*) do not have general rules on referendums or stipulate that the Council of Ministers (cabinet) should determine the form of the text submitted to referendum (*Cyprus*). In *Bulgaria*, it must simply be possible to reply yes or no to the question asked.

66. Other states, such as *Armenia, Denmark, France, Ireland, the Netherlands* (temporary law) and *Turkey*, only provide for a vote on a *specifically-worded draft.* There is also provision in *Italy* for an abrogative referendum, which also relates to a specific legal text.

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[4] *CDL-INF(2001)010, Guidelines for constitutional referendums at national level, adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001), para. II.C.*

67. By contrast, *Croatian* law excludes specifically-worded drafts (and thus takes into consideration questions of principle and generally-worded proposals); the situation is in principle the same in *Portugal*, where the only specifically-worded text which may be submitted to referendum is a treaty which aims at the construction or the deepening of the European Union.

Only questions of principle can be put to the vote in *Georgia* and *Sweden* (where a choice between various alternatives is possible).

68. The referendum may also relate to a text that has or has not been specifically worded, depending on its nature or purpose. In *Austria* (where two alternative drafts may be offered), *Andorra*, *Spain* and *Lithuania*, a decision-making (legally binding) referendum relates to a specifically-worded draft (or the dismissal of the President in the case of Austria) and the consultative referendum to a question of principle.

69. Other states provide both for referendums on specifically worded drafts and questions of principle (*Greece, Spain, Albania*). Finally, the three possibilities (specifically-worded draft, question of principle, generally-worded proposal) may co-exist *(Hungary, Switzerland, Malta* in the absence of a rule to the contrary). *Albania* and *Malta* also have provision for abrogative referendums, which relate to a specifically-worded text.

70. Questions of principle are defined by national law in various ways. In *Greece,* for example, they are crucial national issues and important social issues, in *Spain* issues of particular importance, and in *Cyprus* important issues of public interest; in *Switzerland*, it is the total revision of the Constitution.

Unity of form

71. The question then arises as to whether the texts submitted to referendum have to comply with the principle of unity of form (the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle).

72. States that do not provide for any rule concerning the form of the texts submitted to referendum logically do not adopt the principle of unity of form either. By contrast, when a single form is prescribed, this principle is imposed by definition. Certain states that provide for several types of referendum adopt the principle of unity of form. This principle is expressly laid down in *Switzerland* but is implicit to a greater or lesser extent in quite a number of other states (for example, in *Albania* a vote is held on constitutional provisions, the repeal of legislation or a question of principle). A similar situation may be said to exist in *Andorra, Estonia*, *Greece*, *Hungary, Lithuania* and *Spain.*

Unity of content

73. The principle of unity of content means that, except in the case of a total revision of the constitution or another piece of legislation, there must be an intrinsic connection between the various parts of each question put to the vote in order to guarantee freedom of suffrage (the voter must not be expected to accept or reject as a whole provisions without an intrinsic link between them).

74. To date, most of the states that have replied to the questionnaire have not adopted any rule imposing compliance with the principle of unity of content. This does apply however in *Bulgaria*, *Italy*, *Portugal, Switzerland* and *Hungary*, where freedom to vote

is considered to have been violated if parts of a question are contradictory, if their relationship with one another is not clear and if they do not flow from one another or are not linked by their content. Less explicitly, this principle is also applied in *Armenia*, *Austria* and *"the former Yugoslav Republic of Macedonia"*. In the *Netherlands*, this question does not really arise since only an entire law can be put to the popular vote under the temporary law.

Unity of hierarchical level

75. Unity of hierarchical level means that the same question must not relate simultaneously to the constitution and subordinate legislation. It is complied with in the following countries: *Andorra, Armenia, Ireland, Italy, Switzerland* and, implicitly, *Hungary* and *Lithuania.*

76. Unity of hierarchical level is mandatory by definition in states that do not provide for a constitutional referendum (*Bulgaria, Greece, Luxembourg, Netherlands, Portugal*) or those that, by contrast, provide only for a constitutional referendum (*Turkey*). It applies solely to specifically-worded drafts; questions of principle and generally-worded proposals have no place in the hierarchy of rules (they are implemented by constitutional and legislative rules).

Other requirements relating to the question asked

- *Clear and non-leading questions*

77. Freedom to vote presupposes that "the question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; electors must be informed of the consequences of the referendum; voters must answer the questions asked by yes, no or a blank vote"[5]. A number of national legal systems explicitly uphold these rules, especially the requirement that the question be clear. In *Albania*, questions of principle (particularly important questions) submitted to the electorate must be clear, complete and unequivocal; in *Armenia*, the question must be straightforward; in *Hungary*, devoid of ambiguity; in *Portugal*, questions must be formulated in an "objective, clear and precise manner", and may not contain any suggestion or preliminary considerations; in *France* three conditions are attached: fairness, clarity and absence of ambiguity. The requirement for clarity relates to the rules providing that the voter should be able to reply yes or no (*Austria, Croatia, Greece, Malta, "the former Yugoslav Republic of Macedonia*") or to vote on a specifically-worded text (*Ireland*). The requirement that the question be clear and non-leading is also upheld in *Bulgaria, Italy, Poland, Portugal* and *Switzerland*. Elsewhere it should apply in pursuance of the principle of freedom to vote.

- *Number of questions*

78. In general, the *number of questions asked* at the same ballot is not limited. However, in *Armenia* a referendum cannot relate to more than one question and in *Portugal* no more than three. In some states, *alternatives* can be proposed *(Austria, Russia, Sweden)*. In *Switzerland,* Parliament can adopt a counter-proposal to a popular initiative, which is put to the vote at the same time.

[5] *CDL-INF(2001)010, para. II.E.2.a.*

E – Substantive limits on referendums (substantive validity)[6]

79. The question of substantive limits is most important in the case of constitutional revisions. Most constitutions do not prescribe substantive limits to their revision, but this does not exclude the possibility of such limits existing, whether they be extrinsic (international law or some of its rules) or intrinsic, entailing the precedence of certain constitutional provisions over others. This is not the place to enter into a doctrinal debate but rather to establish to what extent national legal systems recognise such limits to the constitutional referendum.

80. *Intrinsic* limits to the revision of the *constitution* are quite rare. In *Albania,* referendums cannot lead to interference with the country's territorial integrity or with fundamental rights. In *Croatia,* the only limit is the re-creation of a Yugoslav or Balkan state.

81. As regards *extrinsic* limits, *Switzerland* upholds the mandatory rules of international law *(ius cogens*). In *Hungary*, it is forbidden to organise a referendum on the obligations resulting from international treaties already in force and on the laws that implement them.

82. Quite a number of states do not provide for any limits (for example, *Austria, Azerbaijan, Finland, Latvia, Malta, Turkey, France* in practice).

83. On the other hand, when a referendum relates to a legal instrument of *lower rank* than the constitution, an examination is often conducted before the vote to establish whether it conforms to the constitution (*Estonia, Lithuania, Portugal, Russia, Sweden*) or with the constitution and international law (*Cyprus, Denmark, Greece, Italy, "the former Yugoslav Republic of Macedonia*"). In *Ireland*, the examination is carried out with respect to the constitution and European Union law. The latter requires that, at the very least, no law contrary to it should be in force in any member state. Such an examination can even be conducted in the case of a referendum on a question of principle or a generally-worded proposal when the latter cannot lead to a revision of the constitution *(Andorra* – the question must also comply with international treaties). In *Russia*, the question submitted to referendum must not restrict, set aside or reduce universally recognised human and civic rights and freedoms or the constitutional guarantees for exercising them.

84. In *Poland,* even though there is no explicit limit, the Sejm examines the question of conformity with higher-ranking law before deciding to call a referendum. In addition, the necessity to ensure conformity with higher-ranking law does not prevent the exclusion of preventive checks (*Armenia*).

F – Campaigning, funding and voting

1. *Campaigning* [7]

Information for voters

85. The availability of the text put to the vote is an essential precondition for the electorate to freely develop an informed opinion. Publication in the official gazette is a minimum form of publicity that actually only reaches a limited number of voters. *Lithuania* and *Russia* provide for the text to be published in the public media and on

[6] *Cf CDL-INF(2001)010, para. II.D.*

[7] *Cf CDL-INF(2001)010, para. II.E.2.*

their websites. In *Ireland,* the text must be made available to the public at post offices; in the Netherlands, it must be made available in town halls (under the temporary law applicable up to 2004).

86. Some countries have rules stipulating that the authorities must not only put the text at the disposal of citizens, but also provide additional *objective information.* In the *Netherlands,* a summary of the text is sent to voters. Other states arrange for an explanatory note or other information to be made available. In *Switzerland,* the text put to the vote is sent to voters together with an explanatory note from the Federal Council (Government), which must set out the various points of view in a balanced manner. In *France,* even if this is not prescribed by law, in practice the authorities have to supply objective information, by providing voters with the text and an explanatory note. The draft note is checked by the Constitutional Council, as a matter of course. In *Finland,* an objective explanatory note was sent to voters for the referendum on the country's accession to the European Union in 1994 (a special law is passed for each referendum). Such a note is drawn up in *Ireland* if the two houses of Parliament make provision for this and it must be neutral. In *Portugal,* all the authorities are required to ensure the strictest impartiality, while in *Latvia* the Central Electoral Commission must provide citizens with neutral information, especially on the draft put to the vote.

87. In *Portugal,* it is the National Electoral Commission's task to draw up and provide any objective information on the referendum necessary for voters; in *Poland,* the State Electoral Commission is simply authorised to do this.

Sources of campaign material

88. An obligation for the authorities to demonstrate absolute impartiality and neutrality is recognised in *Portugal* and is also very widely established in *Switzerland.*

89. In *Russia,* as well as in *Portugal*, authorities and officials are prohibited from campaigning. Restrictions imposed on the authorities are sometimes more limited. In *Armenia,* they only apply to the exercise of their functions (for judges, police officers and military personnel, there is an absolute ban on campaigning). In *Georgia*, the ban on campaigning applies only to members of the electoral commissions.

90. In *Austria,* the authorities must provide neutral information but they are also allowed to campaign. However, the Constitutional Court has ruled in its case law that they are prohibited from disseminating non-objective or disproportionate mass information.

91. Other states, however, allow the authorities to be involved in the campaign *(Hungary)*.

92. As far as individuals are concerned, most states do not impose any restrictions. However, foreign citizens and organisations are not allowed to campaign, for example, in the following states: *Armenia, Azerbaijan, Georgia* and *Russia.* In *Russia,* religious associations and charities cannot campaign. Special status is granted in *Portugal* to political parties, coalitions of parties or groups of at least 5,000 voters.

Access to the media

Public media

93. The majority of states that replied to the questionnaire regulate access to the public media during the referendum campaign. Quite often, equal air time is given to the

supporters and opponents of the draft proposal (Albania, Azerbaijan, Bulgaria, Cyprus, Lithuania, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia").

94. In some states, a balance must be ensured between the various groups participating in the campaign rather than between the supporters and the opponents. This is the case in *Italy*, *Malta*, *Poland, Portugal* and *Russia.*

95. In the *Netherlands* and *Spain,* the rules simply state that the political parties represented in Parliament can use the time allocated to them on the radio and television for the referendum campaign. In *Spain,* this time is allocated in proportion to the parties' electoral strength.

96. French law requires that the supporters and the opponents of the draft proposal be given "fair" coverage on radio and television. Only the parties represented in Parliament and those whose participation appears justified in view of the nature of the question asked may express their views. There is also a requirement to be fair in *Ireland.*

97. Other legal systems ensure a balance with regard to the requirements of objectivity, impartiality or neutrality. For example in *Austria*, the public broadcasting service is generally required to guarantee that the public receives objective and impartial information and to ensure a diversity of opinions.

Private media

98. Rules concerning the *private media* are less common that those relating to the public media. However, in some states there is a requirement for both the private and the public audiovisual media to be balanced. For example, supporters and opponents have the same air time in the two types of media in *Bulgaria* and *Cyprus.* In *Austria,* the requirement of impartiality and objectivity also applies to private radio and television stations, while in *France* and *Ireland* they must provide supporters and opponents of the draft proposal with fair coverage. This was also the case in *Finland* at the time of the referendum on accession to the European Union.

99. In Portugal,

- the requirement for balance applies to *private audiovisual* media in the same way as to public media – including the obligation to grant air time;
- the same requirement for balance applies to *other private* media (the printed media), but only if they wish to insert campaign material;
- the use of media is free (for parties and groups); the state has to compensate publications and channels.

100. Without going as far as this, legislation may provide that unequal financial conditions must not be imposed on referendum campaigning according to its origin (*Italy, Russia* and *Spain*, where rates cannot be higher than those for commercial advertising, and *Switzerland* in principle).

2. *Funding*[8]

101. The use of public funds for or against a draft submitted to referendum is prohibited in a number of states: *Armenia, Bulgaria, Croatia, Georgia, Ireland, Portugal, Poland, Russia, Spain, Switzerland,* and *"the former Yugoslav Republic of*

[8] *Cf. CDL-INF(2001)010, para. II.F.*

Macedonia". This clearly does not exclude the use of public funds for the organisation of the referendum, including the benefits granted both to the supporters and opponents of the text in respect of postage (*Spain*) or tax exemption for activities connected with the referendum *("the former Yugoslav Republic of Macedonia*").

102. Other countries link the use of public funds to compliance with the requirement of neutrality. *Ireland* and *Malta* provide for public funds to serve the purpose of providing information but not for campaigning. In *Finland*, at the time of the referendum on accession to the European Union, public funds were distributed equally among the supporters and opponents of the proposal.

103. In some countries, the authorities' ability to use public funds during the campaign is not ruled out but is limited. In *Austria*, the moderate use of public funds by Parliament and the Government is accepted if it does not constitute disproportionate and non-objective information. In *Azerbaijan*, the authorities are prohibited from campaigning only in the period immediately preceding the vote.

104. The law of other states that replied to the questionnaire makes no mention of this question.

Payment for the collection of signatures

105. In states in which popular initiatives or optional referendums are held, there is the question of the possibility of remunerating the people who collect signatures. None of the replies to the questionnaire mentions that such payment is prohibited, so the problem does not appear to exist in practice. It goes without saying, only these who collect signatures may be remuneated, not as voters who sign a popular initiative or a request for a referendum stated in Russia's reply.

3. *Voting*

Voting period

106. In most states, the vote takes place over *one day* in the *Czech Republic* over *two days. Finland* schedules two days if the referendum is held at the same time as the national elections. The vote can also take place over one or two days in *Poland*. By definition, when advance or postal voting is allowed, it takes place before the actual polling day. For example, postal voting takes place over a period of thirty days in *Sweden* and three weeks before polling day in *Switzerland.* In *Estonia,* advance voting may take place at the polling stations from thirteen days before the election (moreover, electronic voting between four and six days before the election will be allowed from 2005). Advance voting is permitted by *Russian* law for fifteen days in the case of less accessible localities, boats, polar stations and, more generally, everywhere outside the national territory.

107. If there are different time-zones within a country, is it possible for the results from some polling stations to be known before voting closes in others? This question arises in *Russia* much more than anywhere else, and the outcome of the vote is announced after the closure of all polling stations and the general counting of the votes. There is a significant time-difference between Metropolitan *France* and the overseas departments, and up to now the publication of the results has not been prohibited before the last polling stations close.

Compulsory voting

108. Compulsory voting is prescribed for referendums only in a very limited number of states: *Greece, Luxembourg, Turkey* and *Belgium* (where just one *ad hoc* referendum has been organised). In *Switzerland,* it is imposed only in one canton.

Quorum

109. Most states do not provide for a quorum to validate the result of a referendum.

110. Where a quorum does exist, it can take two forms: quorum of *participation* or quorum of *approval*. The quorum of participation (minimum turnout) means that the vote is valid only if a certain percentage of registered voters take part in the vote. The quorum of approval makes the validity of the results dependent on the approval (or perhaps rejection) of a certain percentage of the electorate.

111. A quorum of approval is considerably preferable to a quorum of participation, which poses a serious problem[9]. The opponents of the draft proposal submitted to referendum, as several examples have shown, appeal to people to abstain even if they are very much in the minority among the voters concerned by the issue.

112. A *quorum of participation* of the majority of the electorate is required in the following states: *Bulgaria, Croatia, Italy* and *Malta* (abrogative referendum), *Lithuania, Russia* and *"the former Yugoslav Republic of Macedonia"* (decision-making referendum). In *Latvia,* the quorum is half the voters who participated in the last election of Parliament (except for constitutional revisions, see below), and in *Azerbaijan,* it is only 25% of the registered voters. In *Poland* and *Portugal,* if the turnout is not more than 50%, the referendum is *de facto* consultative and nonbinding (in *Portugal,* the quorum is calculated on the basis of the citizens registered at the census).

113. A *quorum of approval* of a quarter of the electorate is laid down in *Hungary.* In *Albania* and *Armenia,* the quorum is one-third of the electorate. In *Denmark*, a constitutional amendment must be approved by 40% of the electorate; in other cases, the text put to the vote is rejected only if not simply the majority of voters vote against it but also 30 % of the registered electorate.

114. Moreover, a particularly high quorum is sometimes required for fundamental decisions. In *Latvia*, when a constitutional amendment is submitted to referendum, it must be approved by more than 50% of the registered voters. In *Lithuania,* certain particularly important rules relating to sovereignty can only be decided by a majority of three-quarters of the electorate, while others relating to the state and constitutional revisions require a majority of the electorate. In *Croatia,* a "yes" vote of a majority of the electorate is required in the case of an association with other states.

115. The quorum of participation and quorum of approval may be combined. For example, in *Lithuania,* in the case of a mandatory referendum, the quorum is a 50% turnout and one-third of the voters must approve the draft proposal. For accession to supranational organisations, only the minimum turnout has to be achieved.

[9] *Cf. CDL-INF(2001)010, para. II.O.*

G – Effects of referendums [10]

Decision-making (legally binding) and consultative referendums

116. Most referendums organised in the states that replied to the questionnaire are of a decisionmaking nature, in other words the result is legally binding, in particular on the authorities.

117. *Several states provide only for decision-making referendums:* Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Estonia, France, Georgia, Greece, Ireland, Italy, Latvia, Russia, Switzerland, "the former Yugoslav Republic of Macedonia" *and* Turkey. *The only referendum organised in the* Czech Republic *(on accession to the European Union) was a decision-making one.*

118. In other states, such as *Denmark,* decision-making referendums are the rule but consultative referendums are not excluded.

119. In *Hungary,* a referendum on a law or following a popular initiative launched by 200,000 citizens is always binding, while in other cases Parliament decides whether the referendum will be binding or consultative.

120. Some states distinguish between decision-making referendums and consultative referendums according to the nature of the text put to the vote. In *Andorra, Austria* and *Spain,* a referendum on an important issue is consultative, while a constitutional referendum (and a legislative referendum in *Austria*) is legally binding. In *Lithuania*, a referendum is binding if it relates to legislative provisions proposed by a popular initiative and to constitutional provisions submitted to a mandatory referendum. In other cases, it is consultative.

121. In *Poland* and *Portugal*, the referendum is binding if the majority of the electorate has voted; otherwise it is *de facto* consultative.

122. Finally, *Belgium*, *Finland*, the *Netherlands* and *Norway* have had only *consultative* referendums to date. In *Sweden*, while a legally binding referendum on a question relating to basic laws is possible, only consultative referendums have been held up to now.

Suspensive and abrogative referendums

123. Leaving out the case of the popular initiative, which leads to the adoption of a new text, a decision-making referendum may also be:

- *suspensive:* the text may not enter into force unless it has been approved by the voters or unless a request to hold a referendum has not been made within the time-limit established by the Constitution or by law;

- *abrogative* or *resolutory*: the text ceases to be in force following a vote against it or failure to secure a "yes" vote within a certain time-limit after its adoption.

124. A *suspensive* referendum, since it involves voting on a text not yet applied, is more likely to result in rejection of the matter put to the vote. It is always employed when international treaties are put to the vote in order not to incur the international liability of the state, as well as in the following countries: *Armenia, Azerbaijan, France, Greece, Hungary, Ireland, Latvia, Lithuania* and *Turkey*. In *Denmark* and *Switzerland*, the referendum is suspensive unless it relates to an emergency law (in which case it is resolutory). The only referendum organised in the *Czech Republic* (on the country's

[10] *0Cf. CDL-INF(2001)010, para. II.N.*

accession to the European Union) was suspensive. Although it is consultative, a referendum is also suspensive in the *Netherlands.*

125. A referendum is suspensive only in respect of constitutional issues in *Albania, Andorra, Italy* and *Spain* and, when it relates to a specifically-worded draft, (and is accordingly binding) in *Austria.* In *Malta,* a referendum is suspensive if it concerns a constitutional revision submitted to a mandatory referendum or a law proposed by Parliament.

126. By contrast, in *Russia* a referendum is in principle *abrogative.* Both suspensive and resolutory referendums exist in *"the former Yugoslav Republic of Macedonia*". It must be recalled that *Denmark* and *Switzerland,* where referendums are in general suspensive, use abrogative referendums for emergency laws. *Albania, Italy* and *Malta* have *abrogative* referendums also in respect of legislative matters.

Decisions to be taken after a referendum

127. When the vote has concerned a question of principle or a generally-worded proposal, Parliament must adopt implementing regulations. This is the case in states where specifically- worded drafts cannot be submitted to referendum, as in *Croatia* and *Georgia.* It is also the case with generally-worded texts in *Estonia* (issue of national interest), *Switzerland* (generally- worded popular initiative). *Bulgaria* (when necessary) and *"the former Yugoslav Republic of Macedonia"* (within 60 days if the referendum is not suspensive) also provide for Parliament to be called upon to pass legislation in accordance with the outcome of the referendum.

128. In *Portugal,* in the case of a legally-binding referendum with a positive outcome, Parliament or the Government is required to approve an international convention or corresponding legislative act within 90 or 60 days respectively. In *Russia*, the follow-up decisions necessary must be taken within three months of the vote.

129. In the *Netherlands*, under the temporary law, although a referendum was suspensive, Parliament had to take a new decision if the outcome of the referendum was negative and decide on the entry into force of the text if the vote was positive.

130. In order to ensure that Parliament does not bypass the popular vote, *Croatian* law provides that it may not take a decision contrary to the outcome of a referendum until one year has passed. Moreover, another referendum on the same issue may not be organised for six months. These rules do not apply in the case of a popular initiative and a referendum concerning an association with other states.

H – Parallelism of procedures and rules governing referendums

Parallelism of procedures[11]

131. The scope of a popular vote depends not only on whether it is a binding or consultative one, but also on whether parliament is able to reverse the decision taken by the people. In other words, can a provision approved by referendum be revised without going through the same procedure again? If it has been rejected by the people, can it be adopted without a referendum?

[11] *Cf. CDL-INF(2001)010, paragraph. II.L*

132. There is no clear trend in this respect and the various national laws are divided in their approach. In general terms, the following countries apply parallelism of procedures and consequently require proposed amendments to provisions already approved by referendum to be put to a further referendum (mandatory or consultative): *Albania, Andorra, Azerbaijan, Italy, Malta, Switzerland and "the former Yugoslav Republic of Macedonia*". Where the referendum is abrogative (legislative referendum in *Albania, Italy* and *Malta*), a parliamentary amendment running counter to the decision taken by referendum can, in theory, enter into force, but this is viewed as a politically unwise move. In *Russia*, a provision approved by referendum may be annulled or revised only by referendum unless another procedure had been stipulated in the text submitted in the original referendum. A new referendum cannot take place for two, or even five years.

133. Some countries (*Austria, Denmark*, *Ireland, Latvia*) have provision for parallelism of procedures exclusively for matters submitted to mandatory referendum. In *Armenia*, not only constitutional provisions (submitted to mandatory referendum), but also laws approved by referendum may be amended only by means of a subsequent referendum; however, in theory at least, parallelism of procedures does not apply to texts rejected by referendum, which may be approved by parliament.

134. There is no provision for parallelism of procedures in *Portugal,* but if a solution has been rejected in a referendum, it cannot be passed by parliament until after the election of a new parliament.

135. In principle, where referendums are consultative, parallelism of procedures is not an issue. This is the case in *Belgium, Finland* and *Norway*. Clearly, this does not rule out a consultative referendum on a text amending a text put to referendum, as indicated in the *Netherlands* reply to the questionnaire.

136. The question is a controversial one in some states, such as *Greece*. However, in the majority of the other countries that replied to the questionnaire (eg *Bulgaria, Croatia* (after one year), *Cyprus, Hungary, Lithuania, Poland, Spain, Sweden),* it is possible – at least from a legal point of view – for parliament to take action running counter to the result of a referendum.

Arrangements for revising the rules governing referendums[12]

137. Can a constitutional or legislative provision allowing for a referendum be amended by a procedure which does not provide for a referendum?

138. The majority of countries that replied to the questionnaire indicated that there was no particular provision relating to the revision of texts setting out the rules for referendums.

139. Accordingly, the situation across the different countries varies considerably. For example, in countries such as *Norway*, *Finland* and the *Netherlands*, which have only consultative referendums, obviously the only type of referendum that could be held in this respect would be a consultative one. In *Portugal,* where referendums cannot relate to constitutional provisions, no such popular vote could be held, even if the provision in question concerned referendums. In contrast, in *Switzerland*, where the constitution is subject to mandatory referendum and legislation to optional referendum, any provision relating to referendums (except where it is regulatory) must, under the

[12] *Cf. CDL-INF(2001)010, paragraph II.K.*

law, be submitted to referendum. Between these two extremes, every possible situation is to be found. Clearly, in countries where constitutional amendments are subject to mandatory referendum (in addition to *Switzerland*, this is also the case in *Andorra, Armenia, Azerbaijan, Denmark* and *Ireland*), this also applies where such amendments relate to referendums. In *Italy,* constitutional provisions are submitted to suspensory referendum and legislation to abrogative referendum at the request of 500,000 voters. In *Albania,* constitutional provisions relating to referendums (like all other constitutional provisions) may not be amended without a referendum unless they have been approved by a two thirds majority in parliament.

140. However, in some countries, there are specific provisions stipulating that certain regulations relating to referendums must themselves be subject to mandatory referendum. This is the case in *Latvia* and *Malta* (in respect of the provision stipulating the constitutional provisions subject to mandatory referendum), in order to ensure that parliament is unable to get round the requirement for a referendum by amending the provision in question. This is also the case more broadly in *Estonia* and *Lithuania* for the sections of the constitution relating to constitutional revision, which set forth the cases where a mandatory referendum applies.

I – Specific rules on popular initiatives and ordinary optional referendums[13]

141. Where referendums are organised at the request of a part of the electorate, whether this is for an ordinary optional referendum or popular initiative, a number of questions are raised concerning the *collection of signatures*.

142. The first concerns the *time-limit for collecting signatures*. Where the referendum is not suspensory, domestic legislation may not stipulate a time-limit, as in *Albania, Georgia, Malta, Poland* and *Portugal*.

143. Where a time-limit is stipulated, it varies considerably: just 15 days in *Croatia,* 45 in *Russia*, 3 months in *Lithuania*, 3 months for legislative referendums and 6 months for constitutional referendums in *"the former Yugoslav Republic of Macedonia*", 4 months in *Hungary,* 100 days for ordinary optional referendums and 18 months for popular initiatives in *Switzerland*. In *Italy*, the time-limit is 3 months for constitutional referendums while abrogative legislative referendums can be called for between January 1 and September 30. In the *Netherlands* (according to the temporary law*),* signatures were not collected as such, and electors signed referendum applications in their town hall; the introductory application (40,000 signatures) must be filed within 3 weeks and the final application (600,000 signatures) within 6 weeks following the date on which the introductory application was declared valid.

144. In most cases, *checking of signatures* is centralised and carried out by the central electoral commission *(Albania, Latvia, Lithuania, Russia* – where at least 40% of the required number of signatures are checked) or an equivalent body *(Hungary, Malta)*. In *Italy,* a special office of the Court of Cassation is responsible for this task; in *Switzerland*, it is the Federal Chancellery; in *"the former Yugoslav Republic of Macedonia*", the department of state administration in the Ministry of Justice. In *Poland,* the Speaker of the Sejm checks that the required number of signatures has been collected; if this is not the case, a further two weeks are allowed; the list of signatures

[13] *Cf. CDL-INF(2001)010, paragraph. II.J.*

may be sent to the state electoral board if there is any doubt about the validity of the signatures. In the case of any dispute, the Supreme Court takes the final decision. In *Portugal,* parliament may request that the competent authorities check the signatures by sampling. In some countries, signatures may be checked at local level: in *Georgia*, all signatures must be confirmed by a notary or the local authority (although this does not also rule out checks at national level); in the *Netherlands*, signatures were checked by the town hall under the temporary law. In *Croatia,* the referendum committee is responsible for checking the lists of signatures.

145. Only *Switzerland* provides for rectification of *irregularities resulting from the content of the question,* which must be carried out before the collection of signatures begins.

J – Judicial review[14]

146. Judicial review in the field of referendum applies first *a priori* and addresses the decision to submit a matter to referendum. It may also take place during the procedure, and address procedure itself or the voting rights and, after the vote, the validity of results. Finally, *a posteriori* control of the text adopted by referendum is conceivable.

147. The questionnaire put the main emphasis on the *a priori* scrutiny and the scrutiny of results. However, the answers provided a number of other interesting elements.

148. Many countries provide for judicial review of *decisions on whether or not to submit a matter to referendum.* Often this relates to whether the questions put to a referendum are in conformity with the constitution: *Albania, Armenia, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Italy, Malta,* the *Netherlands, Poland, Russia, "the former Yugoslav Republic of Macedonia*". In *Lithuania*, review relates to conformity with legislation in general; in *Portugal,* to the constitutionality of questions submitted to referendum and the legality of submitting a matter to referendum.

149. In countries which have a Constitutional Court, the latter is generally competent to review *(a priori or a posteriori)* the conformity with legislation of the texts submitted to the people.

This applies to all the countries cited, with the exception of *Estonia* and the *Netherlands* (where the Council of State is the competent organ).

150. In other countries, judicial review relates not to the decision on holding a referendum but solely to procedure (Austria, France, Greece – special Supreme Court, Ireland, Spain, Sweden, Turkey – Supreme Board of Elections -); it may lead to the invalidation of results. Judicial appeals may also be limited to the respect of the right to vote (Switzerland).

151. As regards *competence,* it should be noted that the Constitutional Court in many countries is the organ responsible for ruling in general terms on appeals concerning referendums (*Croatia, France* – Constitutional Council -, *Malta, Portugal*). In *Albania*, it rules not only on constitutional matters, but also on the clarity of the question (where people are asked to vote on a generally-worded text) and, with regard to an abrogative referendum, on the autonomous nature of the law of which part is to be repealed. *Portugal*'s reply states that *a posteriori* judicial control by the Court deals namely with the lawfulness of the campaign and the vote, as well as the sincerity of results.

[14] *Cf. CDL-INF (2001)010, paragraph II.P.*

152. There may also be provision that only the decision on holding a referendum fall under the competence of the Constitutional Court, while another body is responsible for scrutiny of the results. In *Bulgaria,* disputes over results are dealt with by the Supreme Administrative Court, in *Hungary* and *Italy* by the administrative courts, in *Latvia* by the ordinary courts following a decision by the central electoral commission (only decisions of the President or parliament are subject to the review of the Constitutional Court).

153. In *"the former Yugoslav Republic of Macedonia*", the Constitutional Court is competent only for non-conformity of the law with the constitution or in cases of a violation of a constitutional right other than the right to vote or eligibility. The ordinary courts are competent to deal with disputes over the right to vote (following submission of the matter to the electoral boards).

Who may lodge an appeal

154. Replies from several countries *(Croatia, Greece, Hungary, Ireland, Italy, Malta, Russia, Switzerland* and *"the former Yugoslav Republic of Macedonia")* stated that all electors were able to *lodge an appeal*. In the *Netherlands,* any person directly concerned could appeal; in *Andorra* legitimate interest was necessary; in *Denmark* and *Estonia,* a legal interest. In *Austria,* an appeal has to be submitted by a specific number of electors, varying from 100 to 500 depending on the province in question. Broad capacity to lodge an appeal does not however prevent certain authorities from doing so (the Director of Public Prosecutions in *Ireland*, the Attorney General in *Malta),* or the initiators of a referendum from being given special capacity in this respect (*Italy*).

155. However, in other countries capacity to lodge appeals is not so extensive. In *Spain,* only interested parties (political parties, institutions) may do so; in *Russia*, the persons or bodies who took part in the referendum; in *Bulgaria*, the bodies entitled to propose a referendum. In *France*, this capacity is granted to the central government representative in each department or equivalent authority, but not to the electorate except in very special cases. In *Portugal*, in an *a priori* scrutiny, the standing to lodge appeals belongs (compulsorily) to the President of the Republic; in an *a posteriori* scrutiny, it includes every voter (for his or her polling station), but in particular political parties and groupings that took part in the referendum campaign.

156. Lastly, there may be provisions to restrict the capacity to lodge an appeal solely to certain authorities. In *Armenia,* this is the President of the Republic or a third of the members of parliament; in *Georgia,* the President of the Republic, a fifth of the members of parliament or the ombudsman; in *Lithuania,* a fifth of the members of parliament, the government or the courts (to which of course the matter may be referred by individual citizens).

K – Experiences of referendums

157. Countries' experiences of referendums vary considerably. With the exception of *Switzerland,* where more than 500 matters have since 1848 been put to a referendum, most states make rare use of the possibility. Several countries (*Albania, Andorra, Bulgaria, Croatia,* the *Netherlands* (up to 2004*), Russia*) have never had a referendum, at least under the terms of their current constitution. However, in *Albania*, *Andorra* and *Russia*, the constitution was adopted by referendum and the question of *Croatia's* independence was also put to referendum.

158. Several countries *(Armenia, Azerbaijan, Belgium, Cyprus, Czech Republic, Estonia, Malta, Spain*) had experienced only one referendum at the time their replies to the questionnaire were written. Others had held only two *(Austria, Finland, Luxembourg* – in 1919 and 1937 -, *Norway, Poland, Portugal, "the former Yugoslav Republic of Macedonia*", *Turkey),* three *(Latvia),* or four *(Hungary).* Six had taken place in *Sweden, Lithuania* (since 1992) and *Greece* (during transition periods) and nine in *France* (since 1958).

159. Accession to the European Union was the reason for the majority of referendums in countries where they are infrequent. It was the subject of the only referendums held in the *Czech Republic* and *Estonia* and the two referendums in *Norway* (to be more accurate, in 1972 it concerned accession to the European Communities). One of the two to four referendums held in *Austria, Hungary, Poland* and *Latvia,* also concerned accession to the Union.

160. Referendums are more frequent in *Denmark* (14 referendums on 17 matters), *Ireland* (28 constitutional referendums since 1937) and especially in *Italy* (53 abrogative referendums and one constitutional referendum since 1948).

161. *The body initiating a referendum* obviously varies in line with the procedures provided for in domestic law. In *Switzerland,* it is a percentage of the electorate, except in the case of mandatory referendums; only one referendum out of more than 500 has been at the request of the cantons. In *Italy*, referendums have generally been initiated by the electorate, and only rarely by regional councils. The two referendums held in *"the former Yugoslav Republic of Macedonia"* following independence have been at the request of part of the electorate. Two referendums have been held at the request of the electorate in *Hungary* and two on the initiative of the government. The executive has initiated the referendums held in *France, Armenia, Azerbaijan, Cyprus, the Czech Republic, Spain, Turkey* and, jointly with parliament, *Luxembourg* and *Malta.* In *Finland* and *Norway*, special acts of parliament were passed. Parliament has also initiated referendums in *Austria, Belgium, Estonia*, *Lithuania* (with the exception of one case of a popular initiative), *Sweden, Ireland* (by adopting texts submitted to mandatory referendum), *Portugal* (one mandatory referendum, one parliamentary initiative). In *Denmark*, referendums have always been organised at the request of the authorities, but on only one occasion (on four matters) was this a request by parliament; all other referendums have been initiated by the government wishing to gain acceptance for a bill that had failed to obtain a sufficient majority in parliament, or have been mandatory referendums. In *Latvia*, one referendum has been initiated by parliament, and two following suspension of a law by the President, at the request of one tenth of the electorate.

162. Obviously, the question on a turn-out/approval *quorum* applies only to those countries where such a quorum is provided for[15]. The 50% turn-out threshold was not achieved in 18 out of 53 abrogative referendums in *Italy,* in two out of six in *Lithuania,* in one out of two in *"the former Yugoslav Republic of Macedonia"* and in *Portugal.* In this latter case, the effect of the referendum was then merely consultative. With regard to approval quorums, the only referendum held in *Armenia* since the adoption of the current constitution failed as it was not approved by a third of the

[15] *See above, point I.F.3.*

electorate. Similarly, one referendum (out of the four that have been held) in *Hungary* was invalidated as none of the alternatives in the question obtained the approval of one quarter of the electorate.

163. The proportion of *yes* and *no votes* in referendums varied considerably among the different countries and it is impossible to draw any general conclusions. Moreover, the raw figures given do not indicate the extent to which citizens voted in line with the wishes of the authorities, at least in countries having popular initiatives or abrogative referendums (in which a yes vote implies in principle a vote against the authorities and a no vote implies confidence in them). *Switzerland*, which has held the most number of referendums, has had more no votes than yes votes, but many of these rejections relate to popular initiatives. In *Italy,* 19 abrogative referendums have yielded a yes vote and 16 a no vote. In countries where referendums are held solely on texts submitted by the authorities, there have been 21 yes votes and 7 no votes in *Ireland*, 10 yes and 2 no in *France*, and 9 yes and 7 no in *Denmark*. In the other countries, referendums are too infrequent to be able to making any meaningful comparisons. In any event, there is no significant trend towards either a systematic yes or a systematic no vote.

164. The questionnaire asked whether factors unrelated to the question asked in the referendum, or the popularity (or lack of it) of an authority may have played a role in the result. A few replies were received that suggested this might have been the case, mentioning the role of the executive (*Azerbaijan, France, Malta, Spain*), whereas the reply from *Switzerland* did not rule out such factors (at least in some of the over 500 questions put). However, it is likely that such factors play a role to varying degrees in other countries.

II. Local and regional referendums

A – Legal basis for referendums

165. Provision is less common for local or regional than for national referendums. Of the states that replied to the questionnaire, *Andorra, Azerbaijan, Cyprus, Georgia, Latvia, Lithuania, Norway* and *Turkey* do not allow such referendums. In *Denmark,* local consultative referendums can be held only on the basis of specific laws. In *Lithuania*, municipalities can only conduct surveys.

166. Any provision for local or regional referendums is usually made in central government texts. However, there are fewer constitutional references to such referendums than to national referendums. Provision is made for them, for instance, in the basic law of *Albania, Belgium, Bulgaria, France, Hungary, Italy, Luxembourg, Poland, Portugal, Russia* and *Switzerland*. In the *Czech Republic*, the Charter of Fundamental Rights and Freedoms, which ranks as constitutional law, makes indirect provision for local referendums. In *Spain*, provision is made in the constitution for referendums on the Statutes of Autonomy and amendments to them, and there is a law providing for municipal referendums.

167. By contrast, provision for local or regional referendums is made solely at the legislative level in the following states: *Armenia, Croatia, Estonia, Finland, Ireland, Malta, Russia, Sweden* and *"the former Yugoslav Republic of Macedonia"*. This was also the case under the temporary law applicable in the *Netherlands* from 2002 to 2004.

168. Even where a constitutional provision allows referendums at a sub-national level, *implementing legislation* has often also been adopted, as is the case in *Albania,*

Bulgaria, the *Czech Republic, France, Hungary, Luxembourg* and *Poland.* In *Portugal*, the implementing legislation is an "organic" law.

169. In federal and regional states, if national law allows local or regional referendums, the rules governing such referendums are often laid down at the level of the entities. In *Austria*, this institution is mentioned in the constitutions of the nine Lander; in *Russia,* many local and regional entities have introduced regulations relating to referendums; in *Switzerland*, the federal constitution simply makes provision for cantonal constitutional referendums, leaving it up to the cantons to define the institution of the referendum. In *Italy,* the constitution allows the regions' Statutes (basic laws) to make provision for referendums on regional legislative acts and administrative decisions; the Statutes also make provision for local referendums. Regional implementing provisions also exist in *Spain.*

170. Specific rules may also be adopted at local level in unitary states: in *Hungary* for instance, the law simply lays down the basic framework; the details are dealt with in municipal regulations. Local, provincial or regional authorities in *Croatia, Estonia,* the *Netherlands* and *"the former Yugoslav Republic of Macedonia"* have also adopted provisions on referendums.

A1 – Level at which referendums are held

171. Stating that referendums are possible at a sub-national level does not answer the question as to the precise level at which they can be held. Referendums may be solely regional, solely local, or both, not to mention the fact that they can be held at intermediary levels. Firstly, this depends to a large extent on the types of territorial authorities within a state, since provincial referendums, for instance, are only conceivable in those states that have provinces.

172. The replies to the questionnaire are consequently very wide-ranging.

173. In federal and regional states, there is provision for referendums in the federate states, autonomous communities and regions, as well as in the municipalities. This is the case in *Austria, Italy, Russia* and *Switzerland*. In *Spain*, referendums can be held at the level of the autonomous communities, provinces and municipalities.

174. In *Belgium*, however, there is currently provision for referendums in provinces and municipalities, but they are still in the process of being introduced at regional level.

175. There is provision for referendums at both the local and regional levels in *Albania, Bulgaria, Croatia, Hungary* and *Sweden.* In the *Netherlands*, referendums could be held in provinces and municipalities from 2002 to 2004; in *Poland,* in regions, districts and municipalities. *France* provides for local referendums at the regional, department and municipal levels; it also holds institutional referendums within specific territories (overseas territories, Corsica), relating to the status of the territory in question as a unit of government. The *Portuguese* constitution provides for regional referendums in the Azores and Madeira autonomous regions, but an "organic" law must be passed before such referendums can be held.

176. By contrast, only municipal referendums are held in *Armenia,* the *Czech Republic, Estonia, Finland, Ireland, Luxembourg, Malta, "the former Yugoslav Republic of Macedonia"* and *Portugal* (in municipalities and their constituent districts, until the "organic" law on regional referendums is passed). In *Lithuania,* municipal authorities can conduct surveys.

Role of central government authorities

177. The questionnaire asks whether national or federal authorities can intervene in local and regional referendums.

178. Generally speaking, they cannot, with the exception of judicial reviews of the compliance of referendums and texts adopted by referendum with higher-ranking legislation. The matter may be referred to a court by an executive organ; in *France*, for instance, the central government representative can apply to the Administrative Court for preliminary or ex post facto review. In *"the former Yugoslav Republic of Macedonia*", the central government representative can suspend the application of any municipal regulation on grounds of unconstitutionality or illegality, but must then refer the matter to the Constitutional Court. In *Estonia,* such matters may be referred to a court by district governors; in *Malta,* by the Attorney-General.

179. In *Spain,* however, local referendums are subject to the authorisation of the national government.

180. A national electoral commission may also be involved in local and regional referendums, as is the case in *Poland*.

B – Types of referendum – bodies competent to call referendums

181. At national level, a distinction must be made at local level between mandatory referendums, referendums called by an authority and referendums at the request of part of the electorate.

Mandatory referendums

182. In federal states, revisions of the constitutions of the federate entities are sometimes submitted to mandatory referendum. This is the case in *Switzerland* and in two *Austrian* Lander. Similarly in *Spain,* amendments to the Statutes of Autonomy adopted in accordance with a special procedure in the first few years following the constitution's entry into force are submitted to mandatory referendum.

183. One area in which there is generally provision for mandatory referendums is that of *geographical boundary changes*. In *Italy*, this applies to changes to regional boundaries and the establishment of new regions. In *Albania*, a referendum is generally mandatory in the event of geographical boundary changes, although the final decision rests with Parliament, in the form of legislation; the same applies to *Hungary*, where there is provision for this institution in the event that municipalities are merged or divided up, or that a municipality is transferred from one district to another. In the *Czech Republic*, mandatory referendums are held only in the event that a municipality is divided up, in the part of the municipality wishing to separate.

184. *Swiss* cantonal law provides for many other situations in which referendums are mandatory, particularly in relation to legislation. In *Hungary,* local laws can also provide for other situations in which referendums are mandatory.

Referendums called by an authority

185. National law may provide for regional referendums to be held at the request of regional authorities: in *Austria*, depending on the Land, a referendum may be called by the Landtag (Parliament) or a specified number of its members.

186. Referendums called by the municipal legislature exist at local level, for example in the following states: *Belgium,* the *Czech Republic, Estonia, Finland, Ireland, Luxembourg,* the *Netherlands* (temporary law) and *"the former Yugoslav Republic of Macedonia";* in *Hungary,* a referendum may be called by the municipal council itself, a quarter of its members or one of its committees. Where the decision to hold a referendum is taken by the assembly, it may be initiated by part of the assembly or by an executive organ: in *Bulgaria,* for instance, at municipal level, the initiative may come from a quarter of the municipal councillors, the mayor of the municipality or the regional governor; in *Portugal*, from members of the assembly or the local executive; in both of these states, the assembly takes the final decision as to whether or not to hold a referendum, which, as will be explained further on, can be requested by a specified number of citizens.

187. In some states, local referendums require the agreement of the municipality's legislative and executive organs. This is the case in *Russia,* where the agreement of the representative body and that of its head are required, and in *Spain*, where mayors can hold referendums with the agreement of a majority of the municipal councillors and that of the national government.

188. At both local and regional levels, referendums can also be called by the authorities: in *Croatia* and *Sweden*, referendums can be called by municipal, town or regional assemblies; in *France* and *Poland,* by the deliberative assembly of each local or regional authority. In *Switzerland,* a number of cantonal laws provide for such referendums at various levels.

189. Referendums *called by lower-ranking territorial authorities* exist at regional level in *Albania*: they are organised at the request of commune or municipal councils representing at least a third of the region's population. A number of *Austrian* Lander also provide for referendums to be held at the request of a specified number of municipalities.

Referendums at the request of part of the electorate

190. Most of the states that have local or regional referendums allow referendums at the request of part of the electorate. Where national law provides that the deliberative body is free to decide whether or not to hold a referendum following such a request, the number of signatures required is generally fairly low: at local level, in *Estonia*, 1% of the population, but at least 5 signatures; in *Finland,* 5% of voters. By contrast, where a request for a referendum must be followed by a popular vote, the number of signatures required is often higher: 30% of voters in municipalities with up to 3000 inhabitants in the *Czech Republic,* 20% in *"the former Yugoslav Republic of Macedonia*", 10% in *Malta* and *Albania* (but no more than 20 000 in the latter), but 5% in *Armenia* and *Russia*. In *Bulgaria*, requests for referendums must be supported by at least a quarter of registered voters, but a municipal council is obliged to hold a ballot only if it is requested by half of the registered voters. In *Italy,* a regional referendum may be requested by 20 % of the region's voters.

191. Owing to the considerable variations in the number of inhabitants in different territorial communities, the percentage of voters necessary in order to request a referendum is often higher in smaller municipalities than in large ones: in *Luxembourg*, the requirement is a fifth of voters in municipalities with more than 3000 inhabitants, and a quarter in other municipalities; similar rules apply in the *Czech Republic.*

192. In *Belgium* and in *Portugal,* the percentage is calculated according to the population, at both provincial and local levels. As stated above, *Albania* has an upper limit of 20 000 on the number of signatures. In *Hungary*, each local or regional authority decides on the necessary percentage of voters, within a range of 10 to 25 %.

193. In federal states, the law of the federate entities also governs referendums requested by part of the electorate: this is the case in *Switzerland* (where referendums and popular initiatives are very frequent), *Austria* and *Russia*.

194. As with national referendums, the *role of the authorities* in triggering the referendum process also varies in respect of local and regional referendums. The question of intervention by national authorities has already been discussed above. In the case of referendums called by the authorities or requested by part of the electorate, subject to an authority's approval, local and regional authorities can decide whether or not to hold a ballot. This is the case in *Finland*; in *Bulgaria,* where the request comes from less than 50 % of registered voters; in *"the former Yugoslav Republic of Macedonia*", where it comes from less than 20 % of registered voters. In the event of a request from part of the electorate, local or regional authorities in some states can rule on its compliance with higher-ranking legislation (*Poland, Switzerland*); otherwise, they essentially have the task of organising the ballot. In the *Czech Republic* however, a municipal council receiving a request for a referendum from part of the electorate can, with the referendum committee's agreement, rule on its substance without holding a referendum.

C – Content

Types of act submitted to referendum

195. Most of the replies to the questionnaire state that, generally speaking, it is not so much the legal nature of the act that determines whether or not it can be submitted to local or regional referendum; rather, the decisive factor is whether or not the act comes within the remit of local or regional authorities. This is the case in the following states: *Albania, Armenia, Belgium, Bulgaria, Croatia*, *Finland, France* (in respect of local referendums), *Hungary,* the *Netherlands, Portugal, Russia, Sweden* and *"the former Yugoslav Republic of Macedonia").* In other words, this means that, in these states, all acts of local or regional authorities can theoretically be submitted to referendum. *Denmark*, *Estonia*, *Luxembourg* and *Poland* do not have any specific rules, from which it may be inferred that a similar situation exists.

196. Some states impose restrictions, however, as to the legal nature of the acts that may be submitted to referendum. In the *Czech Republic,* municipal regulations cannot be submitted to referendum; in *Malta*, on the other hand, they are the only possible subject-matter of a referendum; in *Ireland*, this instrument is confined to draft financial schemes. In *Switzerland*, a wide range of acts are submitted to referendum: except for referendums on cantonal constitutions, which are mandatory under the federal constitution, these acts – at both cantonal and local level – are specified by cantonal law; at cantonal level, for instance, there is usually provision for referendums on laws and on certain items of expenditure (financial referendums). In *Austria* too, the law of the federate entities (Lander) specifies the acts that can be submitted to referendum: at the level of the Lander, these are usually bills passed by the Landtag (regional Parliament); at local level, municipal council decisions.

Matters to which referendums may relate

197. In many cases, there is no restriction on the list of matters that may be submitted to referendum either (*Albania, Croatia, Czech Republic, Estonia, Finland, France, Lithuania* – where it is more a question of surveys -, *Malta, Poland* and *"the former Yugoslav Republic of Macedonia").* In *Switzerland,* cantonal law, which governs this area, generally adopts the same approach.

198. One of the most common subjects of local and regional referendums is that of changes to the boundaries of local and regional authorities, even where the final decision is a matter for national law, as stated, for instance, in the replies from *Albania, Croatia, Estonia, Hungary,* the *Netherlands* and *Russia*; in *Austria*, municipal boundary changes can be the subject of a referendum in some Lander. In *Switzerland,* the federal constitution provides for the approval of the electorate concerned in respect of any change to a canton's geographical boundaries. In *Italy,* regional boundary changes and the establishment of new regions are submitted to mandatory referendum. In *Portugal,* local referendum (the only one which exists for the time being) may at best deal with territorial changes of a municipality only in the framework of proceedings for consultation of local bodies, proceedings which the legislature has to follow. By contrast, referendums cannot be held on geographical boundary changes in *Belgium.*

199. In *France*, institutional referendums within specific territories (overseas territories, Corsica) relate to the status of the territory in question as a unit of government.

200. However, a number of states exclude certain areas from the scope of referendums, however. Firstly, these may relate to matters for the exclusive jurisdiction of elected bodies (*Armenia*). In that country, referendums relating to areas delegated by the national authorities, or affecting fundamental rights, are also excluded. In *Russia* too, referendums cannot lead to restrictions on fundamental rights.

201. Matters excluded from referendum may relate, for instance, to appointments and staffing matters (*Armenia, Belgium, Hungary* and *Russia*) or to budgetary, financial and fiscal matters (*Armenia, Belgium, Croatia, Italy, Portugal, Russia* and *Spain*).

202. In *Ireland*, by contrast, local referendums can relate only to draft financial schemes (but none has been held to date).

203. In *Bulgaria* too, local referendums relate to financial matters: loan contracts with banks or other financial institutions; sales, concessions, leases or rentals of municipal assets of considerable value or of particular importance to the municipality; the construction of buildings, infrastructure works or other facilities to meet the municipality's needs and investments that cannot be paid for out of the municipality's ordinary revenue. The *Dutch* Temporary Law (in force until 2004) also set out a detailed list of subjects on which referendums could or could not be held; provincial and municipal regulations could add other subjects, except, naturally, where the Temporary Law ruled out a referendum.

204. Generally speaking, elections cannot be challenged by a referendum, as is expressly provided in the *Czech Republic, Hungary* and *Russia.* In *Poland* and some *Austrian* Lander, however, it is possible for an elected body to be dismissed following a referendum at the request of voters *(recall*).

D – Form of the text submitted to referendum (formal validity)

205. To an even greater extent than for national referendums, the legislation of the various states often has nothing to say about the form (specifically worded draft, question of principle, generally worded proposal) of the acts that may be submitted to local or regional referendum.

206. *Armenia, France* and *Italy* allow only specifically worded drafts. In *Malta,* where only municipal regulations can be submitted to referendum, specifically worded texts are also required. By contrast, the *Czech Republic* and *Portugal* provide for referendums only on questions of principle or generally worded proposals, and *Belgium* restricts them to questions of principle. In *Ireland,* the subject-matter of local referendums (draft financial schemes) means that they are generally worded texts.

207. In the other states, referendums on questions of principle, generally worded proposals or specifically worded texts may therefore coexist, as is expressly provided in *Hungary* and *Switzerland* (under cantonal law). Some legislative systems also provide simply that it must be possible to answer yes or no to the question, which does not rule out any of these forms (*Bulgaria, Croatia*). In *Austria*, the approach adopted varies according to the Land.

Unity of form

208. Explicit provision is made for unity of form in *Switzerland*, and implicit provision in *Hungary*. Unity of form is also required in those states that submit only specifically worded drafts to referendum (*Armenia, France, Italy*) or, on the contrary, only questions of principle or generally worded proposals (*Belgium, Czech Republic, Portugal*).

Unity of content

209. The rule of unity of content is not imposed any more often in respect of local and regional referendums than for national referendums. It applies, for instance, in *Armenia, Bulgaria, Italy, Portugal, Switzerland* and *Hungary,* where, as is the case in national referendums, parts of a question must not be contradictory, their relationship with one another must be clear and they must flow from one another or be linked by their content. In *Austria,* the approach adopted depends on the Land.

Unit of hierarchical level

210. *Swiss* law states that, in the cantons which provide for the so-called "unique" popular initiative – which can be of a constitutional or a legislative nature – the initiators have to determine its hierarchical level and may not provide at the same time a revision of the Constitution and of ordinary law.

Other requirements relating to the question asked

- *Clear and non-leading questions*

211. As already stated in respect of national referendums, freedom to vote presupposes that the question put to the vote must be clear and non-leading, even though not all national legislative systems contain explicit provisions to this effect.

212. Generally speaking, the national rules applicable in this respect are the same as for national referendums.

213. In *Albania*, the question submitted to the electorate must be clear, complete and unequivocal; in *Armenia*, the question must be straightforward; in *Hungary*, devoid of ambiguity; in *France,* conditions of fairness, clarity and absence of ambiguity are imposed. The requirement for clarity also emerges from the rules providing that voters should be able to answer yes or no (*Belgium, Bulgaria, Croatia, Czech Republic, Finland, Malta, "the former Yugoslav Republic of Macedonia")*. The requirement that the question be clear and non-leading is also upheld in *Italy, Poland* and *Switzerland.*

- *Number of questions*

214. As in national referendums, there is usually no limit on the *number of questions asked* at the same time. In *Armenia* there cannot be more than one question per ballot, and in *Portugal,* no more than three. Alternative replies are also allowed in *Russia,* as well as in *Switzerland* and *Austria* on the basis of the law of the federate entities.

E – Substantive limits on referendums (substantive validity)

215. Substantive limits are inevitably more numerous in the case of local and regional referendums. While there are often doubts as to the existence of legal rules ranking higher than the (national) constitution, the very existence of the state implies that the law of the (federal or unitary) central state prevails over that of the federate entities, regions and other subordinate local authorities.

216. Accordingly, almost all the replies to the questionnaire emphasise the need for texts submitted to referendum to comply with higher-ranking legislation, particularly national or federal law. This requirement may be explicit or implicit. Some replies emphasise the need to respect fundamental rights (*Russia*) or to keep within the municipality's remit (*Finland, Hungary*); once again, this is an expression of the more general principle of the need to comply with higher-ranking legislation.

217. Referendums must also comply with the rules of higher-ranking territorial authorities (for example, regional rules in the case of local referendums), in accordance with the general principle of the hierarchy of rules.

218. The regulations governing purely consultative referendums can be more flexible, since no legal rules are adopted by popular vote, thereby excluding any breach of higher-ranking legislation. However, the principle is that consultation must remain within the remit of the local or regional authority in question, as stated in the reply from *Belgium.* In *Lithuania,* where municipalities conduct surveys instead, the latter must relate to areas within the municipality's remit.

F – Campaigning, funding and voting

1. *Campaigning*

219. The rules governing election campaigning are often less stringent in respect of local and regional referendums, in view of the more limited stakes of such ballots. However, the replies from the following states indicate that the same rules apply, *mutatis mutandis,* as at national level: *Austria, Hungary, Italy,* the *Netherlands, Portugal, Switzerland, Spain* and *"the former Yugoslav Republic of Macedonia"*.

220. The authorities have an obligation to supply *objective information* in *France, Poland* and *Switzerland,* in particular.

221. As far as *sources of campaign material* are concerned, prohibitions on campaigning by the authorities, which are in place in *Armenia, Portugal* and *Russia* for instance, apply to all referendums. In *Austria,* this also holds for the principle whereby the authorities, although allowed to campaign, cannot disseminate non-objective or disproportionate mass information; in *Hungary*, the authorities can be involved in campaigning.

222. In view of the limited stakes, states impose fewer regulations in respect of the *media* for local and regional ballots than for national ballots. In *France,* provision is made for campaigning on television channels or radio stations only in the case of institutional referendums, and then only on local public channels and stations; in such cases, as at national level, supporters and opponents of the draft proposal must be given fair coverage. In *Portugal*, free access to the media is guaranteed. In *Spain*, free access is confined to those parties represented in the regional or provincial Parliament. In *Malta,* a balance must be ensured between supporters and opponents in the public media; however, no local referendum has been held to date.

2. *Funding*

223. Relatively few states regulate the funding of referendum campaigns at local, or even regional, level. Prohibitions on using public funds for campaign purposes are mentioned in the replies from *Armenia, Portugal, Russia* and *Switzerland.* In *Austria*, the moderate use of public funds is accepted, as it is for national referendums; in *Malta*, public funds can be used for information purposes, but not for campaigning; in *Spain*, campaign mailings are subject to special, preferential postage rates. In many cases, administrative costs are borne not by the central government, but by the local authority organising the vote, as is the case in *Croatia, Poland* and *"the former Yugoslav Republic of Macedonia"*.

224. *Payment for the collection of signatures* is not prohibited in any of the states that replied to the questionnaire. This consequently does not seem to raise any problems, any more than it does at national level.

3. *Voting*

Voting period

225. Voting over *one day* only is the rule in local and regional referendums, even more so than in national referendums. The *Czech Republic* schedules two days if the vote coincides with local, regional or national elections.

226. As in the case of national referendums, postal voting may also be allowed, for instance over a period of 30 days in *Sweden* and three weeks in *Switzerland.* The early voting permitted by *Russian* law (over a period of 15 days in less accessible locations, on boats, at polar stations and abroad) also applies to federate entities and municipalities.

Compulsory voting

227. Compulsory voting is virtually unheard-of in connection with local and regional referendums. It exists in one *Swiss* canton.

Quorum

228. Quorum requirements are uncommon in local and regional referendums.

229. A *quorum of participation* of 50 % of voters is required in *Bulgaria, Croatia,* the *Czech Republic*, *Malta* and *Russia* (but not in *Italy*, unlike at national level). In *Poland*, the quorum is 30 %, and in *Belgium* just 10 % of inhabitants at provincial level and 10 to 20 % at municipal level. In *Portugal,* referendums are legally binding only if the turnout is more than 50 %.

230. Other states provide for a quorum of approval. In *Hungary,* a referendum is valid if the same answer is given by 25 % of registered voters; in *Armenia*, the approval of a text necessitates a third of registered voters; in *Ireland* and the *Netherlands* (according to the temporary law applicable up to 2004), on the other hand, the rejection of a text requires a third or 30 %, respectively, of registered voters. Lastly, in the *Czech Republic,* the separation or merger of municipalities requires the approval of 50 % of registered voters.

G – Effects of referendums

Decision-making (legally binding) and consultative referendums

231. Like national referendums, local and regional referendums are usually legally binding. This is always the case in *Armenia, Bulgaria, France, Hungary, Poland, Spain* and *"the former Yugoslav Republic of Macedonia*". In *Portugal* 's referendums are legally binding only if the turnout is more than 50 %.

232. Generally speaking, referendums are also legally binding in *Austria* and *Switzerland*, but Lander or cantonal law, respectively, can provide for consultative referendums.

233. In other states, referendums are legally binding, unless they relate to a question necessitating the passing of a law at national level. In *Albania,* for instance, referendums relating to geographical boundary changes, which necessitate a national law, are consultative; in *Italy*, the establishment of new regions and the transfer of an area from one region to another are the subject of consultative referendums; in the *Czech Republic*, more generally, referendums are consultative when they relate to a question that comes within the municipality's consultative remit. In *Malta,* a consultative referendum is conceivable.

234. A number of states have only consultative referendums at local level: this is the case in *Belgium, Denmark, Estonia, Finland, Ireland, Lithuania* (where it is more a question of surveys), *Luxembourg*, the *Netherlands* and *Sweden*.

Suspensive and abrogative referendums

235. Most local or regional referendums are *suspensive.* This is the case in *Armenia, Spain,* the *Netherlands* (temporary law, even though referendums were consultative) and, in almost all cases, *Switzerland* (nevertheless, cantonal law can provide for an abrogative referendum). In *Austria,* the effect of a referendum depends on Lander law.

236. *Abrogative* referendums are less common at local and regional level. They are mentioned explicitly only in the reply from Malta, and no such referendum has been held as yet. In *Italy, Austria* and *Switzerland*, provision is made for them in the law of some federate or regional entities.

Decisions to be taken after a referendum

237. National authorities usually have to decide what action to take on a legally binding referendum relating to a question of principle or a generally worded proposal, as the reply from *Switzerland* explains. In *Portugal,* in the event that the outcome of a legally binding referendum is positive, and that the answer to the question requires the competent local body to take a decision, the latter must do so within 60 days. In *Russia,* if a follow-up decision is necessary, it must be taken within three months.

238. In some states that have only consultative referendums, provincial or municipal bodies may nevertheless have to follow a specific procedure after the vote. In *Belgium*, provincial or municipal councils must give reasons for their decisions in relation to matters that have been the subject of popular consultation; in the *Netherlands,* according to the temporary law, they had to take a new decision if the outcome of the referendum was negative, and decide on the entry into force of the text if the outcome was positive.

H – Parallelism of procedures and rules governing referendums

Parallelism of procedures

239. As in the case of national referendums, a number of legislative systems provide that rules adopted by referendum at a lower level can be revised only by referendum, so as to ensure respect for the popular will. However, such rules are less common than for national ballots.

240. Firstly, the revision of texts submitted to mandatory referendum may be submitted to the same type of referendum, but this is less common than at national level[16]. In *Switzerland,* any rule submitted to referendum (mandatory or optional) can be revised only by the same procedure. The same applies in *Italy* and *"the former Yugoslav Republic of Macedonia",* which has only optional referendums at local level. In *Armenia,* texts adopted by referendum can be revised only by the same procedure.

241. The *Czech Republic, Russia* and *Hungary* have the most stringent legislation. In the *Czech Republic*, a decision adopted by referendum can be modified only by another referendum, after a period of 24 months. In *Russia,* a question submitted to referendum can be reopened only after two or five years, depending on the circumstances, and by referendum; the rule submitted to referendum can, however, provide for a different procedure. In *Hungary*, if a quarter of voters supported or opposed the proposal, the matter can be addressed only by a new referendum, after a period of one year. In *Croatia,* on the other hand, the prohibition on reversing a decision taken by referendum without holding a fresh referendum applies for just one year.

242. By contrast, in other states it is permissible – at least from the legal point of view – to address issues that have been the subject of a popular vote without holding a fresh referendum, as is the case in *Bulgaria, France, Hungary, Poland* and *Spain.* It remains to be seen whether this is politically feasible. That is also the case in *Portugal*, but only during a new term of the local body concerned. The same principle applies to a new referendum on the same question (in case the result of the first one was negative). It remains to be seen whether going against the people's vote is politically feasible.

243. As already stated in respect of national referendums, the question of parallelism of procedures does not normally arise in respect of consultative referendums (*Belgium,*

[16] *For specific examples, see point II.B above.*

Denmark, Estonia, Finland, Ireland, Luxembourg and *Sweden*), even if, as indicated in the reply from the *Netherlands,* a consultative referendum can be held on the same subject.

Procedure for the revision of rules governing referendums

244. As stated above[17], where rules governing referendums are submitted to referendum, this is due to their nature (usually constitutional) rather than their substance, except for certain constitutional rules relating to referendums. Few constitutions contain provisions relating to local or regional referendums: it is consequently fairly unusual for them to be submitted to referendum. In *Armenia* for instance, only the constitutional provision allowing the institution of the referendum can be amended solely by referendum, and it does not explicitly mention local referendums.

245. *Switzerland* is an exception, since all federal and cantonal constitutional and legislative texts are submitted to referendum. In *Italy*, referendums may also be held on a considerable number of rules, at either state or regional level, including – naturally – those relating to referendums.

I – Specific rules on popular initiatives and ordinary optional referendums

246. Where provision is made for referendums to be called at the initiative of part of the electorate (a popular initiative or an ordinary optional referendum), the *time-limit for collecting signatures* varies, as is the case at national level: thirty days in *Armenia,* one month in *Hungary,* forty-five days in *Russia*, sixty days in *Poland*, three months in *Italy.* In *Austria* and *Switzerland,* the time-limit depends on the federated entities' law. In the *Netherlands,* the temporary law established a time-limit of three weeks for the initial motion and six weeks for the final one, as at national level.

247. Here too, some states apply no time-limit for consultative or abrogative referendums. This applies to *Albania, Belgium,* the *Czech Republic, Estonia, Finland, Luxembourg* and *Malta.*

248. In *Albania, Malta, Poland* and *Russia,* it is the Central Election Commission which *checks signatures*.

249. However, in some states checking of signatures is performed at regional or local level. In *Hungary,* it is the responsibility of the local or district election commission, depending on the level at which the referendum is being held. In *Italy* the local judicial authorities or special bodies of the regional councils have competence for regional referendums, and special branches of local authorities for local referendums. In the *Czech Republic* signatures are checked by the municipal council. Lastly, in *Austria* and *Switzerland,* the federated entities' legislation determines the competent body.

250. In *Armenia* and *Switzerland,* correction of flaws in the question's substance is possible before signature collection begins.

J – Judicial review

251. According to the replies to the questionnaire, the rules governing judicial review are generally not as well-developed in the case of regional or local referendums as they are for national referendums. The lesser importance of the issues at stake helps to limit the number of proceedings.

[17] *Point I.H.*

252. One specific means of exercising oversight regarding use of local referendums is designation of a supervisory authority, which exists for instance in *Belgium*. Automatic prior review of the question put to the vote may also be performed by a judicial authority: in *Italy,* the special office of the Court of Cassation gives decisions concerning referendums on changes to regional boundaries or the creation of new regions; in *Portugal,* the Constitutional Court obligatorily rules on the constitutionality and lawfulness of the question put to the vote, in terms of both form and substance.

253. Centralisation of judicial review is less frequent than for national referendums. That is, however, the case with the Constitutional Court in *Malta,* which has few local authorities. Otherwise, it may be a matter for the administrative courts (*Belgium*, *Finland*, *Poland* and *France*, where jurisdiction in proceedings concerning institutional referendums lies with the Conseil d'Etat, the administrative court of last instance) or the ordinary courts *(Armenia, Bulgaria,* the *Czech Republic, Hungary* – the local or district court depending on whether the referendum is held at municipal or district level – and *Russia,* where federal courts have jurisdiction). In *Croatia,* the competent bodies are the State Election Commission and the Constitutional Court. In *"the former Yugoslav Republic of Macedonia"* the ordinary courts or the election commissions are competent for infringements of voting rights, and the Constitutional Court for violations of the Constitution. In *Italy,* the question's substance and form are a matter for the Constitutional Court, and the administrative courts deal with appeals concerning results.

254. Holding of referendums may be excluded from the courts' jurisdiction, as in *Ireland.* The Central Election Commission may also give last-instance decisions concerning results, as in *Finland*.

255. Lastly, in *Austria* and *Switzerland,* it is respectively the Lander and the cantons which determine the bodies competent for deciding appeals at their level. The Swiss Federal Court rules at last instance on infringements of political rights at cantonal level.

256. Judicial review of the constitutionality or lawfulness of the question put to the vote, once approved, is also, more often than not, possible on appeal to the courts normally competent in such matters, as for any rule-making instrument.

257. Only a few respondents provided information as to *who may lodge appeals.* As is the case for national referendums, this right may be conferred on any member of the electorate *(Czech Republic, Hungary, Malta, Russia, Switzerland*), or it may be confined to bodies or groups of voters entitled to propose the holding of a referendum (*Bulgaria*). In *Portugal*, in the *a priori* scrutiny, the standing to lodge appeals belongs (compulsorily) to the president of the municipal assembly; in an *a posteriori* scrutiny, it includes every voter (for his or her polling station), but in particular parties or groups having participated in the campaign.

K – Experience of referendums

258. As is the case with national referendums, it is in *Switzerland* that regional or local referendums are most frequent (at cantonal and municipal level).

Recourse to referendums is fairly frequent in *Hungary, Italy,* the *Netherlands* (solely at municipal level), *Sweden* and *"the former Yugoslav Republic of Macedonia"*. Local referendums are held from time to time in the *Czech Republic, Denmark* and *Russia* (over 130 examples, but the number of local and regional authorities must be borne in mind*).* In *Estonia* and *Finland,* local referendums primarily concern mergers

of municipalities. In *France,* nine institutional referendums have been held since 1958, including five in 2003; consultative referendums were held in a large number of municipalities before the introduction of local decision-making referendums. *Belgium* has a few experiences of consultative referendums at local, but not provincial, level. Only two local referendums have taken place in *Portugal,* and only one in *Malta.* In *Poland,* local referendums have only been held concerning dismissal of directly elected authorities. In *Spain,* only five regional referendums have been held, all relating to approval of statutes of autonomy.

260. Lastly, a number of states where regional or local referendums are permitted have no practical experience of them to date. They include Albania and Armenia.

III. The future of referendums

261. The last questions concerned the future of referendums, more precisely reforms being undertaken in this field.

262. In the *Czech Republic,* a constitutional law must be passed to permit the holding of constitutional referendums at national level, as provided for in the Constitution. A bill exists, but has not yet been voted. Another bill should be tabled concerning the referendum on the European Constitution.

263. Similarly, in the *Netherlands,* although the Constitution does not require the introduction of referendums, following the expiry of the temporary law in this field on 1 January 2005 the issue should be the subject of further debate. The referendum on the European Constitution was held on the basis of an *ad hoc* law.

264. Reforms are under way or at least being discussed in a number of other states. They may be part of a complete revision of the Constitution, as is the case in *Austria*, where the Convention working on the revision process is considering the possibilities of extending public voting rights at federal level. In *Belgium*, the Constitution was revised in order to make this matter a regional one, and the introduction of a consultative referendum at regional level is being envisaged. In *Luxembourg*, apart from the *ad hoc* referendum on the European Constitution (held in July 2005), a bill on popular initiatives and legislative referendums was tabled in 2003. Lastly, in *"the former Yugoslav Republic of Macedonia",* the principal aim is to bring all the relevant provisions together in a single legal instrument.

265. In *Sweden*, although no change in the law is being discussed, a political debate is taking place regarding cases in which it would be appropriate to resort to a referendum, particularly ratification of the European Constitution.

266. In addition, a number of replies stated that new legislation had just been passed. This applied to *Lithuania* (2003), *Poland* (2004), and the *Czech Republic* (2004 – solely for local referendums). In *Portugal,* the Constitution was revised in 2005 in order to enable referendums to be held on the approval of a treaty aimed at the construction or the deepening of the European Union which addresses directly the content of the convention. In *Poland,* the quorum of 50% of turnout required for a referendum to be decisive remains a controversial matter. In *Russia,* the law of 28 June 2004 introduced the following changes, inter alia: extension of the right to initiate referendums, more complex rules on popular initiatives, stricter regulation of campaigning. In *Switzerland*, following the recent constitutional amendment introducing general popular initiatives (adopted in 2003 but not yet in force), a more global reform is still being discussed, although it should not be implemented in the near future.

Conclusion

267. This study confirms what was suspected from the outset: when it comes to referendums, national laws and practices vary widely. Europe has democracies which are almost entirely representative, democracies which are semi-direct, and any number of intermediary forms. Referendums are sometimes seen as a tool used by the executive branch of government, sometimes as an instrument used by groups of citizens to further their views outside traditional political party structures.

268. However, a number of general trends gives us some idea of the form which a European constitutional law on referendums might take. For example, it is customary to provide for referendums (at least at national level) in national constitutions, to prohibit compulsory voting or, more specifically, to allow private funding of the collection of signatures for popular initiatives- when this system exists.

269. The rules which states share are usually minimum rules guaranteeing the democratic nature of the vote. To be truly democratic, referendums – like elections – must satisfy certain requirements. One, which recurs throughout this report, is respect for procedures provided for in law. Others are common to both elections and referendums, and cover respect for the principles inherent in Europe's electoral heritage, which apply *mutatis mutandis* to referendums[18]. Those which are obvious are not detailed here, but those which may apply in a special way to referendums, such as the rules on election campaigns or judicial review, are examined in more depth.

270. Finally, other common democratic requirements are specific to referendums. This applies, for example, to certain aspects of voter freedom, such as respect for the principle of unity of content, and the rule that questions put to the public must be clearly phrased.

271. Thus, like the rest of constitutional law, referendums combine diversity with the need to respect the principles of Europe's constitutional heritage.

[18] *See the Code of Good Practice in Electoral Matters adopted by the Venice Commission at its 52nd plenary session, CDL-AD(2002)023rev.*

Report on the participation of political parties in elections

Adopted by the Council for Democratic Elections at its 16th meeting
(Venice, 16 March 2006)
and the Venice Commission at its 67th plenary session
(Venice, 9-10 June 2006)

on the basis of comments by
Mr Angel SANCHEZ NAVARRO (Substitute member, Spain)
Mr Hans-Heinrich VOGEL (Member, Sweden)

I. Introduction

1. In recent years, the Venice Commission has been actively involved both in the field of electoral law and of legislation on political parties in different countries. This work is focused not only on the legislation of specific States but also on some general issues essential for the democratic development of democratic institutions in Europe and elsewhere.

2. Free elections and freedom to associate in political parties are closely linked in any democracy, since political parties exist for the purpose of winning political power through free and fair elections. In a number of its separate opinions and research projects, the Venice Commission has examined the role of political parties in a democratic society and their participation in the electoral process of specific countries. However, until now the Venice Commission has conducted no comparative study of the legislation and practices in its Member countries in this important field.

3. At its 11th meeting (Venice, 2 December 2004) the Council for Democratic Elections decided to study the question of the participation of political parties in the electoral process and appointed Messrs A. Sanchez-Navarro (Substitute member, Spain) and H.-H. Vogel (Member, Sweden) as rapporteurs on this subject.

4. The following report is based on comments provided by Messrs A. Sanchez-Navarro and H.- H Vogel, as well as on some remarks provided by the members of the Council for Democratic Elections. This report was adopted at the 16th meeting of the Council for Democratic Elections (Venice, 16 March 2006) and the 67th Plenary session of the Venice Commission (Venice, 9 – 10 June 2006).

II. Specific issues related to participation of political parties in elections

5. The Venice Commission has adopted, during the last few years, different guidelines and opinions on legislation on political parties[1]. These documents underlined the essential role of political parties in the electoral process and highlighted the existence of some issues of great importance in the practical implementation of the right to free and

[1] *CDL-INF(2000)001 – Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st plenary session (Venice, 10–11 December, 1999), CDL-INF(2001)007 – Guidelines and Report on the Financing of Political Parties adopted by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001) and CDL-AD(2004)007rev – Guidelines and Explanatory Report on Legislation on Political Parties: some specific issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004).*

fair elections. However, many of these questions cannot be answered solely on the basis of the legislation on political parties. They are the main players in the electoral process, the ground and rules of which are defined mainly by electoral laws. Consequently, the understanding of elections as one of the main reasons for the existence of political parties requires the analysis of all the elements of the «electoral game».

6. Electoral legislation and laws on political parties differ from one country to another. It is usually accepted that electoral systems, and party systems, greatly depend on specific – historical, cultural, political, social – national factors. In these fields, it is practically impossible to find two similar political systems. In addition laws are intended to manage the workings of the national systems, thus responding to national problems, experiences and expectations. Regardless of this diversity, two main approaches to the existence of the political parties can be mentioned. The first one defines a political party as a free association of individuals, with minimal state regulation, oversight, financial support etc (UK experience) or it may be that of a specific association with precise duties, responsibilities and prerogatives (German model). Parties in Europe have evolved from one or other concept and are on a converging path, but cultural differences are still significant. Hence, in many countries, any state regulation is still seen as interference, whilst in others there is less hesitation about political engineering through party law, registration procedures etc.

7. Therefore, a general report on "political parties and elections" has to consider the existence of those differences. Questions may be somewhat similar, but answers will vary in most of the cases. In any case, some of these issues may be grouped considering the different periods which can be observed in any electoral process. This report will thus deal with them in that same order.

8. However, it seems possible to argue that the existence of parties is particularly important, and has to be especially taken into account, up to the moment of the elections. In fact, political parties precisely aim to participate in the political process, mainly presenting candidates to elections. Of course, parties are important throughout the whole electoral process. But once the voters come directly into the scene, the fact of political representation loses part of its relevance. Once the elections have been held, and even during the election day, all the constitutional or legal rules (and, most particularly, those relating to the system of appeals and complaints) are based on specific circumstances, in which all candidates and citizens have to receive equal treatment.

9. In this sense, it would not be reasonable to have different rules (deadlines, definition of irregularities, procedures, sanctions...) for partisan or non partisan actors, as they may exist for presenting partisan or non-partisan lists, for taking part in election management bodies, for having access to public media and for being able to benefit from public funding. For that reason, the final questions, especially those related to the procedures for complaining and lodging appeals (competent bodies and/or courts, legal framework, sanctions, etc.) possibly do not admit many differences depending on partisan organisation.

10. Another important aspect of political parties' participation in elections is that of the influence exercised by the electoral system itself on party internal structure. For example, a candidate-based first past the post electoral systems hardly requires any party involvement in other issues than candidate's political backing and contribution to the campaign financing. On the contrary, in proportional systems with closed party

lists a party has very important prerogatives in defining, among other issues, the place of each given candidate in the list.

A) Questions raised during the pre-electoral period

11. The *Code of Good Practice in Electoral Matters*[2] considers universal suffrage as the first of the principles underlying Europe's electoral heritage which "means in principle that all human beings have the right to vote and to stand for election". However -and indeed- this right may be subject to certain conditions, usually concerning age and nationality[3].

12. In any case, there are other conditions, derived from the importance of political parties in modern democracies. This implies that the individual right to stand for election may be affected by two different sets of rules: first, by the general rules and requirements adopted by a State to allow parties to run in an election. And, second, by the rules adopted by the parties for nominating their candidates in a given election. The former rules have to be analysed especially with the perspective of pluralism: if, as the European Court of Human Rights has said, *"there can be no democracy without pluralism*"", the main point is to ascertain that additional requirements imposed on parties are not so heavy that may hurt the expression of social pluralism. The latter rules, which may be fixed by the parties themselves, or imposed by legislation, may affect the idea of intra-party democracy, or to the right of the members of a given (in this case, political) association, to participate in the basic decisions of the association (party).

a) Rules for depositing lists and/or candidatures: additional requirements for parties for running in an election

13. Some countries require the fulfilment of some additional conditions for applications to be presented. In particular, they may consist of a number of signatures (200 persons eligible to vote in the constituency, in Germany; one percent of the voters registered in the constituency, in Spain), or of the deposit of certain amounts of money.[4]

14. Applications and lists of candidates are usually registered by parties. In fact, in some countries (Albania, Bulgaria, Latvia, "The Former Yugoslav Republic of Macedonia" or Slovakia, amongst others)[5], only parties are allowed to participate in elections. In most of the others, parties do enjoy a more advantageous position than independent or non-party candidates with respect to matters such as requisites for presenting candidates, access to public mass media, etc.

15. Political parties are, as some Constitutions and the European Court of Human Rights have expressly admitted, essential instruments for democratic participation. In fact, the very concept of the political party is based on the aim of participating "in the management of public affairs by the presentation of candidates to free and democratic

2 *The Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I, 1.a.*

3 *See also Report on the abolition of restrictions on the right to vote in general elections endorsed by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004) (CDL-AD(2005)012).*

4 *The Code of Good Practice in Electoral Matters (CDL-AD(2002)23rev), Part I, item 1.3 paras 8 and 9.*

5 *Replies to the Questionnaire on the Establishment, Organisation and Activities of Political Parties (CDL-DEM(2003)002rev, 1.5)*

elections[6]". They are thus a specific kind of association, which in many countries is submitted to registration for participation in elections or for public financing. This requirement of registration has been accepted, considering it as not *per se* contrary to the freedom of association, provided that conditions for registration are not too burdensome. And requirements for registration are very different from one country to another: they may include, for instance, organisational conditions, requirement for minimum political activity, of standing for elections, of reaching a certain threshold of votes...[7] However, some pre-conditions for registration of political parties existing in several Council of Europe Member States requiring a certain territorial representation and a minimal number of members for their registration could be problematic in the light of the principle of free association in political parties.

16. In any case, the existence of such a register, "as a measure to inform the authorities about the establishment of the party as well as about its intention to participate in elections and benefit from advantages given to political parties[8]", should possibly be reflected in the additional requirements imposed at the moment of depositing lists and/or applications. In particular, countries which require registration of parties (Germany, Spain) may exempt them on any other additional requirements, allowing them to stand in elections without, for instance, collecting a number of signatures or paying a guarantee deposit, as other political agents have to do.

b) Procedures adopted by parties for nominating candidates

17. Parties are a specific kind of association. Their status is thus guaranteed under the right of freedom of association, and they can only be subject to restrictions prescribed by law. Therefore, internal party procedures for decision-making should be presided by the principle of self-governing, and in many countries these rules are only set in the Party Statutes. Nevertheless, their relevance for the working of the whole system implies that, as has been previously pointed out, the Constitution or the law may set up some rules, usually requiring parties to respect democratic principles in their internal organisation and working[9].

18. However rules may go further: the French Constitution had to be recently reformed to allow the law to impose the principle of equal access of men and women to elective offices, so limiting the free choice of candidates by party organs. In some countries, the Electoral Law contains a procedure of nomination of party candidates, which has logically be respected by the party statutes. This is, for instance, the case

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[6] *Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues (CDLAD(2004)007).*

[7] *See Guidelines and Report on the Financing of Political Parties (CDL-INF(2001)8), and Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures (CDL-INF(2000)1, Appendix I). In this sense, the Venice Commission has expressed serious concerns, for instance, about legal provisions which establish a high threshold of membership for founding new parties; which oblige parties to be active nationwide, excluding local or regional parties; or which foresee the denial of registration if the Charter of a party contains rules contrary to the Constitution or the law (Cf. CDL-AD(2002)017, on Ukraine; CDL-AD(2003)008, on Moldova; or CDL-AD(2003)005, on Armenia).*

[8] *Guidelines on Legislation on Political Parties: Some Specific Issues (CDL-AD(2004)007).*

[9] *Cf. Replies to the Questionnaire on the Establishment, Organisation and Activities of Political Parties (CDL-DEM(2003)002rev, 3.5).*

in Germany (art. 21) or Ukraine (art. 40). In this respect, it could be asked what is the scope of autonomy and self-governing that should be respected by the law or, in other words, what degree of external -and general- constraints are compatible with the very idea of free association. In any case, it seems that the very respect of the democratic principle should suffice to exclude any possibility of changing the order of candidates within a list after voters have cast their ballots, as for instance seems to be possible in some specific countries[10].

c) Parties and election management bodies

19. In general, different Election management bodies have to guarantee the fairness of the electoral process. This aim may be reached by different means, and so the composition of election management bodies greatly differs from country to country. In some countries, such as Germany, the electoral law does not specify whether the assessors appointed to form the Electoral Committees have any partisan component. In Spain, Higher Electoral Committees are mainly composed of judges, with a number of experts who have to be jointly nominated by parties with seats in the Lower Chamber, whilst Polling Station Committees are formed by drawing lots among voters registered in each Polling Station, and by the observers that all parties can nominate (although, in practice, only major parties are able to have representatives in most of the Polling Stations). Other countries, such as Ukraine, foresee Election Commissions formed by representatives of concurrent parties, with the offices of president, deputy president and secretary proportionally distributed among parties (art. 21.8 of the Ukrainian Electoral law speaks about the "right [of parties] to a proportional share of leadership positions in polling district elections commissions").[11]

20. In this respect, different elements should be considered. For instance, the different kinds of election management bodies, their size, the way their members are nominated, or which parties have the right to participate in this process. It could be argued that the lower Committees have to deal with the working of the voting process, solving problems as fast as possible, and so they have to be functional and -really and apparently- trustworthy, in political terms. That implies that they possibly should not include too many members, and that their working should not be submitted to politically-oriented criteria. In this sense, bodies, mainly or totally composed of politically-nominated members, sometimes do not seem to be a practical option.[12] On the other

[10] *Joint Recommendations (by the Venice Commission and the OSCE/ODIHR) on the Electoral Law and the Electoral Administration in Albania (CDL-AD(2004)017, para 68).*

[11] *See also The Code of Good Practice in Electoral Matters (CDL-AD(2002)23rev), Part II, item 3.1 para 71.*

[12] *Very recently, for instance, the Venice Commission and OSCE/ODIHR adopted the Preliminary Joint Opinion on the Revised Draft Amendments to the Electoral Code of Armenia (CDL-AD(2005)008) which underlines the "strong partisan interest" of the members of the Central Electoral Commission, and states that "the rule of having the commissions constituted only by parliamentary appointments. without any non-partisan based appointments... that the commissions cannot be regarded as being sufficiently pluralistic and providing and adequate balance of overall impartiality and independence", highlighting the importance of "inclusiveness of political and civil interests in order for there to be a sufficient level of public confidence in the election processes and results" (emphasis added). Similarly, the already mentioned Joint Recommendations on the Electoral Law and the Electoral Administration in Albania (CDL-AD(2004)017) express a "major concern" about "provisions regulat-*

side, higher bodies mainly have to deal with complaints or particular problems which have to be solved with more general criteria, in an almost-judiciary function. In this case, the number of people is possibly less important, and of course the confidence of the concurrent parties must be assured, be it because of the independence and technical expertise of their members, or because the parties (all or just the main ones? In fact, the guarantee of pluralism does not require that all parties participate in every sphere of the electoral organisation. The mutual control among some of the main ones may be enough) have a role in their nomination process.

21. There are different approaches in the Council of Europe Member States to the composition of the electoral management bodies and to the procedure of nomination of their members. However, the electoral management bodies should be composed in a way to ensure the trust of all forces taking part in elections and individual voters in their impartiality and professionalism[13].

d) Rights and obligations of parties observers

22. During the electoral process, party observers and representatives must indeed have the same opportunities for defending their interests in any sphere of political activity. It does not necessarily follow, as has been previously suggested, that all parties do have to take part in every organ of the electoral administration, but it implies that all concurring parties must have the right to be heard in the decision-making process and to complain against any decision which they consider not to be legally grounded.

23. It is also important that representatives of the political parties keep their observer status not just until the voting is over but up to the date when the last disputes concerning election results are settled. This could have a positive impact on the credibility of the results.

B) Questions raised at the electoral campaign

a) Financial questions including the equality principle and the use of public (State) resources

24. The Venice Commission has already established guidelines on the financing of electoral campaign expenses, which differs from regular financing.[14] In fact, regular financing may be justified for the essential role of political parties in democratic regimes, but electoral financing has an even stronger basis: the electoral process is the regular procedure for people to decide the main orientation of democratic institutions. It is therefore the main stream through which democratic legitimacy runs. In that sense, campaign expenses are similar to institutional expenses: expenses which are necessary for institutions to work according to the constitutional framework.

25. This perspective allows some limits to be drawn: party activities have to be financed, and equally financed, in as much as they contribute to the working of democratic institutions. This means that public resources may be limited only to

ing formation of electoral commissions. [which] have given an extremely dominant role to each of the two main political parties at every level of the election administration", establishing a "highly politicized environment".

[13] *See also The Code of Good Practice in Electoral Matters (CDL–AD(2002)23rev), Part II, item 3.1 paras. 71 -72.*

[14] *Guidelines and Report on the Financing of Political Parties (CDL-INF(2001)8).*

"institutional" parties, i.e., parties which are represented in Parliament, and therefore participate in the parliamentary activity. It is also obviously possible to extend this public funding to other parties which represent a "significant section of the electoral body", or which "reach a certain threshold of votes". But equality does not mean that all parties are entitled to public resources regardless of their real strength in a given society. For example, the Code of good practice in electoral matters provides that:

"Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections *[...]*[15]*"*

26. In any case, some specific points can be examined. Provided that not every party is entitled to public (regular, or electoral) resources, which are the admissible thresholds for denying public funding? Electoral systems may leave socially important parties out of Parliament, but the denial of public means may simply make them disappear, thus reducing the social pluralism and the political alternatives of a society. Should electoral financing be more generous than regular financing, increasing the incentives for social movements to offer their political alternatives at the moment of elections, without great risks of bankruptcy?

27. In a different sphere, it is clear that major parties, whose members and leaders usually dispose of institutional power (for instance, members of national, regional or even local chambers; executive positions at any of those different levels, etc.) may dispose of much more resources (facilities, advisors, administrative staff), just because they do have access to public means, which are not considered as public financing of party activities. In the United Kingdom, for example, the Statutes of the Conservative Party set up a different, and stronger, majority, for the incumbent leader to be confirmed than for a new leader to be elected, just because it is generally accepted than the incumbent leader has many more means to influence party members or electors. Is this kind of difference relevant? And, if so, is it taken into account in other spheres?

28. The Venice Commission's Guidelines and Report on the Financing of Political Parties (CDL-INF(2001)8) distinguish between regular financing and financing of electoral campaigns. But the practical usefulness of the distinction is limited when political parties receive (public) funds permanently and regularly for both their current operations and their participation in elections. If that is the case, it is underlined in the report, *"confining funding to the full or partial coverage of campaign expenses ... merely aims to avoid emptying the parties ' coffers every time an election takes place and to permit the trouble-free functioning of the democratic process through the holding of regular, free elections*." It is also pointed out in the report, that most of the major European democracies have opted for this approach. The situation is similar when political parties acquire (private) donations.

29. Therefore, if and when the distinction is to be used anyhow in regulations for different provisions concerning, on the one hand, electoral campaigns and, on the other, pre- and post- electoral periods, a number of clarifications is desirable. Such clarifications should be considered in order to avoid some of the problems which have been discussed on various occasions in Europe during the last few years and especially

[15] *Code of Good Practice in Electoral Matters (CDL-AD(2002)23rev), I.2.3.b.*

during the deliberations which preceded the adoption of the European Union Regulation (EC) No 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding[16].

30. If public funds are allocated *with general regard* to an electoral campaign it should be clarified that the funds can be used by the political party for any legitimate party purpose; specific conditions for the use of appropriations should be expressly indicated. If funds are appropriated *strictly for campaign purposes* and for such purposes only, guidance should be provided how to handle expenditure which cannot be classified as exclusively campaign related – as for example expenditure for (rent of) party premises, which are used both for current party business and for campaign activities, or for party employees who are employed by the party for both current and campaign activities. If applicable, guidance should also be provided as to both the span of time before and after an election during which the use of appropriations is legally acceptable and the time at which expenditure is considered to have occurred.

31. If private donations are acquired for campaign purposes by either the party or the candidate guidance should be provided how to handle any conditions or wishes for the use of a donation, which may have been expressed by the donor, how to handle expenditure which cannot be classified as exclusively campaign related and for which time before and after an election the use of campaign donations is acceptable. Further, problems may be caused, if the candidate him- or herself provides own resources. In such cases guidance may be necessary, for example, to which extent the candidate may use own resources or resources of his family, how resources, which are provided in kind, have to be valued and who has to do the valuation.

32. If political parties are or can be liable to income tax it should be clarified to which extent appropriations, donations, membership fees etc. are or can be regarded as taxable income, which expenditure is deductible from taxable income and which information has to be provided by the political party to establish deductibility. Similar clarifications should be considered concerning value added tax and other taxes which may apply to political parties.

33. It should also be clarified according to which set of regulations the party has to keep its books – for example according to provisions for private associations or companies or any other private individuals or according to provisions for public authorities or other public entities (or maybe even both).

b) Access to (public and private) media

34. From a different point of view, contemporary societies are mainly "information" societies: elections are fought in a very particular context, so that access to mass media is possibly the best instrument for parties to transmit their message to electors. Therefore, that is possibly the main resource that parties may seek. And the access to publicly-

[16] *Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, Official Journal of the European Union (OJ) 2003 L 297/1, together with the Decision of the Bureau of the European Parliament of 29 March 2004 laying down the procedures for implementing Regulation (EC) No 2004/2003, OJ 2004 C 155/1, and Court of Auditors, Special Report No 13/2000 on the expenditure of the European Parliament's political groups, together with the European Parliament's replies, OJ 2000 C 181/1, as well as the travaux préparatoires to Regulation No 2004/2003.*

owned media is, at the same time, the least expensive of the aids that the State authorities may offer, so that there is a clear interest from both sides. Of course, problems will arise when deciding the details of that access (time provided to the different parties and/ or lists, presence of the campaign in the news, etc.). In this respect, the existence of a model of party registration may also be taken into account, giving some advantages to registered parties, but it cannot be used as a discriminatory instrument, depriving other social sectors of any opportunity to defend their positions in a fair campaign. The Code of good practice in electoral matters provides that:

"Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by the state authorities, in particular with regard to: the election campaign and the coverage by the media, in particular by the publicly owned media [...][17]"

35. In the field of private media, problems are clearly different. The principle of fair elections must be compatible with that of free elections: if all parties and/or candidates have the right to campaign, and to address their messages to all citizens, it is also true that many private media have clear social, ideological and, at the end, political orientations, which may be considered when defining a right to access to all mass media[18]. This factor, of course, cannot justify the definition of different economic conditions for the different parties' publicity, but it might even support claims to deny the access of some parties to some media. The difficulties of establishing a balanced equilibrium of media in a given society are thus particularly evident in the framework of electoral competition.

36. Another complex issue concerning the coverage of electoral campaign is the responsibility of different mass media for the quality of information they provide on different political forces. The freedom of press is a cornerstone of modern democracies, however there should be a mechanism providing an effective remedy against misuse or abusive use of information during the pre-electoral period.

C) Questions raised the day of election

a) Role of parties observers

37. It is particularly important to guarantee the possibility of all parties and candidates to have observers during the election day[19]. In this respect, it is evident that parties have some elements -permanent organization, membership, and so on- which help them in this task, and that are much more difficult to dispose of for other non-partisan candidates.

38. These observers must have the right to control all the spheres of the voting process (polling boxes, election committees at all levels), to intervene – at least, to be heard- in the resolution of possible conflicts which may arise, and to inform the parties which they represent about the problems during the observation so that the latter could lodge appeals against any decision not grounded in legal terms.

[17] *Code of Good Practice in Electoral Matters (CDL-AD(2002)23rev), I.2.3.a.*

[18] *See also the Code of Good Practice in Electoral Matters (CDL-AD(2002)23rev), I.2.3.c.*

[19] *The Code of Good Practice in Electoral Matters (CDL-AD(2002)23rev), Part II, item 3.2.*

b) Complaints procedures

39. The *Code of Good Practice in Electoral Matters* insists in the importance of "an effective system of appeal.[20]" And, as has just been pointed out, that requirement has to be applied to the whole system, including of course the appeals which can be posed on election day by individual citizens or by any other subject. In the context of elections, an effective system of appeal would mean that any decision by any state authority can be challenged and that a decision by a competent body is taken immediately. Any delay in complaints and appeals procedures can seriously compromise the credibility of an election.

D) Questions raised at the post-election period.

a) Contesting electoral results: timeframe.

40. The "deadlines for taking decisions on complaints and appeals", including of course the decision of contesting electoral results, have to be "realistic[21]". This is obviously an important element of the whole system of appeal, but the precise timeframe must vary not only from one country to another (depending on multiple factors, such as the systems of ballot-counting and of transmitting results), but also from case to case (different elections, which may be held in different contexts: uninominal districts or national constituencies, for instance; different chambers...). It does not seem easy to draw general conclusions about what deadlines should be admitted or not, and it will greatly depend on the circumstances.

b) Sanctions

41. Something similar may be held with respect to the system of sanctions. Firstly, there are obviously such a large number of different possibilities that it is not possible to sum them up in very short terms. Secondly, in this field the participation of parties does not affect to the definition and working of the rules: the cancellation of the election of seats, the eventual loss of seats, the economic and financial sanctions, may affect candidates independently of their partisan affiliation.

III. Conclusion

42. The Council of Europe Member States have different approaches to the regulation of political parties' activities and their participation in political life, notably in elections. However, there are some common trends and concerns as to the equality of different forces seeking political representation, financing of parties and issues related to the internal operation of parties.

43. A set a common standards is not only possible but also quite appropriate in a number of fields, which are:

a. rules for the nomination of candidates for different elections;

b. equal treatment of different parties and individual candidates competing in elections;

[20] *Idem, item 3.3.*

[21] *Joint Recommendations on the electoral law and the electoral administration in Albania (CDLAD(2004)017), already quoted, para. 103.*

c. possibility to have observers during the elections until the last complaints are dealt with by the competent bodies;

d. transparency in campaign financing and accountability of parties for the different resources used;

e. equal access to mass media;

f. effective complaints and appeals system, which provides for a speedy procedure for the settlement of different disputes during the whole electoral process;

g. respect of the principle of proportionality in case of sanctions.

44. The Venice Commission hopes that further co-operation between the Council of Europe Member States in these areas could contribute to the elaboration of common standards in addressing the issue of political parties' activities and to the improvement of electoral practice in Europe.

Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament

Adopted by the Council for Democratic Elections at its 26th meeting
(Venice, 18 October 2008)
and the Venice Commission at its 77th plenary session
(Venice, 12-13 December 2008)

on the basis of a contribution by
Mr Klemen JAKLIC (Member, Slovenia)

Introduction

1. Further to Recommendation 1791 (2007) of the Parliamentary Assembly of the Council of Europe on the state of human rights and democracy in Europe, and to the conclusions of the 2007 Forum on the future of democracy, the Advisory Committee of the Forum was in favour of a more detailed examination of the issue of the threshold of parliamentary representation being made by the Venice Commission., Mr Jaklic prepared a report on the "Thresholds and Other Features of the Electoral System which Bar Parties from Access to Parliament in the Member States of the Venice Commission". In consultation with the Secretariat it was agreed that this would probably take several stages. The first stage is about delineation of various mechanisms that have the same effect of limiting party's access to parliament, and about exposing different comparative contexts in which the mechanisms appear within particular electoral systems. Such a contextual comparative approach at the initial stage is understood to be an indispensable precondition to any sound further assessments of the situation across the Member States (possible second stage), which would then ideally lead to a potential elaboration of common European standards in this area (possible third stage).

2. The present report was adopted by the Council for Democratic Elections at its 26th meeting (Venice, 18 October 2008) and by the Venice Commission at its 77th plenary session (Venice, 12-13 December 2008).

1. General remarks

3. Unless otherwise noted, the term "threshold" is used, in this report, in the broader sense: as any mechanism affecting parties' access to parliament. By the term "threshold" we usually understand the threshold in the formal sense: the legally prescribed minimum number of votes needed for a party to take part in distribution of parliamentary seats. However, while this is one of important mechanisms for barring parties from access to parliament, the legal threshold is but one of several mechanisms that can result in the same, or at least very similar, effect of restricting/enhancing opportunities for access. When measuring the issue of access contextually it would thus be insufficient to focus solely on legal thresholds; while keeping a legal threshold low, the same result of high level of exclusion could be achieved through many other mechanisms. They all are relevant, and are especially important from the perspective of inclusion/exclusion of minor and new parties. This report is thus concerned with all these mechanisms – the threshold in the broader sense.

4. It is also important to note that this initial report is not (yet) about value judgment. It is not claimed that more inclusive systems are better. In order to be able potentially to make a normative value judgment and elaborate any common standards in this area one must first clarify facts: different degrees of inclusiveness/exclusiveness of different systems. The following contextual analysis of different types of thresholds is thus the initial step towards this first goal.

2. The Choice of a Type of an Electoral System

5. The natural starting point of any analysis of electoral systems' effect on inclusion/exclusion of parties from access to parliament is the "Duverger's law". It states that majority/plurality system "tends to party dualism" while "proportional representation tend to multipartyism".[1] The law is not without exceptions and can be understood only as a probabilistic generalization.[2] Sometimes significant disparities exist within one and the same system-family. Nonetheless, the choice of a type of electoral system (majority/plurality, combined, proportional) is an important general threshold; it is itself a mechanism with an important general impact on minor party exclusion/inclusion and, consequently, party fragmentation. Party systems will be more competitive and fragmented in proportional systems (PS), whereas majority/plurality systems (MS) will usually restrict opportunities for minor parties. Thus, a study of electoral systems worldwide found that «the mean number of parliamentary parties (based on the simplest definition of parties holding at least one seat) was 5.22 in the countries using majority/plurality systems, 8.85 in combined (or mixed) systems, and 9.25 in societies with proportional representational electoral systems."[3] Similarly, «the mean number of *relevant* parties [] (holding over 3% of parliamentary seats) was 3.33 in all majority/plurality systems, 4.52 for combined systems, and 4.74 for all proportional systems".[4]

3. Restrictions on Ballot, Funding, and Media Access

6. Another set of mechanisms flows from statutory or constitutional provisions designed to limit or prevent parties from either registering, nominating candidates for office, or otherwise gaining official ballot access, as well as to unequally restrict access to campaign funds and media airtime.[5] As in the previous section, here, too, the logic is straightforward. On the one hand, «minor parties seeking to break into office are generally expected to perform well in political systems which facilitate more egalitarian conditions of party competition, for example where all parties are equally entitled to ballot access, free campaign media, direct public funds, and indirect state subsidies[6]." On the other hand, "minor parties face a harsher environment where such public resources are allocated in a 'cartel' arrangement biased toward established parties already in the legislature, thereby

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[1] *M. Duverger, Political Parties: Their Organization and Activity in the Modern State (Wiley, NY 1954).*

[2] *M. Duverger, "Duverger's Law: Forty Years Later" in B. Grofman and A. Lijphart (eds), Electoral Laws (Agathon, NY 1986); M. Gallagher and P. Mitchell (eds), The Politics of Electoral Systems (OUP, Oxford 2007) 545-46. P. Norris, Electoral Engineering (CUP, Cambridge 2004) 81.*

[3] *P. Norris, Radical Right: Voters and Parties in the Electoral Market (CUP, Cambridge 2006) 107.*

[4] *Id.*

[5] *P. Norris (footnote 3), 87.*

[6] *Id 83.*

protecting incumbent politicians... Minor challengers face even more serious limitations in regimes holding manipulated elections, where the rules for the allocation of public resources, such as media airtime, are grossly biased toward the ruling party[7].”

3.1. Registration Requirements

7. This is a precondition to getting access to the ballot. Only in a few countries (among them, in France, Sweden, and Ireland) there is no requirement for political parties to register before appearing on the ballot[8]. In most countries there *are* such requirements, and they have generally been increased over the recent years due to the increasing regulation of public campaign funds as well as due to detailed bureaucratic requirements to register legally[9]. The requirements differ across different countries, but the common demands are deposition with electoral authorities of a written statement of the party’s principles and constitution, statutes and rulebooks, an organizational structure, a list of officers, a list of minimum membership or signatures, or sometimes even a minimum number of candidates or a particular regional distribution of candidates.[10] When the burden of restrictions is generally heavy this does «represent a barrier for all new challengers and minor players [and does] deter some contenders[11]”. Moreover, the more specific requirements, such as those that parties must not oppose certain principles or that they have to have a minimum number of contenders, and the like, affect minor parties on the extremes of the political spectrum[12].

3.2. Ballot Access

8. After restrictions regarding party registration there are then also restrictions on access to ballot, such as the requirement of paying an official deposit prior to election and the collection of a particular number of signatures per candidate or party list.

9. In some states the deposit is relatively low (for instance, according to a comparative study from 2003, the deposit in France was $180, and in Ireland $350), but this does reach less modest rates in others (UK, $735)[13]. Deposits are usually returnable if a candidate/party gets some minimal share of votes (for instance, 5% in the UK). Nonetheless, when high deposits are combined across several candidacies such a requirement may work as a significant deterrent, or threshold, for serious contenders with limited financial resources. Norris thus exemplifies: “if they lost every deposit by falling below the minimum 5% threshold, it would cost the greens almost half a million dollars to contest every seat in a UK general election[14]”.

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[7] *Id; see also R. Katz and P. Mair, “Changing models of party organization and party democracy: The emergence of the cartel party” in Party Politics 1 (1995) pp 5-28, arguing that established democracies have been heading toward a cartelised system.*

[8] *P. Norris (footnote 3), 88.*

[9] *Id.*

[10] *Id; Election Process Information Collection (EPIC), http://archive.idea.int/ideas_work/02_electoral_epic.htm*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *S. Bowler et al, “Changing Party Access to Elections” in B. Cain et al (eds) Democracy Transformed? (OUP, Oxford 2003). A. Blais and A. Yoshinaka, Establishing the Rules of the Game (UTP, Toronto), table 2.1.*

10. The situation is similar with respect to the required minimum number of signatures per candidate or party list. In some states they are fairly modest (e.g. 200-500 signatures per district in Austria and Belgium), but not so in all states or across all different context. Thus, when Italy used a mixed system, it required 500 signatures for candidates in single member districts, but 1500-1400 for party lists. The requirement sometimes becomes quite fierce: in Norway, for instance, 5,000 signatures are required per party[15]. This may function as an important threshold barring minor parties from access to the ballot and, therefore, parliament.

3.3. Funding and Media Access

11. After party registration and access to ballot, there is also regulation of access to campaign funding and media (public funding, indirect state subsidies, access to broadcasting). This, too, may function as an important threshold for parties' access to parliament. It is well established that «access to money and television are two of the most important factors that help parties in conveying their message and mobilizing potential supporters[16].» Particular regulation in these fields could lead either to a "political cartel", reinforcing the relative power of parties already in parliament, or, alternatively, generate a more level playing field, thereby boosting opportunities for minor/new parties[17]. For instance, when resources are distributed based on percentage of seats in the current parliament, as in Switzerland or the Netherlands, then such provisions can, other things being equal, act more as a cartel allocating public goods to current parliamentary parties. The threshold for access to parliament by minor/new parties is relatively higher in these circumstances. By contrast, minor/new parties have grater chance when these resources are allocated on a more egalitarian basis, whether the allocation is based on the percentage of votes cast in the previous or current elections (e.g. Spain) on the number of candidates running (e.g. allocation of airtime in UK), or equally across all registered parties (e.g. Russia). The most minimal allocation of campaign funding and free broadcasting access are found in states like Austria, Finland, Iceland, Switzerland, and the most equitable ones in states like Russia, Italy and Spain[18].

12. This being said, it should be cautioned that funding and media access could serve as a useful guide to assessing the threshold issue in practice only if, in addition to these *formal* requirements, one takes into account also the *factual* functioning of these formal rules in different states. That is, one would also need to take into account the intensity with which the formal rules are being implemented (by the courts and election commissions) in the different states. Thus, while it is true, for instance, that in Russia all registered parties are entitled to equal access to free campaign broadcasting, there is

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[15] *P. Norris (footnote 3), 90.*

[16] *Id. 95.*

[17] *Id. 95, 103; S. Bowler et al, "Changing Party Access to Elections" in B. Cain et al (eds) Democracy Transformed? (OUP, Oxford 2003).*

[18] *P. Norris (footnote 3), table 4.1, listing 24 European countries on the scale from the least to the most equitable, judging on the cumulative basis of the following 8 criteria: 1.) Is there a system of regulation for financing parties? 2.) Is there provision for disclosure of contributions to parties? 3.) Is there a ceiling on contributions to parties? 4.) Is there a ceiling to party election spending? 5.) Do parties receive direct public funds? 6.) Are parties entitled to free media access? 7.) Are parties entitled to tax exempt status? 8.) Do parties receive indirect public subsidies?*

such a multiplicity of parties, and thus campaigning adds, that the practical mobilizing support is automatically diluted. Each party, regardless of size, gets no more than its "thirty-second moment of fame".[19] Moreover, some official observers have reported a heavy pro-government bias on all main channels during successive Russian elections in the past.[20] All these, and other, contextual specificities must be taken into account when measuring and comparing this particular threshold across different states.

4. The Legal Threshold

13. The next threshold for parties' access to parliament is the threshold in the narrower, literal, sense of the word. It has also been called the «threshold of exclusion[21]". No electoral system can be perfectly proportional in practice: according to the principle of representation a larger body (whole electorate) is always translated into a much smaller one (members of parliament). There will thus always be a certain minimum amount of votes needed to qualify a party for representation (distribution of seats) in the parliament. The threshold of exclusion is about that percentage of votes. On the one hand, it is generally true that MS are more restrictive to minor/new parties in this respect. This is, however, not so when a minor party's support is concentrated within a specific region that corresponds to one or more of the electoral districts. On the other hand, even though PS and combined systems (CS) are considered generally to be more favourable to minor/new parties when it comes to the threshold of exclusion, there are still significant degrees of exclusion possible in those systems as well.

14. There are two types of thresholds of exclusion. In some electoral systems the threshold is set artificially, by law. This is known as the *legal* (or artificial, or formal) threshold. Parties that do not obtain the legally prescribed minimum number of votes do not get any seat. This is an obvious limitation to minor parties, one that often also proves fatal to the survival of such parties. States with legal threshold differ according to the chosen percentage. For the member states of the Venice Commission this range is between the lowest 0.67% (in the Netherlands) to the highest 10% (in Turkey). Based on an analysis of electoral legislation and other sources a list of different legal thresholds across several of the European states was prepared. The list (table) appears at the end of this subsection. However, it also follows from the analysis that any sound conclusions as to the comparative merits of these numbers would have to take into account a complex set of different contexts associated with the numbers. Most obviously, we would have to take into account the thresholds' *different levels of application* as appear across different states. Thus, some laws prescribe that a certain amount of votes needs to be obtained at the constituency/district level (e.g. Spain). Others require nation-wide legal thresholds (e.g. Germany), and still other thresholds are meant to apply at both these levels (e.g. Sweden). It is impossible, without further and detailed measurements/calculations of the type used in political science, to assess which of these systems, other things being equal, is at the end more/less favourable to parties' access, and what the actual degree of that inclusiveness/exclusiveness is. Moreover, there are differences between the

[19] *Id. 101.*

[20] *Id.*

[21] *D. Nohlen, "Threshold of Exclusion" in R Rose (ed), The Encyclopedia of Electoral Systems (CQ Press, Washington DC) 2000.*

countries as to the *stage of the threshold's application*: whether the legal threshold is applied to the first, second, or any subsequent rounds of seat allocations. Furthermore, there is the problem of the *"graduation of the threshold*": the thresholds differ also in the sense that some numbers apply to parties and others to party coalitions; for example 5 % per parties, 8% per two-party coalitions, 10 % for larger party-coalitions.[22] All these circumstances further complicate a potential comparative assessment of our question (the relative openness/closure of a given system to parties' access). The same is true of the fact that some states (e.g. Germany) prescribe alternative legal thresholds determined by *seats, not percentage*. These usually (as in the case of Germany, where winning 3 direct (plurality) seats also suffices to take part in the distribution at the national level) appear in addition to the thresholds determined by percentage. On top of this, there are *other details of each system* that make the comparative assessment of the threshold effects even more difficult. For instance, in Germany the 5% national threshold plays an important role while the threshold of 3% in Greece has little effect: there, minor parties fail to get elected due to a different cause – the use of fifty-six districts for party lists[23]. Similarly, the 3% legal threshold in multimember districts in Spain may be nearly insignificant. It's has been reported that it is already the magnitude of the districts in Spain that "does not permit the representation of parties with a share of votes lower than 5 percent[24]". Another example of the different functioning of the thresholds, due to specificities of each system in which they appear, is this: "a national legal threshold (as in Germany) applied across the whole country limits minor parties such as the Party of Democratic Socialism (PDS), who are strongest in the east but who fell below the 5% level nationally in the 2002 Bundestag election, whereas a district-level legal threshold (e.g. the one used in Spain) will not affect small parties such as the Basque Nationalists, who are returned in their regional strongholds[25]".

Legal Threshold in Majority/Plurality Systems

Country	Legal Threshold
Belarus	None
France	Either 12.5% support of registered electorate in a district, or to finish in top two (in first round) to qualify for second round
UK	None

Legal Threshold in Combined Systems

Country	Legal Threshold
Albania	2,5% for parties and 4 % for coalitions (before the constitutional revision)

[22] *Id; P. Norris, (footnote 3), 119.*
[23] *Id.*
[24] *D. Nohlen, id.*
[25] *P. Norris (footnote 3), 119.*

Germany	Either 5% nationwide or 3 district seats
Hungary	5% of votes in proportional representation tier needed to qualify for any seats from proportional representation tier or national tier
Italy	4%
Lithuania	5%
Russia	5% (when the combined system was applied)
Ukraine	4% (when the combined system was applied)

Legal Threshold in Proportional Systems

Country	**Legal Threshold**
Austria	1 seat in a lowest-tier district, or 4% nationwide, needed to qualify for middle or national tier seats
Belgium	5% of votes needed within a constituency to qualify for seats there
Bosnia and Herzegovina	None
Bulgaria	4%
Croatia	5%
Czech Republic	5%
Denmark	Parties do not qualify for share of higher tier seats unless they win a lower tier seat, win the equivalent of the Hare quota in two of the three regions, or win 2% of national vote
Estonia	5%
Finland	None
Greece	3%
Iceland	None
Ireland	None
Latvia	5%
Luxembourg	None
Moldova	6%
Netherlands	0.67%
Norway	4%
Poland	5%
Portugal	None
Romania	5 %
Russia	7 %
Slovakia	5%
Slovenia	4%
Spain	3% of votes needed within a district to qualify for a seat there

Sweden	Either 4% national or 12% district
Switzerland	None
«the former Yugoslav Republic of Macedonia"	None
Turkey	10%
Ukraine	3 %

5. **The Natural Threshold**

15. In the previous subsection it was mentioned that there are two types of thresholds of exclusion. Our attention then moved to the one set artificially, by law *(legal* threshold). But this is only the first threshold of exclusion. The second one is the so-called *natural* (or hidden, or effective, or informal) threshold. This one is present in any electoral system, regardless of whether or not the system also has any legal threshold. Even when there is no legal threshold at all, small parties can thus still face considerable natural thresholds for access to parliament. The natural threshold is the percentage of votes needed to get one seat at a district level, and is mainly dependent on the mean district magnitude (the average number of legislators returned per district, spanning from one in the UK to 150 in the Netherlands. The other factors affecting the natural threshold (but with a much less force than the first) are, the seat allocation formula (d'Hondt, Saint-Lague, LR-Droop, Hare), the number of contestant political parties, and size of an assembly. Generally speaking, a system with small district magnitudes thus requires a relatively high percentage of votes per district to return a legislator. Conversely, the more seats there are to fill in the districts, the lower its natural threshold.[26]

16. While the concept of national threshold is clearly different from the legal, or formal, threshold, it is obvious that depriving minor/new parties of accurate or any representation «can be done just as well by low district magnitude as by imposing a formal threshold".[27] As to the measurement of a country's natural district threshold (average number), there is no formula that would work in all circumstances. Nonetheless, there is consensus that the following formulas [t=75%/(m+1), or m = (75%/t) -1], where «t" is the threshold" and «m" is the magnitude (number of seats per district), result in sufficiently accurate estimations of the natural threshold. To take an example, when seats are to be allocated through fourteen-seat districts, the natural threshold is 75%/(14+1), that is, 5%. This means that it is as difficult for a party to get into parliament in such circumstances as if there were a formal district threshold of 5%.[28] Moreover, if there was a legal threshold of 5%, or lower, prescribed at the district level, such a legal threshold would be quite irrelevant: a party with fewer votes than 5% could not get a seat regardless of whether or not there was the legal threshold. The following are some examples of natural thresholds (average numbers) as calculated for some of the countries (source: P. Norris, note 3, pp 110-11):

[26] *On this issue, see P. Martin,* Les systemes electoraux et les modes de scrutin *(Montchrestien, Paris 2006) 84-85.*

[27] *M. Gallagher and P. Mitchell (eds),* The Politics of Electoral Systems *(OUP, Oxford 2007) 607.*

[28] *Id.*

Natural Threshold in Majority/Plurality Systems

Country	Natural Threshold
Belarus	50%
France	50%
UK	35%

Natural Threshold in Combined Systems

Country	Natural Threshold
Hungary	11.3%

Natural Threshold in Proportional Systems

Country	Natural Threshold
Belgium	9.2%
Finland	5%
Iceland	10.8%
Ireland	15%
Luxembourg	4.8%
Portugal	6.7%
Spain	9.7%
Switzerland	9%

17. An important caveat needs to be mentioned here. While the natural threshold may be an important general indicator of the threshold at the district level it could not, of course, be equated with nation-wide natural threshold, or compared with the legal nation-wide threshold. For instance, while the average natural threshold (district level) for Spain is 9.7% (see above) a party can actually get into the Spanish Cortes by winning just one seat in any district. In the Madrid district (with 34 seats and thus only 2.1% natural threshold in 2000 elections) a party would thus, in the absence of the district legal threshold of 3% in Spain, need only 2.1% of the national vote. Applying the additional legal district threshold of 3% this still meant only 0.38% of the national vote.[29]

18. Similarly, with 165 elected legislators an average district magnitude in Ireland is 4.0 (2002 elections). The average natural threshold at the district level is thus 15% (75%/5). Again, it is quite clear that this cannot possibly be the same as the nation-wide natural threshold; it would have to mean that a party with 14.9% support would not get into the Parliament. In fact, while within an individual three-seat district a party would

[29] *Id, 609.*

get a seat only at approximately 18.7% of votes (75%/(m+1)), this is only about 0.3% of the votes on the national level.[30]

19. Indeed, the natural district threshold cannot be automatically projected to the national level and directly compared with, say, the nationwide legal threshold. Some have tried to devise a formula and calculate the nationwide natural thresholds (see the tables at the end of this subsection).[31] However, such calculations cannot be fully precise; any such calculation would remain approximation because, among others, the real force with which the thresholds curtail access depends heavily upon particular distribution of party support, the number of districts, and the number of legislators returned within each district.[32] These characteristics may vary significantly, and some average reflection on the national level (or to some extent even the average district level) might not fully capture the exclusionary force already at work within some specific districts. Moreover, even if sufficiently approximate, the nationwide natural threshold is a concept that does not have all the properties of the legal threshold while it has some unique properties of its own.[33] Furthermore, «whereas natural thresholds tend to widen the proportionality gap between the share of votes and seats, favouring especially the biggest party, legal thresholds foster a more proportional distribution of seats among those parties that passed the threshold".[34] Hence, the two thresholds, when translated to the national level, could not be directly compared as if they were one and the same thing.

20. The following three variables are relevant for calculating the approximation to the nationwide natural threshold: M (average district magnitude), S (total assembly size), and E (number of electoral districts). The formula is this: T = 75% / ((M + 1) * VE) or, which is the same, T = 75% / (((S/E) + 1) * VE), or 75% / (((S + E)/E) * VE).[35] To illustrate with our examples of Spain and Ireland: in Spain, where S=350, and

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[30] *Id.*

[31] *A. Lijphart, Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945-1990 (OUP, Oxford 1994); R. Taagepera and M. Soberg, Seats and Votes: The Effects and Determinants of Electoral Systems (Yale University Press, New Haven 1989); R. Taagepera, "Effective Magnitude and Effective Threshold" Electoral Studies (1998), 393-404; R. Taagepera, "Nationwide Threshold of Representation" 21 Electoral Studies (2002) 383-401. R. Taagepera, Predicting Party Sizes (OUP, Oxford 2007).*

[32] *Id; see also P. Norris (footnote 3), 120; also M. Gallagher and P. Mitchell (footnote 27), 607.*

[33] *M. Gallagher and P. Mitchell (footnote 27), 610-11; R. Taagepera, Predicting Party Sizes (footnote 31), 252. Thus, when it comes to the property of the "threshold of representation" (the minimum percentage of the vote that allows a party to earn a seat under the most favourable circumstances) the two thresholds (legal and natural) do seem to share sufficient similarity. However, when it comes to the properties of disproportionality and fragmentation, they "clearly do not". For instance, "in a country that applies a PF formula in constituencies averaging fourteen MPs, such as Finland, we can be confident that we will encounter low disproportionality and a multiparty system". At the same time, "in a country that uses only SMDs, such as the Uk, we expect high disproportionality and low fragmentation even if there are several hundred constituencies". Therefore, "however well it serves as an estimate of the nationwide threshold of representation, [the nation-wide natural threshold] formula understates the importance of average district magnitude and overstates the importance of the number of constituencies when it comes to disproportionality and the effective number of parties... Nonetheless, the number of constituencies is a variable that does make some difference". M Gallagher and P Mitchell, id.*

[34] *D. Nohlen (footnote 21), 311.*

[35] *M Gallagher and P Mitchell (footnote 27), 610; R Taagepera (footnote 31).*

E=52, the nation-wide natural threshold (T) is 1.35%, while in Ireland, where S=165 and E=42, T amounts to 1.85%.[36] The following are some additional calculations of the nationwide natural threshold (source: Gallagher and Mitchell, footnote 27, Taagepera, footnote 31):

Nation-wide Natural Threshold in Majority/Plurality Systems

Country	Nation-wide Natural Threshold
France	1.56%
UK	1.48%

Nation-wide Natural Threshold in Combined Systems

Country	Nation-wide Natural Threshold
Germany	0.13%
Hungary	1.77%
Russia (when the combined system was applied)	1.67%

Nation-wide Natural Threshold in Proportional Systems

Country	Nation-wide Natural Threshold
Austria	0.41%
Belgium	1.93%
Denmark	0.43%
Finland	1.32%
Ireland	2.34%
Italy	1.48%
Netherlands	0.5%
Spain	1.35%

6. Other Mechanisms With the Threshold Effect

21. There are, moreover, still other mechanisms that can have the same effect as the described thresholds of exclusion and other thresholds. Thus, restriction on minor parties' access can be achieved by partisan manipulation of the electoral rules. Examples of the latter are malapportionment (producing constituencies containing different sized electorates) and gerrymandering (intentional drawing of electoral boundaries for partisan advantage).[37]

[36] *Id.*

[37] *P. Norris, Electoral Engineering (footnote 2), 82.*

22. Moreover, factors such as particular administration of voting facilities, frequency of elections, citizenship franchise qualification, as well as the institute of compulsory voting, can also lead to the same effect of restricting/enhancing opportunities for access. It has been suggested, for example, that under a compulsory voting regime (at the level of national parliamentary elections it occurs, for instance, in Belgium, Greece, Luxembourg, Italy, while in Austria and Switzerland it is used in some of the Lander/ cantons) voters who are otherwise not inclined to vote might, out of their dissatisfaction with the major parties, «cast a protest vote". This often goes to a radical (usually a minor) party.[38]

Conclusions

23. In order to be able potentially to make a normative value judgment and elaborate any common European standards with respect to the inclusiveness/exclusiveness of parties' access to parliament, one must first clarify how inclusive/exclusive the different electoral systems across Europe actually are. However, the degree of inclusiveness/ exclusiveness is dependent on several features, or mechanisms, which are either explicit or implicit components of these electoral systems. Since the same effect of excluding parties from parliament can be achieved through any of those, it would be insufficient, when measuring the degree of inclusiveness/exclusiveness, to focus solely on the legal threshold. Any contextual and sound comparative analysis of the issue would take into account also the mechanisms discussed above – the thresholds in the broader sense. At the same time, this brings significant difficulties. While all those mechanisms affect inclusiveness/exclusiveness of electoral systems, not all could be compared in a straightforward way. The analysis of the natural threshold showed, for instance, that this mechanism is not exactly the same as the nation-wide legal threshold. Yet, it is crucial for measuring the openness and cannot be, without jeopardizing sound conclusions, excluded from the analysis. It needs to be calculated for each member-state at the district as well as national level, and then the comparison of the issue of openness could perhaps proceed through these parallel and different routes until, ideally, estimations could at the end perhaps also be made as to the overall degree of openness. Crucially, none of these further steps could proceed without a detailed and in-depth political-science type of investigation into the issues.

[38] *P. Norris (footnote 3), 122. Norris reports that «radical right did fare slightly better in the eight nations which use compulsory voting" and that «this evidence is suggestive", but concludes that, due to the limited number of cases under scrutiny, we need further studies to fully prove the relation between compulsory voting and successful access of minor parties from the extremes.*

Report on the Rule of Law

Adopted by the Venice Commission at its 86th plenary session
(Venice, 25-26 March 2011)

on the basis of comments by
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I. Introduction

1.The concept of the "Rule of Law", along with democracy and human rights[1], makes up the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention on Human Rights.

2. It is also enshrined in a number of international human rights instruments and other standard-setting documents.

3. The present study takes as a background Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe on "The principle of the rule of law" (see in particular par. 6.2 which refers to the Venice Commission). Its purpose is to identify a consensual definition of the rule of law which may help international organisations and both domestic and international courts in interpreting and applying this fundamental value. This definition should therefore be of a nature that allows of practical application.

4. Although the terminology is similar, it is important to note at the outset that the notion of "Rule of law" is not always synonymous with that of "Rechtsstaat", "Estado de Direito" or "Etat de droit" (or the term employed by the Council of Europe: "preeminence du droit"). Nor is it synonymous with the Russian notion of "Rule of the laws/of the statutes", *(verkhovenstvo zakona),* nor with the term "pravovoe gosudarstvo ("law governed state")[2].

5. This report aims to reconcile the above notions, and especially the notions of "Rule of Law", "Rechtsstaat" and "Etat de droit"[3].

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[1] *Statute of the Council of Europe (ETS No. 001), in particular its Preamble and Article 3*

[2] *Hiroshi Oda, "The Emergence of Pravovoe Gosudarstvo (Rechtsstaat) in Russia" 25 Review of Central and East European Law 1999 No. 3, 373.*

[3] *For an account of the difference in origins and concept between Rechtsstaat, Rule of Law and Etat de droit see M. Loughlin, Foundations of Public Law (2010), chap.11.*

6. The present report was adopted by the Venice Commission at its 86th plenary session (2526 March 2011).

II. Historical origins of Rule of law, Etat de droit and Rechtsstaat

7. The qualities embodied in the notion of rule of law have been propounded for centuries and go back to antiquity. Plato said that "Where the law is subject to some other authority and has none of its own, the collapse of state, in my view, is not far off, but if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state"[4]. The modern concept of the rule of law was brought to attention in particular by the British constitutional lawyer Professor A.V. Dicey in his *Introduction to the Study of the Law of the Constitution* (1885)[5].

8. Dicey believed that there were two principles which were inherent in the non-codified British constitution. The first, and primary principle, was the "sovereignty or supremacy of Parliament" (thus endorsing the notion of representative government as the main feature of a democratic state). The second principle, which tempered the first (but in the UK context could not override it) was the rule of law.

9. Dicey therefore saw the rule of law as a constraint (although not ultimate control) of the theoretically unlimited power (in the British context) of the state over the individual. For him the rule of law principle resulted from the existing common (judge-made) law over the years (and was not necessary therefore to be codified in any written constitution). For Dicey the rule of law had three core features: First, that no person should be punished but for a breach of the law, which should be certain and prospective, so as to guide peoples' actions and transactions and not to permit them to be punished retrospectively. He believed that discretionary power would lead to arbitrariness. Secondly, that no person should be above the law and that all classes should be equally subjected to the law. Thirdly, that the rule of law should emanate not from any written constitution but from the "common (judge-made) law".

10. Dicey's third feature of the rule of law cannot survive a modern society, and although the first feature (legality and certainty) and the second feature (equality) are core to the concept, Dicey's view of legal certainty was not universally accepted to the extent that he believed that any discretionary power would inevitably lead to the "arbitrary" exercise of power[6].

11. In the first half of the twentieth century the rule of law became a highly contested concept as Dicey's opposition to discretionary power was portrayed by the architects of the "welfare state" as driven by his opposition to government intervention. Discretion

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[4] *Plato, Laws, Book IV, 715 d; Complete Works, Cooper, Jonh et al., Hackett Publishing Company Inc., 1997, Indiana, p. 1402. For an account of the origins of the concept of Rule of Law in the ancient world see M. Loughlin, Swords and Scales (2000), chap. 5; B. Tamanaha, On the Rule of Law: History, Politics and Theory (2004), chap. 1*

[5] *10th ed.1959 with an introduction by E.C.S.Wade, London, MacMillan, chap.4.*

[6] *On the issue, see Jeffrey Jowell, "The Rule of Law and its Underlying Values", in The Changing Constitution, edited by Jeffrey Jowell and Dawn Oliver, 7th edition, Oxford University Press 2011; Kaarlo Tuori, The Rule of Law and the Rechtsstaat, in Ratio and Voluntas, Ashgate 2011, chap. 7, pp. 8 ff; Erik O. Wennerström, The Rule of Law and the European Union, Uppsala: Iustus Förlag 2007, pp. 61 ff.*

was seen as necessary for the decision-making required in an increasingly complex society.

12. From the middle of the twentieth century, the rule of law became reconciled to discretionary power. Discretion was accepted, but nevertheless should be constrained by the letter and purpose of the power-conferring law, as well as by other elements of the rule of law, such as that everyone have access to fair procedures before an impartial and independent court, and that the law be applied consistently, equally and in a manner that is not arbitrary or devoid of reason.

13. The *Rechtsstaat* concept focuses, by definition, much more on the nature of the state. Whereas the rule of law emerged from courtrooms, the *Rechtstaat* emerged from written constitutions[7]. The main theorist of this notion was Robert von Mohl (1831). The *Rechsstaat* was defined in opposition to the absolutist state, with unlimited powers conferred on the executive. Protection against absolutism had to be provided by the legislature rather than by the courts alone.

14. The French approach can be foreseen in the Declaration of the Rights of Man and the Citizen (1789). The notion of *Etat de droit* (which followed the positivistic concept of *Etat legal)* puts less emphasis on the nature of the state, which it considers as the guarantor of fundamental rights enshrined in the Constitution against the legislator. As developed at the beginning of the 20th Century by Carre de Malberg, the *Etat de droit* connotes (judicial) constitutional review of ordinary legislation[8].

15. The rule of law has been variously interpreted, but it must be distinguished from a purely formalistic concept under which any action of a public official which is authorised by law is said to fulfil its requirements. Over time, the essence of the rule of law in some countries was distorted so as to be equivalent to "rule by law", or "rule by the law", or even "law by rules". These interpretations permitted authoritarian actions by governments and do not reflect the meaning of the rule of law today.[9]

16. The rule of law in its proper sense is an inherent part of any democratic society and the notion of the rule of law requires everyone to be treated by all decision-makers with dignity, equality and rationality and in accordance with the law, and to have the opportunity to challenge decisions before independent and impartial courts for their unlawfulness, where they are accorded fair procedures. The rule of law thus addresses the exercise of power and the relationship between the individual and the state. However, it is important to recognise that during recent years due to globalisation and deregulation there are international and transnational public actors as well as hybrid and private actors with great power over state authorities as well as private citizens. In part V below («new Challenges") this report briefly considers whether the rule of law should be extended to constrain the actions of these bodies as well as the traditional public authorities at state level.

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[7] *Wennerström, p. 50*

[8] *See in particular Wennerström, pp. 73 ff.*

[9] *See the 3 volume work on the rule of law by Serhiy Holovaty,* The Rule of Law. *Kyiv, Phoenix Publishing House (2006) LXIV,1747 (Vol. 1: The Rule of Law: From Idea to Doctrine; Vol. 2: The Rule of Law: From Doctrine to Principle; Vol. 3: The Rule of Law: The Ukrainian Experience).*

III. Rule of law in positive law

a. *International law*

17. The concept of the rule of law can be found at the national as well as at the international level.[10] The most important documents in this respect are international treaties. This paragraph will first address the texts drafted by several international and supranational organisations (a) before turning to examples of national law (b).

18. For the *Council of Europe,* the most important references to the rule of law are found in :

- the Preamble to the Statute of the Council of Europe, which underlines the "devotion" of member states "to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy";

- the Preamble to the European Convention on Human Rights, which states that "the governments of European countries ... are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law".

19. In both cases, the expression "rule of law" was translated into French by "preeminence du droit" and not by "Etat de droit".

20. However, neither the rule of law (or the Rechtsstaat, or the Etat de droit) is defined in these texts.

21. For example, when addressing the issue of "the rule of law as part of the core mission of the Council of Europe", the Committee of Ministers of the *Council of Europe* quoted a number of documents referring to such concept, but it also noted that "the foregoing overviews are not sufficient to allow the drawing up of a list of key rule of law requirements accepted by the Council of Europe, let alone a definition".[11] This leads the document to state that «the Organisation works pragmatically on a daily basis to promote and strengthen the rule of law in and among its member states". However, this pragmatic and ad hoc approach appears to be giving way to a consensus on including, in the rule of law, specific reference to requirements such as the prohibition of arbitrariness, the right to seek redress from independent judges in open courts, legal certainty and equality of all before the law.[12]

22. Neither does Resolution 1594 (2007), titled «The principle of the rule of law", adopted by the Parliamentary Assembly of the Council of Europe on 23 November 2007, clarify the content of the principle.

23. More can be found in the case-law of the European Court of Human Rights. The Court considers that the rule of law is a concept inherent in all articles of the Convention (and uses not only the terms "preeminence du droit", but also "Etat de droit" in French).[13] The case-law of the European Court of Human Rights, as summarised in the already mentioned report drafted in the framework of the Swedish Chairmanship of the Committee of Ministers (CM(2008)170), applies the notion of the rule of law to a

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[10] *See R. McCorquodale, ed. The Rule of Law in International and Comparative Context, British Inst of International and Comparative Law (2010).*

[11] *See The Council of Europe and the Rule of Law – An overview – CM(2008)170, 21 November 2008, para. 22.*

[12] *Ibid., paras. 29-30. See also, G. Palombella and N. Walker, Relocating the Rule of Law, Hart Publishing, 2009.*

[13] *ECtHR Stafford v. United Kingdom, 28 May 2002, para. 63.*

number of issues, with a rather formal approach, starting from the principle of legality in the narrow sense, but developing various aspects of (procedural) due process and legal certainty as well as separation of powers, including the judiciary, and equality before the law.[14] In *Golder v. UK* (1975) 1 EHRR 524, the Court stated (at para.34), "one can scarcely conceive of the rule of law without there being the possibility of having access to the courts. See also *Philis v. Greece* (1991), Series A No. 209, para. 59. The reference to the rule of law by the Court as inherent in all articles of the Convention gives it, however, a substantive nature too.[15]

24. In the *United Nations,* the notion of the rule of law, which appeared in the Preamble to the Universal Declaration of Human Rights (1948), is used to promote a number of principles which vary according to the specific context. A comparison between two reports drafted at short intervals (2002 and 2004) shows this variety of approach; the first one insists for example on the elements of an independent judiciary, independent human rights institutions, defined and limited powers of government and fair and open elections, whereas the second focuses, in a more classical way, on the elements of quality of legislation, supremacy of law, equality before the law, accountability to the law, legal certainty, procedural and legal transparency, avoidance of arbitrariness, separation of powers, etc[16]. A 2005 Resolution of the UN Human Rights Commission focuses on the elements of the separation of powers, the supremacy of law and the equal protection under the law.[17]

25. A broad definition of the rule of law was offered by former UN Secretary-General Kofi Annan. In his 2004 report he says: "The 'rule of law' [...] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[18]

26. Amongst regional organisations other than the Council of Europe, it is worth mentioning in particular the OSCE. The main elements of this organisation's doctrine in the field were summarised in a document on the *OSCE Commitments relating to the rule of* law[19]. According to the 1990 Copenhagen document (2), "the rule of law does not mean merely a formal legality which assures regularity and consistency in the

[14] *As regards « accordance with the law » the Court generally only demands that a state power finds support in a legal norm. However, the Court has begun stressing the link between democracy and the rule of law, requiring that a statute set out the framework of certain discretionary state powers to restrict human rights ». See, as regards surveillance, Iordachi and Others v. Moldova, 10 February 2009.*

[15] *See the extensive list of cases of the Court in which the rule of law is cited set out by Holovaty (above, note 9), pp. 1169-1214. And see his summary of the cases at pp.1215-1220.*

[16] *Wennerstrom, pp. 23ff ; see UN Secretariat Documents A/57/275 and S/2004/616.*

[17] *HR Res. 2005/32 Democracy and the rule of law.*

[18] *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General, Doc. S/2004/616, 23 August 2004, see para. 6.*

[19] *http://www.osce.org/documents/odihr/2009/01/36062 en.pdf.*

achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression". "Democracy is an inherent element of the rule of law"(3). The document on OSCE Commitments relating to the rule of law then quotes various commitments of the participating states on independence of the judiciary and legal practitioners, and impartial operation of the public judicial service, as well as on the administration of justice. The Helsinki Ministerial Council Decision No. 7/08 on *"Further strengthening the rule of law in the OSCE area"* encouraged the participating States to strengthen the rule of law, inter alia, in the following areas: independence of the judiciary, effective administration of justice, right to a fair trial, access to a court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention; prevention of torture and other cruel, inhuman or degrading treatment or punishment; awareness-raising and education on the rule of law for the legal professions and the public; provision of effective legal remedies and access to the same; adherence to rule of law standards and practices in the criminal justice system; and the fight against corruption.

27. The *OECD* also attempted a definition, according to which "the rule of law is composed of the following separate fundamental elements, which must advance together: [1] The existence of basic rules and values that a people share and by which they agree to be bound (constitutionalism). This can apply as much to an unwritten as to a written constitution. [2] The law must govern the government. [3] An independent and impartial judiciary interprets the law.

Those who administer the law act consistently, without unfair discrimination. [5] The law is transparent and accessible to all, especially the vulnerable in most need of its protection. [6] Application of the law is efficient and timely. [7] The law protects rights, especially human rights. [8] The law can be changed by an established process that is itself transparent, accountable and democratic."[20]

28. In the *European Union,* the concept of rule of law is enshrined not only in the Preamble to the Treaty on European Union (TEU), but also in its Article 2, according to which "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights, including the rights of persons belonging to minorities". It also appears as a basis of the EU's external action[21] as well as in the Preamble to the Charter of Fundamental Rights of the European Union. In French, the term *Etat de droit* is used, whereas the German version uses *Rechtsstaatlichkeit.* Here too, the notion is not defined. The concept of *rule of law* has been used in the European Union to encompass a number of meanings, including formal notions such as the supremacy of law, but also substantive notions such as respect for fundamental rights and notions specific to European Union law, such as fair application of the law, effective enjoyment of Union law rights, protection of the legitimate expectation, and even anti-corruption (in external relations).[22]

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[20] *Equal Access to Justice and the Rule of Law, OECD Development Assistance Committee (DAC). Mainstreaming Conflict Prevention (2005).*

[21] *Article 21 TEU.*

[22] *Wennerstrom, see in particular the tables at pp. 160, 218-219, 289-290 and 302.*

29. Other international bodies have frequently endorsed the rule of law. For example, the Commonwealth of Nations' *Latimer House Principles* (2003) require that "Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner." The International Commission of Jurists (ICJ) has systematically studied the rule of law over the years and adopts a notion of the rule of law as a fundamental principle for the protection of individuals from the arbitrary power of the state and which empowers human dignity. The International Bar Association has, similarly, adopted the rule of law as a core concept for all practising members of the legal profession.[23]

b. *National law*

30. In national legislation, the term *Rechtsstaat* is found in a number of provisions of the German Fundamental Law, in particular for what concerns the constitutional order of the Lander and the European Union.[24] Moreover, the substantive interpretation of the *Rechtsstaat* has gained ground in Germany, both in the doctrine of constitutional law and in the practice of the Constitutional Court.[25]

31. In the United Kingdom, the notion of the *rule of law* is an important constitutional principle, recognised as a constraint on governmental action and the exercise of power. It is applied by the courts and the Constitutional Reform Act of 2005 makes an explicit mention of the notion of the rule of law by stating that "This Act does not adversely affect – (a) the existing constitutional principle of the rule of law, or – (b) the Lord Chancellor's existing constitutional role in relation to that principle."

32. The notion of the rule of law (or of Rechtsstaat/Etat de droit) appears as a main feature of the state in a number of constitutions of former socialist countries of Central and Eastern Europe (Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, "the former Yugoslav Republic of Macedonia", Ukraine) it is more rare in old democracies (Andorra, Finland, Germany, Malta, Norway, Portugal, Spain, Sweden, Switzerland, Turkey). It can be mostly found in preambles or other general provisions. There are, however, more concrete provisions in Spain, according to which "the Courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action"; courts as well as prosecutors are subject to the rule of law.[26]In Switzerland, «the state's activities shall be based on and limited by the rule of Law".[27]

33. The notion of the rule of law is however often difficult to find in former socialist countries which experienced the notion of *socialist legality.* The classical Marxist approach is based on the idea of the withering of the state and therefore of the law which emanates from it. It is well known that the practice in the Soviet system led on the contrary to the hypertrophy of the state. The 1936 Soviet Constitution (Article 113), for example, stated that "Supreme supervisory power over the strict execution of

[23] *F. Neate (ed). The Rule of Law: Perspectives from Around the Globe, IBA; LexixNexis (2009).*

[24] *Articles 28 and 23.*

[25] *Kaarlo Tuori, The Rechtsstaat, p. 12.*

[26] *Articles 106, 117 and 124 of the Constitution.*

[27] *Article 5.1 of the Constitution («Le droit est la base et la limite de l'autorite de l'Etat" / « Grundlage und Schranke staatlichen Handelns ist das Recht »).*

the laws by all People's Commissariats and institutions subordinated to them, as well as by public servants and citizens of the U.S.S.R, is vested in the Procurator of the U.S.S.R." Apart from the specific role of the general prosecutor (Procurator), what had to be retained was "strict execution of the laws". Here there was no general concept of the rule of law, but a much narrower notion of strict execution of the laws, based on a very positivistic approach. This forbade going beyond the first stage of the definition of the rule of law, "rule by law", or "rule by the law".[28] This conception may still be enshrined in practice and prevent the development of a more comprehensive definition of the rule of law; law is more easily conceived as an instrument of power than as a value to be respected. In other words, especially in new democracies, the values of the rule of law still need «sedimentation", that is that they have to become part of day to day practice[29] and, in the words of Valery Zorkin, «legal awareness".[30]

IV. In search of a definition

34. The divergences of the meanings given to the notion of the rule of law – as well as of Rechtsstaat – may lead to doubting its usefulness as a fundamental concept in public law.[31] However, it needs to be understood and therefore be defined, both because it appears in many legal texts, and because the rule of law is accepted as a fundamental ingredient of any democratic society.

35. Looking at the legal instruments, national and international, and the writings of scholars, judges and others, it seems as if there is now a consensus on the core meaning of the rule of law and the elements contained within it.

36. Perhaps the following definition by Tom Bingham covers most appropriately the essential elements of the rule of law.

«all persons and authorities within the state , whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts".[32]

37. This short definition, which applies to both public and private bodies, is expanded by 8 «ingredients" of the rule of law. These include: (1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law.

38. Bingham's requirement that laws must be publicly made, taking effect in the future deals with the nature of law and legal decision-making, requiring, like Dicey, that laws themselves should be accessible and clear and prospective. However, in expanding

[28] *See the analysis of S. Holovaty (above, note 9) at pp. 1655-65.*

[29] *On the rule of law's sedimentation, see Kaarlo Tuori, The "Rechtsstaat" in the Conceptual Field – Adversaries, Allies and Neutrals, Associations Vol. 6 (2002) Number 2, pp. 201-214, 212.*

[30] *VD Zorkin, «Rule of Law and Legal Awareness", in Francis Neate (ed.) The Rule of Law: Perspectives from Around the Globe (2009) pp. 43-54.*

[31] *This is for example the point of view of Martin Loughlin, as expressed in document CDL-DEM(2009)006 (The rule of law in European jurisprudence), p. 3.*

[32] *Tom Bingham, The Rule of Law (2010).*

on that definition Bingham makes it clear that, although, unlike Dicey, he recognises that discretion on the part of public officials is necessary in our complex society, discretion should not be unconstrained, and should not permit arbitrary or unreasonable decisions (the nature of law is thus infused with both procedural and substantive content).

39. Bingham's statement that all persons and authorities should be «bound by" the law speaks both to members of the public and private entities, who are expected to comply with the law and to public officials (who are expected both to comply with the law in the sense of not exceeding their powers, and also, to apply the law equally, and regardless of the status of the object of the law's implementation or any threats or inducements offered to the decision-maker).

40. Bingham's notion that everyone shall have the benefit of laws, implies access to justice in two senses: first, access to courts in order to claim the benefit of the laws, and secondly, that the procedures of those courts are fair and their decisions are made independently and impartially.[33]

41. Drawing on that definition and on others based on very different systems of law and the state,[34] it seems that a *consensus* can now be found for the necessary elements of the rule of law as well as those of the Rechtsstaat which are not only formal but also substantial or material (materieller Rechtsstaatsbegriff). These are:

1) Legality, including a transparent, accountable and democratic process for enacting law

2) Legal certainty

3) Prohibition of arbitrariness

4) Access to justice before independent and impartial courts, including judicial review of administrative acts

5) Respect for human rights

6) Non-discrimination and equality before the law.

(1) Legality (supremacy of the law)

42. The importance of the principle of legality was underlined by Dicey. It first implies that the law must be followed. This requirement applies not only to individuals, but also to authorities, public and private. In so far as legality addresses the actions of public officials, it requires also that they require authorisation to act and that they act within the powers that have been conferred upon them.[35] Legality also implies that no person can be punished except for the breach of a previously enacted or determined law and that the law cannot be violated with impunity. Law should, within the bounds of possibility, be enforced.

43. The term "law", as used in this chapter, refers primarily to national legislation and common law. However, the development of international law as well as the importance

[33] *Expanding on that definition, Bingham also believes that the rule of law must afford adequate protection to human rights (many of which, such as the right to a fair trial, have already been covered by his definition) and that the rule of law requires compliance by the state with its obligations in international as well as national law.*

[34] *For example, Zorkin's definition of the rule of law set out in his chapter referred to above at note 30.*

[35] *Jeffrey Jowell, The Rule of Law and its underlying Values, in: Jeffrey Jowell/Dawn Oliver (Eds.), The Changing Constitution (note 6 above), p. 10.*

given by international organisations to the respect of the rule of law lead to addressing the issue at international level as well: the principle *pacta sunt servanda* is the way in which international law expresses the principle of legality.[36]

(2) Legal certainty

44. The principle of legal certainty is essential to the confidence in the judicial system and the rule of law.[37] It is also essential to productive business arrangements so as to generate development and economic progress.[38] To achieve this confidence, the state must make the text of the law easily *accessible.* It has also a duty to respect and apply, in a *foreseeable* and consistent manner, the laws it has enacted. Foreseeability means that the law must where possible be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct.

45. The need for certainty does not mean that discretionary power should not be conferred on a decision-maker where necessary, provided that procedures exist to prevent its abuse. In this context, a law which confers a discretion to a state authority must indicate the scope of that discretion. It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness.[39]

46. Legal certainty requires that legal rules are *clear and precise,* and aim at ensuring that situations and legal relationships remain foreseeable. *Retroactivity* also goes against the principle of legal certainty, at least in criminal law (Article 7 ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests. In addition, legal certainty requires respect for the principle of *res judicata*. Final judgements by domestic courts should not be called into question.[40] It also requires that final court judgments be enforced. In private disputes, enforcement of final judgments may require the assistance of the state bodies in order to avoid any risk of *"private justice"* contrary to the rule of law.[41] Systems which allow for the quashing of final judgments without cogent reasons of public interest and for an indefinite period of time are incompatible with the principle of legal certainty.[42]

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[36] *See Bingham, above note, who believes that "The rule of law requires compliance by the state with its obligations in international as well as national law" (chap.10).*

[37] *The Council of Europe and the Rule of Law – An overview, CM(2008)170 21 November 2008, see para. 51.*

[38] *See R. McCorquodale, in The Rule of Law in International and Comparative Context (above, note 10, chap. 3).*

[39] *The Council of Europe and the Rule of Law – An overview, CM(2008)170 21 November 2008, see para. 46.*

[40] *This does not exclude, of course, the right to apply to an international court complaining that the final domestic judgment is in violation of an international legal obligation.*

[41] *The Council of Europe and the Rule of Law – An overview, CM(2008)170 21 November 2008, see para. 49.*

[42] *The Council of Europe and the Rule of Law – An overview, CM(2008)170 21 November 2008, see para. 48.*

47. In addition, Parliament shall not be allowed to override fundamental rights by ambiguous laws. This offers essential legal protection of the individual *vis-a-vis* the state and its organs and agents.[43]

48. Legal certainty also means that undertakings or promises held out by the state to individuals should in general be honoured (the notion of the 'legitimate expectation').

49. However, the need for certainty does not mean that rules should be applied so inflexibly as to make it impossible to take into account the dictates of humanity and fairness.

51. The existence of conflicting decisions within a supreme or constitutional court may be contrary to the principle of legal certainty. It is therefore required that the courts, especially the highest courts, establish mechanisms to avoid conflicts and ensure the coherence of their case- law.

51. Legal certainty – and supremacy of the law – imply that the law is *implemented* in practice. This means also that it is implementable. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking *a posteriori* whether it may effectively be applied is very important. This means that ex ante and ex post *legislative evaluation* has to be considered when addressing the issue of the rule of law.

(3) Prohibition of arbitrariness

52. Although discretionary power is necessary to perform a range of governmental tasks in modern, complex societies, such power should not be exercised in a way that is arbitrary. Such exercise of power permits substantively unfair, unreasonable, irrational or oppressive decisions which are inconsistent with the notion of rule of law.

(4) Access to Justice before independent and impartial courts

53. Everyone should be able to challenge governmental actions and decisions adverse to their rights or interests. Prohibitions of such challenge violate the rule of law. Normally these challenges should be made to courts of law, but some countries allow alternative challenge to more informal tribunals, from which appeal may lie to a court.

54. The role of the judiciary is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed State.[44] It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.[45]

55. The judiciary must be independent and impartial. Independence means that the judiciary is free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. The judges should not

[43] *The Council of Europe and the Rule of Law – An overview, CM(2008)170 21 November 2008, see para. 43.*

[44] *The Council of Europe and the Rule of Law – An overview, CM(2008)170 21 November 2008, see para. 39.*

[45] *Rule of Law Inventory Report, Hague Institute for the Internationalisation of Law, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20th April 2007, p. 16.*

be subject to political influence or manipulation.[46] Impartial means that the judiciary is not – even in appearance – prejudiced as to the outcome of the case.

56. There has to be a fair and open hearing, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service. As justice should be affordable, legal aid should be provided where necessary.

57. Moreover, there must be an agency or organisation, a prosecutor, which is also to some degree autonomous from the executive, and which ensures that violations of the law, when not denounced by victims, can be brought before the courts.[47]

58. Finally, judicial decisions must be effectively implemented, and there should be no possibility (save in very exceptional cases) to revise a final judicial decision (respect of *res judicata*).

(5) Respect for human rights

59. Respect for the rule of law and respect for human rights are not necessarily synonymous. However, there is a great deal of overlap between the two concepts and many rights enshrined in documents such as the ECHR also expressly or impliedly refer to the rule of law.

60. The rights most obviously connected to the rule of law include: (1) the right of access to justice, (2) the right to a legally competent judge, (3) the right to be heard, (4) inadmissibility of double jeopardy *(ne bis in idem)* (Article 4 of Protocol 7 to ECHR), (5) the legal principle that measures which impose a burden should not have retroactive effects (6) the right to an effective remedy (Article 13 ECHR) for any arguable claim, (7) anyone accused of a crime is presumed innocent until proved guilty,[48] and (8) the right to a fair trial or, in Anglo-American parlance, the principle of natural justice or due process; there has to be a fair and open hearing, absence of bias, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service, and the decisions of which are implemented without undue delay.[49]

61. Most of these rights (as well as the principle of independence and impartiality of the judiciary) are enshrined in Article 6 ECHR. However, other rights may also have rule of law connotations, such as the right to expression, which permits criticism of the government of the day (Article 10 ECHR) and even rights such as the prohibition on torture or inhuman or degrading treatment or punishment (Article 3), which may be linked to the notion of a fair trial.

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[46] *Thomas Carothers, The Rule of Law Revival,* Foreign Affairs *77 (1998), 95 (96).*

[47] *Rule of Law Inventory Report, Hague Institute for the Internationalisation of Law, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20th April 2007, p. 16.*

[48] *Thomas Carothers, The Rule of Law Revival,* Foreign Affairs *77 (1998), 95 (96).*

[49] *Rule of Law Inventory Report, Hague Institute for the Internationalisation of Law, Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20th April 2007, p. 16.*

(6) Non-discrimination and equality before the law

62. Dicey affirms the notion of equality through his requirement that, under the rule of law, there is a "universal subjection" of all to the law. He was in this context enunciating a notion of formal equality, to the extent that laws, however unjust in practice, should be equally applied, and consistently implemented.

63. Formal equality is nonetheless an important aspect of the rule of law – provided that it allows for unequal treatment to the extent necessary to achieve substantive equality – and can be stretched without damage to the underlying principle to the notion of non-discrimination which, together with equality before the law, constitutes a basic and general principle relating to the protection of human rights. As underlined by the Council of Europe's 2008 document on the issue,[50] these two principles are human rights principles as much as they are rule of law principles, and the Court's case-law tends to apply the prohibition of non-discrimination without there being a special need to refer to it as a rule of law principle, although there is some recognition that equality in rights and duties of all human beings before the law is an aspect of the rule of law.

64. Non-discrimination means that the laws refrain from discriminating against individuals or groups. Any unjustified unequal treatment under the law is prohibited and all persons have guaranteed equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

65. Equality before the law means that each individual is subject to the same laws, with no individual or group having special legal privileges.

V. New challenges

66. A challenge for the future is how the achievements of the rule of law can be preserved and further developed under circumstances where individuals are increasingly influenced by and linked to new modes of governance. This topic is not only related to international organisations but is also important in the sphere of public-private partnerships and in all fields which have previously been purely national but which have been transformed to being transnational. The rule of law must be tailored in a way that freedom for all will be ensured even in areas where hybrid (state-private) actors or private entities are responsible for tasks, which formerly have been the domain of state authorities. The substance of the rule of law as a guiding principle for the future has to be extended not only to the area of cooperation between state and private actors but also to activities of private actors whose power to infringe individual rights has a weight comparable to state power. Governmental actors at the national, transnational and international level all have to act as guarantors of the fundamental principles and elements of the traditional rule of law in these areas.

IV. Conclusion

67. The notion of rule of law has not been developed in legal texts and practice as much as the other pillars of the Council of Europe, human rights and democracy. Human rights are at the basis of an enormous corpus of constitutional and legal provisions and

[50] *The Council of Europe and the Rule of Law – An overview, CM(2008)170 21 November 2008, see para. 53.*

of case-law, at national as well as at international level. Democracy is implemented through detailed provisions concerning elections and the functioning of institutions, even if they often do not refer to this concept.

68. Legal provisions referring to the rule of law, both at national and at international level, are of a very general character and do not define the concept in much detail.

69. This has led to doubting the very usefulness of addressing the rule of law as a practical legal concept. However, it is increasingly included in national and international legal texts and case-law, especially the case law of the European Court of Human Rights. However, we believe that the rule of law does constitute a fundamental and common European standard to guide and constrain the exercise of democratic power.

70. The aim of the present report has been to find a consensual definition which is outlined above, together with an identification of the core elements of the rule of law. Its object has been that the Council of Europe, the international organisation which has defined the rule of law as one of its three pillars, may contribute, among other organisations and institutions, to the practical implementation of this important principle through its interpretation and application vis- a-vis and in its member states.[51]

Annex: Checklist for evaluating the state of the rule of law in single states

1. Legality (supremacy of the law)

a. Does the State act on the basis of, and in accordance with the law?
b. Is the process for enacting law transparent, accountable and democratic?
c. Is the exercise of power authorised by law?
d. To what extent is the law applied and enforced?
e. To what extent does the government operate without using law?
f. To what extent does the government use incidental measures instead of general rules?
g. Are there exception clauses in the law of the State, allowing for special measures?
h. Are there internal rules ensuring that the state abides by international law?
i. Does the *nulla poena sine lege* system apply?

2. Legal certainty

a. Are all the laws published?
b. If there is any unwritten law, is it accessible?
c. Are there limits to the legal discretion granted to the executive?
d. Are there many exception clauses in the laws?
e. Are the laws written in an intelligible language?
f. Is retroactivity of laws prohibited?
g. Is there a duty to maintain the law?
h. Are final judgments by domestic courts called into question?
i. Is the case-law of the courts coherent?
j. Is legislation generally implementable and implemented?
k. Are laws foreseeable as to their effects?
l. Is legislative evaluation practiced on a regular basis?

[51] *See Review of the rule of law situation: feasibility and methodology, DG-HL (2010) 21*

3. Prohibition of arbitrariness

a. Are there specific rules prohibiting arbitrariness?
b. Are there limits to discretionary power?
c. Is there a system of full publicity of government information?
d. Are reasons required for decisions?

4. Access to Justice before independent and impartial courts

a. Is the judiciary independent?

b. Is the department of public prosecution to some degree autonomous from the state apparatus? Does it act on the basis of the law and not of political expediency?

c. Are single judges subject to political influence or manipulation?

d. Is the judiciary impartial? What provisions ensure its impartiality on a case-by-case basis?

e. Do citizens have effective access to the judiciary, also for judicial review of governmental action?

f. Does the judiciary have sufficient remedial powers?

g. Is there a recognised, organised and independent legal profession?

h. Are judgments implemented?

i. Is respect of *res iudicata* ensured?

5. Respect for human rights

Are the following rights guaranteed (in practice)?

a. The right of access to justice: Do citizens have effective access to the judiciary?
b. The right to a legally competent judge
c. The right to be heard
d. Non-retroactivity of measures
e. The right to an effective remedy
f. The presumption of innocence
g. The right to a fair trial
h. Ne bis in idem

6. Non-discrimination and equality before the law

a. Are the laws applied generally and without discrimination?
b. Are there laws that discriminate against certain individuals or groups?
c. Are laws interpreted in a discriminatory way?
d. Are there individuals or groups with special legal privileges.

Report on the misuse of administrative resources during electoral processes

Adopted by the Council for Democratic Elections at its 46th meeting
(Venice, 5 December 2013)
and by the Venice Commission at its 97th plenary session
(Venice, 6-7 December 2013)

on the basis of comments by
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I. Definition and scope

A. Scope

1. After more than twenty years of election observation in Europe and more than ten years of legal assistance to the Council of Europe member states, many improvements were observed regarding electoral legislation and practice. These improvements were materialised thanks to political will and to a rather successful implementation of international recommendations in the electoral legal framework. Nevertheless, the practical implementation of electoral laws and laws related to political parties (including

financing of political parties and electoral processes) remains problematic to several extents. The conduct of elections according to the rule of law involves the setting of a mechanism that would ensure the respect of democratic principles, the guarantee of equal treatment in the exercise of the right to vote and to be elected, the development of a political culture, as well as transparency in the exercise of rights and duties by the electoral actors, preventing therefore any kind of abuse. One of the most crucial, structural and recurrent challenges, raised on a regular basis in election observation missions' reports in most of the countries observed, is the misuse of administrative resources, also called public resources, during electoral processes. This practice is an established and widespread phenomenon in many European countries, including countries with a long-standing tradition of democratic elections. Several generations of both incumbents and civil servants consider this practice as normal and part of an electoral process. They seem even not to consider such practice as illegitimate action *vis-a-vis* challengers in elections. It may be consequently harder for these challengers to take advantage of administrative resources. This phenomenon seems part of an established political culture and keeps a relation not only with practices potentially regarded as illegal but also with the ones caused by the lack of ethical standards related to the electoral processes of the public authorities in office.

2. Considering this widespread phenomenon, the Venice Commission decided to prepare a report on the issue as well as to draw guidelines, on the basis *inter alia* of the contributions of three Venice Commission members, Messrs Gonzalez Oropeza,[1] Hirschfeldt and Kask, and one election expert, Mr Serhii Kalchenko. In order to assess the situation among the Venice Commission member states, the report aims at answering two questions: 1) what are the inherent weaknesses in legislation and in practice in the member states that lead to misuse of administrative resources during electoral processes? 2) How to address this problem in law and in practice?

3. The report proposes in this introductory part a definition of the notion of administrative resources during electoral processes. The report also defines in this introductory part the scope of this analysis in a comparative perspective. For the purpose of this comparative approach, the Secretariat of the Venice Commission prepared a table comparing legal provisions, opinions and election observation missions' reports dealing with this topic in the various Venice Commission member states, with the help of the members who contributed to this comparative table (CDL-REF(2012)025rev). This table exclusively analyses electoral laws. Therefore, other pieces of legislation related to the misuse of administrative resources, though relevant, are not covered in the report. The report also benefits from the contributions of the Fourth Eastern Partnership Seminar held in Tbilisi, Georgia, on 17-18 April 2013, and presentations on relevant practice in Latin America, France, Armenia, Azerbaijan, Georgia, Ukraine and Moldova[2].

4. After an executive summary (part two) the third part of the report focuses on the legal environment and the practice in member states, making reference to other

[1] *Use of public funds for election purposes, the practice in Mexico, Report by Mr Manuel Gonzalez Oropeza (CDL(2012)076).*
Available at: www.venice.coe.int/webforms/documents/?pdf=CDL(2012)076-e.
Remark: All website references are updated up to 15 October 2013.

[2] *Reports of the Seminar: CDL-EL(2013)007.*

countries for the purpose of comparison. A fourth part elaborates on the distinction between legitimate or illegitimate use of administrative resources during electoral processes. The fifth part of the report suggests recommendations in order to prevent the misuse of administrative resources and limit the phenomenon.

5. Finally, in a sixth part, the Venice Commission draws guidelines aiming at fighting misuse of administrative resources during electoral processes, for the consideration of the states and lawmakers.

6. This report was adopted by the Council for Democratic Elections at its 46th meeting (Venice, 5 December 2013) and by the Venice Commission at its 97th Plenary Session (Venice, 67 December 20l3).

B. Sources, reference documents

7. This report is mainly based on the following sources:

- Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms;[3]
- OSCE, Copenhagen Document 1990;[4]
- Case-law of the European Court of Human Rights;[5]
- Council of Europe, Parliamentary Assembly, election observation missions' reports;[6]
- Council of Europe, GRECO reports;[7]
- Council of Europe, Parliamentary Assembly, Lobbying in a democratic society (Doc. 11937);[8]
- Council of Europe, Venice Commission, Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev);
- Council of Europe, Venice Commission, Report on media monitoring during election observation missions (CDL-AD(2004)047);
- Guidelines on Media Analysis during Election Observation Missions Prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission (CDL-AD(2005)032);
- Guidelines on Media Analysis during Election Observation Missions by the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Venice Commission (CDL-AD(2009)031);
- Council of Europe, Venice Commission, Code of Good Practice in the Field of Political Parties (CDL-AD(2009)021);
- Council of Europe, Venice Commission, Guidelines on political party regulation by OSCE/ODIHR and Venice Commission (CDL-AD(2010)024);

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[3] *Available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2013)007-bil. Available at: www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm.*

[4] *Available at: www.osce.org/odihr/elections/14304.*

[5] *Available at: http://hudoc.echr.coe.int.*

[6] *The reports by country are detailed in the report.*

[7] *Available at: www.coe.int/t/dghl/monitoring/greco/default en.asp.*

[8] *Available at:http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=12205&lang=EN&search=MTE5Mzc=.*

- Council of Europe, Venice Commission, Report on the role of the opposition in a democratic parliament (CDL-AD(2010)025);

- Council of Europe, Venice Commission, Comparative table on legislation, opinions and election observation missions' reports dealing with administrative resources, updated after consultation of the Venice Commission members (CDL- REF(2012)025rev);

- OSCE/ODIHR, Review of electoral legislation and practice in OSCE participating states;[9]

- Council of Europe, Venice Commission and OSCE/ODIHR, Guidelines on political party regulation (CDL-AD(2010)024)[10];

- Fourth Eastern Partnership Facility Seminar on the "use of administrative resources during electoral campaigns" – Tbilisi, Georgia, 17-18 April 2013 – Reports of the Seminar (CDL-EL(2013)007); and

- OSCE/ODIHR, election observation missions' reports.[11]

C. Definition

8. The "misuse of public resources" is widely recognised as the unlawful behaviour of civil servants, incumbent political candidates and parties to use their official positions or connections to government institutions aimed at influencing the outcome of elections. Nevertheless, this definition does not cover the exact scope of this report. Indeed, the report highlights the problem of constant, or frequent, practice of misuse of administrative resources by both incumbents and civil servants during electoral processes. The assumption is therefore the following: there are among the Venice Commission member states inherent weaknesses in legislation and in practice that may lead to misuse of administrative resources, giving an undue advantage to incumbent political parties and candidates vis-a- vis their challengers, thus affecting the equality of electoral processes.[12]

9. An electoral process as understood in the report is a period going beyond the electoral campaign as strictly understood in electoral laws, it covers the various steps of an electoral process as starting from, for example, the territorial set-up of elections, the recruitment of election officials or the registration of candidates or lists of candidates for competing in elections. This whole period leads up to the election of public officials. It includes all activities in support of or against a given candidate, political party or coalition by incumbent government representatives before and during election day. An electoral campaign as defined in the report starts at such an early stage. Hence, the report alludes to domestic provisions that for some of them strictly refer to the electoral

[9] *Publication issued on 15 October 2013. Available at: www.osce.org/odihr/elections/107073. This publication is indicated for information as it was not used by the rapporteurs for completing this report due to its recent publication.*

[10] *Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)024-e; and www.osce.org/odihr/77812.*

[11] *Available at: www.osce.org/odihr/elections/. The reports by country are detailed in the report.*

[12] *The OSCE/ODIHR Guidelines on political party regulation define the incumbency advantage as follows: «While there is a natural and unavoidable incumbency advantage, legislation must be careful to not perpetuate or enhance such advantages. Incumbent candidates and parties must not use state funds or resources (i.e., materials, work contracts, transportation, employees, etc.) to their own advantage".*

campaign, for some others to larger periods. Electoral campaigns are part of the electoral process. Hence, it does not impact the comparative dimension of the methodology used for this report (in particular regarding the comparative table on legislation, opinions and election observation missions' reports dealing with administrative resources).[13] The report retains therefore a broad definition of the electoral process.

10. The report also clearly distinguishes the use and the misuse of administrative resources. The use of resources should be permitted by law; it implies a lawful possibility of using administrative resources during electoral processes for the proper functioning of the institutions and providing that such a use is not devoted to campaigning purposes. On the contrary, the misuse of administrative resources should be sanctioned by law due to the unlawful use of public resources by incumbents and civil servants for campaigning purposes.

11. The allocation of public funds for campaigning purposes provides political parties and candidates with a specific public financial support, limiting risks of unbalanced financial means for campaigning. In this respect, there are examples of laws stipulating that parliamentarians and cabinet ministers have the right to travel within the country free of charge, including during electoral processes. If such political activities are financially supported by public funds, in conformity with the principle of equality among parliamentarians and under independent supervision, such measures will not fall under the definition of misuse of administrative resources.

12. Therefore, the following **definition of administrative resources** can be retained for the purpose of this report:

Administrative resources are human, financial, material, *in natura*[14] and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations[15], access to public facilities as well as resources enjoyed in the form of prestige or public presence that stem from their position as elected or public officers and which may turn into political endorsements or other forms of support[16].

13. The misuse of administrative resources includes accordingly the use of equipment (i.e. the use of phones, vehicles, meeting rooms, etc.) as well as access to human resources (i.e. civil servants, officials...) in ministries and among territorial and local public institutions aimed at promoting the campaigns' activities of the incumbents. Such abuses lead to inequality between candidates, particularly between incumbents and other political parties or candidates and even more for those having no representation in parliament. Moreover, it should be noted that despite the focus of the report on elections to parliaments, the report could also apply to territorial and local self-government bodies. Furthermore, in order to limit the scope of the study, the report retains the public institutions as main actors of misuse of administrative resources. This does not exclude semi-public bodies such as state-owned enterprises, semi-public institutions, public

[13] *CDL-REF(2012)025rev. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2012)025rev-e.*

[14] *Like some benefits from social programmes, including goods and in kind resources.*

[15] *As well as state-owned media, which will not be addressed here.*

[16] *This definition aims at harmonising various expressions that can be found in domestic legislation such as "public resources" or "state resources". Both expressions refer to "administrative resources".*

agencies and their employees, which are subject to political pressure and can be abused for the purpose of electoral campaigning.

14. The notion of misuse of administrative resources during electoral processes should also be defined throughout the existing international binding texts and soft law. In this respect, the 1990 Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (OSCE) underlines the need for "a clear separation between the State and political parties." Political parties should be provided "with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities.[17]" The International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Corruption (UNCAC) are also part of the applicable international standards, as well as the Council of Europe Committee of Ministers 2003 Recommendation on common rules against corruption in the funding of political parties and electoral campaigns[18].

15. This requirement of equal treatment – the principle of equality of opportunity – implies that there is an effective remedy against misuse of administrative resources by both the incumbent political parties and civil servants during electoral processes but also during the period under which they are in power and especially during the period immediately foregoing the electoral process[19]. Following the principle of neutrality that guarantees a level playing field for all political contestants and that entails an impartial behaviour by civil servants during the whole electoral process, it is important that authorities of all levels stay away from the election process in order to avoid any kind of interference and guarantee fairness and impartiality during the entire electoral process[20].

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[17] *Respectively para. 5.4 and 7.6 of the 1990 Copenhagen Document. Available at: www.osce.org/odihr/elections/14304.*

[18] *See respectively:*

ICCPR, Article 25: "(...) Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind". Available at: http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf. . UNCAC, Article 17: "each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position". Available at: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-14&chapter=18&lang=en. . CoE Committee of Ministers Recommendation Rec(2003)34, Section IV: "(...) Objective, fair and reasonable criteria should be applied regarding the distribution of state support (...)" (art. 1) and "(...) States should prohibit legal entities under the control of the state or of other public authorities from making donations to political parties" (art. 5. c). Available at: www.coe.int/t/dghl/monitoring/greco/general/Rec(2003)94_EN.pdf.

[19] *See also Guidelines on political party regulation by OSCE/ODIHR and Venice Commission (CDLAD(2010)024), p. 207-210, where some of the general problems concerning abuse of state resources are presented. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)024-e.*

[20] *2006 Ruling on the final count result of the Presidential elections in the United States of Mexico, declaration of validity of the election and the President elect, Mexico, TEPJF, 2008, p. 392. Available at: www.tedf.org.mx/sentencias/index.php/sentencias.*

Moreover, in countries where re-election is allowed, officials in public positions that are running for office should not use their opportunities as officials when they campaign and act as candidates. Norms dealing with misuse of administrative resources by public officials aimed at consolidating repetitive practices identifiable as democratic principles, the guarantee of equality for each political party and the safeguard of the principle of free and fair elections[21].

16. The report is based on the above definition of misuse of administrative resources during electoral processes. It does not therefore cover the issue of abuse of administrative resources through state-owned media or limits to campaign expenditures, even if these are also widespread phenomena. Moreover, specific provisions apply to media coverage during electoral campaigns and prescribe in general that airtime is devoted to all competitors on an equal basis[22]. If abuses do exist, the purpose of this report is not to reflect such considerations.

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[21] *As acknowledged by the Constitutional Court of Germany in a judgement of 1977, actions by state authorities have an influential effect on the electorate's opinion and how to vote. Therefore, they are forbidden, with regard to their public function, to identify themselves with political parties or candidates during elections and to use administrative resources in favour or against them, particularly through advertising aimed at influencing the voters' decision (see BverfGE 44; 125; C; I; 4; para. 49). See inter alia:*

http://www.kommunalbrevier.de/kb.epl?dn=ou%3D%C2%A7%2011%20Unterrichtung%20der%20Einwohner%2 Cou%3DLandkreisordnung%20%28LKO%29%2Cou%3DGesetzestexte%2Cou%3DKommunalbrevier%2Cdc%3 Dkomb%2Cdc%3Dgstbrp.

[22] *In this respect, the Venice Commission's Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev) states that:*

I. 2.3. Equality of opportunity

a. Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to:

i. the election campaign;

ii. coverage by the media, in particular by the publicly owned media;

iii. public funding of parties and campaigns.

(...)

I. 3.1. Freedom of voters to form an opinion

a. State authorities must observe their duty of neutrality. In particular, this concerns:

i. media;

ii. billposting;

iii. the right to demonstrate;

iv. funding of parties and candidates.

See also the Report on media monitoring during election observation missions (CDL-AD(2004)047), para. 9,14.5, 22.1, 22.3, 26, 41, 46, 49.1, 58, 60, 62-63, 147-148 and 166.

Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)047-e.

See also Guidelines on Media Analysis during Election Observation Missions Prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission (CDL-AD(2005)032); as well as Guidelines on Media Analysis during Election Observation Missions (CDL-AD(2009)031) in particular para. 6061. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)032-e; and at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)031-e.

II. Executive summary

17. Despite many improvements in Europe in the field of electoral legislation and practice, the practical implementation of electoral laws and laws related to political parties (including financing of political parties and electoral processes) remains problematic to several extents. One of the most crucial, structural and recurrent challenges, raised on a regular basis in election observation missions' reports in most of the countries observed, is the misuse of administrative resources, also called public resources, during electoral processes. This practice is an established and widespread phenomenon not only in Europe but also for example in the Americas and in Central Asia, including in countries with a long-standing tradition of democratic elections. The Venice Commission believes that there are among the Venice Commission member states inherent weaknesses in legislation and in practice that may lead to the misuse of administrative resources, potentially giving an undue advantage to incumbent political parties and candidates vis-a-vis their challengers, thus affecting the equality of electoral processes and the freedom of voters to form an opinion.

18. The report underscores that the misuse of administrative resources during electoral processes can threaten some of the basic requirements of a democratic constitutional state. Nevertheless, the political will of the highest state authorities to ensure free, fair and balanced elections remains a key factor. Furthermore, what is crucial here is how the legislative instrument is used, the executive power is exercised and the judiciary or independent relevant bodies apply the law. The implementation of sanctions against abuse of administrative power is possible only if the investigation, auditing, prosecution and justice systems are independent from the ruling political power.

19. Legal provisions on prevention and sanction of the misuse of administrative resources can be divided into six categories. Certain sub-sections refer to similar laws but emphasise distinct provisions:

- The first category does not distinguish between material and human resources. Albania, Georgia, Turkey and Ukraine for instance prohibit the misuse of administrative resources while the Russian Federation imposes several restrictions in order to avoid the use of public means in favour of any political party that contends for elections.

- The second category emphasises particular types of resources. The countries concerned are *inter alia* Armenia, Georgia, Kazakhstan, Moldova and Montenegro. In the case of Moldova and Montenegro, the legal provisions on the prohibition of the misuse of administrative resources target candidates instead of public servants. In

Kazakhstan, the relevant regulations deal with the misuse of public real estate properties for instance. Regarding the misuse of human resources, most regulations focus on public servants taking advantage of their positions and develop very detailed hypothesis of possible misconduct. Some European countries fit in a general restrictive clause, *inter alia,* Armenia, Azerbaijan, Georgia, Kazakhstan and Moldova.

- A third category focuses on provisions forbidding any kind of intervention by public servants in favour of a candidate. This is notably the case in Greece, Ireland, the Kyrgyz Republic, Portugal and Spain. Four analysed legislations refer to temporary circumstances where public servants cannot campaign while in office or only during their workdays, i.e. Albania, Armenia, Kyrgyz Republic and Ukraine.

- A fourth category of provisions contains rules focusing on the preservation of free suffrage against possible influence of public servants through gifts, donations or

promises. Such prohibition is explicitly stipulated in the electoral laws of Belgium, France, Luxembourg and Monaco.

- A fifth category includes media coverage as a possible misuse of public funds (see the electoral codes of Armenia and Georgia).

- A sixth and last category mentions the states that have no explicit provisions on the misuse of administrative resources during electoral processes but implicit rules, which may be intended at dealing with this issue.

20. In countries without provisions on misuse of administrative resources during electoral processes, constitutional courts or equivalent bodies interpreted the law through a corpus of decisions, by giving a judicial interpretation of constitutional principles about equality in electoral processes and contributing to ensure neutrality of government authorities in electoral processes. The report also mentions several topical decisions of the European Court of Human Rights.

21. The Venice Commission considers that codes of good practice and ethical standards – particularly with regard to electoral administration and electoral disputes – should be identified and incorporated materials should be readily available to public servants. The importance of respecting the role of the opposition in a democratic parliament has also to be highlighted. It could be looked upon as a first important step against misuse of political power.

22. Moreover, the report underlines that satisfactory criminal laws against misuse of administrative resources are in force in most countries, but an effective implementation remains a general problem. To effectively implement the legislation, a mutual understanding and a sense of responsibility are required among all political stakeholders. There is a need for a shared understanding and consensus on the importance of constitutional values. However, this does not concern only criminal law but also general legislation.

23. The integrity of all relevant stakeholders, inter alia police, prosecutors, courts, judges, as well as auditors, is clearly vital to tackle the misuse of administrative resources. Media under the principle of freedom of information can also play an important role in countering abuses and support the effective administration of justice in this field. The Venice Commission reminds that the fundamental principles of transparency – in electoral processes – and of freedom of information are sine qua non pre-conditions for preventing misuse of administrative resources.

24. Guidelines aimed at fighting the misuse of administrative resources during electoral processes can be found in chapter V. These guidelines are based on this report.

III. Legal environment and practice

A. Principles

25. Traditionally, an electoral process is a highly competitive period, sometimes far from political platforms that should be proposed to the citizens. Electoral processes are often characterised by harsh rhetoric between competitors; by pressure on voters and on candidates; by defamation; by vote buying and sometimes by illegal campaigning means. The latter practice is persistent throughout electoral processes in many elections. Indeed misuse of administrative resources during the whole electoral process does impact public institutions (ministries, territorial and local bodies and other state-funded bodies) and human resources within the public sector.

26. Despite the need to regulate the use of administrative resources during electoral processes, in many countries, domestic electoral laws do not provide rules and/or sanctions. As a result, the principle of balance of powers can be threatened by a misuse of administrative resources due, *inter alia,* to unbalanced electoral processes in favour of incumbents. Moreover, general pieces of legislation, such as laws against corruption, on conflict of interest or on public service may be too general to effectively respond to the need for tackling specific situations of misuse of such resources. Where there is no legislation on the issue, public authorities should act based on ethical principles, guaranteeing conditions of equality for all political competitors. The respect of a balanced electoral process and consequently of basic requirements of a democratic constitutional state implies an obligation for the State to protect such principles, notably for new political parties and candidates, especially those without representation in parliament and/or local self-government bodies and particularly during electoral processes, where the environment is the most competitive and too often the most unbalanced. In this sense, electoral legislation should be developed to provide efficient and sufficient means for tackling the misuse of administrative resources, which must be applied ethically by public servants, following the principle of neutrality in exercising their functions, with a clear, understandable and predictable system of appropriate sanctions.

27. In democratic institutions, a distinction should be made regarding the access to public facilities of political parties which are or not represented in parliament, considering that candidates without representation in parliament do not have easily access to such public facilities. Opposition parties and candidates should have access to administrative resources following the principle of equality. Governmental action and political campaigning should be distinct activities, following the separation of roles for political actors, which include state authorities and political parties. It is therefore important to design appropriately the law, including public funding of political parties and electoral campaigns, in order to reflect these various situations, both in presidential and parliamentary systems.

28. The misuse of administrative resources during electoral processes can threaten some of the basic requirements of a democratic constitutional state.[23] The balance of powers and freedom of opinion must be guaranteed and promoted by parliament in its role as a legislator supervising the government, by the government in its executive role, by an independent judiciary and by free media and opinions. Moreover, a body independent from government and political structures could be in charge of tackling the misuse of administrative resources, according to the practice established for equivalent independent bodies in the countries. The format of an inter-agency, as set up in Georgia for instance, seems to be an interesting approach, bearing in mind that such a body does not have a judicial dimension. It is logically associated to electoral commissions – and in particular to the central electoral management body – and courts dealing with electoral matters.[24] Nevertheless, the political will of the highest state authorities to ensure free, fair and balanced elections remains a key factor. Without such a will, widely shared among political stakeholders, establishing an independent body that monitors the use of administrative resources during electoral processes may remain a superficial initiative.

[23] *See para. 25.*
[24] *See para. 62.*

29. Accordingly, a well-functioning democratic state under the rule of law requires that certain overarching common values within the society can be developed and maintained. The goal must be a political and legal culture of fair play, where politicians – in particular the incumbents -, judges, civil servants and all social leaders, intervening in the election process for the renewal of public authorities, should not only comply with the law but also seek to maintain high ethical standards in their task. The public should also take part in a comprehensive and responsible social debate.

30. The report clearly takes into account the various traditions and views of the political parties' positions. Some countries, such as the Nordic countries, have traditionally preferred self-regulation and voluntary agreements of party life to more detailed laws. Such gentlemen's agreements may be more difficult to achieve in other regions of Europe where the tradition of a pluralistic political scene is still recent or less developed.

31. A national legislation may guarantee some privileges for oppositions political forces, including seats in parliamentary committees and majority in a central electoral management body for instance.[25]

32. It is important to note that both in countries with strong and longstanding legal traditions and in those with thin legal frameworks, there are two key elements to protect administrative resources during the whole electoral process: firstly, the enforcement of existing laws and secondly, the well-functioning of institutions where self-regulation can be exercised by the political community. The latter involves a real possibility for non-incumbent political parties and candidates to publicise and institutionally channel grievances against the misuse of administrative resources. Independent, impartial and open institutions strengthen and incentivise a culture of legality and a democratic environment.

33. In the end, however, what is crucial here is how the legislative instrument is used, the executive power is exercised and the judiciary or independent relevant agencies apply the law. As in corruption cases, the implementation of sanctions against abuse of administrative power is possible only if the investigation, prosecution and justice systems are independent of the ruling political power.

B. Comparative analysis

34. Regarding the legal environment and based on the comparative table provided,[26] several Venice Commission member states do not have specific provisions against the misuse of administrative resources during electoral processes in their electoral legislation. Nevertheless, a more thorough analysis of other pieces of legislation may cover such provisions such as criminal or administrative legislation or laws on political parties.[27] For the countries providing legislation on the misuse of administrative resources during

[25] *In the case of Sweden, it is now an accepted practice within Parliament that a representative of the opposition parties is in charge of the office of President of the Constitutional Committee, while the majority of the committee stays in the hands of the party(-ies) in government as long as the ruling party or the ruling coalition has the majority in parliament.*

[26] *CDL-REF(2012)025rev.*

[27] *To find further information on relevant provisions dealing with the misuse of administrative resources, please refer to the International IDEA Political Finance Database. Available at: www.idea.int/political-finance/index.cfm.*

electoral processes, the level of details and of effective sanctions stipulated by law is variable and does not ensure the same level of safeguards. If electoral processes are often regulated regarding financing of campaigns and political parties, media coverage or defamation, laws are weaker in regulating misuse of administrative resources during electoral processes, including sanctions. The law is therefore absent or insufficient in domestic electoral laws to face this long-standing practice.[28] Overall, the judiciary does not cover enough the phenomenon and other existing complaints as well as appeals procedures are not systematically adapted to this issue. In countries like Mexico, constitutional principles have helped the Judiciary to adjudicate controversies over the misuse of administrative resources based on the equality principle.

35. It should be noted that the list of OSCE/ODIHR reports referenced in the present report is not exhaustive. Moreover, no mention of issues of misuse of administrative resources in OSCE/ODIHR reports does not necessarily mean that there was no issue. The same consideration applies to the election observation missions' report of the Parliamentary Assembly of the Council of Europe.

36. The following sub-sections aim at distinguishing various categories of provisions dealing with the use of administrative resources. Certain sub-sections refer to similar laws but emphasise distinct provisions.

37. **a. The first category of provisions regulates the use of administrative resources during electoral processes, without distinguishing between material and human resources.[29]**

38. The Election Code of Georgia, newly enacted in 2011, provides for exhaustive provisions both on "prohibition of the abuse of administrative resources during the pre-election agitation and campaign" (Article 48) and on "prohibition of the use of budget funds, occupational status or official capacity" (Article 49).[30], [31]

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[28] *In Latin America, at least 18 countries provide special regulations on the misuse of administrative resources during campaigns. In cases such as Mexico and Uruguay, there are constitutional provisions that mandate civil servants to perform impartially, avoiding influencing political competitors. There is evidence that Supreme Courts and Specialized Electoral Courts have taken actions with regard misuse of administrative resources that provide evidence of good practice, although challenges are still pervasive*

[29] *Countries described in para. 38-44 belong to this category. In the Americas, countries like Bolivia, Guatemala, Honduras, Mexico, Panama, Dominican Republic, the United States and Venezuela are concerned by this category. Regarding more precisely the United States, the Hatch Act 1939 restricts the partisan political activity of any individual employed by the state, an executive agency, or someone working in connection with a program financed by federal loans or grants. The Hatch Act has undergone a reform in 2011 (The State and Local Law Enforcement Hatch Act Reform Act 2011).*

[30] *The expressions "Electoral Code" or "Election Code" are used in the report on purpose, depending on the original version used by the country, in opinion or all other relevant documents.*

[31] *Mexican regulations are also quite specific in the matter of use of public funds during elections. Article 134 of the Constitution establishes that financial resources of the federal, state, municipal and Mexico City governments with their political administrative sub-agencies of their territorial demarcations shall be managed with efficiency, economy, transparency and integrity in order to achieve the objectives they are destined to, and that public officials shall be accountable for the enforcement of these provisions. Federal, State and municipal public officials, as well as the ones of Mexico City and its boroughs are under the obligation to use the public resources under their responsibility with impartiality without affecting fairness in the competition of political parties. For a more exhaustive report on the misuse of public funding for election purposes and practice in the filed in Mexico,*

39. In the **Russian Federation**, Article 46 of the Law on State Duma Elections imposes several restrictions to avoid the use of public means in favour of any political party that contends for elections. In practice, the OSCE/ODIHR notes in its report following the presidential election of 4 March 2012 that "[t]here was an evident mobilization of individuals and administrative resources in support of Mr Putin's campaign, which was observed by the OSCE/ODIHR EOM [Election Observation Mission]. In several regions, participants in campaign events reported that they had been ordered to take part by their superiors. Various levels of public institutions instructed their subordinate structures to organize and facilitate Mr Putin's campaign events. Local authorities also used official communication, such as their institutional websites or newspapers, to facilitate Mr Putin's campaign."[32] The PACE Report following the same elections recommends "strict rules [...] with regard to the use of administrative resources in campaign periods."[33]

40. In **Turkey**, the Law on Basic Provisions on Elections and Voter Registers prohibits in Articles 63-65 the misuse of administrative resources during electoral campaigns by public authorities. In practice, following the 2011 parliamentary elections, the misuse of administrative resources was not brought to the attention of the OSCE/ODIHR Election Observation Mission.[34]

41. In **Ukraine**, the Law on Elections of People's Deputies prohibits misuse of administrative resources during campaigns by public authorities.[35] Article 74 of the Law stipulates the restrictions regarding the conduct of electoral campaigns, banning *inter alia* canvassing for civil servants during their working hours or placing campaign material in public administration's buildings. In practice, the OSCE/ODIHR reported in its final report following the 28 October 2012 parliamentary elections a "lack of a level playing field, caused *[inter alia*] primarily by the abuse of administrative resources [...]." The report also underlines that this misuse of administrative resources during the electoral campaign "demonstrated the absence of a clear distinction between the State and the ruling party in some parts of the country, contrary to paragraph 5.4 of the 1990 OSCE Copenhagen Document."[36]

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including electioneering expenditure and case-law of the Supreme Court of Elections on public resources, see the report of Mr Manuel Gonzalez Oropeza (CDL(2012)076). Available at : www.venice.coe.int/webforms/documents/?pdf=CDL(2012)076-e.

[32] *OSCE/ODIHR, Russian Federation, Presidential Election, 4 March 2012, Election Observation Mission Final Report, paqe 1. Available at: www.osce.orq/odihr/90461.*

[33] *Council of Europe, Parliamentary Assembly, Observation of the Presidential Election in the Russian Federation (4 March 2012), Election observation report (Doc. 12903, 23 April 2012), para. 61. Available at:http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=18168&lanq=EN&search=MTI5MDM=.*

[34] *OSCE/ODIHR, Republic of Turkey, Parliamentary Elections, 12 June 2011, Final Report. Available at: www.osce.orq/odihr/84588.*

Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Turkey (12 June 2011), Report (Doc. 12701, 5 September 2011).

Available at:http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12999&lanq=en.

[35] *Articles 6.2, 68.4, 68.10, 74.1, 74.4, 74.13, 74.21 and 74.24 of the Law.*

[36] *International Election Observation Mission, Ukraine, Parliamentary Elections, 28 October 2012, Final Report, Executive Summary, pages 3-4. Available at: www.osce.orq/odihr/elections/98578.*

42. In **Albania**, the use of material assets and human resources belong to similar provisions but both notions are explicitly distinguished. The Electoral Code covers the misuse of administrative resources during electoral campaigns as follows:

Article 88 – Prohibition of the use of public resources for the support of electoral subjects

1. Except for the cases provided by law, resources of public organs or entities of a central or local level, or of any other entity where the state owns capital or shares or/and appoints the majority of the supervisory or administrative body of the entity, regardless of the source of the capital or ownership, cannot be used or made available for the support of candidates, political parties or coalitions in elections.

2. For purposes of this article, movable and immovable assets provided in article 142 of the Civil Code, as well as any human resource of the institution, are considered "resources". The use of "human resources" is understood as the use of the administration of the institution during working hours for election purposes. Even hiring, dismissing from work, release, movement and transfer of duty, with the exception of motivated cases, are considered to be activities of the public institution.[37]

43. In this provision, assets and human resources are considered as administrative resources as soon as they are used for electoral purposes during working hours. This provision is interesting as it covers at least in the law the requirements for preventing misuse of administrative resources. Nevertheless, the last joint opinion of the Venice Commission and the OSCE/ODIHR[38] on the Electoral Code of Albania underlines that the expression «with the exception of motivated cases" (Article 88.2) «appears as very broad and needs some specification". Therefore, «the Venice Commission and OSCE/ODIHR recommend amending Article 88.2 in order to limit the scope of this exception".[39]

44. In practice, the OSCE/ODIHR Final Report following the 28 June 2009 parliamentary elections underlines that «[t]here were substantiated allegations of misuse of administrative resources by the [Democratic Party] for campaign purposes. Such actions blurred the distinction between state and party activities, in contravention of paragraph 5.4 of the OSCE Copenhagen Document."[40] The report of the Parliamentary Assembly of the Council of Europe (PACE) following the same elections raises the same concerns:

«38. The ad hoc committee considered worrying the information supplied by the opposition parties about cases of administrative resources being used for the purposes of the election campaign and public servants threatened with loss of employment,

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Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Ukraine (28 October 2012), Election observation report (Doc. 13070, 29 November 2012), para. 7. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19213&lanq=en.

[37] *Article 88 of the Electoral Code of Albania (CDL-REF(2011)038). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)038-e.*

[38] *All references made to joint opinions in the report are opinions prepared jointly by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR).*

[39] *CDL-AD(2011)042, para. 85-86. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)042-e.*

[40] *OSCE/ODIHR, Republic of Albania, Parliamentary Elections, 28 June 2009 Election Observation Mission Final Report, page 2. Available at: www.osce.org/odihr/elections/albania/38598.*

specifically schoolteachers and medical personnel, chiefly in the rural regions supporting the opposition candidates.

39. The ad hoc committee was informed that a large number of ceremonies to open roads, hospitals and a hydro-electric plant, and other official functions had been organised during the election campaign in Tirana and in the regions by the authorities, with public servants, students and schoolchildren allegedly participating under coercion. Nevertheless, one of the main objectives of the election campaign should be to inform the citizens of the programmes and ideas of the political parties before asking citizens for a mandate."[41]

Following the 23 June 2013 parliamentary elections, the report of the Parliamentary Assembly of the Council of Europe underlines that «legislation did not adequately regulate or penalise the misuse of administrative resources. The enforcement of provisions against campaign misconduct, including vote buying, was weak."[42] The OSCE/ODIHR stresses in its report that «[t]he framework fails to detail a comprehensive system of sanctions for misuse of administrative resources, including public servants, involvement of schoolchildren in campaigning, and misappropriation of public official positions and government events, for campaign purposes" and recommends that "[t] he abuse of state resources, including human resources, for campaign purposes could be more effectively prevented through improved enforcement and by holding those in violation accountable."[43]

45. **b. There is another category of provisions that draw attention to some particular types of resources.[44]**

46. The Electoral Code of **Armenia** covers the misuse of administrative resources during electoral campaigns since 2011, following up recommendations from the OSCE/ ODIHR and the Venice Commission to address in the Armenian legal framework the chronic issue of separation of state resources from party and/or candidate resources. In this respect, Article 22 provides:

1. Candidates occupying political, discretionary, civil positions, as well as candidates occupying a position of state or community servant shall conduct election campaigns taking into account the following restrictions:

(...)

(2) use of areas for election campaign purposes, of transportation and communication means, of material and human resources provided for performing official responsibilities, shall be prohibited, except for security measures applicable in respect of high-ranking officials subject to state protection under the Law of the Republic of Armenia "On

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[41] *Council of Europe, Parliamentary Assembly, Observation of the Parliamentary Elections in Albania (28 June, Report, (Doc. 12007; 16 September 2009), para. 38-39. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=12831&lang=EN.*

[42] *Council of Europe, Parliamentary Assembly, Observation of the Parliamentary Elections in Albania (23 June 2013), Report (Doc. 13296; 3 September 2013), para. 22. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20055&lang=en.*

[43] *OSCE/ODIHR, Republic of Albania, Parliamentary Elections, 23 June 2013 Election Observation Mission Final Report, part V, page 7; also page 14 and Recommendation no. 18. Available at: www.osce.org/odihr/elections/106963.*

[44] *This group not only distinguishes material and human administrative resources but also includes other criteria that are country specific*

ensuring the safety of persons subject to special state protection".

These candidates shall make use of state property on the grounds equal to those provided for other candidates.

(...)

47. Another example of this subdivision in Europe[45] is the Election Code of Georgia, whose Article 48.1 allows the use of administrative resources for campaign purposes. The provision allows the use of state-funded buildings, communication means, and vehicles, provided that equal access is given to all election subjects. The joint opinion on the draft Election Code of Georgia of the Venice Commission and the OSCE/ODIHR raises once again concerns regarding continuous risk of misuse of administrative resources. The opinion states that "this provision appears to adhere to the equal opportunity principle. However, in practice such equality may quickly be undermined as political parties in government have easier access to such resources (government facilities, telephones, computers and vehicles). Moreover, Article 48(2) allows civil servants to use their official vehicles for campaign purposes of campaigning, provided that the fuel costs are reimbursed."[46]

48. In its final report on the 1 October 2012 parliamentary elections, the OSCE/ODIHR underlines the possibility given by the law to misuse "some administrative resources for campaign purposes, in particular state-funded buildings, provided that equal access is given to all election subjects." Nevertheless, the report relays the concerns expressed in the joint opinion as "[i]n practice, such equality may be undermined as political parties in government have easier access."[47] The Parliamentary Assembly report underlines that "[t]he campaign centred mostly on issues of abuse of administrative resources and the advantages of incumbency by the ruling party and on the abuse of private financial resources by opposition leaders" and noted that "[t]he abuse of administrative resources continued to be an issue during these elections, including allegations of pressure on civil servants and opposition activists. International observers noted that the distinction between State and the ruling party was often blurred. Local civil society organisations played an important watchdog function in this respect. In a number of cases, the IATF [Inter Agency Taskforce for Free and Fair Elections] made recommendations to address both proven cases and allegations of misuse of administrative resources."[48]

49. **Kazakhstan** also has regulation for misuse of public real estate properties (para. 63-64). Similarly, **Moldova** (para. 65-66) and **Montenegro** (para. 50-51) have this kind of legal provisions, although the prohibitions of using administrative resources for electoral purpose are not aimed at public servants, but at candidates, probably in the context of re-election.

50. **Montenegro**'s legal provisions focus in a special way on the use of material resources;

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[45] *In the Americas, the cases are Bolivia, El Salvador and Nicaragua.*

46 *CDL-AD(2011)043, para. 11 & 60 ss. Available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)043-e.*

[47] *OSCE/ODIHR, Georgia, Parliamentary Elections, 1 October 2012, Election Observation Mission Final Report, page 6. Available at: www.osce.org/odihr/98399.*

[48] *Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Georgia (1 October 2012), Election observation report (Doc. 13068, 29 November 2012), para. 59 & 61.*

Article 22 of the Law on the election of the President provides:

The candidate for President of Montenegro may not use the facilities, financial resources, vehicles, technical means and other state property for the purpose of the electoral campaign.

51. The Law on the Election of Councillors and Representatives of Montenegro provides in its Article 50.2 that "[n]o property (money, technical equipment, facilities etc.) of state authorities, state-owned enterprises, public institutions and funds, or of the Chamber of Commerce and Economy of Montenegro can be used for the presentation of electoral lists."

52. In practice, the OSCE/ODIHR final report following the early parliamentary elections of 14 October 2012 underlines that "[allegations of abuse of state resources and reported violations of the public sector recruitment ban during the electoral campaign blurred the line between state activities and the campaign of the ruling coalition.[49]" The Council of Europe Parliamentary Assembly report following the early parliamentary elections of 14 October 2012 reports misuse of administrative resources and in particular pressure and intimidations on civil servants to vote in favour of ruling political forces.[50] Following the 7 April 2013 presidential election, the OSCE/ODIHR final report indicates that "[allegations of the misuse of state resources and mistrust in public institutions and the judiciary diminished public confidence in the electoral process and should be addressed."[51] The Parliamentary Assembly report underlines that "[t]he ad hoc committee was informed by the ODIHR limited election observation mission and by the NGO and media representatives of cases of alleged vote-buying and of misuse of administrative resources by the ruling coalition inasmuch as the dividing line between the activities of the State and the election campaign was blurred. Some 40% of jobs in Montenegro are directly or indirectly tied to the various public administrations." The report recommends that misuse of administrative resources "should be tackled at the earliest opportunity by the Montenegrin authorities."[52]

53. Regarding the misuse of human resources, most regulations focus on public servants taking advantage of their positions and develop very detailed hypothesis of possible misconduct.

54. Some European countries fit in the general restriction clause, *inter alia,* Armenia, Azerbaijan, Georgia, Kazakhstan and Moldova.[53]

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[49] *OSCE/ODIHR, Montenegro, Early Parliamentary Elections, 14 October 2012, Limited Election Observation Mission Final Report, paqe 1. Available at: www.osce.orq/odihr/97940.*

[50] *Council of Europe, Parliamentary Assembly, Observation of the early parliamentary elections in Montenegro (14 October 2012), Election observation report (Doc. 13069, 29 November 2012), para. 5, 33, 42 & 45.Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19196&lanq=en.*

[51] *OSCE/ODIHR, Montenegro, Presidential Election, 7 April 2013, Limited Election Observation Mission Final Report, pages 1, 2, 11 & 12; and Recommendation 19. Available at: www.osce.orq/odihr/elections/103093.*

[52] *Council of Europe, Parliamentary Assembly, Observation of the presidential election in Montenegro (7 April 2013), Election observation report (Doc. 13217, 30 May 2013), para. 29, 32, 46, 49 & 52. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19735&lanq=en.*

[53] *In the Latin American context, the following countries fall within the scope of general restriction clause: Costa Rica, El Salvador, the United States and Venezuela.*

55. In Armenia (as mentioned in para. 46), Article 22 provides:

Candidates occupying political, discretionary, civil positions, as well as candidates occupying a position of state or community servant shall conduct election campaigns taking into account the following restrictions:

making direct or indirect statement urging to vote for or against a candidate, political party, alliance of political parties while performing official duties, as well as any abuse of official position to gain advantage at elections, shall be prohibited. (...)

56. Moreover, the representative of the Central Election Commission of Armenia also indicated during the Seminar of April 2013[54] that the Election Code bans the use of premises for campaigning in buildings occupied by state government bodies and local self-government bodies (except for cases where electoral campaign's offices occupy an area not belonging to such bodies), or in buildings in which electoral commissions are functioning.[55] The Electoral Code further stipulates that community leaders should designate spaces for putting campaign posters up. Campaign posters are provided free of charge to all the candidates in order to safeguard equal conditions.[56]

57. The joint opinion on the Electoral Code of Armenia (as of 26 May 2011) underlines that «[t]he separation of state resources from party and candidate resources has been a problem cited in every OSCE/ODIHR election report since 1996. The governing party network exercises influence on national government, but also the governors' offices and local selfgovernment in most regions. During a national election, the resources under the control of these offices are called on to campaign on behalf of the government candidates. This creates a disparity in resources available with the added problem of creating the perception that employees are obligated to work for, attend rallies on behalf of and vote for the government candidates for fear for their employment. This practice is neither in conformity with the Code of Good Practice in Electoral Matters, where the principle of equality of opportunity entails a neutral attitude by state authorities,[57] nor with OSCE commitments which call for a separation of party and State and campaigning on the basis of equal treatment.[58] The changes to Articles 19 and 22, if implemented fully and properly, could contribute significantly to address problems noted in past elections.[59]"

58. In practice, criticisms remain. Following the last parliamentary elections of 6 May 2012, the OSCE/ODIHR Election Observation Mission Final Report stresses that "[s]ome violations of campaign provisions by electoral contestants, including the use

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[54] *Fourth Eastern Partnership Facility Seminar on the «use of administrative resources during electoral campaigns" – Tbilisi, Georgia, 17-18 April 2013 – Reports of the Seminar (CDL-EL(2013)007). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2013)007-bil.*

55 *Article 20.9 of the Electoral Code of Armenia adopted on 26 May 2011. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)029-e.*

[56] *Article 21.2 of the Electoral Code of Armenia adopted on 26 May 2011. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)029-e.*

[57] *Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I, 2.3, a. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev-e.*

[58] *OSCE, Copenhagen Document 1990, para. 7.6. Available at: www.osce.org/odihr/elections/14304.*

[59] *CDL-AD(2011)032,para.50.Availableat:www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)032-e.*

of administrative resources and attempts to limit voters' freedom of choice, created an unequal playing field.[60]" Following the same elections, the Council of Europe Parliamentary Assembly underlines that "administrative resources were misused, in direct contradiction with the Electoral Code. The RPA [Republican Party of Armenia, ruling party] actively involved teachers and pupils in campaign events, including during school hours. In one case, teachers and local authorities even asked parents to attend an RPA event. RPA campaign material and party flags were present on a number of school buildings.[61]" The OSCE/ODIHR final report following the presidential elections of 18 February 2013 underlines that "the campaign regulations were not always interpreted or implemented properly by the authorities and contestants, especially with regard to campaign-finance provisions. This proved to allow for abuse of administrative resources and did not provide for a level playing field among candidates or protect voters from undue influence. In addition, the Criminal Code does not include specific offenses for abuse of office and state resources in an election campaign. These factors contributed to an undue advantage of the incumbent during the campaign.[62]" The Parliamentary Assembly indicates in its report following the same election that "[t]he campaign regulations did not provide sufficient protection against the misuse of administrative resources, nor against the blurring of the distinction between the State and the ruling party.[63]"

59. The Electoral Code of Azerbaijan prohibits the misuse of administrative resources during electoral campaigns as well. Article 55 aims at "[e]nsuring Equal Status for Candidates during their Nomination". This provision underlines that "[a] ll candidates shall have equal rights and responsibilities" (Article 55.1). Article 55.2 develops the actions considered by the Electoral Code as abuse of position. Moreover, a list of persons and institutions prohibited to implement charitable activities during electoral campaigns is highlighted in Article 55.3. Pursuant to Article 115 of the Election Code, the persons who misuse their powers and administrative resources in order to influence the results of elections shall be accordingly subject to criminal, civil or administrative liability. The Criminal Code of the Republic of Azerbaijan also implies that the incumbents who violate electoral rights by misusing their official powers shall be relevantly punished by penalty, deprivation of the right to take official position for some period or imprisonment.

60. In practice, the OSCE/ODIHR Final Report following the parliamentary elections of 7 November 2010 underlines *inter alia* that "misuse of administrative resources as well as interference by local authorities in favour of candidates from the ruling party created an uneven playing field for candidates." The Report details that

[60] *OSCE/ODIHR, Republic of Armenia, Parliamentary Elections, 6 May 2012, Election Observation Mission Final Report, page 1. Available at: www.osce.org/odihr/91643..*

[61] *Council of Europe, Parliamentary Assembly, Observation of the Parliamentary Elections in Armenia (6 May 2012), Election observation report (Doc. 12937, 24 May 2012), para. 30. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=18720&lang=en.*

[62] *OSCE/ODIHR, Republic of Armenia, Presidential Election, 18 February 2013, Election Observation Mission Final Report, page 5. Available at: www.osce.org/odihr/elections/101314.*

[63] *Council of Europe, Parliamentary Assembly, Observation of the Presidential Election in Armenia (18 February 2013), Election Observation Report (Doc. 13172, 22 April 2013), para. 34. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19556&lang=en.*

"[t]he misuse of administrative resources was reported from 20 constituencies where employees of state institutions were involved in campaigning for a particular candidate during working hours." The OSCE/ODIHR Report recommends that "[t]he continuous problems regarding undue interference of local executive authorities in the election process, in particular regarding [...] the misuse of administrative resources in favour or certain candidates, should be resolutely addressed as it is the responsibility of the State to enable contestants to compete on a basis of equal treatment.[64]" The Council of Europe Parliamentary Assembly Report following the same elections also underlines "allegations of abuse of administrative resources[65]". Following the 9 October 2013 presidential election, the International Election Observation Mission stated that "YAP's campaign on behalf of the incumbent President appeared well-organized and resourced, including rallies and concerts. While the incumbent President did not directly campaign, he toured the country in his official capacity and frequently appeared at public events. The campaigns of the other candidates were more modest, involving small-scale meetings, door-to-door canvassing, and social media on the internet, with few large-scale rallies. Some of the candidates did not hold any rallies or produce posters.[66]"

61. Article 49.1 of the Election Code of Georgia prohibits persons "holding offices in state or local authorities" from combining campaign activities in support of (or against) electoral subjects with the conduct of their official duties. This applies specifically when those persons use subordinates in campaigning, gathering signatures during official business trips, or conducting "pre-election agitation." The joint opinion criticises this provision because "[p]ersons 'holding offices in state or local authorities' are not listed in Article 49 and there are varying interpretations among stakeholders as to which public officials are legally considered to be persons 'holding offices in state or local authorities'." The opinion recommends to clarify the list of officials concerned by this provision and to include governors and mayors, who are entitled to campaign. According to the joint opinion, "[t]he Code should further prohibit such individuals from directly or indirectly using administrative resources and from engaging in electoral campaign activities on behalf of any party/candidate, in order to ensure a level playing field for all contestants.[67]" On the contrary, the joint opinion welcomes the provision "which stipulates that state and local governments, between the day of announcement of the elections and the day of determining the election results, are not allowed to launch any special programs apart from those envisaged in their annual budgets.[68]"

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[64] *OSCE/ODIHR, Republic of Azerbaijan, Parliamentary Elections, 7 November 2010, Election Observation Mission Final Report, pages 1, 11 & 24. Available at: www.osce.org/odihr/elections/azerbaijan/75073.*

[65] *Council of Europe, Parliamentary Assembly, Observation of the parliamentary elections in Azerbaijan (7 November 2010), Report (Doc. 12475, 24 January 2011), para. 30 & 49. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=13086&lang=en.*

[66] *International Election Observation Mission, Republic of Azerbaijan, Presidential Election, 9 October 2013, Statement of Preliminary Findings and Conclusions, page 7. Available at: www.osce.org/odihr/elections/106901.*

[67] *CDL-AD(2011)043,para.62.Availableat:www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)043-e.*

[68] *CDL-AD(2011)043, para. 63.*

62. In practice, "OSCE/ODIHR election observation mission reports from past elections have consistently identified the [mis]use[69] of administrative resources in Georgian elections as a significant problem. This problem is due in part to the lack of clarity and specificity in the legislation, as reproduced in the draft Code. The draft Code provisions blur the line between the state and political parties and fall short of OSCE commitments. The Venice Commission and the OSCE/ODIHR recommend revising the provisions on the misuse of administrative resources. Additionally, the last Evaluation Report by the Council of Europe Group of States against Corruption (GRECO) on transparency of party funding in Georgia raises similar concerns and "recommends to take further measures to prevent the misuse of all types of administrative resources in election campaigns[70]". As a consequence, the Inter-agency Commission (IAC) was set up to administrate the misuse of administrative resources during the electoral campaign. The IAC is a body composed of senior officials of the executive mandated to consider complaints or allegations of violations by civil servants. Mr Zurab Kharatishvili, former President of the Central Election Commission, highlighted the efficiency of such mechanism. It played a pro-active role in deterring campaign violations through issuing 12 recommendations on corrective measures. However, certain recommendations raised concern over the actual scope of the lAC's authority, which at times exceeded its mandate and challenged the principle of separation of powers.

63. The Kazakhstan Constitutional Act on elections states that (Article 27.5):

"Taking advantages of the official status by the candidates, who are officials of the state bodies, shall be forbidden. Under the use of advantages of the positional or official status, this Constitutional Act shall consider the following:

involvement of persons, who are subordinated or dependent on a candidate, to the conduct of a pre-election campaign, except the cases when the above-mentioned persons conduct campaigning as proxies of a candidate;

using the premises occupied by the state bodies to promote the election of a candidate or a political party that nominated a party list, if other candidates, political parties are not guaranteed by the use of these premises on the same conditions."

64. In practice, the OSCE/ODIHR report following the 15 January 2012 early parliamentary elections does not explicitly refer to administrative resources. Nevertheless, the electoral process as a whole was assessed as not having met "fundamental principles of democratic elections.[71]"

65. The Election Code of Moldova states in Article 47.6 that "[c]andidates may not use public means and goods (administrative resources) during the electoral campaigns, and public authorities/institutions and other related institutions may not send/grant to the electoral competitors public goods or other benefits unless on a contract basis, providing equal terms to all electoral competitors." The 2010 joint opinion underlines

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[69] *The original text says use. The Rapporteurs added the prefix mis to preserve conceptual coherence in the report*

70 *CDL-AD(2011)043, para. 61. Additional reference: GRECO, Evaluation Report on Georgia on Transparency of party funding, Third Evaluation Round, Strasbourg, 27 May 2011, Adopted by GRECO at its 51st Plenary Meeting (Strasbourg, 23-27 May 2011; Greco Eval III Rep (2010) 12E), paragraph 69. Available at: www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3%282010%2912_Georgia_One_EN.pdf.*

[71] *OSCE/ODIHR, Republic of Kazakhstan, Early Parliamentary Elections, 15 January 2012, Election Observation Mission Final Report, page 1. Available at: www.osce.org/odihr/elections/89401.*

that "this new paragraph is welcomed and addresses previous recommendations.[72]" The risk of misuse of administrative resources is higher among the candidates who hold a public position at the time of registration on the electoral candidate list. The Election Code therefore imposes their suspension from function for the entire duration of the electoral campaign[73].

66. In practice, following the 2011 local elections (5 and 19 June 2011), the OSCE/ODIHR reported the distribution of illegal electoral gifts to voters during the electoral campaign[74]. The report also indicates that interlocutors "complained about the misuse of administrative resources at the local level, especially by incumbents running for re-election, although the scale was difficult to determine.[75]" In its 2010 report following early parliamentary elections, the PACE states that "[a] number of people expressed anxiety about the [mis]use of administrative resources during the election campaign." The document reports allegations of gifts to voters bearing the names of political leaders, including food and sundry items[76].

67. **c. Among European countries, there are provisions forbidding any kind or intervention in favour of a candidate, i. e. prohibition of endorsement by public officials or civil servants[77].**

67. In **Portugal**, the Law on Election to the Parliament prohibits the abuse of public functions for campaigning purposes (Article 153). In practice, misuse of administrative resources during the electoral campaign, following the parliamentary elections of 27 September 2009, was not brought to the attention of the OSCE/ODIHR Election Observation Mission[78].

69. In **Greece**, the provision is included in the Constitution:

Article 29

Manifestations of any nature whatsoever in favor of or against a political party by magistrates and by those serving in the armed forces and the security corps, are absolutely prohibited. In the exercise of their duties, manifestations of any nature whatsoever in favor or against a political party by public servants, employees of local government agencies, of other public law legal persons or of public enterprises or of enterprises of local government agencies or of enterprises whose management is directly or indirectly appointed by the State, by administrative act or by virtue of its capacity as shareholder, are absolutely prohibited.

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[72] *CDL-AD(2010)014, para. 37. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)014-e.*

[73] *Article 44.1 g) of the Election Code of Moldova. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL(2008)082-e*

[74] *It should be taken into account that the financing of campaigns in Moldova is mainly public.*

[75] *OSCE/ODIHR, Republic of Moldova, Local Elections, 5 and 19 June 2011, Limited Election Observation Mission Final Report, pages 10-11. Available at: www.osce.org/odihr/elections/85409*

[76] *Council of Europe, Parliamentary Assembly, Observation of the Early Parliamentary Elections in Moldova (28 November 2010), Report (Doc. 12476, 24 January 2011), para. 40. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=13085&lang=en.*

[77] *In Latin America, the general prohibition of acting in favour of any particular candidate can be found in the legal provisions of Bolivia, Colombia, Costa Rica, Haiti, Honduras, Nicaragua and Panama. See also footnote no. 31.*

[78] *OSCE/ODIHR, Portugal, Parliamentary Elections, 27 September 2009, Election Assessment Mission Report. Available at: www.osce.org/odihr/elections/41003.*

70. The Electoral Act of Ireland prohibits "officer[s] acting as agent of candidate or furthering a candidature" (Article 144):

"A returning officer, an assistant, deputy or acting returning officer or any person employed by any such officer for any purpose relating to a Dail election who acts as agent for any candidate at that election or who is actively associated in furthering the candidature of any candidate or promoting the interests of any political party at the election shall be guilty of an offence".

71. In practice, the OSCE/ODIHR underlines in its Needs Assessment Mission Report following the 25 February 2011 early parliamentary elections that "[t]here is [...] a very high level of confidence of all stakeholders in the electoral process and the election administration". Therefore, no concern was raised regarding misuse of administrative resources during electoral campaigns[79].

72. According to the Constitutional Law of the Kyrgyz Republic on the Presidential and Parliamentary Elections, "[m]embers of election commissions, observers, international observers, judges, representatives of religious organizations, charity organizations, individuals under 18 years of age, foreign citizens and organizations have no right to carry out election campaign, issue and disseminate any campaign materials. Officers of government and self-governance bodies can carry out campaign and disseminate any campaign materials when they are outside of their official positions" (Article 22.15). The joint opinion on the electoral law underlines that by prohibiting certain groups from campaigning,

Article 22.15 introduces 'unreasonable restrictions on individual citizens' and may be considered as 'overly restrictive"[80].

73. In practice, the OSCE/ODIHR report following the 30 October 2011 presidential election underlines that "[a]llegations of misuse of institutional authority in the form of pressure and intimidation were raised throughout the pre-election period, which undermined confidence in the electoral process." The report also indicates that "[o]n 29 September the parliament adopted a decree on "Measures to ensure the implementation of the Law on Presidential and Parliamentary Elections", reinforcing the electoral law and imposing strict measures in cases such resources are misused"[81].

74. In **Spain**, the Law on the Regime of General Elections includes different provisions regarding misuse of administrative resources. Article 52 prohibits officials from campaigning; Article 139 sanctions infractions committed by civil servants during electoral campaigns; and Article 140 sanctions civil servants misusing their positions for campaigning purposes. In practice, the misuse of administrative resources was not brought to the attention of the OSCE/ODHIR Election Observation Mission in its report following the early parliamentary elections of 20 November 2011[82].

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[79] *OSCE/ODIHR, Ireland, Early Parliamentary Elections, 25 February 2011, Needs Assessment Mission Report, page 11. Available at: www.osce.org/odihr/elections/75725.*

[80] *CDL-AD(2011)025,para.73.Availableat:www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)025-e.*

[81] *OSCE/ODIHR, The Kyrgyz Republic, Presidential Election, 30 October 2011 Election Observation Mission Final Report, pages 2 & 10. Available at: www.osce.org/odihr/elections/86926.*

[82] *OSCE/ODIHR, Spain, Early Parliamentary Elections, 20 November 2011, Election Assessment Mission Final Report. Available at: www.osce.org/odihr/elections/Spain/88222*

75. Other more specific prohibitions include the use of staff and employees, as in Georgia (para. 61-62) and in Kazakhstan (para. 63-64)[83].

76. **Only four analysed legislations refer to temporary circumstances where public officials cannot campaign while in office or only during their work-day**, i.e. the legislations of Albania (para. 43), Armenia (para. 55), the Kyrgyz Republic (para. 72-73) and Ukraine (para. 41)[84],[85].

77. Also related to campaigning, the Electoral Code of "the former Yugoslav Republic of Macedonia" stipulates that:

(1) As an election campaign is considered: public gathering and other public events organised by the campaign organiser, public display of posters, video presentations in public areas, electoral media and internet presentation, dissemination of printed materials and public presentation of confirmed candidates by official electoral bodies and their programmes.

(2) The election campaign commences 20 days prior the Election Day and in the first and the second round of election cannot continue 24 hours before elections and on the Election Day (Article 69-a).

78. The joint opinion on the Electoral Code underlines that "[t]his definition could be considered as limiting regular political activities held prior to the start of the official campaign period" and that "[t]he Code should specify what political activity is not permissible before the start of the official campaign period[86]."

79. In practice, the OSCE/ODIHR report following the 5 June 2011 early parliamentary elections describes that "certain aspects [of the elections] require attention", including "measures to ensure an adequate separation of state and party structures." Moreover, "[t]he OSCE/ODIHR EOM [Election Observation Mission] received a number of allegations that party activists had requested civil servants to list a certain number of voters who would vote for the ruling party. According to these allegations, employees of state and public institutions were intimidated and threatened with loss of their jobs if they did not comply with these requests. Other allegations included threats that citizens would lose their pensions or social services if they did or did not support certain parties or candidates. The overwhelming majority of these allegations concerned actions by state officials and activists of the principal governing party. Any partisan actions by state employees taking place during working hours represent a misuse of state resources for party purposes[87]."

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[83] *In the Americas, this kind of provisions can be found in Bolivia, Colombia and the United States.*

[84] *In the Americas, this is the case of Chile, Costa Rica, Guatemala, Honduras, Panama, the United States and Uruguay.*

[85] *In Mexico, there is a judicial criterion (Supreme Court of Elections, 14/2012) regarding the same issue: Political Proselitysm Acts. The sole attendance of public servants in non-working days to such acts is not restricted by law.*

[86] *CDL-AD(2011)027, para. 46. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)027-e.*

[87] *OSCE/ODIHR, "The former Yugoslav Republic of Macedonia", Early Parliamentary Elections, 5 June 2011, Election Observation Mission Final Report, pages 1, 6 & 11. Available at: www.osce.org/odihr/elections/83666.*

80. Apart from Article 134 of the Constitution,[88] the specific relevant piece of legislation for **Mexico** is the Federal Code of Electoral Institutions and Procedures. Article 134.8 of the Constitution states that representatives, either at federal or at local levels as well as senators and parliamentary groups are banned from campaigning with governmental facilities. The catalogue of restrictions on officials is large as it includes the Human Rights Commissions, the Elections Commissions, the National Institute of Statistics, Geography and Informatics and the Bank of Mexico. This catalogue also includes any other entity or government agencies, which are subject to any legal system of public status at all levels of government (federal, state or city). This legislation is completed by Article 212 of the Federal Criminal Code, which prohibits offenses committed by public officials.[89] These rules establish the separation of all public officials from their duties for the time they compete for an elective position which is different from the one they hold. It should be taken into consideration that immediate re-election is prohibited. In the 2012 presidential election, it was alleged that the winning candidate's party distributed bank and store cards in order to favour the presidential candidate. However, the evidence presented was not detailed enough to confirm an influence on the final results.

81. d. **Another category of provisions contains rules focusing on the preservation of freedom of vote against possible influence of public servants through gifts, donations or promises.[90]**

82. The Electoral Code of Belgium sanctions persons who promise jobs in public or private sectors (Article 182). The Code also prohibits promises made to persons against their vote or their abstention (Article 187).[91] In practice, the OSCE/ODIHR underlines in its report following the 10 June 2007 federal elections that the legal framework «is in some aspects advantageous to established parties, but this has not hindered new parties from emerging in the last decades, contributing to an already heterogeneous political landscape[92]".

83. The Electoral Code of France prohibits any gifts, donations and promises aimed at influencing the vote as well as those accepting such gifts, donations or promises.[93] In practice, misuse of administrative resources during the electoral

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[88] *Article 134 of the Constitution establishes an explicit mandate for public servants to make impartial use of administrative resources, avoiding influencing equality in the competition between political parties.*
Available at: www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf.

[89] *For a more exhaustive report on the use of public funding for election purposes and practice in the filed in Mexico, including electioneering expenditure and case-law of the Supreme Court on public resources, see the report of Mr Manuel Gonzalez Oropeza (CDL(2012)076).*
Available at: www.venice.coe.int/webforms/documents/?pdf=CDL(2012)076-e.

[90] *In the Americas, there are cases in Brazil and El Salvador. In Canada, candidates are forbidden from accepting gifts or any other advantage during electoral campaigns.*

[91] *Available at: www.droitbelge.be/codes.asp.*

[92] *OSCE/ODIHR, Belgium, Federal Elections, 10 June 2007, Election Assessment Mission Report, page 1.*
Available at: www.osce.org/odihr/elections/belgium/28213.

[93] *(Only in French) Republique frangaise, Code electoral, Article L106 (modifie par Ordonnance n°2000-916 du septembre 2000 – art. 1 (V) JORF 22 septembre 2000 en vigueur le 1er janvier 2002) : Quiconque, par des dons ou liberalites en argent ou en nature, par des promesses de liberalites, de*

campaign, following the parliamentary elections held on 10 and 17 June 2012, was not brought to the attention of the OSCE/ODIHR Election Observation Mission.[94] Nevertheless, France's National Commission for Campaign Accounts and Political Financing (CNCCFP)[95] underlines in its 2011 annual activity report[96] that the Commission took 2,899 decisions of approbation with reformation of candidates' accounts (for a total of accounts of 7,047 scrutinised). The accounts approved with reformation represent a bit more than 40% of all accounts (twice more than for the 2008 elections), which tends to demonstrate the inclusion by many candidates of costs qualified as electoral expenses that are not considered by the Commission as expenses for electoral purposes. These candidates' accounts were approved mainly after reformation of the following expenses: interest rates, equipment, receptions, phone and communication costs.[97] However, these rules are not always easily enforceable as it was observed during the campaign of the former French President Nicolas Sarkozy in 2012. In this case, France's National Commission for Campaign Accounts and Political Financing estimated that Mr Sarkozy had to incorporate in his campaign expenses the cost of public meetings he had held in the province as part of his mandate of President, even if some of them were hold before he declared his candidacy. In July 2013, the French Constitutional Council rejected the 2012 presidential campaign accounts of Mr Sarkozy.[98] Consequently, his Party (U.M.P) shall reimburse 11 million euros to the State. This case highlights that despite the existence of excellent instruments against any kind of abuse, it remains difficult to do a clear distinction between the use of administrative resources for the campaign of a candidate and the use of these resources by the incumbents in their official capacities.

84. The Electoral Law of Luxembourg prohibits to give or to receive donations, gifts or promises between electoral contestants and voters (Article 95). The Law also prohibits to give or to receive donations as well as gifts or promises in order to obtain a specific vote or abstention (Article 96).

85. The Electoral Law of Monaco on national and municipal elections prohibits gifts and promises in the electoral context (Article 69). Misuse of administrative resources

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faveurs, d'emplois publics ou prives ou d'autres avantages particuliers, faits en vue d'influencer le vote d'un ou de plusieurs electeurs aura obtenu ou tente d'obtenir leur suffrage, soit directement, soit par l'entremise d'un tiers, quiconque, par les memes moyens, aura determine ou tente de determiner un ou plusieurs d'entre eux a s'abstenir, sera puni de deux ans d'emprisonnement et d'une amende de 15 000 euros. Seront punis des memes peines ceux qui auront agree ou sollicite les memes dons, liberalites ou promesses. Available at: http://www.legifrance.gouv.fr/; and http://www.legifrance.gouv.fr/telecharger pdf.do?cidTexte=LEGITEXT000006070239.

[94] *OSCE/ODIHR, Republic of France, Parliamentary Elections, 10 and 17 June 2012, Election Assessment Mission Final Report. Available at: www.osce.org/odihr/elections/93621.*

[95] *www.cnccfp.fr/presse/kit/cnccfp en.pdf.*

[96] *www.cnccfp.fr/docs/commission/cnccfp activite 2011.pdf.*

[97] *CNCCFP, 2011 Activity Report, pages 54-55. Available at: www.cnccfp.fr.*

[98] *French Republic, Constitutional Council, Decision of the Constitutional Council following an appeal from Mr Nicolas Sarkozy against the decision of 19 December 2012 of the National Commission for Campaigns Accounts and Political Financing (Decision n° 2013-156 PDR of 4th July 2013). Available at: www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-n-2013- 156-pdr-of-4th-iuly-2013.137967.html.*

during the electoral campaign was not brought to the attention of the OSCE/ODIHR Election Observation Mission.[99]

86. **e. Two European countries include provisions related to media coverage as a possible misuse of public funds.[100]**

87. In addition to **Georgia**,[101] the Electoral Code of Armenia also refers to this issue in its Article 22:

1. Candidates occupying political, discretionary, civil positions, as well as candidates occupying a position of state or community servant shall conduct election campaigns taking into account the following restrictions:

(...)

(3) coverage via mass media of activities of these candidates shall be prohibited, except for the cases prescribed by the Constitution, official visits and receptions, as well as activities carried out by them during natural disasters.

2. Where coverage of other activities of a candidate referred to in this Article is made, mass media exercising terrestrial broadcast transmission must consider this when making coverage of the activities of other candidates, in order to comply with the non-discriminatory principle of equality of coverage laid down by Article 19 of this Code.[102]

88. **f. In a number of states, there are no explicit provisions on the misuse of administrative resources during electoral processes but implicit rules, which may be intended at dealing with this issue.** This will be developed hereafter (para. 89-91 as well as chapter C).

89. The Elections Act of **Finland** does not cover explicitly the misuse of administrative resources during electoral processes but sanctions breaches of their official duties by members of electoral commissions:

Section 185 – Criminal responsibility of an election official

If a member of an election district committee, central election committee of a municipality, election committee or an electoral commission or an election assistant or any other person functioning as an election official as defined in this Act, neglects his or her duties, he or she is punished as if he or she had committed an offence in office.[103]

90. In practice, the OSCE/ODIHR did not recommend deploying an election-related activity for the last presidential election (22 January 2012) as "[a]ll interlocutors met by the OSCE/ODIHR NAM [Needs Assessment Mission] expressed a high level of confidence in all aspects of the electoral process." The remaining recommendations made in previous missions do not refer to the issue of misuse of administrative resources during electoral campaigns.[104]

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[99] *Council of Europe, Parliamentary Assembly, Observation of the elections to the National Council of Monaco (10 February 2013), Election observation report, (Doc. 13137, 27 February 2013). Available at: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19506&lang=en.*

[100] *In the Americas, this is the case of Bolivia, Ecuador, El Salvador, Honduras, Mexico, Paraguay and Peru.*

[101] *See para. 60 of the report.*

[102] *Electoral Code of Armenia adopted on 26 May 2011. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2011)029-e.*

[103] *Available at: www.finlex.fi/en/laki/kaannokset/1998/en19980714.pdf.*

[104] *OSCE/ODIHR, Republic of Finland, Presidential Election, 22 January 2012, Needs Assessment Mission Report, page 2 and conclusions on page 8.Available at: www.osce.org/odihr/elections/85410.*

91. Finally, the 2000 Act on Political Parties, Elections and Referendums of the **United Kingdom** regulates expenses when they are incurred for election purposes. Besides, the 2006 on Electoral Administration[105] includes rules on breach of official duty – as for **Finland** – that might include the issues at stake (Article 63). In practice, misuse of administrative resources during the electoral campaign, following the 6 May 2010 general election, was not brought to the attention of the OSCE/ODIHR Election Observation Mission.[106]

92. An additional issue is that only Georgia and Montenegro base their legal provisions on the principle of safeguard of public resources,[107] while most laws focus on electoral equity.

C. Judicial standards established by case-law

93. The overview of the existing legislation on misuse of administrative resources during electoral processes on the one hand, and the practice observed during elections on the other hand, show that the implementation of legal provisions in the field remains difficult in many countries. Practice too often presents a contradiction between incumbents' interests and fairness of the electoral process.

94. Up to now, the report has dealt with existing provisions on the use and misuse of administrative resources during electoral processes. It has not addressed in detail the Venice Commission member states that do not have specific legal provisions in electoral laws or other specific means against the misuse of administrative resources during electoral processes.[108]

95. However, such specific legal provisions can be developed in other pieces of legislation, such as general criminal or administrative legislation as well as anti-corruption or public service legislation. These provisions could be as effective as a narrower or specific legislation (such as an electoral legislation) when appropriately applied to both incumbents and civil servants. They could be even more effective in general legislation as they can underline the severity of such abuses.

96. In countries without provisions on misuse of administrative resources during electoral processes[109], constitutional courts or equivalent bodies interpreted the law through a corpus of decisions, delivering therefore a judicial interpretation on constitutional principles about equality in electoral processes. Such interpretation contributes chiefly to ensure the neutrality of government authorities in electoral processes.

97. In the European context, it should be referred to the following decisions of the European Court of Human Rights and of the Constitutional courts (or equivalent bodies) (by chronological order):

- European Court of Human Rights' case-law:

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[105] *Available at: www.leqislation.qov.uk/ukpqa/2006/22/pdfs/ukpqa 20060022 en.pdf.*

[106] *OSCE/ODIHR, United Kingdom of Great Britain and Northern Ireland, General Election, 6 May 2010, Final Report. Available at: www.osce.org/odihr/elections/69072.*

[107] *Like in the case of Argentina, Chile, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay, Dominican Republic, the United States and Venezuela.*

[108] *See para. 87-91 of the report.*

[109] *Austria, Croatia and Czech Republic (CDL-REF(2012)025rev). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2012)025rev-e.*

United Kingdom, case of Ahmed and others v. the United Kingdom, on the need of governmental neutrality during electoral campaigns in the United Kingdom[110];

Russian Federation, case of Republican Party of Russia v. Russia, on the dissolution of the Republican Party of Russia and illustrating the misuse of administrative resources[111];

Russian Federation, case Russian Communist Party and Others v. Russia, on media access, in the European Court of Human Rights, ruling of 19 June 2012[112]; and

Constitutional courts' case-law (or equivalent bodies):

France, on municipal servants' intervention in electoral campaign[113];

Armenia, on neutrality required from Armenian public servants standing for election[114];

Ireland, in the case McCrystal v. Minister for Children and Youth Affairs & ors, on an Irish referendum, which refers to the British Electoral Commission principle that every democratic exercise, such as elections or referendums, should be based on trust and participation, and must stay away from any undue influence[115];

Ukraine, in the case on Election of the President of Ukraine, the Constitutional Court highlights the importance to safeguard the voters' will to elect a candidate running for the presidency. The legislation bans the bodies of executive power and local self-governance, as well as their officials and officers from participating in electoral campaigns so as to avoid pressure on voters and ensure freedom of expression[116].

98. In the judicial practice of the **United States of America**, there are also relevant cases:

People v. Sperl:[117] in 1976, the Marshal for Los Angeles County put a vehicle at the disposal of a candidate, his staff and family. Mr Sperl was sentenced to prison; the execution of the sentence was suspended and he was placed on probation for a period of four years, on certain terms and conditions, one thereof being that he spent the first six months in the county jail and was fined $500.

People v. Battin[118]: in 1974, Battin was Supervisor of the First District of Orange County, while he decided to seek the Democratic Party's nomination for Lieutenant

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[110] *Decision ECH-1998-2-011. Available at: www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/ech/eng/ech-1998-2-011.*

[111] *Decision available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104495.*

[112] *Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111522.*

[113] *Decision FRA-2002-3-007. Available at: www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/fra/fra-2002-3-007?fn=documentframe.htm$f=templates$3.0.*

[114] *Decision ARM-2012-2-002. Available at: www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/arm/arm-2012-2002?f=templates$fn=documentframeset.htm$q=%5Bfield,GRP%3A%5Borderedprox,0%3ACCCOCND%5D%5D%20$x=server$3.0#LPHit1*

[115] *Decision IRL-2012-3-005, Available at: www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/47c2796248c9a70280257ad1005980df?Op enDocument.*

[116] *Decision of the Constitutional Court of Ukraine № 3-pn/2005 dated 24 March 2005. Available (in Ukrainian) at: www.ccu.gov.ua/uk/doccatalog/list?currDir=8847*

[117] *People v. Sperl. 54 Cal. App. 3d 640. Crim. No. 26259. Court of Appeals of California, Second Appellate District, Division Five. January 21, 1976. Available at: http://law.justia.com/cases/california/calapp3d/54/640.html.*

[118] *People v. Battin (1978) 77 Cal. App. 3d 635. Crim. No. 9051. Fourth Dist., Div. Two. Jan. 18, 1978. Available at: http://law.justia.com/cases/california/calapp3d/77/635.html.*

Governor of California. During the five months up to the time of the primary, he used his office, equipment and staff to promote his candidacy. Mr Battin was given three years' informal probation on the condition that he served six months in the county jail and paid a $3,500 fine plus penalty assessments.

Stanson v. Mott[119]: in June 1974 in California, voters approved a $250 million bond issue to provide funds for the future acquisition of park land and recreational and historical facilities by state and municipal authorities. One day before the election, plaintiff Sam Stanson filed a taxpayer suit, alleging that defendant William Penn Mott, Jr., Director of the California Department of Parks and Recreation (department), had authorised the department to spend more than $5,000 of public funds to promote the passage of the bond issue. Asserting the illegality of such use of public funds, the plaintiff sought a judgment that would require Mr Mott personally to repay the funds to the state treasury and any other appropriate relief. The Supreme Court unanimously found that the director had acted unlawfully, and stated that "...The selective use of public funds in electoral processes, of course, raises the specter of just such an improper distortion of the democratic electoral process."

99. In the **Latin American** context, there are also several examples that include decisions by the Colombian Supreme Court (which imposed limits to public servants to prevent influencing electoral campaigns)[120], as well as the Peruvian National Electoral Jury (by establishing restrictions to participation of State entities as soon as there is a call for elections)[121].

IV. Legitimate use or misuse of administrative resources during electoral processes: elements for an analysis

A. Assessing a situation of use or misuse of administrative resources during electoral processes

100. It appears legitimate, in accordance with the laws observed and the practice assessed in Part III of the report, to adopt legislation relating to the use of administrative resources during electoral processes as well as provisions prohibiting the misuse of such resources. It is also necessary to ensure continuity in implementing policies and political platforms that are established *before* the starting-point of the electoral process.

101. For instance, the Supreme Court of Elections of Mexico considered that the involvement of civil servants on non-working days to political campaigning events in support of a particular party, primary election candidate or election candidate, does not imply by itself the misuse of State funds.[122]

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[119] *Stanson v. Mott, 17 Cal.3d 206. L.A. No. 30567. Supreme Court of California. June 22, 1976. Available at: http://scocal.stanford.edu/opinion/stanson-v-mott-27987.*

[120] *Sentencia de la Corte Constitucional, Decision C1153-2005. Article 38. Available at : www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=18212.*

[121] *Jurado Nacional de Elecciones, Decision 136-2010-JNE. Available at: http://portal.jne.gob.pe/informacionlegal/Constitucin%20y%20Leyes1/Reglamento%20de%20proganda%20electoral.pdf*

[122] *Jurisprudence 14/2012, under the heading of «Acts Electioneering. The sole presence of public officials at non-working days at such acts is not is not restricted by law», derived from the appeals SUP-RAP-14/2009 and cumulative, SUP-RAP-258/2009 and SUP-RAP-75/2010. Gaceta de Jurisprudencia y Tesis en Materia Electoral Mexico City, number 10, 2012, pages 11-12. More*

102. Hence, in order to establish a clear distinction between use and misuse of administrative resources during electoral processes, the timeframe that established these policies will be the main criterion. There is a legitimate use of administrative resources during electoral processes by elected persons and senior civil servants when a political platform (and more precisely the events implementing this platform, such as inaugurations of public buildings, launching new public building programmes, increased salaries or pensions in the public sector, etc.) arises from a long-term established plan, i.e. established at the beginning of the legislature (or mandate) or at the latest at the beginning of the budgetary year. Moreover, the outcome of such a policy is not intended to be seen during electoral processes. The number of inaugurations of public buildings, for instance, should be on a similar level during electoral processes compared to other periods without elections. An electoral process is not the appropriate timeframe for establishing new programmes and actions with budgetary impact that were not planned before the campaign. Such programmes and actions can therefore be more easily qualified as misuse of intangible administrative resources.

103. The line – especially when the law is silent – between use and misuse of administrative resources during electoral processes concerns also human resources involved directly or indirectly in elections, insofar as their use would cause breach of the fairness commitment which should be the governing spirit of any electoral process. These resources are in particular the senior civil servants. These public officials are either politically appointed by political authorities (elected people or government) or issued by career from the Civil Service, i.e. issued from the non-political branch of the public administration. No matter their initial appointment (or promotion and position), these public officials should effectively, fairly and competently contribute in implementing policies with their knowledge and sound judgment.

104. Also, a distinction should be made whether these public officials are politically appointed or not. Then it has to be assessed whether they performed their duties in conformity with the law and impartially (i.e. in the public interest) or whether they performed them still in conformity with the law but also with loyalty and good faith vis-a-vis the public political authority which appointed them. Public officials should not perform their duties for purely political interests of the party(ies) in power. Moreover, public officials should not be subject to pressure and influence in the professional context. In order to draw a distinction between both categories, using legislation is not sufficient. There is also a need that those civil servants strive to develop and maintain high ethical standards in their work. Therefore, it is not only a question of the culture of political stakeholders but it is also a question of the professional standards of conduct of the civil servants or of a professional culture of public administration. Codes of good practice and ethical standards – particularly with regard to the issues of electoral administration and electoral disputes – should be identified and incorporated into readily available resources for public servants.

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details in the report of Mr Gonzalez Oropeza (CDL(2012)076). Available at: www.seatlax.gob.mx/JURIS/14_2012.htm. http://portal.te.gob.mx/colecciones/sentencias/html/SUP/2009/RAP/SUP-RAP-00014-2009.htm. www.te.gob.mx/Informacion_juridiccional/sesion_publica/ejecutoria/sentencias/SUP-RAP-0258-2009.pdf; and . www.te.gob.mx/Informacion_juridiccional/sesion_publica/ejecutoria/sentencias/SUP-RAP-0075-2010.pdf.

B. Government versus incumbent party, majority and opposition parties with or without seats in parliament

105. The legitimate activities of a government have to be distinguished from those of the ruling party, especially during electoral processes. Legal and ethical obligations have to be set up in order to distinguish usual governmental activities from ruling party activities during electoral processes. For measuring the balance in electoral processes, the governmental activities have to be compared with the opposition role in a democratic parliament.

106. It is therefore crucial to distinguish between the ruling party's (or coalition) internal work and preparations for reform policies on different societal matters, and the design and follow- up work of the reform programmes that the government is responsible for. For the latter, both elected persons and civil servants have their tasks and obligations and have to cooperate under certain legal and ethical principles (as proposed in the previous chapter A, above).

107. The legitimacy of the operating activities of the government may for example come under critical discussion or be seen as a mere abuse when special limited social support campaigns immediately linked to an electoral process are staged, e.g. with financial contributions, for certain specific groups of voters.

108. The issue of misuse of administrative resources also needs to be analysed from the perspective of the constitutional obligation of the state to protect the freedom of voters to form their opinion and consequently to protect and promote equality and neutrality in relation to the upcoming existence of new political parties that have not yet achieved representation in parliament and to the already established political parties. This is particularly relevant in the context of electoral processes. It can also have an impact on how legislation governs transparency of private financing of political parties and the individual interests behind the legal design of systems supporting public funding of political parties. The implementation of a specific rule should be based on the fact that the value to be protected is fairness in the elections. Such rule should gather the following characteristics: avoiding anything that could harm its efficiency, especially activities at state level; highlighting the role of the media; as well as adding provisions that impede the excessive private funding, in particular the funding coming from organised crime.

109. It is also important to respect the role of the opposition in a democratic parliament[123]. Opposition parties clearly do not have the same possibilities to use the competent services of the non-political public branch of government as the parties in power, including among the local and regional administrations. Opposition can be subject to discrimination in terms, *inter alia,* of premises' facilities, staff and communication sources. However, it is possible to introduce some balancing structures within the constitutional system. The opposition parties in parliament may be given the equivalent resources through participation in committees and access to investigative resources that parliament makes available for individual members of parliament or political parties represented in parliament. The internal rules of parliaments should provide for such

[123] *Report on the role of the opposition in a democratic parliament (CDL-AD(2010)025), see especially p. 116 – 124. Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)025-e.*

guarantees as well as for an equal access to facilities proper to parliaments as well as to local and regional administrations.

110. The objective of laws providing measures tackling the misuse of administrative resources is in principle to secure a free and equal vote. However, the risk of too drastic provisions is that they may conflict with other principles or be unworkable or counter-productive in practice, or may deter some people from seeking public office altogether. Electoral laws and elections-related texts should therefore seek to strike a balance. Such balance can be reached by providing enough safeguards to persons holding political offices against the risk of being prosecuted after losing elections. Such laws should also ensure continuity and efficiency of on-going policies even during electoral periods while providing opposition parties – including those outside the parliament – with sufficient resources to carry out their electoral campaigns.

111. The report, based on the comparative analysis of legislation and practice developed above, will suggest preliminary recommendations in Part IV, before drawing guidelines (Part V).

V. Towards Recommendations

A. Self-regulation – A first step

112. The use of standards of ethical conduct could be looked upon as a first important step against misuse of political power. In this respect, political parties can informally agree – i.e. without going through legal provisions – on charts of ethics or agreements related to electoral processes including concerning the misuse of administrative resources. According to the principles of transparency, such agreements should be publicly discussed so that citizens can also discuss the issue and hold back possible sanctions agreed by the convention in case of breach of the assumed commitments. If such agreements are not respected or if abuses are observed in practice, this has to be reported, including in the media. Such self-regulation models are widely applied in the Scandinavian countries. They could be defined as belonging to a concept of consensual approach. The parties may organise themselves very freely[124].

113. The alternative model, which is less developed, is a strategy where legislation plays an important role in regulating the political parties.

B. Legislation sanctioning bribery and corruption

114. In its worst form, the misuse of administrative resources in electoral processes (where services and favours are exchanged) is a crime and a very serious form of corruption in a country. Satisfactory criminal laws against misuse of administrative resources are in force in most countries, contributing to prevent issues such as embezzlement and breach of trust. These criminal laws can or should be directed against the most serious forms of misuse of administrative resources during electoral processes. The huge problem of providing an effective enforcement or implementation remains in general. Costs in enforcement and pervasive behaviours, clearly unethical but perhaps legal, represent additional challenges in this respect.

115. The integrity of all relevant stakeholders, *inter alia* police, prosecutors, courts, judges, as well as auditors, is clearly vital to tackle the misuse of administrative resources.

[124] *See also para. 104 of the report.*

Media, under the principle of freedom of information, can also play an important role in countering abuses and support the effective administration of justice in this field. It seems fruitful to build similar perspectives on abuses during electoral processes as on corruption in general.

C. Other legislative measures

116. The basic instrument against abuse is the law and its enforcement. This includes not only criminal law but also legislation in general, as it is the case in many European countries. In order to fully understand the implications of these provisions, it also seems necessary to be informed about the overall context where these provisions are inserted into the legislation as a whole. Otherwise it is not possible to thoroughly evaluate the effects of these provisions. This question requires to take into account several areas of law.

117. First, it is crucial to emphasise the constitutional provisions in this respect in order to determine how the constitution deals with the separation of powers, the rule of law, the supervision of the government by parliament and parliamentary committees, the constitutional court (or equivalent body), electoral courts or commissions, the Ombudsman and the Auditor General. Such bodies and institutions should therefore perform their duties with regard to the principle of equality of all citizens before the Law. Furthermore, in their decisions and actions, they should ensure objectivity and impartiality. Such principles should clearly apply to electoral processes as a whole as well as to the supervision of such processes. Indeed, the equal access for political parties to public resources and to media should prevail. Moreover, the State should be constantly neutral throughout the electoral process.[125]

118. Abuses of administrative resources in electoral processes that originate in or that could be seen as typical general crimes should preferably be left to the general criminal code and not be regulated in special electoral acts. Different kinds of unauthorised actions before elections (improper reward for voting, etc.) should be seen as severe general crimes in the same way as bribery and corruption, severe misconduct or malpractice by public officials and economic crime, such as embezzlement of administrative resources and breach of trust. Political parties, candidates, media and public officials that incur misuse of administrative resources should be subject to sanction. Ensuring the implementation of standards in the various levels of government within the federal systems shall also be an important aspect to be contemplated by legislation.

119. In public law, it may be important to set up provisions establishing clear distinctions between politically active officials and civil servants and to determine how tasks and responsibilities should be distributed between them. Furthermore, well-developed, detailed and transparent legal regulations on the state budget and its allocation and proper use are needed. Otherwise, internal and external auditing controls will not be an effective countermeasure against abuse. It is also important to decide on detailed provisions on certain budgetary matters such as the use of official premises,

[125] *In Latin America, Bolivia, El Salvador, Mexico and Uruguay are examples of countries with specific constitutional provisions against misuse of administrative resources for political purposes. For instance in Mexico, the Electoral Court of the Federal Judiciary is the highest authority in the application of constitutional principles in electoral matters.*

communications and transport and other technical resources, complemented by the adoption of values and good practices in the area.

120. Public officials who breach the rules governing the conditions of the civil service must be sanctioned either for crimes or for breaches of their duties with disciplinary sanctions (including dismissal from office). Different provisions are appropriate for political positions (ministers, political staff of the government institutions, staff of parliament factions, etc.)[126]. In this area, there is also a need for an independent review, and ultimately decisions pronounced by the courts. In addition to the criminal charges and the considerations expressed earlier in this report, the application of administrative sanctions seems to be a convenient solution compared to political impeachments when misuse of administrative resources is conducted by public officials.

D. The correct and effective implementation of legislation

121. To effectively implement the legislation, a mutual understanding and a sense of responsibility is required among all political stakeholders. There is a need for a shared understanding and consensus on the importance of constitutional values. There is a need, for example, to share a common view on the role of the opposition within society and an explicit reference to good practice.

122. If there is such a consensus, it opens up for the possibility to exercise a more effective parliamentary supervision in parliamentary standing committees bearing responsibility for constitutional and related issues such as electoral matters. Similarly, in presidential regimes, the opposition finds more incentives to participate through institutional channels where certainty prevails with regard to the interpretation and implementation of laws.

123. An independent national audit office reporting to the parliament can also play an important role by supervising spending and financial management of the Government. It can also investigate and take action against financial irregularities within the Government.

124. In the end, it is of course crucial that constitutional courts or equivalent bodies, electoral courts or bodies, prosecutors and ordinary courts take the ultimate responsibility for the administration of justice in matters of abuse of administrative resources during electoral processes.

125. It is also important that the functions mentioned here are performed with transparency and respect the principle of freedom of information.

E. The requirement for transparency and freedom of information

126. The fundamental principles of transparency – in electoral processes – and of freedom of information are *sine qua non* pre-conditions for preventing misuse of administrative resources. The statutory system and its implementation through various institutions must also be subject to public reporting and discussion. It is essential that any shortcomings and errors can be debated openly in the media and in public. Behaviours of ministers, elected persons, civil servants and public officials as a whole, as well

[126] *See for instance the Venice Commission Opinion on the draft Law on conflict of interest in Moldova (CDLAD(2007)044). Available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)044-e.*

as judges and auditors, are therefore liable before the citizens, with possibly further consequences like investigations and political, civil or criminal actions against abusers. In addition to these liabilities, in case where the interference of the state in the elections is so strong that it jeopardises the fairness between the different political contenders and the liberty of the citizens, the ultimate sanction is the cancellation of the election as long as the own legal tradition and the specificities of electoral legislation provide for this ultimate option.

F. Public grants to political parties[127]

127. One recurrent problem is the risk of mismatch of possibilities, that is to say an inequality between the government party(-ies) and the opposition party(-ies). Such imbalances can be somehow counteracted by a system of public financing of parties' activities. This system must be established under a thorough legislation on public grants to political parties based on the principle of equality. On another related issue, the report also highlights the need to provide proper conditions for parties without representation in parliament (see para. 13). This report provided a number of examples on public grants to political parties. However, it does not cover in depth the topic.[128]

128. In the context of a system of financial grants to political parties, it may be envisaged to establish some financial compensation so that the opposition parties would have an additional contribution in the course of a legislature, compared to the ruling parties. This is intended to compensate them up to a certain extent for the advantage in resources the party(-ies) in power get by having access to the human resources of the government as well as local and regional administrations.

129. In such context, another important element can also be the establishment of a public system of financing. This system could permit printing of ballot papers and provide financial support, e.g. free or subsidised facilities and office services.

130. Legislation could also provide for members of parliament and ministers the right to free domestic travels at public expense, and this even during electoral campaigns.

131. Finally, a system of public grants to political parties could provide a good starting point for a certain public inspection and auditing of the economic conditions of the parties. There is here an opportunity to implement different protective mechanisms against misuse of administrative resources for electoral processes. Such a grant system based on the principle of equality, ultimately reviewed by courts or specific bodies, may fulfil legitimate aims within a democratic society, like in Mexico, where rules are exhaustive and judicial review is guaranteed in every step of the public financing.

132. The report suggests considering the coming guidelines, based on the analysis of the phenomenon of the misuse of administrative resources during electoral processes, and aimed at improving the legal framework and the relevant practice of the member states in this field.

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[127] *See the Venice Commission – OSCE/ODIHR Guidelines on political party regulation, para. 176-192.*

[128] *Parts III and IV of the report.*

VI. Guidelines

I. Principles

1. The principles of transparency and of freedom of information are *sine qua non* preconditions for preventing the misuse of administrative resources.

2. The principle of equality of opportunity is also a key principle in order to ensure fair electoral processes. This entails two prerequisites:

- Firstly, a neutral and ethical attitude should be adopted by state authorities – including public and semi-public bodies -, in particular with regard to: the pre-electoral period, including through the candidates' registration process; the coverage by the media, in particular by publicly owned media; and the funding of political parties and electoral campaigns, in particular public funding;

- Secondly, incumbents should ensure non-discrimination towards their challengers by providing equal access to administrative resources.

3. The principle of neutrality should apply to civil servants while performing their professional duties as well as to public and semi-public bodies.

II. Legal framework for implementing the principles

1. The electoral and criminal laws as well as the laws on funding of political parties and electoral campaigns are the core texts which should provide measures for tackling the misuse of administrative resources during electoral processes.

2. Such measures must be proportionate, clear and foreseeable for all contestants.

3. For this purpose, these provisions have to distinguish activities inherent to the state's responsibility from those of political parties and candidates, notably incumbents.

III. Measures for implementing in good faith principles and provisions aimed at tackling the misuse of administrative resources[129]

1. Charters of ethics or agreements could be appropriate steps to tackle the misuse of administrative resources during electoral processes. In this respect, political parties would agree on such charters or agreements. Publicity and the thorough dissemination of these instruments are crucial to increase their effectiveness.

2. During electoral processes, officials in public positions who are standing for election should not use their opportunities as officials when they campaign and act as candidates.

3. An **independent national audit office** reporting to the Parliament plays an important role by supervising the use of administrative resources, including the public funding of political parties and electoral campaigns. An **independent body**, established according to the law, could be in charge of tackling all issues related to the misuse of administrative resources, including non-financial ones, as long as it is provided with enough resources and adequate rules to fulfil this task.

4. Competent bodies in charge of tackling the misuse of administrative resources should use preventive measures to stop unlawful activities as soon as possible before the elections.

[129] *Beyond the principles and the legal framework, political willingness remains a key factor for effectively implementing measures aimed at tackling the misuse of administrative resources.*

5. Political parties, candidates, public media and public officials who misuse administrative resources should be subject to **sanctions**.

6. In this respect, an **independent judiciary** is a *sine qua non* condition for sanctioning the misuse of administrative resources.

7. It is therefore crucial that **constitutional courts, electoral courts, or equivalent bodies, as well as prosecutors and ordinary courts** take the ultimate responsibility for the administration of justice dealing with the misuse of administrative resources.

8. Ensuring the **integrity** of the **police, prosecutors, judges** as well as **auditors** of political forces is of crucial importance. Concrete legislative measures should address the issue of integrity so as to assure the neutrality of these persons vis-a-vis the entire electoral processes.

Compilation of Venice Commission opinions and reports concerning courts and judges[1]

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BUDGETARY AND STAFF AUTONOMY
4. COUNCIL OF JUSTICE
- 4.1 FUNCTIONS, REMIT AND DUTIES
- 4.2 COMPOSITION OF THE JUDICIAL COUNCIL

[1] *This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 101th Plenary Session (12-13 December 2014)*

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Introduction

This document is a compilation of extracts taken from opinions and reports/ studies adopted by the Venice Commission on issues concerning the judicial system (courts, judges and council of justice). The focus of this compilation is on the status of judges, on the internal organisation of the judiciary, its relations with other branches of the Government, guarantees of independence and accountability of the judges. This compilation does not concern constitutional justice and organisation of prosecution system (these topics are presented in separate compilations), as well as other fair trials guarantees than independence and impartiality of the courts.

The compilation is intended to serve as a source of reference for drafters of constitutions and of legislations on the judiciary, researchers, as well as the Venice Commission's members, who are requested to prepare comments and opinions concerning legislation dealing with such issues. When referring to elements contained in this draft compilation, please cite the original document but not the compilation as such.

The compilation is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the opinions from which extracts are cited in the compilation relate to individual countries and take into account the specific situation there. The citations will therefore not necessarily be applicable in other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

Venice Commission reports and studies quoted in this compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Each citation in the compilation has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to shorten the text, most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this draft compilation (venice@coe.int).

1. LEVEL OF REGULATION – CONSTITUIONAL AND LEGISLATIVE LEVELS

1.1. PROVISIONS ON APPOINTMENTS, DISMISSALS AND THE STATUS OF THE JUDGES

«The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts.»

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §22

«It is [...] indispensable to provide [...] a constitutional right to have access to independent and impartial tribunals, in accordance with Article 6 of the European Convention of Human Rights.»

CDL-INF(1996)006, Opinion on the draft Constitution of Ukraine, p.15

"Under Venice Commission standards, there is no requirement as such that the procedure for appointments to the judiciary be described in detail in the Constitution itself. Moreover, in view of the relative briefness of the Bill, it does not seem unnatural that no specific provision for this is made. [...]"

CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, §135

"[...] [I]n the majority of member states, the criteria for the recruitment or the promotion of judges are established by laws or regulations. The only tacit or explicit exceptions to this are those judicial systems where a discretionary power of selection exists through the election by the people (legislative power) or an independent authority, including a judicial one, which can sometimes have political characteristics."

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §12

"Since the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment in [...] detail in the Constitution. [...]"

CDL-AD(2008)010, Opinion on the Constitution of Finland, §112

"For the [...] reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be set out, as well as the right of appeal of the judge concerned."

CDL-AD(2008)010, Opinion on the Constitution of Finland, §113

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §105

"[...] [I]t is essential that this constitutional law should provide detailed and precise grounds for termination of office of judges and a detailed procedure to be followed, including the possibility for the judges whose mandate is terminated to seek review of this decision by an independent body. [...]"

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §11

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §105

"All the procedure of dismissal and cessation of office would now be contained in the law and would no longer be set out in the Constitution. It would have been preferable nevertheless to keep the basic elements of the dismissal of judges within the constitutional level, although the legislation should develop the detailed regulation in this respect. [...]"

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §10

1.2. **PROVISIONS ON THE COURTS AND THEIR STRUCTURE**

"The establishment and jurisdiction of courts, as well as the procedure before the courts, shall be specified by law."

CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, p.44 "It is important that the different types of court are provided for at Constitutional level."

CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §102

"Article 125 will be amended to provide that the network of courts and general jurisdiction is to be determined by law, and that the courts are to be established, reorganised and abolished through the law. The intention behind this provision is to prevent such changes being made by means of a decree. Parliament will be empowered (see Article 85) with the right to determine the structure of the court system (called 'network' in the Amendments), to establish, to reorganise and to abolish the courts upon the motion of the President of Ukraine. This solution seems to be reasonable and involves the co-operation between various organs. The Venice Commission welcomes that in the future the network will be defined by law."

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §15

"It is a fact that alternative machineries for resolving conflicts are developing in many European states. The relationship between the ordinary courts and these alternative institutions certainly needs to be analysed and even regulated through legal norms. The Constitution is perhaps not the appropriate place to settle such problems, beyond a mere reference to the existence of the problem as such.

It is not necessarily correct that 'the Constitution must define the individual elements of the court organisational structure'. [...] Only the general framework

of the organisation of the court system deserves to be reflected in the Constitution itself."

CDL-INF(1996)002, Opinion on the regulatory concept of the Constitution of the Republic of Hungary, p. 32

1.3. PROVISIONS ON THE JUDICIAL COUNCIL

«An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its [...] powers and autonomy."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §48

"Given their crucial role in appointing judges the composition of the Supreme Council [of the Judiciary], as well as their appointment or election, should be defined in the Constitution."

CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ ODIHR, §102

See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §24

"The single body that has been specifically created in BiH to consolidate and strengthen the independence of the judiciary is the High Judicial and Prosecutorial Council (HJPC). [...] The corresponding Law on the HJPC was then adopted by the Parliamentary Assembly of BiH pursuant to Article IV 4. a) of the Constitution of BiH. This Law is currently being revised. The Venice Commission recommends that in due course, the HJPC be provided with an explicit constitutional basis."

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §84

"The lawmaker should consider including in the Constitution provisions guaranteeing independence and impartiality of individual members of the [Judicial Council] and of the [Judicial Council] as a whole. The removal of a member before the expiration of his mandate should be possible only for the reasons specified in the law."

CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §77

"The Montenegrin authorities have decided to propose two separate draft laws in the area of the judiciary: the Draft law on courts and the law on rights and duties of judges and on the High Judicial Council. To adopt two separate laws on this field seems, however, not to be the best solution, as both issues are closely connected. [...]

[...] '[A] single law would make the regulations more coherent and understandable'."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§13, 14

2. JUDGES

2.1. INDEPENDENCE AND IMPARTIALITY – DEFINITION

"Independence means independence from the executive and the parties. Courts should also be independent from the legislature except in so far as they are bound to

apply laws emanating from the legislative body. While 'independence' primarily is a question of absence or presence of organic links between the judiciary and the other poles of public power, 'impartiality' is something normally decided in light of the circumstances of a particular case, i.e. a *prima facie* independent court may act partially. However, in light of the case-law of the ECtHR lack of guarantees of independence may easily create an appearance of lack of impartiality as well. Thus in the present context, as in others, it may be difficult to make a clear distinction between the requirements of independence and impartiality. According to the ECtHR, relevant in the assessment of independence (and impartiality) of a tribunal are 'the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'."

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §34

"[...] [A] problem often discussed in Ukraine was that of 'selective justice', whereby – potentially well founded – charges [of corruption] would be brought only against some [judges], possibly including those who would be seen as being close to opposition or in conflict with the prosecution service. Such allegations should be taken seriously but they are not an issue of constitutional legislation and have to be addressed in its implementation."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §26

2.2. APPOINTMENT OF JUDGES

2.2.1. Qualifications, eligibility and quotas

"The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §27

"In a number of countries judges are appointed based on the results of a competitive examination, in others they are selected from the experienced practitioners. *A priori,* both categories of selection can raise questions. It could be argued whether the examination should be the sole ground for appointment or regard should be given to the candidate's personal qualities and experience as well. As for the selection of judges from a pool of experienced practitioners, it could raise concerns as regards to the objectivity of the selection procedure."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §36

"The draft Law [...] sets out general requirements that persons wishing to be appointed as judges or prosecutors need to satisfy, as well as requirements for the appointments to the different courts and prosecutor's offices. General requirements include citizenship of BiH, a good medical record, professional competence, the bar exam and the absence of any criminal proceedings. These appear to be appropriate and in line with European standards."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §73

"Article 127 proposes to require newly appointed judges to be 30 years old as against the current 25 and to have five years rather than three years' experience. These provisions seem to be reasonable. [...]"

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §26

"[...] While it is usually a fundamental principle that a country cannot have foreign nationals serving as judges, this is one of the areas where the specificities of a very small country such as Monaco need to be taken into consideration: it is, even today, not possible to recruit only Monegasque nationals to all judges' positions, as there are not enough qualified candidates. [...]"

CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, §86

"The opening of the profession of judge for candidates from outside the judicial system (e.g. lawyers in governmental service and in private practice in fields of work other than mainly court litigation) is to be welcomed."

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §49

"Provisions on the appointment of judges establish a closed judicial career with strictly defined requirements of judicial experience, the positions of Supreme Court judges being the only exception. This is not a self-evident choice, and arguments can be presented for facilitating the entry from outside the judiciary into at least the Commercial Court and the Administrative Court, perhaps even the High Courts and the Appellate Court."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §53

«[...] [T]he composition of both the Supreme Court and the Constitutional Court should include judges with particular expertise in human rights, especially [...] where a core body of case-law on such issues is being established."

CDL(1999)078, Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina, §32

"The list of grounds for which discrimination [in respect of judicial appointments] is prohibited does not include sexual orientation, which should be added. On the other hand, the (absence) of the knowledge of language can be a valid reason to discriminate. A command of the state language is a legitimate requirement for appointment as a judge. The term 'or other features' may also be too wide: Sufficient legal qualifications, for example, are of course necessary for appointment."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §38

"[...] Article 8 sets out the qualifications of trainees. Among the qualities required of a trainee judge or prosecutor is the following [...]: 'Not to have physical or mental health problems or disabilities which will prevent to perform the profession of judgeship [...] throughout the country, or not to have handicaps such as unusual difficulties for speaking or controlling movement of organs that may be regarded as odd by other people. '

This provision is far too broad and would not be regarded as generally acceptable according to European standards in its approach to how to deal with persons under a physical or mental disability. The test of something appearing odd to other people seems an inappropriate one."

CDL-AD(2011)004, Opinion on *the Draft Law on Judges and Prosecutors of Turkey, §31*

" [...] In order to ensure the high quality and diversity of candidates, mandatory written exams should be introduced at the entry level; a national pool of vacancies should be established rather than having each vacancy published separately, as this would also improve the mobility of the judiciary across the country."

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §91

"The criteria set out in some detail the ethical qualities required of a judge. These include honesty, conscientiousness, equity, dignity, persistence and the setting of good example. Under the latter, such matters as refraining from any indecent act, refraining from any action causing suspicion, raising doubts, weakening confidence, or in any other way undermining confidence in the court, refraining from hate speech, indecent or blunt behaviour, impolite treatment, expressing partiality or intolerance, using vulgar expressions, wearing indecent clothing and other improper behaviour are referred to.

These factors are to be evaluated on the basis of the results of interviews, and other methods such as carrying out of tests and other psychosocial techniques. They may also be evaluated on the basis of getting the opinions of persons the candidates have worked with, such as judges or members of the bar. This may be very difficult to evaluate in practice."

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§30-31

"Draft Article 35(6) obliges the candidates for judge's office to make a property statement to the High Council of Justice and to authorise the latter to take the data in the statement into account when deciding on appointment. First, the statement of property by a candidate is not relevant at this stage, since only an increase of property during the mandate of the judge should trigger further investigation into possible corruption. It might also raise the issue of discrimination on the basis of the social, i.e. property status. In this respect, special attention should be paid to draft Art. 35(9) which states that during the competition, equality for candidates for judges shall be ensured irrespective, among others, of their social status.

Furthermore, the possibility of the 'structural unit' of the High Council of Justice to collect information on the financial status of the candidates (draft Art. 351) is also problematic for the same reasons and might jeopardise the right of every citizen to hold any public office protected by the Article 29 of the Georgian Constitution.

Second, although the consent of the candidate is necessary for that the 'structural unit' of the High Council of Justice has access to his/her personal details, in practice, it seems not to be possible for a candidate to refuse this consent."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §§51, 52 and 56

2.2.2. Incompatibility with other occupations and activities

"The individual freedom of judges is an item for permanent discussions. The Concept seems to set high standards when it states that 'judges ... may not perform political activities, may not be party members ...'. Based on past experience, it is easy to understand the concern expressed. It should be added that in some other European states the private life of judges is not restricted in such a way."

CDL(1995)73rev, Opinion *on the regulatory concept of the Constitution of the Republic of Hungary, §10*

"[Judges] may not be members of political parties or participate in political activities."

CDL-AD(2005)003, Joint Opinion on a Proposal for a Constitutional Law on the Changes and Amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, §104

"Moreover, judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §62

"Judges at present may not engage in any other occupation or remunerative activities except for 'pedagogical activities'. To that is now to be added 'scientific activities', which is positive [...].

On a strict reading this provision might prevent the appointment of judges to public inquiries or commissions representing the state abroad, membership of charitable institutions or the like. Such an interpretation would seem unduly restrictive."

CDL-AD(2005)005, Opinion on Draft Constitutional Amendments Relating to the Reform of the Judiciary in Georgia, §§6-7

"[...] [A] judge should first resign before being able to contest political office, because if a judge is a candidate and fails to be elected, he or she is nonetheless identified with a political tendency to the detriment of judicial independence."

CDL-AD(2008)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan, §45

"Article 89.3 of the draft Law provides that judges [...] may not be members of any organisation that discriminates on various grounds, including sex and sexual orientation. There are various churches and religions which do so discriminate and it is perhaps not intended to prevent judges [...] being adherents of or practising such religions.

Article 90.3 of the draft Law would prohibit the judge [...] from membership of any management or supervisory board of the public or private company or any other legal entity. This seems very broad and would prohibit membership of any charitable or non-profit organisation which had legal personality, possibly including even professional organisations.

Article 92 of the draft Law requires a judge [...] to seek the opinion of the [High Judicial and Prosecutorial Council] on whether activities he or she intends to undertake are in conflict with his or her duties under the law. Presumably this should be confined to cases where the judge [...] has reason to have at least a doubt about the issue."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§115 and 117-118

"[...] The drafters [of the constitutional law on disciplinary responsibility of the judges] may also consider imposing a duty on the judge to disclose any paid work."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the *disciplinary responsibility of judges in the Kyrgyz Republic, §33*

"Article 91 enounces that 'upon request of the president of the court or the judge, the Judicial Council shall give opinion about whether certain activities are incompatible with discharging duties of judicial office'. *A reference to Article 123 of the Constitution should be added, to make it clear that incompatibility has been exhaustively regulated at constitutional level."*

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §63

"The situation with regard to remuneration seems to be more complicated. The draft Law should provide general restrictions on the type of remunerated work that is incompatible with a judge's or prosecutor's position. Any offer of remunerated work that may lead to or appear to lead to improper influence, must be declined. However, receiving remuneration should not systematically be linked to disciplinary misconduct. For instance, where a litigant is a student at or involved in work with a university or research institution at which the judge or prosecutor is engaged in academic work, it would be unreasonable to demand from the judge or prosecutor to abandon the academic work altogether. However, this may (and in some cases must) lead to self-recusal and/or a declaration of conflict of interest."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §97

2.2.3. Appointing bodies and appointment procedure[2]

2.2.3.1. Multitude of systems

"Choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies; where often concerns related to the independence and political impartiality of the judiciary persist. Political involvement in the appointment procedure is endangering the neutrality of the judiciary in these states, while in others, in particular those with democratically proved judicial systems, such methods of appointment are regarded as traditional and effective.

International standards in this respect are more in favour of the extensive depolitisation of the process. However no single non-political 'model' of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.

In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

[2] *See also the Section on Councils of Justice*

New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.

In Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the types of judges to be appointed.

Notwithstanding their particularities appointment rules can be grouped under two main categories.

In elective systems, judges are directly elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament [...]. This system is sometimes seen as providing greater democratic legitimacy, but it may also lead to involving judges in the political campaign and to the politisation of the process.

Appointments of ordinary judges [in contrast to constitutional judges] are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

In the direct appointment system the appointing body can be the Head of State [...].

In assessing this traditional method, a distinction needs to be made between parliamentary systems where the president (or monarch) has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. As long as the President is bound by a proposal made by an independent judicial council [...] the appointment by the President does not appear to be problematic.

In some countries judges are appointed by the government [...]. There may be a mixture of appointment by the Head of State and appointment by the Government. [...] As pointed out above, this method may function in a system of settled judicial traditions but its introduction in new democracies would clearly raise concern.

Another option is direct appointment (not only a proposal) made by a judicial council [...]. To the extent that the independence or autonomy of the judicial council is ensured, the direct appointment of judges by the judicial council is clearly a valid model."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§2-3, 59 and 12-17

2.2.3.2. Appointment by political bodies (Parliament or President); popular elections

"[...] [T]he principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) [...] requires that every state body has to receive its powers – even if indirectly – from the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

[...] [The appointment of judges by the Parliament is] a method for constituting the judiciary which is highly democratic but [...] the balance might be tilted much too far

towards the legislative power. This is not without its risks from the point of view of judicial independence, *inter alia* since judicial appointments may over time be more likely than otherwise to become a subject of party politics.

The parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in political bargaining in the parliament in which every member of parliament coming from one district or another will want to have his or her own judge. The right of appointment ought to remain linked with the head of state. Of course, the president also represents a given political tendency but in most cases he/she will demonstrate greater political reserve and neutrality. It therefore seems that entrusting the head of state with the power to nominate judges is a solution that depoliticizes the entire process of nominating a judge to a much greater degree.

[The appointment of judges by the Parliament is] acceptable by European standards, there may be reason to reconsider the possibility of entrusting the President as the appointment authority or by arranging the process of judicial appointments so as to go by submission from the Council of Justice to the President of the Republic (who also is to represent all the people) and from the President [of the Parliament]."

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§13, and 21-23

"[...] [I]t is in any case ill advised that the President should participate in the nomination of judges."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.2

"A *priori,* the Venice Commission has no objection against appointment of judges by the Head of State when the latter is bound by a proposal of the judicial council and acts in a 'ceremonial' way, only formalising the decision taken by the judicial council in substance. In such a setting, a situation where the President refuses to ratify a decision of the judicial council would be critical because it would de facto give the President a veto against decisions of the judicial council. In order to ensure that the President indeed only has a ceremonial role, the Constitution could provide that proposals by the judicial council would enter into force directly, without the intervention of the President if the President does not enact them within a given period of time. Of course, direct appointment of judges by the judicial council avoids such complex safeguards."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §16

See also CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland, §137

"[...] There would seem to be no common opinion yet about the most appropriate procedure. For the legitimacy of the administration of justice a certain involvement of democratically elected bodies like the Diet may be desirable. However, the Prince Regnant is not democratically elected. His involvement in the nomination procedure, other than in a merely formal way, is problematic, especially if this involvement is of a decisive character.

The proposed first paragraph of Article 96 provides that no candidate can be recommended to the Diet for election without the consent of the Prince Regnant. His far-reaching involvement in the election procedure could amount to undue influence and could give rise to doubt about the objective independence and impartiality of the elected

judge. [...] Therefore, the proposed Article 96 would not sufficiently ensure respect for the guarantees laid down in Article 6 of the European Convention on Human Rights and could therefore create problems with respect to Liechtenstein's obligation under Article 1 of that Convention. This situation is not adequately remedied by the provision in the second paragraph of Article 96 that, if a proposed candidate is not approved by the Diet, the choice between the proposed candidate and any other candidate would be made by referendum, since a choice by the people would also not guarantee the impartiality of the elected candidate. [...]"

CDL-AD(2002)032, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, §§29-30

"According to Article 117, justices of the peace and judges of the courts are appointed by the Government, not the Grand Duke. Members of the Superior Court of Justice and presidents and vice-presidents of the district courts are appointed by the Government on nominations from the Superior Court of Justice. In several other parliamentary monarchies, the power to appoint judges appertains to the Crown, which exercises it under ministerial responsibility. However, it is a matter of political choice. Most States have a higher judicial council which nominates judges, who are subsequently appointed by the Head of State. Furthermore, the 'Commentaire' proposes setting up such a body [...]. Whichever body is formally responsible for appointment (Grand Duke or Government), the necessary guarantees on judicial independence must be provided."

CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg, §114

"As regards the joint power of the President and the Parliament to form the whole judicial corpus, and in particular the election of all judges of local courts (district, city, regional, military and arbitrage) upon the approval of each nominee by the [Parliament], the Commission is of the view that this politicizes the process of nominating judges too strongly. [...]"

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §10

"[...] [In] designating the Parliament as a body entrusted with the task of electing and re-electing judges, the proposed amendments do not provide guarantees that the choices will not be politically biased. Such provision is therefore contrary to the principles of a free and democratic government and to the ECHR."

CDL-AD(2003)019, Opinion on three Draft Laws Proposing Amendments to the Constitution of Ukraine, §40

"[...] [T]he Draft Law grants totally free discretionary power to the President of Armenia for appointment or rejection of the person (judge) elected by the Council of Justice. The President is not obliged to give reasons for his decision; the only consequence of rejection of the proposal of the Council of Justice is restarting the election process.

The Venice Commission recognised that 'discretionary power is necessary to perform a range of governmental tasks in modern, complex societies'. However, 'such power should not be exercised in a way that is arbitrary. Such exercise of power permits substantively unfair, unreasonable, irrational or oppressive decisions which are inconsistent with the notion of rule of law'. Discretionary power granted to the President of Armenia can lead to conflict between the President and the Council of Justice, what may not only cause difficulties in proper administration of courts but it can

harm citizens' trust in the independence of the Judiciary. Rethinking of the power of the President (obligation to motivate rejection, limitation of his/her right to reject the elected person on certain reasons, e.g. irregularities in election process, or election of more than one candidate and obligation of the President to appoint one of them) may reduce either the undesirable opportunities mentioned above or the danger of politicization of the election/appointment process."

CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §§34, 35

"There is a proposal to introduce elected justices of the peace. It is not clear what is intended. There is no problem with introducing lay judges, but this should not be done through popular elections. Judges would have to campaign for their election or – even worse – political parties would do that for them. This would endanger the impartiality of the judges who might later feel obliged to be 'grateful' to the political party, which supported their election. Such a system should not be introduced in Ukraine, in a context where the independence of the judiciary is essential in combatting corruption."

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §47

2.2.3.3. Involvement of an expert body (Judicial Council) in the appointment

"The mere existence of a high judicial council cannot automatically exclude political considerations in the appointment process.

[...] The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment [...] of judges [...]."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§23 and 25

"[...] It would be desirable that an expert body like an independent judicial council could give an opinion on the suitability or qualification of candidates for the office of judge."

CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §30

"[...] The main role in judicial appointments should [...] be given to an objective body such as the High Judicial Council provided [...] in the Constitution. It should be understood that proposals from this body may be rejected only exceptionally. From an elected parliament such self-restraint cannot be expected and it seems therefore preferable to consider such appointments as a presidential prerogative. Candidatures should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. [...]"

CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, §17

"[...] Candidatures [for judicial appointments] should be prepared by the High Judicial Council, and the President would not be allowed to appoint a candidate not included on the list submitted by the High Judicial Council. For court presidents (with the possible exception of the President of the Supreme Court) the procedure should be the same."

CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, §17

2.2.3.4. Appointment procedure

"In Europe, a variety of different systems for judicial appointments exist and even the proposal for appointment by a single individual, such as the President of the NJO (National Judicial Office), is in principle compatible with the provisions of the ECHR. It seems that the procedure offers guarantees that the appointment of judges is based on merit, applying objective criteria, although the set of substantive and procedural rules do not contain sufficient safeguards in order to exclude that improper considerations play a role.

Doubts arise notably as concerns Section 18.3 ALSRJ, which states that the 'President of NJO may decide to deviate from the shortlist and propose the second or third candidate on the list to fill the post'. No conditions nor criteria are referred to under which the President of the NJO may deviate from the order of the shortlist. This seems to be a full discretionary power of the President of the NJO and thus violates the rule of law and the principle of transparency. The Venice Commission was told, during its visit in Budapest, that the decision cannot be appealed to a court. This means that there is no way to check this kind of use of the discretionary power. While there are other legal systems in Europe that do not provide for judicial review of decisions on judicial appointments, in the specific context of a system, where a largely non-accountable person exercises wide discretionary powers, such review appears necessary. In order to enable the courts to review these decisions, the law would have to indicate the criteria to be used by the President of the NJO."

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §§57-58

"The Venice Commission finds the proposal contained in the first set of amendments to be very positive. Indeed, the Commission had indicated in former opinions that granting the final decision on both the appointment and the dismissal of the President of the Supreme Court to the Parliament conveyed the impression of political control. This proposed amendment fully takes such criticism into account, and eliminates any political intervention in the choice of the President of the Supreme Court. In this respect, the transparency of the procedure for appointment and dismissal of the President of the Supreme Court by the two-third majority of the Judicial Council, at the proposal of the Supreme Court's judges, should be ensured.

As concerns the proposal set out in the second set of amendments, the requirement of a two- third majority represents an improvement compared to the present situation; however, the Venice Commission considers that the first proposal – election and release from duty by the Judicial Council – is more appropriate and should be retained."

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §§16-17

"There is nothing in the Constitution to require such a two-candidate rule. It would be preferable if the High Judicial Council were to put forward only one candidate for each vacant position [...]. [T]he two-candidate rule has as a consequence that the final appointment remains in the hands of the parliamentary majority."

CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §§59-60

"Nevertheless, the draft Law seems to leave open the possibility of a politicised appointment method, despite the commendable inclusion of the parliamentary opposition in the Council for the Selection of Judges. No detailed criteria for the appointment of judges are provided. Only very basic ones concerning age limit, length of employment and basic legal qualification are set out. There is no written examination, nor does there appear to be any provision for training before a judge is appointed to office. The only competitive element is an interview. After the Council for the Selection of Judges has made a recommendation, the President has discretion whether to accept the recommendation, but no criteria are established to give guidance as to whether he or she should do so or not."

CDL-AD(2011)017, Opinion on the Introduction of Changes to the Constitutional Law "On the Status of Judges" of Kyrgyzstan, §74

"The new Kyrgyz Constitution does not provide for a single body in charge of appointment and career of judges but has charged separate bodies with this task. Article 64.3 of the Constitution provides that the judges shall be appointed on the proposal of the Council for the Selection of Judges (hereinafter, 'Council') and same article provides judge shall be dismissed on the basis of a proposal by the Council of Judges, which is distinct from the Council for the Selection of Judges. Regrettably, this constitutional provision makes it impossible to establish a single body competent to take decisions on appointment and career of judges. A future constitutional revision could provide for a single body, possibly with sub-commissions for specialized functions (e.g. discipline).

When a Constitution provides for more than one body competent for all aspects of the career of the judges, provisions on each of these bodies should be examined in the light of the standards developed for single judicial councils.

The Constitution also designates the President and the Parliament as authorities competent to appoint (elect) judges. As a point of departure, this is not problematic. [...] However, special precautions are needed to guarantee that in such appointment procedures the merits of the candidate are decisive, not political or similar considerations. The law should clearly determine the procedure for the selection of judges. Excellence and proficiency of judges are the best guarantees for their independence and for a better service to the citizens. A system of competitive entry examination is appropriate for the selection of judges in countries where **judges enter the judiciary right after their law studies (as opposed to the common law system of appointing experienced barristers as judges)."**

CDL-AD(2011)017, Opinion on the Draft Law on the Council for the Selection of Judges of Kyrgyzstan, §§1315

"Article 90.2 provides that the decision on election to a permanent post shall be taken by a majority of the constitutional composition of the Verkhovna Rada. This is a kind of qualified majority as proposed by the Venice Commission. Despite this improvement there are still strong doubts about the role of Parliament in the election of judges. [...]

The election process is susceptible of being highly politicised. Democratic as it may seem at first sight, a process involving intensive questioning by Parliamentarians may create the image of judges being dependent on the views of the legislature in a manner

not compatible with the separation of powers needed in a democracy. Independence of judges means that judges must feel free to render also decisions that are sometimes unpopular with the politicians or which certain persons do not like. In the minds of some judges the prospect of being scrutinised by politicians who dislike those decisions or being subjected to a campaign of 'petitions' by citizens and others (Article 87) who feel disgruntled by the judge's decisions may have a 'chilling' effect and impact the judge's independence. Even in case of those judges who uphold their integrity the outside appearances may be such as to put in question their objective independence. That a judge later may have to work under the threat of being subjected to similarly politicised dismissal procedure [...] is likely to create a picture of a judiciary which somehow is at the mercy of political forces, quite in breach of the principle of judicial independence. [...]"

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §§44-45

"There is a written qualifying exam for the appointment as a judge [...]. The introduction of such an exam [...] is to be welcomed. [...]

[...] The Article also provides for an appeal to the HJPC. It is not clear how this can work, since the HJPC is both the body making the decision and hearing the appeal. There does not appear to be any provision for an appeal to a court of law, which should be added."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§77-78

"The appointment process starts with a public announcement of vacancies that must be well- publicised. The announcement is followed by nominations of candidates by special departments set up by the judicial or prosecutorial sub-councils of the [High Judicial and Prosecutorial Council] for nominations for vacancies in the different courts and prosecutors' offices consisting of four or five judges or prosecutors. This suggests that candidates cannot apply for a certain position directly, but only through the sub-councils. Such a practice could be seen as problematic, as it could undermine the transparency and openness of the process."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §76

"According to Article 13.4.2.3 of the draft Law, the Judicial Legal Council Secretariat must publish on its webpage, *inter alia,* information on results of written and oral examinations for the selection of nominees to the position of judges, appraisals of nominees after long-term trainings and of final interviews. It has to be noted that information on the depth of the legal knowledge of judges or candidates for judges should be of limited access to avoid unwanted impacts on the independence of judges after they enter into office. For this reason, the Venice Commission considers that the draft Law should be interpreted in such a way as to only make information on the results of examinations and interviews available to indicate a pass or a fail, without providing further details."

CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, §38

2.3. TERM OF OFFICE AND CAREER

2.3.1. Duration

"[...] [T]he Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §38

"[...] [T]ime-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges."

CDL-AD(2003)019, Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine, §39

"[...] Judicial appointments are to be for a period of no less than ten years and a judge must retire at the age of 70. Appointment for life would give a better guarantee of judicial independence [...]. At least, in the case of a general time-limit, for instance of 10 years, for the appointment of judges to a specific court, re-appointment for a second term should be excluded. [■■■]"

CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, §105

See also CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §8

"The term of office of five years for the members of the administrative court [...] is a rather short one. From the point of view of independence, appointment of judges for life is to be preferred. It is true that so far the Strasbourg Court has not found comparable provisions concerning terms of office to be in violation of Article 6. However, the greater the political influence on the re-election procedure, the greater the risk that a short term of office may throw a shadow on the independent position of the judge concerned. There again, the facts which were put before the European Court of Human Rights in Wille v. Liechtenstein [...] show that this is not a theoretical issue."

CDL-AD(2002)32, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, §31

"[...] Any possible renewal of a term of office could adversely affect the independence and impartiality of judges."

CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, §57

"[...] At any rate, given that [judges of local courts] are appointed for seven years only [...], the Commission is of the view that the appropriate constitutional law should set out objective criteria for their reappointment, in order safeguard their independence."

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §10

"[...] The appointment of retired judges where there are no other applicants seems to be inconsistent with judicial independence since such persons are not irremovable and may therefore be subjected to improper pressure. [...]"

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"[...] It would be appropriate to specify the term of the chairs [of the different courts in the Constitution] [...]."

CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, §105

2.3.2. Probationary period

"[...] The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way [...].

This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a 'refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office'.

The main idea is to exclude the factors that could challenge the impartiality of judges: 'despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value'.

In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they cannot yet take judicial decisions which are reserved to permanent judges."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§40-43

"[...] [T]he system [established by the statute of the High Council of Justice] of having professional tests following appointment is obviously open to abuses in connection with the confirmation of a magistrate in his or her post."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

"[...]The evaluation of judges, prosecutors and investigators during the three-year period before they become irremovable in their office should be restricted to courts of first instance [...]."

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"At present judges, prosecutors and investigating magistrates become permanent upon completing a third year in office. This will be changed to completion of five years' service as a judge and the irremovability will not operate unless the judge has been attested and the Supreme Judicial Council decides that he or she is to become irremovable.

The rule does not specify the conditions in presence of which the Supreme Judicial Council could deny its consent. It would be advisable to offer to that body some criteria or test of judgment to circumscribe its discretion in confirming or denying the permanent status to the concerned officials. These guidelines could refer to the provisions dealing

with the revocation of the permanent status, but it might be convenient adding criteria concerning the evaluation of the performance of the concerned officials after their temporary appointment and during the five years of service necessary to qualify for the irremovable status.

In its 2002 Opinion the Commission recommended that the evaluation of judges, prosecutors and investigators during the three-year period before they became irremovable in their office should be restricted to courts of first instance. This would seem to be all the more important if the period during which a judge is to be evaluated is now to be extended to five years [...].

[...] [T]he discretion of the Supreme Judicial Council in confirming or denying the permanent status to magistrates should be limited by specifying criteria [...]. In any case, this procedure should be restricted to courts of first instance."

CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §§12-14 and 26

"[...] Some states have a practice that gives the opportunity to persons who are qualified as judges or prosecutors to gain experience of the legislative process by serving for a period of time at the Ministry of Justice. However, it is vital that there is a clear demarcation in their rights and duties when they serve in these quite different functions, on the one hand as civil servants within a hierarchy and on the other as independent prosecutors or judges."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §47

"The appointment of temporary or probationary judges is a very difficult area. A recent decision of the Appeal Court of the High Court of Justiciary of Scotland [...] illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6.1 ECHR was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to a discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability, to say the least, of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent.

[...] Despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.

[...] A refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office."

CDL(2005)066, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia", §§23 and 29-30

"Initial appointment as a judge is for a five-year term, apparently intended as a kind of probationary period. [...] A period of five years cannot be regarded as acceptable. [...]

Their situation is worsened by the fact that in order to be finally elected to a permanent position they have to face what may be – or at least to an outsider may seem to be – a politicised procedure in Parliament [...]. The system leaves the probationary judges for too long a period in a situation in which they do not have sufficient guarantees against outside pressures – or in which at least an appearance of potential pressures may be created.

First appointment to a permanent position is also comparable to promotion. [...] [P]olitical and the like considerations are inadmissible. The proposed regulation gives rise to a suspicion in the mind of an outside observer that political considerations do play a role in the appointment of judges in Ukraine.

The procedure foreseen for the permanent appointment of judges should be amended, by removing the involvement of Parliament through an amendment of Article 128 of the Constitution. In the absence of such amendment, the independence of the High Qualification Commission should be strengthened. Alternatively, the decisive say in the election of judges could be entrusted to a High Council of Judges having a pluralistic composition [...]. In this spirit, the questioning by Parliament should be excluded. The role of petitions from natural and legal persons (Article 87) should be eliminated altogether as far as the election process is concerned."

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §§39 and 46-47

"[...] Submitting a candidate's performance as a judge to scrutiny by the general public,

i.e. including by those who have been the object of unfavourable rulings, constitutes a threat to the candidate's independence as a judge and a real risk of politicisation. [...]

[...] Article 79.2 of the Law provides that the issue concerning the election of a candidate to a lifetime judicial position will be considered at once at a plenary meeting, without preliminary discussions and investigations by a committee of the *Verkhovna Rada.* This provision is clearly aimed at reducing the role of the *Verkhovna Rada* in the election process. As such it enhances the independence of the judges, and is therefore welcomed."

CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §§60 and 63

"[...] [I]n order to meet the proportionality test, the introduction of probationary periods should go hand in hand with safeguards regarding the decision on a permanent appointment. Especially in countries with judicial systems newly established in the 1990s, such as in Hungary, there might be a practical need to first ascertain whether a judge is in fact able to carry out his or her function effectively before permanent appointment. If probationary appointments are considered indispensable, a 'refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office'.

Sections 3.3.c and 25.4 ALSRJ even provide for the possibility of repetitive probationary periods. The Law should provide *expressis verbis* for a maximum limit

of cumulative probationary periods with the aim of balancing the need for judicial independence, on the one hand, with the interest of the state, on the other.

The delegation of the Venice Commission was informed that, usually a person who intends to become a judge would first become court secretary and, in some cases, stay in this position for up to six years before he or she would be appointed as a regular judge. Under the new Fundamental Law, Court Secretaries may exercise judicial functions in misdemeanour cases (see also below). This means that a person who is already acting in a judicial function could remain in a precarious situation for up to nine years (six years as court secretary and three years in probationary period). The problem is not so much that the evaluation during the time as court secretary and the probationary period would objectively exert pressure on the person concerned. However, the court secretary or probationary judge will be in a precarious situation for many years and – wishing to please superior judges who evaluate his or her performance – may behave in a different manner from a judge who has permanent tenure ('pre-emptive obedience'). Probationary periods are problematic already as such. The additional time as court secretary further aggravates this problem."

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §§66-68

"[...] In order to identify suitable candidates, candidate judges could rather assist sitting judges as trainees. They would prepare judgments which would be adopted under the authority of a judge with permanent tenure."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §32

"The drafters have managed to introduce criteria [for the refusal of reappointment] that are objective and verifiable, for instance quantitative evaluations (number of overruled decisions is significantly higher than the average in the court where he or she works (paragraph 9/3), less number of cases were concluded than are required by the orientation norm (paragraph 9/4)) and so on.

However, this is a matter that should be approached with a great degree of caution. It does not necessarily follow that because a judge has been overruled on a number of occasions that the judge has not acted in a competent or professional manner. It is however reasonable that a judge who had an unduly high number of cases overruled might have his or her competence called into question. Nevertheless, any final decision would have to be made on the basis of an actual assessment of the cases concerned and not on the basis of a simple counting of the numbers of cases which had been overruled.

In addition, a distinction might be drawn between decisions made on the basis of obvious errors, which any lawyer of reasonable competence should have avoided and decisions where the conclusion arrived at was a perfectly arguable one which nonetheless was overturned by a higher court.

With respect to the workload of the judge concerned, where he or she has concluded a lesser number of cases than required by the orientation norm or where criminal cases have had to be abandoned due to delays for which the judge is responsible, these are matters to be considered. It is important, once again, that the actual cases be evaluated.

It cannot be ruled out that some judges may be given more difficult cases than others as a result of which their workload appears to be less than that of their colleagues."

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§35-38

2.3.3 Evaluation and promotions

"[...] [A] competition should be the rule for all promotions of judges in order to prevent any abuse. Also, there is the risk that the promotion procedure without competition negatively affects the development of regular promotion procedure and of its criteria which should be determined and developed by the High Council, as required by Article 41(1) of the Organic Law."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §64

See also CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §54

"The evaluation of court and justice systems is generally seen as a good means of implementing managerial or political decisions aimed at improving these systems; whereas, the evaluation of the performance of individual judges is often seen as infringing judges' independence. Although this danger may well exist, it should not prevent an evaluation from taking place. [...]"

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §11

"A system on evaluation of judges is generally to be welcomed. [,..]However it should be stressed that such a system properly implemented will consume a lot of time, personal and economic resources to guarantee results that could be relied upon in the long run.

[...] [I]t is recommended to include the Supreme Court judges in an evaluation system."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§59-60

"[...] [I]t should be noted that 'individual evaluation' is far from being considered as indispensible by European judicial systems in general.

Countries that have decided not to proceed with an individual evaluation of judges (such as Denmark, England and Wales, Finland, Ireland, Netherlands, Sweden and, to some extent, Spain), have instead developed general performance evaluations of the judicial procedure."

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§10-11

"If there is to be a system of evaluation, it is essential that control of the evaluation is in the hands of the Judiciary and not the executive. [...] Secondly, the criteria for evaluation must be clearly defined. [...]"

CDL(2005)066, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia", §30

"[...] This provision looks problematic as it defines the President of the Court as a central figure in the process of the evaluation of judges. This may not only lead to a conflict of interest, but also result in malpractice, limiting the independence of individual judges."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §66

"[...] [S]ince the decision assessing the performance of a judge is to be made by the President of the court, it would be desirable that the President of the court not have the sole decision in this matter. Cases where Presidents of courts abuse their position with regard to ordinary judges are not unknown in many countries. [...]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§84

"[...] [E]valuation and disciplinary liability are (or should be) two very different things.

Disciplinary liability requires a disciplinary offence. A negative performance, which leads to a negative overall result of an evaluation, can also originate from other factors than a disciplinary offence. Therefore, the proposal that repeatedly low or negative overall evaluation results shall lead to the Ethics and Disciplinary Commission instigating disciplinary proceedings raises problems, because the reasons for a negative result could be other than a disciplinary offence. [...]

[...] [I]t should be underlined that not every shortcoming in a judge's performance is a disciplinary offence."

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§28, 102 and 108

"Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §55

"If there were to be a measurement of workloads, systems would need to be in place to evaluate the weight and the difficulty of different files. [...] Simply counting the number of cases dealt with is crude and may be completely misleading. At most, such a measurement may serve as a useful tool to indicate a possible problem, but can do no more than this and certainly should not be determinative of a problem.

Measurement of the 'observance of procedural periods' [...] again may point to a possible problem, but it is important that the judge be given an opportunity to explain any apparent failings in this regard.

Measuring the 'stability of judicial acts' [...] is questionable. It effectively means counting the number of successful appeals. Such a measure should be avoided because it involves an interference with the independence of the judge. [...] Where a case is overturned on appeal, who is to say that the court of first instance got it wrong and the appeal court got it right? The decision of the judge of the first instance court quashed

by the Court of Appeal could well later be supported by the decision of the Court of Cassation, the Constitutional Court or the European Court of Human Rights. [...].

The threshold of reversals would need to be quite high and the rule for exceptions to be established by the Council of Judges would have to be very generous. Such a system of ongoing assessments is likely to produce a timid judiciary [...].

[...] [T]he caseload of judges in Armenia increases annually and could potentially reach unsustainable levels. Insofar as a judge is able to dispose of a certain number of cases annually, should the caseload continue to increase, it would be unfair to evaluate the judge on the basis of a percentage of disposed cases without properly analysing the reasons for the increase in the caseload. [...]

The proposal [...] to measure the average duration of examination of cases is inappropriate for similar reasons to those already referred to above [...]. Who is to say that a judge who takes longer over a case is not doing a more thorough job than the speedier colleague? [.] The judge seeking to meet these time frames might be tempted to disregard what would normally be seen as necessary under the law and his or her interpretation of it.

[...] [T]he 'quality of justification' (reasoning) is often a problem in new democracies and coherent reasoning should be promoted. Logical argumentation, clarity, and other aspects are of interest and are dealt with in Opinion No. 11 of the CCJE on Quality of Judicial Decisions.

Criterion (2) Professional abilities [...] raises the problem how one measures the '(a) ability to withstand pressure and threats' [...]. If the pressure or the threat is made in open court, one can make a judgment, but pressures or threats made behind-the-scenes are unlikely to be known to the evaluator.

[...] [T]he proposed rating scheme to be assigned to judges is not recommended because it creates more problems than it solves. Although it looks precise, it is not. It is subjective – if the proposed questionnaire or experience judges are used – which is bound to influence the distribution of points. An evaluation does not need exact points. What is important is to know whether or not a judge fulfils all the criteria, where his or her strong points and weaknesses lie and how to improve his or her capacities. This can be done without assigning points. [...]

[...] [The Venice Commission recommends] a greater attribution to the qualitative criteria than to the quantitative ones, because the former include the most important aptitudes that a judge should have, such as knowledge and personal skills. Unless there is malice or repeated gross negligence, qualitative criteria should not relate to the interpretation of the law."

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§37-40, 42-43, 49-50 and 77-78

"The draft Law contains no details with regard to the procedure and frequency of the evaluation as well as the consequences of such an evaluation. Although the draft Law provides that the HJPC is authorised to adopt evaluation criteria, it is crucial for the criteria, procedure and consequences to be clearly formulated, easily accessible and foreseeable. It is important that the evaluation system be neither used nor seen to be used as a mechanism to subordinate or influence judges."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §68

"The draft Law also lacks a mechanism for the disqualification of an evaluator at a later stage who fails to recuse him or herself or to report a conflict of interest. Evaluators should also be under the obligation to report any form of communication that attempts to influence the evaluation process by improper means (including, but not limited to, undue pressure, duress, or coercion).

[...] [T]he evaluation of judges with the involvement of prosecutors and advocates is a very sensitive issue. Of course, both prosecutors and advocates are well placed to know a judge's strengths and weaknesses. However, they are not disinterested observers. There is a risk that a judge may tailor his or her relations with particular prosecutors or advocates to secure a more favourable assessment or may be perceived as doing so. Furthermore, there is a particular risk in involving prosecutors in assessments of judges in legal cultures where historically the prosecutors dominated the judiciary. However, these considerations would not have the same force if retired advocates or prosecutors were to be used as assessors.

[...] [T]he use of serving judges to evaluate their colleagues has the potential of causing some difficulties. It could lead to bad personal relationships between colleagues and has the potential to further undermine the morale of the judiciary. Alternatively, where judges receive favourable evaluations this could give rise to allegations of cronyism. There is a danger that such a system could lack credibility.

In general, establishing a mixed team of evaluators, inviting legal professionals from outside the current judicial system may be the least bad option. It is essential to establish an evaluation team with a balanced composition. This will avoid cronyism and the perception of self-protection. In addition, the evaluation must be conducted in a transparent manner and impartially.

Article 96.2.17 provides for the identity of assessors to be kept confidential. Since this rule is not to be applied in cases where the results of an evaluation are appealed against, it is difficult to see what the point of it is. In any event, any system of evaluation should be transparent. The identity of the evaluator may be highly relevant since the person concerned may be biased against the judge. [...]"

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§62, 67, 69-70 and 75

2.4. ACCOUNTABILITY

2.4.1.Immunities

"It is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §61

"[...] Magistrates [...] should not benefit from a general immunity [...]. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts. [...]"

CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15

See also CDL-AD(2003)016*, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §8*

"It is reasonable to grant immunity from civil suit to a judge acting in good faith in the performance of his or her duty. But, it should not be extended to a corrupt or fraudulent act carried out by a judge."

CDL-AD(2008)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan, §24

"As regards the immunity of judges, it is necessary to separate the substantive issue relating to the material scope of the functional immunity, which should provide the legal grounds to pronounce the inadmissibility of a complaint against a judge, from the procedural safeguards which exist to protect such functional immunity [...]."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §38

"[...] [A] limited functional immunity from arrest and detention which would interfere with the workings of the court is one thing but a total immunity from prosecution is difficult to justify. [...]"

CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, §11

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §107

"[...] It is worth highlighting that even if the material scope of the functional immunity is reduced (e.g., by expressly excluding certain criminal offenses such as bribery, corruption or traffic of influence), the procedural safeguards [...] will still protect the judges e.g., from blackmail relating to an alleged crime committed in office, by ensuring that only duly substantiated claims or complaints will get the consent of the Council of Judges to proceed further."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §42

"In the Commission's view, there is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their judicial functions. [...]"

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.2

"The issue of the personal liability of judges was raised by the Committee of Ministers in its Recommendation CM/Rec(2010)12 on judges [...].

While imposing civil liability on a judge is a possibility, the grounds for the compensation of damage should be considered with great caution, as this may have a negative impact on the work of the judiciary as a whole. It could limit the discretion of an individual judge to interpret and apply the law. [...]

[...] It is not uncommon for violations of the rights and freedoms guaranteed by the European Convention on Human Rights and/or the national Constitution to occur as a

result of the application and/or interpretation of the law. It is also not unusual for the European Court of Human Rights [...] to reach different conclusions in defining the scope and content of a right (including procedural rights) or of a legal provision. [...] Should the judge be liable if s/he 'wilfully' did not follow the standards established by any of these international organisations? The argument could be made that where the international case-law is well-established, the judge should be expected to follow it. However, the fact that a judge has wilfully chosen not to follow the established standards should not in itself become a ground for personal liability. [...] [I]t is of great importance that issues pertaining to the personal liability of judges be determined by national courts, but this should only be allowed on the basis of criteria and procedures that are clearly defined by the law."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §§18-19 and 22

"[...] [I]t may go too far in giving the judge immunity for such matters as failure to give judgment at all or improper conduct such as giving a judgment as a result of an inducement or bribe, which would be dealt with in criminal and disciplinary proceedings."

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §28

"There is a suggestion that the decision on detention or arrest in the case of judges of the Constitutional Court should be by Parliament. This would certainly not be desirable, as it would represent a continued politicisation of judicial immunity and endanger judicial independence. [...] For ordinary judges, immunity should be lifted by the HCJ. [...]"

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §49

"[...] [T]he judges' immunity [...] should be lifted not by the Verkhovna Rada but by a truly independent judicial authority."

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §79 See also CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §57

2.4.2. Disciplinary control

2.4.2.1. Grounds for disciplinary proceedings (material aspect)

"Article 2 sets out the 'Principles of procedure on disciplinary cases of judges'. These principles (legality, respect for judicial independence, fair procedure, proportionality of the sanction with the committed offence, transparency) are in line with international standards and are to be welcomed."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law

of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §12

"It must be pointed out that internationally, there is no uniform approach to the organization of the system of judicial discipline and that practice varies greatly in different countries with regard to the choices between defining in rather general terms the grounds for the disciplinary liability of judges and providing an all-inclusive list of disciplinary violations. [...]"

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 23

"[...] Only failures performed intentionally or with gross negligence should give rise to disciplinary actions. [...]

[...] Applying disciplinary sanctions to an act that could have merely 'affected the court's activity' is excessive. [...]"

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§19 and 35

"[...] In general, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general definition which may prove too vague, is a good practice/ approach in conformity with international standards."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §15

"[...] [T]he conduct giving rise to disciplinary action be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct. More specific and detailed description of grounds for disciplinary proceedings would also help limit discretion and subjectivity in their application."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, § 24 See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §90

"[...] [P]eriodical breaches of discipline, professional incompetence and immoral acts are categories of conduct which are imprecise as legal concepts and capable of giving rise to abuse."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

"[...] [T]he Venice Commission strongly criticised the vague term of 'breach of oath' as a basis for the dismissal of a judge and welcomed the introduction of the clause 'commitment of an offence, incompatible with further discharge of the duties of a judge'.

[...] No dismissal should be possible unless the conduct of a judge is covered by the definition of a disciplinary offence. The obligation to typify disciplinary offences on the level of the law also stems from the judgment *Oleksandr Volkov v. Ukraine* of the European Court of Human Rights."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§54-55

See also CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §33

"[...] [A legislative measure penalising the imposition of] a final judicial verdict, recognised and known to be unjust [...] is so clearly open to abuse [and] it should be repealed as a matter of urgency."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

"It is important to underline that, as a rule in European practice, it is not the judge's task to supervise the execution of judgments. There are specialised bodies which deal with this. The judge will not have the means nor the time to ensure that judgments are implemented in practice. It therefore seems to be inappropriate to establish the judge's liability in this context. This could even be used to undermine the judges' independence."

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §15

"The principle *ne bis in idem* prohibits double trial and punishment for the same offense in two different criminal proceedings (Article 4 of Protocol no. 7 ECHR). This, in principle, does not exclude the initiation of disciplinary proceedings for the same offence in parallel to criminal proceedings. [...]

[...] As mentioned above, the criminal and disciplinary liabilities have different natures and objectives, are subject to different standards of proof and have different constitutive elements, and they do not exclude each other. Consequently, [...] the disciplinary authorities [...] should not be obliged to terminate the disciplinary proceedings when a criminal case is initiated for the same offense. In order to prevent the breach of the principle *ne bis in idem* those authorities should rather have the possibility to terminate the proceedings if they consider that the disciplinary case has a criminal character (the nature of the offense and the gravity of the correspondent disciplinary penalty will be the guiding criteria in the light of the case law of the European Court). [...]"

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §§58 and 6 0

"[...] It would seem desirable to provide that where an event consists of an offence under criminal or administrative law as well as under the disciplinary law, the criminal or administrative proceedings take precedence. [...]"

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §14

"A disciplinary sanction might be imposed on a judge after an acquittal before a criminal court or where the criminal proceedings against him or her have been discontinued but such disciplinary actions and proceedings must not violate the presumption of innocence provided by Article 6.2 of the European Convention on Human Rights. 'Disciplinary bodies should be capable of establishing independently the facts of the cases before them'."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §28

"In this provision, the grounds on which a judge may face disciplinary responsibility centre exclusively on a judge's conduct whilst discussing a case and when handing down a verdict or ruling. They therefore apply to the judicial process itself, to the judge's interpretation of the law while considering a case and to the very essence of a judge's function i.e. independent adjudication. This provision therefore encroaches on the extremely delicate sphere of a judge's independent decision-making in accordance with the Constitution and the law."

CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, §18

"Disciplinary proceedings should deal with gross and inexcusable professional misconduct, but should never extend to differences in legal interpretation of the law or judicial mistakes. The basic rules on disciplinary misconduct are outlined in Article 39 of the Constitutional Law. The first ground mentioned therein, namely 'breaching the law while reviewing court cases', is open to a very wide application. [...] [I]t is recommended that Article 39 par 1 (1) is amended in order to clarify that it only refers to gross and inexcusable misbehavior and not to the incorrect application of the law."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §60

"A judge may not be limited to applying the existing case-law. The essence of his/her function is to independently interpret legal regulations. Sometimes judges may have an obligation to apply and interpret legislation contrary to 'uniform national judicial practice'. Such situations can occur, for instance, in light of international conventions, and where decisions from international courts supervising the international conventions may alter the current national judicial practice.

The legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence. While judges of lower courts should generally follow established case-law, they should not be barred from challenging it, if in their judgment they consider right to do so."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§21-22

"[...] It should be expressly provided that inspection proceedings regarding judges on the performance of their duties in accordance with the laws, regulations, by-laws and circulars, does not refer to laws etc. on court decisions themselves, but solely to general provisions which provide for the proper functioning of courts. The same restriction should apply when inspection rights arise with respect to the 'behaviours and conducts', enquiring whether they are 'compatible with the requirements of their profession and status'."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §95

"The draft Law defines an apparent violation [which gives rise to disciplinary liability] as 'such a violation of a substantive or procedural norm in the administration of justice, the existence of which cannot be questioned by any reasonable legal assumption or argument'. This certainly sets the bar very high. However, it would still be preferable that most of these matters be dealt with by way of appeal or judicial review rather than treating them as the proper subjects of disciplinary proceedings.

It seems, therefore, that many of what are defined as gross violations effectively seek to penalise the judge who makes a wrong decision. This is true of decisions contradicting decisions of the Constitutional Court or of the European Court of Human Rights, or imposing a disproportionate measure of liability. Some of the grounds are extremely vague – for example, rendering a judicial act in violation of the principle of separation and balance of powers. And it is unclear what is meant by making it a subject of disciplinary responsibility to render a judicial act inconsistent with the principle of legal certainty. Does this mean that any decision inconsistent with previous case-law would be a subject of disciplinary responsibility? It is difficult to think of a more obvious interference with judicial independence. The wording 'gross violation' of a substantive or procedural norm should be amended to exclude a well-reasoned interpretation of the law, even if it differs from previous case-law of higher instances. [...]"

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§114 and 122

"[...] [I]t would be problematic to discipline judges for merely criticising judicial decisions [...] or 'assessments with regard to the activities of state authorities and local authorities, and of the heads of those authorities' [...]."

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §33

"Article 66.j defines as a disciplinary offense as 'unjustified delays in making decisions or other actions in connection with the performance of the duties of a judge or any other repeated disregard of the duties of a judge'. Due to a lack of clarity and the ability to foresee consequences of one's own actions, this paragraph should also be revised. The wording such as 'other actions in connection with performance of the duties' or 'repeated disregard of duties' *should be more detailed and clarified. The draft*

Law should stipulate more specifically what types of duties and actions may result in disciplinary proceedings."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §101

"Similarly, without providing any guidance or reference to the meaning of 'inappropriate contact with a party to the proceedings or his/her representative', Article 66.k may potentially result in an overbroad interpretation. Is a meeting with either or both parties always inappropriate? Do judges have clear guidance with regard to the actions that are inappropriate?"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §103

"Article 66.n, which makes it a disciplinary offense for a judge to make – 'any comments while the case is deliberated in court, which may be reasonably expected to interfere with or harm the equitable proceedings or trial, or failing to take appropriate steps to ensure that court employees subordinated to him/her also refrain from making comments' – also seems to be vague and may result in a disproportionate response. It is not clear if this restriction applies to all judges or only to those who are in the process of deliberation. A judge, while making certain public comments or statements during the deliberation may indeed harm the reputation and credibility of the court. It would, however, be unreasonable to punish a judge where a court employee, who is subordinated to him or her, fails to refrain from making similar comments. It is not immediately clear from the draft Law in what circumstances the disciplinary committee may decide that a judge failed 'to take appropriate steps to ensure that court employees refrain from making comments' on the case being deliberated'."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §105

"[In the draft code on judicial ethics] [t]here is a requirement of judges [...] not to disclose ***any*** information in the performance of their duties which seems excessive. It would be appropriate to refer to confidential information. [...]"

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §61

2.4.2.2. Disciplinary sanctions – types and proportionality

"Article 6.1 prescribes four different types of disciplinary sanctions, namely warnings, reprimands, reductions of salary, and removal from office.

Having a reasonable range of possible sanctions facilitates compliance with the principle of proportionality [.]. From this point of view, the authors of the draft may also wish to consider adding 'temporary suspension from office' as another possible disciplinary sanction. Other possible sanctions could be withdrawal of cases from a judge, or moving a judge to other judicial tasks."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§37-38

See also CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §63

"Article 69.2 stipulates that 'the disciplinary measure of dismissal shall be imposed only in cases in which a serious disciplinary offense has been established, and the severity of the offense clearly shows that the offender is unfit or unworthy of continuing to perform his/her duty'. However, the draft Law does not contain any indication which offences may qualify as 'serious'."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §109

"As concerns reduction of salary [...] it is recommended to specify that reduction of salary may be applied only in cases of deliberate wrongdoing and not in cases having more to do with performance.

As concerns 'removal from office' [it] should be reserved to most serious cases or cases of repetition. It could also be applied in cases of incapacity or behaviour that renders judges unfit to discharge their duties."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§41-42

"[...] According to **Article 97, paras 3, 4,** it is considered to be a 'severe disciplinary offense' when a judge '4. Unjustifiably fails to recuse himself/herself in the cases in which there is a reason for his/her recusal'. The reasons on the basis of which a judge has to recuse himself/herself should be determined and defined by the law. The decision of a judge not to recuse him/herself should only be considered a 'very serious offense' in cases in which there is manifestly a reason for his/her recusal and not in cases in which this decision is based on his or her interpretation of the law."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §65

"All of the privileges provided to a judge, as well as retirement benefits, can be withdrawn pursuant to a decision terminating the powers of a judge by the Disciplinary and Qualification Board or a decision by the Judicial Jury according to Article 55-1. The termination of all benefits may be justified in certain cases, however, the sanction imposed should be proportionate to the violation in the individual case. The present provision does not in sufficient detail outline the connection between the breaches of ethics or other offences and the sanction. It is recommended that the provision is further elaborated and describes in more detail which offence or misdemeanour can trigger which sanction."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, §54

2.4.2.3. Examination of disciplinary cases against judges – procedural aspects

2.4.2.3.1. Who may initiate a disciplinary case and decide on it

"[...] Any action to remove incompetent or corrupt judges had to live up to the high standards set by the principle of the irremovability of the judges whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve

this could be to have a small expert body composed solely of judges giving an opinion on the capacity or behaviour of the judges concerned before an independent body would make a final decision."

CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15

"[...] It would be dangerous to give every person the right to initiate proceedings for the dismissal of a judge. A complaints mechanism for individuals should exist for cases where the judge has misbehaved, but such a complaint should not directly result in initiating dismissal proceedings of the judge."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §68

"[...] According to Article 19.1.a the notification regarding the committed actions which may constitute disciplinary offenses committed by judges can be submitted by 'any interested person'. This right should be limited either to persons who have been affected by the acts of the judge or to those who have some form of *'legal interest* in the matter.

According to Article 21, notification on actions that may constitute disciplinary offences shall be filed with the secretariat of the Superior Council of Magistracy, which does not investigate. Investigations are the task of the inspector-judges to whom cases are distributed on a random basis. These provisions are to be welcomed.

Article 26 seems to limit the role of the inspector-judge to preparing and substantiating the disciplinary case file. Inspector-judges should have a strengthened role and in particular should be responsible for drafting the disciplinary charges. Such a provision should be usefully added to the draft Law which is silent on this aspect of the procedure. The inspector-judge would be the best placed for this since the admissibility panel should act only as a filter – deciding on the admissibility – but should not be involved in the drafting of charges."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§64, 68, 69 and 71

"Article 99 grants the Minister of Justice the right to initiate disciplinary proceedings against judges. It may be asked whether this is in harmony with the independence of the judiciary and the principle of the separation of powers."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §68

"[...] [A] qualified majority [of 2/3 of votes] for the initiation of disciplinary proceedings creates the serious risk that too many complaints would not be followed up at this early stage because of corporatist attitudes within the High Council of Justice. A simple majority should be enough in this respect. Furthermore, draft Article 15 also requires a 2/3 majority in the High Council for the 'arraignment of the judge' on disciplinary proceedings and draft Article 60(3) requires again the same qualified majority to appeal against decisions of the Disciplinary Board. Those are too high majorities which may hamper the legitimate aim of the amendment of Article 7 and slow down, if not impede the efficient development of disciplinary proceedings as a whole. [...]"

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §24

"[...] [A] mixture of different powers in one hand, in particular, the power to initiate the proceedings and the power to adjudicate [...] risks leading to problems [...]."

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §16

"The President of the Supreme Court and the presidents of local courts have extraordinarily vast powers. Some of the amendments aim to reduce the scope of these powers, for instance, the competence to initiate disciplinary proceedings is transferred to the Judicial Council, which is welcomed. [...]"

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

"[...] The reporting member of the High Qualifications Commission, whose position is similar to that of a prosecutor, should be excluded from the deliberations and the vote."

CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §74

See also CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"Article 103 deals with the composition of the disciplinary panels. [...] It is not clear whether the disciplinary panel is composed case-by-case, or whether there is only one disciplinary panel which will conduct all disciplinary procedures. The principle of the 'natural judge' implies that disciplinary procedures have to be conducted by a disciplinary jurisdiction 'foreseen by the law'. This excludes an *ad hoc* disciplinary panel, composed on a case-by-case basis. [...]"

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §69

"Article 28 deals with the admissibility examination of the notification. A decision on admissibility is to be adopted where at least one member of the panel voted in favour of declaring the notification admissible. Rejection of the notification, on the other hand, requires a unanimous vote [...]. This seems to balance the system in favour of acceptance. While this is an unusual system, it is acceptable [...].

It is to be welcomed that decisions rejecting the notification shall be mandatorily motivated [...]. Article 28.7 should provide that decisions of admissibility panels should be notified not only to the person who submitted the notification, but also to the judge concerned."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and

Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§73-75

"[...] Article 32, in its last paragraph, requires decisions about the submission of the HCJ's petition regarding dismissal of a judge to be taken by a simpler rather than a two thirds majority. In the light of the flawed composition of the HCJ, this is a regrettable step which would go against the independence of the judges."

CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §46

"The creation of a Disciplinary Board [i.e. a body which examines disciplinary cases and applies disciplinary sanctions to judges] which is separate from the Superior Council of Magistracy is to be welcomed [...].

Article 9.1 defines the composition of the Disciplinary Board (5 judges and 4 persons from civil society). Such a composition is to be welcomed as it should help ensure transparency, as well as community involvement in disciplinary proceedings, while also averting the risk of judicial corporatism."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§46 and 48

2.4.2.3.2. Due process requirements in the disciplinary proceedings against judges

"[...] [T]he draft law [should] be amended so as to enable the judge to be informed of the investigation as early as the preliminary investigation stage to allow him/her to benefit from his/her right to counsel in early stages. In this respect, it is not sufficient that draft Article 39(4) states that the judge may invite a counsel to the hearing before the High Council, but this right should be set out in a different article and apply to all stages of disciplinary proceedings and not only in the context of hearing before the Disciplinary Board."

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §50

"The provisions concerning the right of the judge [...] accused to be heard and represented before the panel seems appropriate but **there is no mention of a right to be heard and represented before the Supreme Judicial Council, which takes the actual decision** [...]."

CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, §26

"The legal solution concerning the involvement of the complainant into disciplinary procedure against a judge may differ from one country to another. On one hand, in general the disciplinary liability of judges is regarded as an internal matter to the judiciary [...]. On the other hand, the complainant can be the direct victim of the judge's

possible disciplinary misconduct, and may have a legitimate interest in participating to the proceedings, in particular where his/her rights are infringed as a result of judge's misconduct. The input of the complainant may also serve to shed light on the concrete circumstances of a given case [...]. Yet in order to guarantee the rights of the judge subjected to disciplinary procedures, the non-disclosure provisions should be effectively implemented.

[...] [T]he draft law should also provide for some indications on the consequences of disclosure of information on a disciplinary case by the complainant. It is also recommended that clear criteria be provided in Article 17(5), on the basis of which the High Council of Justice can decide whether the hearing of the complainant is necessary in a given case. Further, Article 39(7) should also indicate unambiguously whether the complainant may be invited to the hearings before the Disciplinary Board as an exception to the principle of confidentiality and under which conditions."

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §§47-48

"[...] [T]he statute [of the Supreme Council of Justice] provides for secret deliberations and a discretionary power to summons and interrogate affected persons quite contrary to the right to be heard and other procedural rights. The Commission notes in this connection that the practice of the High Council of Justice confirms that affected persons are frequently notified of decisions affecting them only after such decisions have been taken.

Decisions on the transfer of judges [...], also require to be circumscribed by appropriate procedural safeguards."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.4

"[The] Article sets out that the [High Judicial Council]'s sessions are open to the public and that it may decide to work in closed session in accordance with the rules of procedure. It is recommended that this be regulated by law rather than by the rules of procedure and clear criteria for in camera proceedings should be provided.

It is, however, also important that provisions be included which allow the judge – whose position is being deliberated on – to request a closed session, especially where disciplinary proceedings are concerned. [...]"

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§35 and 37

"[...] [P]ublicity should also be the guiding principle for later stages of disciplinary proceedings. [...] [T]he draft Article 30(4), according to witch 'Sessions of the Disciplinary Board shall be closed', is problematic. First, it is recommended that sessions, as a general rule, be held in public and be held in camera only exceptionally, at the request of the judge and in the circumstances prescribed by law. Secondly, it is not clear from the wording of Article 30(4) whether the judge's request for publicity, as in the procedure before the High Council [...], constitutes an exception to the principle of confidentiality of sessions of the Disciplinary Board or only of information related to the hearings. [...]"

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §§26

See also CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §60

"Article 31 [...] provides in paragraph 3 that 'Repeated absence and in the absence of pleas alleging of the judge or of the person who filed the notification or of their representatives at the meeting of the Disciplinary Board shall not prevent its consideration". This provision is to be welcomed as it is a preventive tool against obstructive non-appearances before the Board.

Article 31.5 further states that 'The Board member appointed reporter or any member of the Disciplinary Board may require hearing of witnesses or to other persons within meeting of examination of disciplinary case'. The judge whose case is considered by the Board should be provided with similar rights."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§77 and 78

"Concerning the complaints procedure about the judges performance [...], it can be indeed be regulated in the rules of procedure. However, the law should require clearly the **publication of the decisions taken in this respect in order to ensure transparency and accountability.**

Finally, Article 52.5,which provides that the record of the disciplinary proceedings taken will be deleted after 2 years seems to establish a period too short to allow the appropriate information to be available when considering promotion procedures or future disciplinary cases."

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §§41 and 44

"With respect to Article 60, it should be clarified what is meant by 'open records'. The right of personality has to be protected. Therefore, it may not be appropriate to include medical reports in open records as well as disciplinary and penal investigations and prosecutions, at least if they have not resulted in sanctions. If there have been sanctions, only sanctions for severe violations should be included in open records. In any case, access to the file should be regulated, i.e. not just anyone should have access to this information."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §58

"[...][W]hile the body deciding or recommending on promotions should have access to evaluations, the judge in question should have the opportunity to explain or challenge any adverse finding before that body. [...]"

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §23

"[...] [T]he representative [of the High Council of Justice] should at least be obliged to provide reasons for dropping the case, not only because of the requirements of the principle of legal certainty but also in order to protect the professional and personal reputation of the judge in question."

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §62

"It is thus recommended to supplement the draft law to clearly indicate that in case a procedural issue is not regulated in the Law on Disciplinary Liability, one of the procedural codes can be applied by analogy and to state that only the evidence collected in compliance with the rules of evidence contained in that code will be admissible. The fact that the criminal procedural codes provide generally better safeguards to ensure the fairness of the procedure should be taken into account."

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §34

"The random case distribution [amongst members of the Disciplinary Board] [,..]is to be welcomed."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §60

2.4.3.3. Appeals against disciplinary measures

"The Venice Commission is of the opinion that a judicial council should have a decisive influence on the [...] promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §25

See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §110

"[...] Once the disciplinary panel of the Supreme Judicial Council has found in favour of the judge, this decision should be final. [...]"

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"Finally, on a point of general importance, the Commission has learned that the Constitutional Court has jurisdiction to hear complaints against decisions of the High Council of Justice which allegedly violate the independence of judges, guaranteed by [the constitution], and that it has struck down a decision to transfer a judge in at least one case.

While this is to be welcomed, a future law on the status of magistrates should provide for judicial review of decisions affecting judges and prosecutors more generally, prior to the review exercised by the Constitutional Court."

CDL(1995)074rev, *Opinion on the Albanian law on the organisation of the judiciary? (chapter VI of the Transitional Constitution of Albania), p.4*

"The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §76

"Art 39.1 provides that decisions of the Disciplinary Board can be appealed to the Superior Council of Magistracy and that the Disciplinary Board decisions become final after 15 days from the receipt of the copy of the motivated decision. Every appeal against disciplinary proceedings should prevent the decision from becoming final until the appeal is determined (not only decisions to dismiss a judge from the office of Court chairman or from office as a judge as provided in Article 38.2).

The procedure before the Superior Council of Magistracy is very briefly mentioned in Article 39. It should be regulated in more detail to ensure to the parties to the case a fair and transparent judicial review.

Under the provisions of this draft Law alone, it appears that a member of the Superior Council of Magistrates may file a notification on a disciplinary offense (under Art. 19.1b), and later appeal against the decision of the Disciplinary Board (Art. 39.1) thereby bringing the case before the Superior Council of Magistrates, on which he or she may then also vote on appeal, along with the other Superior Council of Magistrates members (Art. 39.4). In other words, the current draft Law lacks a clear provision that would prevent the same member of the Superior Council of Magistrates from engaging in all these consecutive steps of the disciplinary proceedings, which might raise very valid concerns of potential bias and lack of impartiality. [...].

Article 40 provides that decisions of the Superior Council of Magistracy can be appealed to the Supreme Court of Justice 'by people who have filed complaints, judicial inspection or the judge concerned'. It is not clear why the judicial inspection should be allowed to appeal. The appeal should be allowed to the parties concerned – the complainant and the judge concerned."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§81-84

"The performance of the Presidents of the most senior courts and the Chief Prosecutor are assessed by the relevant sub-council. It seems appropriate that assessments of judges take place at every level. There is an appeal to the HJPC itself. Assessment of performance is to be taken into account when making appointments to senior positions.

In addition, where the President of a court or the Chief Prosecutor receives one of the two lowest assessments he or she loses office. Given the importance of these assessments the specific statement that the appeal to the HJPC is final and no remedies shall be available seems difficult to justify. An appeal should lie to a court of law."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §92

2.4.3. Ethical rules of behaviour: duty of restraint, conflicts of interest, duty to disclose certain information, etc.

"[...] Judges should not put themselves into a position where their independence may be questioned [...]."

Although there are countries in Europe and beyond that have achieved high standards of judicial conduct without adopting a code of conduct or ethics for judges, the Council of Europe recommends that a code be adopted: [...].

In addition, 'new democracies' of Central and Eastern Europe and of Central Asia tend to acknowledge the need for establishing codes of professional conduct as part of an overall judicial reform. [...]

Such a code, or in other words a statement of standards of professional conduct, should also not be seen as a piece of legislation or other provisions of a legal nature, and it should be the judges and their organisation(s) that take the responsibility for the implementation of such a code.

[...] A code of ethics should not be directly applied as a ground for criticism or disciplinary sanctions. Guidelines provide the principles which enable judges to assess how to address specific issues which arise in conducting their day-to-day work, whereas disciplinary procedures are designed to police misconduct and inappropriate conduct which calls out for some form of disciplinary sanction."

[...] The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for disciplinary procedure has grave potential implications for judicial independence.

However, serious violations of ethical norms could also imply fault and acts of negligence that should, in accordance with the law, lead to disciplinary sanctions. Judges may be held accountable accordingly for their unethical conduct by appropriate institutions, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge. There will always be a certain interplay between the principles of ethical conduct and those of disciplinary regulations. In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice."

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§8, 12-13, 15 and 16, 30-31

"[...] [The law at issue] implies that the non-compliance with the ethical principles of professional conduct included in the Code of Honor of Judges may trigger the imposition of disciplinary sanctions. It must be pointed out that generally, given the nature of rules of professional ethics, they should not be equated with a piece of

legislation and directly applied as a ground for disciplinary sanctions. Additionally, these ethical norms are often drafted in general and vague terms which do not fulfil the requirement of foreseeability.

The purpose of a code of ethics is to provide general rules, recommendations or standards of good behaviour that guide the activities of judges and enable judges to assess how to address specific issues which arise in conducting their day-to-day work, or during off-duty activities. In the majority of countries, codes of ethics have only unofficial status and the breach of the ethical principles does not constitute direct ground for disciplinary action.

This is entirely different from the purpose achieved by a disciplinary procedure which is designed to police misconduct and inappropriate acts which call for some form of disciplinary sanction. [...] Breaches of the ethical norms should, in the end, usually result in moral rather than in disciplinary liability."

[...] [I]t is important to ensure a strict separation of duties and responsibilities between the advisory body on ethics and the disciplinary body, since the judge should not have to face the risk that his/her request to the advisory body on ethics be transferred to another procedure that could result in a disciplinary sanction. [...]"

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §§25-27 and 30

"[...] [Under the draft Code of judicial ethics] judges who chose to retire following at least 25 years of impeccable service [...] [are] entitled to receive social benefits and special treatment which is different from that of ordinary retirement. [...] If a retired judge violates the requirements of this draft Code, s/he will risk losing these benefits.

Although the State may attach certain conditions to the social benefits it extends to retired individuals (for example, social benefits may be suspended temporarily if retired an individual engages in a fulltime job), however, most restrictions foreseen by this draft Code seem excessive.

There are a number of restrictions imposed by this draft Code (including relations with the media, political activities, legal practice, limits related to acceptable remuneration, etc.), which should logically not be applicable to individuals after they retire from judgeship."

Article 8.4 [...] seems to request judges to inform the 'persons participating in a case' that the nature or content of their 'extra-procedural application' may result in a conflict of interest. Apart from merely 'informing' parties, a judge should request the termination of the communication, which may lead to the conflict of interest. Judges are under the obligation not to allow communication from the parties to a case (or other individuals), in which they may engage intentionally or by mistake, if such communication may lead or may be seen as leading to the conflict of interest and thus result in the disqualification of the judge from the case."

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§39-41 and 52

"This Article states that the chairman of the court, chief, Judicial Legal Council Secretariat, proper executive body or other persons that has been given authority by the chairman is the official representative of the court or Judicial Legal Council Secretariat or proper executive body in relationship with editorial offices of the mass media.

The aim of this Article could be understood as being that persons who have not received an authorisation by the chairman are not allowed to be in contact with journalists. This would limit the publicity of courts' activities. Furthermore, it should be noted that the chairman of the court has no authority to intervene in the decision-making process and statements of courts are public."

CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan, §§49, 50

"[...] [J]udges should indeed exercise caution while discussing or criticizing the work of their colleagues. Indeed 'they shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality'.

However, judges should not be limited in their freedom to discuss shortcomings of the judiciary outside the circle of their colleagues (for instance, at events such as seminars, conferences, in academic or educational circles. Judges must not fear sanctions for expressing their views publicly on issues that are problematic for the judiciary."

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §§65-66

"Article 5-1 par 1 sub-par (2) of the Constitutional Law states that a judge should 'avoid any circumstances which may discredit the authority and the dignity of a judge'. A concept such as the 'dignity of a judge' is relatively vague and too subjective to form the basis for a disciplinary complaint. According to Article 5-1 par 1 sub-par (6) of the Constitutional Law, a judge should 'observe the working procedures established in the relevant court'. The working procedures established by a court may cover a great variety of judicial acts or tasks required from a judge, some of which may be quite insignificant. Disciplinary proceedings, on the other hand, should deal with gross and inexcusable cases of professional misconduct that also bring the judiciary into disrepute. Additionally, it is not foreseeable which actions fall under the scope of this provision. Both of the above provisions under Article 5-1 par 1 (sub-par (2) and sub-par (6)) should thus not serve as a ground for the imposition of disciplinary sanctions."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §32

"This Article is intended to prevent the judge from showing any signs of religious, political, ethnic or other affiliation and is to be welcomed. The references to 'signs' and to 'such insignia' suggest that it is only physical emblems which are covered. The prohibition should also extend to conduct such as praying or religious gestures or utterances."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §35

"Article 93 of the draft Law requires judges and prosecutors to provide an annual financial report concerning their activities outside their duty as a judge or as a prosecutor. However, the **provision falls short of requiring a judge to declare all of his or her assets. It should be noted that full asset disclosure has proved a valuable weapon in combating corruption in other countries."**

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §120

"[...] While judges should conduct themselves in a respectable way in their private life, it is difficult to lay down very precisely the standards applying to judges' behaviour in their off-duty activities, also considering the constant evolution in moral values in a given country."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §29

"[...] [I]t is unclear whether the prohibition [for a judge] of 'speaking in support or against any political party' should be understood as a complete ban on expressing views on any political matter, including the functioning of the justice system. The ECtHR pointed out the 'chilling effect' that the fear of sanctions such as dismissal has on the exercise of freedom of expression, for instance for judges wishing to participate in the public debate on the effectiveness of the judicial institutions. Consequently, should the expression 'speaking in support or against any political party' be interpreted as including speech on the functioning of the judicial system, the fact that this may lead to dismissal would constitute a disproportionate interference."

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §34

2.5. TRANSFERS AND EARLY TERMINATION OF OFFICE

2.5.1. Transfers and missions

"The Venice Commission has consistently supported the principle of irremovability in constitutions. Transfers against the will of the judge may be permissible only in exceptional cases. [...]"

CDL-AD(2010)004, Report on the independence of the judicial system – Part I: The independence of judges, §43

"Under this Article, a judge working in a court that will be abolished is allowed to continue to work in a court of the same or of approximately the same type and instance. It is important that the judge not be appointed to a lesser position following the abolition of a court."

CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §23

"[...] Section 31 ALSRJ entitles the chair of the tribunal to re-assign judges without their consent to a judicial position at another service post on a temporary basis out of service interests, every three years for a maximum of one year, or for the promotion of his or her professional development. Section 34 enables the President of the NJO to transfer a judge to another court, if a court is closed or its competence or territorial jurisdiction is reduced to such an extent that it no longer permits the employment of a judge. If the President of the NJO transfers a judge to an inferior court, the judge shall retain his or her former salary and shall be entitled to use the title referring to his or her previous position as a judge.

As long as such transfers are made with the agreement of the judge concerned, it seems that these provisions comply with the above-mentioned principles on the transfer of judges, with the exception of the generally phrased and excessively large possibility

of transferring a judge 'for service reasons', for a maximum of one year every three years, which seems to be too often.

However, if the judge does not agree with the transfer he or she is automatically 'exempted from office' for six months and his or her service relationship is terminated [...]. This seems to be an overly harsh automatic sanction. While under certain circumstances transfers may be justified, in exceptional cases even without the consent of the judge – for instance due to an organizational reform – there must be clear and proportional rules for such actions as well as a right of appeal."

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §§77-79

"[...] The Commission welcomes the fact that the amendments provide for judicial review by the administrative and labour court in the event of a transfer. However, this should be a full review on procedure and substance of the decision [...]."

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §56

"[...] [A]ssignment [of the judge to a different court or] sending on mission should only be possible under strict criteria clearly identified in the law, for instance, the number of cases at the receiving court, the number of cases at the sending court, the number of cases dealt with by the judge who is being assigned. Vague criteria as 'in the interests of justice' [...] may not be considered as 'strict criteria' as required by the above-mentioned standards. Also, the maximum duration of the assignment or the mission should be indicated in the law."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §36

"Linking the transfer of a judge to his or her consent even if the court is 'disbanded or reorganized' [...] goes too far. In such cases, a transfer of the judge against his or her will should be possible. On the other hand, the immediate dismissal of the judge because he or she refuses such an involuntary transfer would go too far as well. [...]"

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §17

"The absence of consent to a transfer to another court in case of closure or reorganisation of a court is too wide a formulation for a ground for dismissal of a judge, even if the closure or reorganisation has been decided by the *Verkhovna Rada* in the form of a law. Much will depend on the proposals for transfer made to the judge and on their timing. It may well be the case that right at the moment of closure or reorganisation no adequate position for transfer is available but soon thereafter such a position becomes available. Before being faced with a dismissal, the judge should receive more than one proposal for transfer and the prospect of upcoming retirements of judges in other courts should be taken into account when making such proposals. Rather than simply dismissing the judge, he or she should be transferred against his or her will. If the judge then does not turn up for work at the new post, ordinary disciplinary measures could be taken, which eventually could lead to a dismissal of the judge but not because of the refusal of the transfer but because of the refusal to work."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §29

"Proposal no. 12 would remove the competence of the High Qualification Commission ('HQC') to make proposals for the office of judge and attribute this power to the High Judicial Council. While the draft Law provided for a competence of the High Qualification Commission to submit a motion for the transfer of judges, Proposal no. 25 would attribute the final decision in this matter to the HQC.

It seems not logical to attribute the transfer of judges to a body called 'qualification commission' while the competence to make proposals for the office of judge is withdrawn from that body. If it were retained as a separate body, the HQC should be in charge of the qualifications rather than transfers of judges.

Ideally, in order to ensure a coherent approach to judicial careers, the HQC should become part of the HJC, possibly as a chamber in charge of the selection of candidates for judicial positions. Admittedly there is no European standard that judicial appointments and careers should be dealt with by a single body, however."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§33-35

"[.] The term 'court restructuring' [as a ground for transferring a judge] may be too wide. T o use the term 'restructuring of the court system' would be preferable, thereby sorting out minor changes that do not give reason for transfer against the will of a judge. It could also be argued that a judge should not be transferred against his/her will due to court restructuring to a lower court than the court where he/she has his/her actual judgeship. A provision guaranteeing this principle and the principle of securing the same future salary for the judge as in his/her actual position would also be welcomed."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §58

2.5.2. Early termination of office and impeachment[3]

"[...] It would not be in accordance with the principles of a society governed by the rule of law to allow the dismissal of serving judges without providing any guarantees. [...]"

CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia, §61

"[...] [T]he President [...] may dismiss by his own initiative the Chairman and the members of the Constitutional Court (even those appointed by the Council of the Republic), the President and the members of the High Economic Court [...]: even if the grounds for the exercise of these prerogatives shall be provided by law (regrettably they are not defined in the Constitution), it is possible to say that the interference of the President in the sphere of other state bodies could not be stronger."

CDL-INF(1996)008, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by i: the President of the Republic & ii: the Agrarian and Communist groups of parliamentarians, §34

[3] *See also section 2.4.2 above on disciplinary control*

"[...] [G]ranting the [Chair of Parliament] the right to propose the dismissal of judges of the Supreme Court [...] and of the Economic Court [...] is a serious distortion of the principles of judicial independence and of the separation of powers."

CDL-INF(1997)006, Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic), p.5

"[...] [T]he Commission finds that the Supreme Court should not have the power to dismiss cantonal judges, nor the cantonal high court to dismiss municipal judges [...]."

CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, chapter B.I, §9

"The discharge of a judge should not be the subject of a decision of the Assembly."

CDL-CR-PV(1998)004, Meeting of the Working Group on Albania of the Sub-commission on Constitutional Reform with the Constitutional Commission of Albania, «Parts of the constitution considered for the first time», «Article 130».

"The Commission observes that decisions as to the removal of judges is left to the Constitutional Court [...]. Although this may be seen as an additional guarantee for judicial independence, the absence of any remedy against such a decision of the Constitutional Court can raise problems. A more adequate solution would be to leave the initial decision as to the removal of a judge to the Council of Justice with the possibility for the judge dismissed to appeal to the Constitutional Court. [...] The Commission is now satisfied that the initiative for the dismissal of a judge belongs to the Minister of Justice [...]. Of course the question remains as to the role of the Judicial Council in this matter."

CDL-INF(2001)017, Report of the Venice Commission on the Revised Constitution of the Republic of Armenia, §63

"The provision that a judge may be removed for systematically failing to perform official responsibilities seems to be a provision which is not inappropriate. The failing to perform the official responsibilities has to be caused by a voluntary choice of the concerned person and not by his or her health problems. [...] Or, also, is the revocation possible if his (her) behaviour does not comply with the rules concerning the professional standards of fairness, accuracy and correctness. This last case could be covered by the last part of the sentence ('perform activities that undermine the prestige of the judiciary'), but it is not clear whether this last provision regards the professional aspects of the life of the concerned person, or the social aspects of his or her life. [...]."

CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §16

"The consequences of the dismissal/suspension are the suspension of the payment of salary [■■■].

It should, in the view of the Venice Commission, be taken into consideration that the suspension of salary, besides the fact that it also affects the family of the judge, may seriously hinder the right to a legitimate defence by taking away all of his or her financial means and might therefore seriously affect the human rights of the judge who, until a final condemnation is made, is deemed to be innocent. [...]."

CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, §§55-56

"[...] [T]he the idea which lies behind the draft provision is that the appointment of a post holder by a state body necessarily entails the competence for dismissal by the

same body. However, the guarantees for dismissal of post holders need to be higher than those for appointment. In particular, it is essential that dismissal due to offences committed by the post holder be investigated by an independent body and not by a political organ as the Parliament or the

President. It is those independent bodies or courts which should determine whether the allegations against a post holder are founded. Consequently, it should be that decision that leads to dismissal and not the decision of a political organ. Such dismissal should be distinguished from votes of no-confidence, which Parliament can take against certain state officials, like ministers (political responsibility). A vote of no-confidence is not appropriate for judicial officials who do not have a political responsibility before a representative body."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §72

"This proposal would introduce an impeachment procedure against a judge of lower instance courts, which would be initiated by at least 20 per cent of the citizens of Ukraine of the respective court district or by one third of the members of the *Verkhovna Rada.* Following such an initiative, the *Verkhovna Rada* voted on the impeachment and the judge would be dismissed if more than half of all members of the Rada voted for it. Initiatives for the impeachment of judges of the high specialised courts and the Supreme Court could be introduced by one third of all members of the Rada and would be carried if two thirds of all members voted for it.

The introduction of such a procedure is clear contradiction of the principle of the independence of the judiciary and would make the position of the judges dependent on a political organ, the Verkhovna Rada. The initiation of an impeachment by the citizens could even lead to judges trying to please 'the voters' rather than to apply the Constitution and the laws, for example through harsh sentences in highly mediatised criminal cases."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§31-32

"A qualification test for all sitting judges is a very delicate matter. The Venice Commission was very critical of the dismissals of all judges in Serbia who had to re-apply for their positions. A qualification test for all sitting judges could create similar problems, endanger judicial independence and should be avoided. Problems with the qualification of judges should be settled through efficient disciplinary proceedings in individual cases."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §48

2.6. RETIREMENT

"The retirement age for judges should be clearly set out in the legislation. Any doubt or ambiguity has to be avoided and a body taking decisions on retirement should not be able to exert discretion. [...]"

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §52

"[...] One may doubt whether it is the best solution to allow for applications to extend the period of work beyond the age envisaged by the statute. Experience has shown that the vast majority of judges and prosecutors apply for this extension. This gives some discretionary authority to the Council of Justice. Would it not be better to embrace the opposite principle? That is, raise the age limit in the statute coupled with the statutorily-guaranteed right to take early retirement. [...]"

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §57

"Sections 90.h.ha, 94.3 and 96.2 ALSRJ provide for judges who are reaching the so-called 'upper age limit' to be exempted from office six months before the actual retirement date. It seems questionable – even more so in times of strained budgets – to exempt people from office with full payment just because they are going to retire within the next six months."

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §95

"[...] The text of these provisions implies that retired judges are permanently limited in the possibility of engaging in law practice, which is clearly an unnecessary and excessive limitation. Although there may be some restrictions, such as temporarily limiting the possibility of a former judge to act as a lawyer before the court of which that judge was a member, they should be narrowly targeted and proportional. [...]"

CDL-AD(2013)035*, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §67*

"Proposal no. 10 sets the age of 75 as the retirement age for judges of the Supreme Court and the high specialised courts whereas 65 is fixed as the retirement age for all other judges. Such a stark distinction seems excessive because it would create two classes of judges, the 'upper' judges who can work until the age of 75 years and the 'lower' judges who have to retire at 65 (and as a consequence have to live with a retirement pension, which is much lower than the income of active judges). The consequence of such a split system would probably be that 'lower' judges will make every effort – and possibly compromises in their judgments – to be appointed as a judge of a high specialised court before they have to retire at 65. Such a distinction within the profession of judges is not only discriminatory, it might also lead to judges being willing to compromise in their adjudication in order to obtain promotion before they have to retire at 65."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §30

2.7. REMUNERATION

"[...] [T]he Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties. Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §51

"[...] Although there is no strict international requirement in this regard, it would be advisable to define the scale of the remuneration for the different types of positions within the judiciary, in the Constitutional Law."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ ODIHR, §52

"[...] [T]he low level of salaries of judges in Albania, relative to other professions and activities though not to comparable positions in the civil service, was repeatedly identified as an objective factor contributing to corruption among judges and to the consequent reduction of public confidence in the courts."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

"[...] [T]hat the salaries of judges cannot be reduced during their term of office [...] is a common and desirable guarantee of judicial independence."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

"[The questions regarding the application measures of the general principles on the budget of the judiciary and the remuneration of judges] can and should also be addressed by ordinary legislation. In principle, there is no reason why they could not be so addressed in the context of a law on the status of magistrates."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania), p.3

"The proposed increase of salary in article 99.3 for a judge acting upon a case on the criminal offence of organized crime or corruption or terrorism or war crimes, as well as in cases of 'difficult work conditions' could be problematic, creating the danger that judges categorize ordinary cases as organized crime cases in order to keep their salaries higher."

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §34

"The system of grades as foreseen by the draft Law in articles 4.4 and 8-10 is transparent, as far as can be judged from the outside, but it should not conceal some sort of bonus system. [...] The attribution of housing facilities and allocations are subject to a considerable amount of appreciation and discretion and are a source of possible abuse which, in post-socialist countries, persist. The Venice Commission recommends the phasing out of such benefits and that these be replaced by an adequate level of financial remuneration."

CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, §71

"In some countries, the prohibition to decrease the remuneration of judges is expressly set out in the constitution. [...]

Some constitutional courts have decided that even in a situation when a state experiences financial difficulties, the judges' salaries must be especially protected against excessive and adverse fluctuations [...].

However, if there is no specific constitutional provision unconditionally prohibiting a reduction of the salaries of judges, there is some room for the legislature in case

of (economic) crisis. [...] Other constitutional courts have also concluded that the prohibition to reduce the remuneration of the judiciary cannot be absolute. [.]

The conclusion, therefore, is that, 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. [...].

[...] In [a situation of a serious economic crisis], a general reduction of salaries funded by the state budget may include the judiciary, and cannot be qualified as a breach of the principle of the independence of judges. Such a general measure is in line with the Venice Commission's

Report on the Independence of the Judicial System which states that 'the level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria'. Finally, it may be seen as a token of solidarity and social justice [...]."

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, §§16-20*

2.8. JURORS, LAY ASSESSORS, MILITARY JUDGES AND OTHER PERSONS PERFORMING JUDICIAL FUNCTIONS[4]

"[.] Although the perception that a jury system can enhance fair trial and lead to higher acquittal rates may be explained through historical evidence, this view should be approached with caution. Jury systems in and of their own are no guarantee for the independence and fairness of the justice system. This will depend on the legal framework and the practical application of the rules.

The number of jurors is set at 12. This seems to have been controversial, as the presidential administration wanted to have only 7 or a maximum of 9 jurors. However, it is better to have 12 jurors, as a larger number of jurors helps to base the decision on a broader consensus.

[...] The draft Law should explain the process of ***'random selection'*** in order to exclude any misuse and corruption.

Article 9 is of great importance as it regulates who can be excluded from the list of candidates by the administration. This provision excludes a wide range of professionals such as judges, prosecutors ***(prokuror),*** military servicemen etc. This is to be highly welcomed.

Article 12 regulates the material compensation for jurors. This seems to be acceptable insofar as it does not place jurors at a financial disadvantage due to their work.

The regulations on independence and immunity of jurors are very short also in comparison with earlier versions of the draft. The guarantees of the independence and immunity of judges on the basis of the ***Law on the status of judges of the Kyrgyz***

[4] *See also section 3.1.2 below on military, commercial and other specialised courts*

Republic is extended to jurors and members of their family. It is however strange that immunity also applies to the members of the family."

CDL-AD(2008)038, Opinion on the Constitutional Law on Court Juries of Kyrgyzstan, §§7, 14, 18, 21, 22 and 23

"The lay assessors seem to be a firm part of the Bulgarian judicial system [...]. They have the same rights and obligations as the judges and the fact that they are nominated by the next higher general assembly of judges helps to ensure their qualification. The lay assessors can be removed by the general assembly under certain conditions. The procedure for their nomination, remuneration and other organisational matters are fixed in an ordinance by the Minister for Justice. However, their nomination to the specialised criminal court will be made by the Municipal Council of Sofia [...], which might be in line with the Bulgarian legal system but, in the context of the accurate selection of judges, may not be an appropriate solution, taking into consideration that those lay assessors have the majority vote in the senate.

Having chosen to have lay assessors in their system to fight corruption and organised crime, the Bulgarian authorities may be aware that these could represent a weak link in their system as they could perhaps be exposed to a greater risk to potential undue influence by persons being judged by the specialised criminal courts. For this reason, lay assessors must be carefully chosen. The criteria for choosing judges has been clearly set out in the draft Law on [Judicial Powers], however, there seem to be no set criteria for choosing lay assessors, other than the need for their nomination to be approved by the general assembly of the specialised criminal court. It is clear that lay assessors should not be specifically qualified persons (professionals) and it may simply be enough that the judges who approve them are aware of the potential risk. [■■■]"

CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, §§36, 37

"[...] It does not seem clear from the text how people's assessors are to be selected. How does one become an assessor? Does one have to apply for the position? Has one to be interviewed or are assessors selected at random? How many people are to be assessors? What qualifications are required? It would seem that because assessors sit with professional judges effectively as judges, they are in a somewhat more powerful position than jurors and it seems as if they are intended to be more an elite group than jurors who presumably are to be selected at random from the entire population. However, none of this is made clear. It is true that in **Article 58.4** there is a list of matters which disqualify a person from being an assessor or juror, but it is not clear whether any person who is not so disqualified is to be on the list. Furthermore, it is not entirely clear what the role of an assessor is when he or she sits as a member of a court panel together with a judge, whether the role of assessor is to be confined to the adjudication of fact, or whether he or she also has a role in determining the law notwithstanding that the assessor is presumably not a lawyer.

In **Article 59** it is stated that a court is not to engage people's assessors and jurors in a particular case more than once a year. Presumably what is meant here is that no particular juror or assessor is to be summoned more than once a year and this may be a translation difficulty in the English text.

Article 62 envisages that people's assessors and jurors are to be paid compensation for the period of their service. This is in principle a very welcome provision but in

practice may well create an inhibition to the use of jurors on a wide scale. It is certainly likely to be expensive if juries are commonly used."

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §§42-44

"[...] [T]he Act provides for court assessors in military courts who may be generals, admirals, officers or non-commissioned officers in permanent military service. They take part in court hearings. There seem to be no safeguards in the legislation to ensure that serving military personnel acting as court assessors are independent and impartial unless the requirement in Article 68.3 that they be designated by the General Assembly of the judges of the Appellate Military Court on the proposal of their commanding officers can be so regarded (see the case of ***Findlay v. the United Kingdom*** [...])."

CDL-AD(2009)011, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, §29

"With regard to many questions relating to the status of military judges, in particular their dismissal, the draft law refers to the Law 'On Universal Conscription and Military Service'. The

Commission can only express the hope that this law contains sufficient guarantees to ensure the independence and impartiality of military judges in accordance with the requirements developed in the case law of the European Court of Human Rights."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, "General Comments", p. 5

3. COURTS

3.1. ESTABLISHMENT AND STRUCTURING

3.1.1. Establishment, structuring, and composition of the courts

"[...] While it is obviously appropriate that questions pertaining to appeals and the procedure before the various courts are determined in the various codes of procedure, it may be preferable, under the specific conditions of a country newly establishing a judicial system based on the rule of law, to have one comprehensive text covering all questions pertaining to the composition, organisation, activities and standing of the judiciary."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.2

"The most competent body for designing and changing the court network is the High Judicial Council ('HJC'). The adoption of the network can of course be a competence of Parliament because such decisions have important budgetary implications. However, the initiative for such decisions should come from the HJC rather than the President.

Proposal no. 5 provides that courts shall be established, reorganised and removed through a Resolution of the Verkhovna Rada. While it is positive that the court network is established by the Rada, this should not be done through a resolution but through the ordinary legislative procedure."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §§13-14

"It would seem that the territorial organisation of the court system under the draft would be based on the administrative structure of [a country], both as regards the local general courts of first instance and the establishment of [...] courts of appeal [...]. While the overriding criteria determining the territorial structure of the court system should be the needs of the court system itself and the facility of access by people to the courts, such a system is acceptable in principle. In a new democracy [...] it would however seem preferable to avoid such a link between administrative division and court organisation to make it more difficult for the administration to exert undue influence on the courts."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.4

"However, it would be preferable to leave the composition of the panels to the rules of procedure."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §59

"It would be desirable to avoid extensive involvement of the executive (Ministry of Justice) in adopting court rules for internal operation and procedure and delegate the adoption of the internal regulation and rules of procedure to the courts, within the limits set by the laws."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §70

"The court system is rather complex [...]. There are four levels of jurisdiction, although it seems that after cassation proceedings before a high specialised court the Supreme Court would enter the picture only exceptionally (Article 40.2), thus meaning that in practice there would normally be three levels.

Even so, the system looks unnecessarily heavy [...]. It should be kept in mind that a very elaborate and complicated judicial system carries with it the risk of prolongation of proceedings. [...] Thus structural features in a legal system that cause delays are not an excuse under Article 6. Although the Supreme Court is apparently overloaded today, the solution in a longer term can hardly lie in the establishment of additional court levels but in the streamlining of the proceedings and making them more effective. [...] [T]he complicated system of judicial selfgovernment may potentially deprive many judges of the time needed for the real judicial work. [■■■]"

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §§20-23

"Article 20.1 deals with the creation of courts of general jurisdiction, including by reorganisation. The power of creating courts remains with the President but it is now proposed that he or she will act upon the recommendation of the State Judicial Administration based on a proposal from the Council of Judges of Ukraine. [...] [I]t is still recommended that the President's role should be the formal one of making the order once the appropriate proposal and recommendation had been made."

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §22

"The Venice Commission [...] consider that the appropriate body to make the ultimate assessment on the number of Supreme Court judges and of the need for more judges is usually the legislator or the High Council of Justice, given that the choice depends, inter alia, on the available budgetary means, which cannot be determined by the Supreme Court judges. It is nevertheless highly recommended that the legislator takes into consideration the opinion of the Supreme Court in the legislative process [...]."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §19

"Article 4(3) reads: 'The total number of judges for each court shall be determined by the HJPC, on the elaborated proposal of the President of the Court and the express consent of the Ministry of Justice'. While the first part of the provision [...] is logical and not objectionable, it is less clear (1) why the proposal should be submitted by the President of the Court, and (2) when this should be done. It seems that since the total number of judges is to be determined for each Court, the President of each Court should make a proposal, but this needs to be clarified. Equally problematic is the requirement of the express consent of the Minister of Justice of BiH. The draft Law does not provide details on whether and in what case the Minister of Justice may refuse consent or what is to happen in such an eventuality, which has the potential to lead to deadlock."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §25

"Article 4(2) provides that 'the High Court shall have an equal number of judges from each of the constituent Peoples and the appropriate number of judges from the ranks of Others'. The Venice

Commission understands that this provision aims to ensure the equitable representation of various peoples living in the territory of BiH. While such an effort is legitimate in the political sphere, for instance in setting the parameters of the voting system, it would be highly problematic to apply it within the judiciary. The judiciary is not a representative institution. Here, the principle of the independence and impartiality of individual judges should prevail over other considerations.

[■■■] [O]rganising courts along ethnic lines would be wrong, counterproductive and damaging to the credibility of the judicial institutions. Such an approach may also counter Article 14 on the prohibition of discrimination of the European Convention on Human Rights and should therefore be approached with extreme caution. [...]"

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §§21 and 23

"[...] [S]everal provisions of the Draft confer to the Ministry of Justice powers over the judiciary. Article 47 imposes the obligation on the president of the court to deliver the activity report of the court to the Ministry of Justice, and, at the request of the Ministry of Justice, to deliver specific or periodic reports which are necessary for the performance of tasks falling under their jurisdiction. These obligations seem to place the president of the court in a position of subordination to the Ministry of Justice.

According to Article 50, 'the performance of court administration tasks shall be supervised by the Ministry of Justice. In exercising its supervision functions, the Ministry

may not take actions that interfere with court's decision issuance in legal cases '. Article 52 further establishes the possibility for the Ministry of Justice to carry out inspections in courts , for example, in relation to the organisation of work in courts, acting upon citizens' petitions and complaints against the work of courts [...], or concerning the work of the Secretariat of the Judicial Council, specifically, its activities relating to court administration or the work of clerks and archives.

Article 50, para. 2 includes a specific provision which rightly sets out that 'In exercising its supervision functions, the Ministry of Justice may not take actions that interfere with court's decision issuance in legal cases'. However, it should be noted that no clear-cut boundary separates supervision of court administration from supervision of fulfilment of adjudicative tasks. It should also be noted that Articles 25 and 29-30 of the Draft law on rights and duties of judges and on judicial council implies a certain supervisory task of the Judicial Council as well. It should be considered whether the Judicial Council could be entrusted with the supervision of court administration as defined in Chapter IV of the Draft law on courts [...].

It should be considered to harmonize the two laws in this respect, limiting the supervisory role of the Ministry of Justice in a clearer manner. It is recalled in this context that Montenegro has a long history of risk of politicisation of the judiciary, and that, as proposed in the Draft law on rights and duties of judges and on judicial council, the Judicial Council will have a special (more balanced) composition to combat both this risk and the risk of too corporatist approach within the judiciary."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§33-36

3.1.2. Specialised courts

"[...] [I]t would seem ***inter alia*** desirable to state clearly that the general courts have residual jurisdiction, i.e. that they are competent to deal with all justiciable matters which are not specifically referred by law to the specialised courts within the overall system."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 3

"[...]Different states in Europe (and elsewhere) have based themselves on different models for the organisation of the court system. [...] The answer to these questions cannot be adequately offered until one is more familiar with the socio-political conditions (including the structure and composition of the legal profession) in the present and future [...] society [concerned]."

CDL-INF(1996)002, Opinion on the regulatory concept of the Constitution of the Republic of Hungary, p.34

"[...] [The] need to subject administrative acts to judicial review is one of the fundamental elements of the rule of law. However, as regards the establishment of administrative courts (Article 92), the Commission notes that this is not a necessary element of judicial review of acts of the administration. It may well be envisaged that control over normative acts is carried out by the Constitutional Court (as it is the case under the actual Constitution), whereas judicial review of individual administrative acts is performed by specialised sections or chambers of ordinary courts (usually courts of appeal and courts of cassation), as it is the case in Croatia and Latvia, for example. [...].

There are of course arguments in favour of establishing separate administrative courts and the Commission does not wish to take a definite position on this point. [...] [T]he establishment or non-establishment of an administrative judiciary is a solution of such importance that it should be made at constitutional level."

CDL-INF(2001)017, Report on the Revised Constitution of the Republic of Armenia, §59

"As regards this novelty, it is of course perfectly compatible with European standards to introduce administrative courts with specific jurisdiction standing beside the ordinary general courts, and this is likely to contribute to the efficiency of judicial handling of administrative law cases, which presumably will constitute a relatively large portion of the judicial case load to be expected in the near future. A system of general courts with universal jurisdiction (in civil, criminal and administrative law cases and with power of constitutional review) may however be the most democratic structure for the judicial power, and judges preferably should be generalists rather than specialists in the fields of substantive law.

In relatively small countries not having a tradition of administrative courts, it may not necessarily be desirable to establish such separate courts, especially if the countries also have an effective Ombudsman institution. [...] the Supreme Court [as the court of ultimate appeal] is [therefore] extremely important [...]. As a second matter, if the administrative courts are created, it preferably should be possible to organize the judiciary so as to allow for rotation between these courts and the general courts among the judges of first and second instance, in order to promote a broad outlook and experience within the system. [...]."

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§6, 7

"The draft provides for a system of separate economic (arbitration) courts. Such systems exist in various countries and the need for judges to specialise in various areas of commercial law to efficiently deal with commercial disputes justifies dealing with commercial cases separately. It is however more common in Western Europe to use special panels of the ordinary courts for such matters, often providing for the involvement of merchants as lay judges. By contrast, the Ukrainian solution appears problematic since it is a simple continuation of the Soviet model which was based on different legal regulations for individuals and socially owned entities. The conceptual justification for this model does not exist in a market economy in which interenterprise relations are governed by private law. Under these circumstances the maintenance of the old system appears excessively conservative and the transfer of these cases to economic divisions of the ordinary courts [...]."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 5

"[The law provides that Regional Courts shall have a Civil Case Panel and a Criminal Case Panel]. Ideally there should be the principle of rotation of the judges between panels from time to time. The same applies to the Supreme Court (having Senates) [...]."

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §42

"The extent of jurisdiction of the military courts is not defined in the draft but according to information given to the rapporteurs such courts are competent in cases

involving soldiers having no relation with their military duties such as the divorce of a military serviceman. [...] [A system of granting jurisdiction to military courts for cases involving civilians and where there seems no need to have recourse to military judges is bound to produce violations of the Convention."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 5

"[Following] the system of military courts established by the draft [there] will be courts martial of garrisons [...], military courts of appeal [...] and a military division of the Supreme Court [...]. Even the judges within the military division of the Supreme Court will have military ranks [...]! Therefore this division of the Supreme Court will also have the character of a military court.

It is true that military courts exist in other countries and are not objectionable as such. The proposed system nevertheless goes beyond what is acceptable. In a democratic country the military has to be integrated into society and not kept apart. Democracies therefore generally provide for the possibility of appeals from military courts to civilian courts and a final appeal to a panel composed of military officers appears wholly unsatisfactory."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p. 4

"The court system laid out in Article 3 of the Constitutional Law follows a three instance system (district courts, regional courts and the Supreme Court). The law allows for the establishment of 'specialized courts' for certain types of cases. In particular, a system for administrative courts, deciding on appeals of administrative acts, can be very beneficial for the development of respect for the rule of law and good governance in public administration. When revising the Constitutional Law [...] it may be considered beneficial to draft a specific section on administrative courts, preferably establishing a system similar to the regular court system with three instances."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §17

"[The Draft Constitution] guarantees everyone the right of appeal to a court against decisions, actions or inactions of the bodies of state power, bodies of local self-government or public officials. It is to be welcomed that in this way the judicial control of administrative authorities is established and a constitutional basis for administrative jurisdiction is provided. [...]."

CDL-INF(1996)006, Opinion on the draft Constitution of Ukraine, p. 15

"[...]The transfer of the power to adjudicate misdemeanour proceedings to the judiciary is to be welcomed. Under the current system, bodies in charge of misdemeanour procedure do not have the status of courts, although in such procedures sentence of imprisonment may be passed."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §15

3.2 ORGANISATION OF WORK WITHIN THE COURTS

3.2.1. The role of the higher courts vis-a-vis the lower courts

"[...] [T]he Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §72

"[...] Judicial decisions should not be subject to revision outside the appeal process [...]"

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §8

"[...] Th[e] internal judicial independence requires that they be free from instructions or pressure from their fellow judges and vis-a-vis their judicial superiors.

Seeking instructions in individual cases from higher instance judges, who would be deciding the appeal, deprives the parties from an independent review of their judgment, thereby violating their right of access to the courts [...]. Such practice (including providing instructions) is not only inefficient (one level of jurisdiction is, ***de facto***, removed), but it also violates human rights. This practice, if persisted in, should be dealt with through disciplinary means against judges taking part in such practice."

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§ 15 and 18

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, §101

"Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches."

"In the previous Opinion, the Venice Commission pointed out different ways in which the Curia and the court leaders can interfere in the administration of justice of the lower courts. The Curia ensures the uniformity of the application of the law by adopting 'an obligatory decision applicable for courts' [...], by 'publishing court rulings and decisions or authoritative rulings' [...], by making a 'legal standardisation decision' [...] and by conducting an analysis of the jurisprudence.

Crucially, chairs and division heads of courts and tribunals continuously monitor the administration of justice by the courts under their supervision and have to inform the higher levels of judgments handed down contrary to 'theoretical issues' and 'theoretical grounds' [...]. Non-compliance with the rulings of the higher courts could have a negative influence on the evaluation of the judges and thus on their career.

[...] [U]niformity procedure and its system of supervision by the court presidents might have a chilling effect on the independence of the individual judge [...] [and] may only be acceptable if it does not have a negative influence on the career of the judges [...].

[...] The supervision of judges by chairs and division heads of courts and tribunals should be abolished."

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§ 50-53

"The cassation procedure has as one of its main goals to guarantee and bring about uniformity in the case-law. [...] The internal judicial independence does not exclude doctrines such as that of precedent in common law countries [...], and, indeed, in civil law countries, the lower courts tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. [...].

However, this admissibility criterion should not be used beyond the purpose for which it is established, i.e. ensuring the uniformity of the case law, and therefore not be applied in such a way as to give the Supreme Court the possibility to address to the lower courts general 'recommendations/explanations' on matters of application of legislation. [...]"

CDL-AD(2014)030, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia, §§ 33, 34

"[,..][B]inding positions [formulated ***in abstracto*** by the general assembly of judges of the country] can be deemed problematic from the perspective of the internal independence of judges. [...]"

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §22

See also CDL-INF(2000)005*, Opinion on the draft law of Ukraine on the judicial system, p. 4*

"[...] [T]he Venice Commission delegation [...] heard persistent reports of improper and extraordinary interference by judges of higher-level courts with those of lower-level ones. Notably, that lower-level court judges often seek instructions from higher-level court judges – in particular those of the Court of Cassation. Should these allegations be true, then a firm position must be taken in Armenia to ensure that the independence of the judiciary includes the independence from interference by other judges.

[...] Such practice (including providing instructions) is not only inefficient (one level of jurisdiction is, de facto, removed), but it also violates human rights. This practice, if persisted in, should be dealt with through disciplinary means against judges taking part in such practice."

CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§13 and 18

"Article 15(3)(b) permits the State Court to reopen criminal proceedings that have been concluded with a legally-binding decision of the Court. This provision is too wide in its current form and would permit the Court to reopen an acquittal in breach of the rule against double jeopardy. The circumstances in which a legally-binding decision can be revisited need to be set out. [...]"

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §45

"[...][If] a non-judicial body were to review judicial decisions, the rights of all possible victims of the criminal conduct punished by the courts would remain

unprotected. In addition, if new circumstances have arisen, including awareness of past miscarriages of justice, only courts can be able to review them in final instance. This is why it is essential that when deciding whether or not a case should be referred to a Court of Appeal, the [commission on the miscarriages of justice] should not touch upon what should have been or should be the outcome of the case at issue. Moreover, the outcome of the new procedure – despite the fact that the procedural flaws of the original one will have been fixed – might be the same as the original procedure. In other words, the court reviewing a case of alleged miscarriage of justice will not necessarily reach the conclusion that the plaintiff was innocent and should be released."

[...] The establishment of a special 'chamber for miscarriages of justice' would be contrary to the constitutional prohibition of extraordinary courts."

CDL-AD(2013)013, Joint opinion of the Venice Commission and the Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law (DG I) of the Council of Europe on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia, §§ 15 and 83

"[According to the draft amendments to] the constitution of Kyrgyzstan, the Supreme Court of the Kyrgyz Republic has a right of legislative initiative. The Commission finds that the Supreme Court should not be directly involved in the negotiating efforts to force specific draft legislation through the parliament because this could draw the Supreme Court into the political arena and may thus endanger its independence."

CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, §29

3.2.2. Allocation of cases

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

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §§62, 81

See also CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §70.7

"[...] [T]he Venice Commission recommends that the Hungarian authorities use other mechanisms for the distribution of cases [...] '[...] for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases'. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges sit in on that case. The criteria for making such decisions by the court

president or presidium should, however, be defined in advance on the basis of objective criteria. [...].”

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §91

See also CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §27

See also CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §39

“[...] [I]t should be made sure that specialisation of judges cannot be used to circumvent the system of random case assignment **[...].”**

CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §13

“[...] [W]henever there is an electronic case-attribution system [of distribution of cases amongst judges], the rules according to which it operates must be clear and it should be possible to verify their correct application. Ideally, the allocation should be subject to review. The absence of such rules could easily lead to abuse which may jeopardise the internal independence of the judiciary. For these reasons, it is recommended that detailed rules are provided in the draft law on the functioning of the electronic system and on the review of case allocations. The rules laid down in the second paragraph of the draft article, concerning the case-allocation in case the electronic system is out of order, should also be amended in order to provide all technical indications needed, as in the current Law on distribution of cases (articles 4 to 9).”

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §80

“Articles 31 to 33 establish the rules concerning the adoption by the president of the court of the annual schedule of assignments. It is a well-conceived system, which excludes any external interference, provides for the participation of the judges of the court and guarantees transparency.”

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §37

3.2.3. Transfer of cases from one judge to another

“[...][W]orkload statistics provide objective statistical data, but they are not sufficient as a basis for the decision on transferral, since they do not contain criteria for the selection of certain cases for transferal or for the selection of the individual receiving court. In order to prevent any risk of abuse, court presidents and the President of the NJO (National Judicial Office) should not have the discretion to decide which cases should be transferred or to select the ‘sending’ or ‘receiving’ courts. In addition, any such case allocation should be subject to review in order to take into account possible harsh situations where persons without the means to come to a court that is far away from their home town.”

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §91

"The second urgent topic is the procedure of the transfer of cases. While the NJC adopted criteria on the selection of the court, which is to receive the case, the most critical decision is the selection of individual cases by the president of the overburdened court. The amendments do not provide for the establishment of criteria for this selection.

The NJC should be mandated to establish such criteria, which would have to be objective (e.g. a transparent random selection). The conformity of the selection of a case with such criteria should be the standard for the judicial review of the transfer.

In addition, further issues are linked to the transfer of cases:

1. the date of notification of the transfer to the parties should be the starting point for the 8 days deadline for appeals against transfers, not the date of their publication on the web-site;

2. in case of annulment by the Curia of the assignment of a case to another court, the case should be dealt with by the original court and the President of the NJO should not be able to assign a case to another court instead;

3. even if the Curia uses the NJC's principles on the transfer of cases, the President of the NJO should be explicitly bound by them (and not only 'take them into account') and the judicial review of the transfer of cases should not be restricted to compliance with 'legal provisions' but should explicitly include the principles established by the NJC;

4. as a contradiction of the principle of equality of arms, the competence of the Prosecutor General to give instructions that charges be brought before a court other than the court of general competence should be removed."

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§90-91

See also CDL-AD(2013)012, Opinion on the fourth amendment to the fundamental law of Hungary, §§73-75

"Cases should not be transferred from a judge without good reason and this is covered by the last paragraph of Article 25. This paragraph states that cases may be transferred from a judge due to reasons of: 'his/her prolonged absence [....], or if efficient operation of court is endangered, or if he/she was issued a final disciplinary sanction due to a disciplinary offence for unjustified procrastination, and other situations provided by the law'. Some specific reasons for the transfer of the case to another judge, which are listed in this paragraph, would qualify as valid reasons, however, formulations such as 'efficient operation of the court' and 'other situations provided by the law' are clearly too broad and vague."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §42

3.2.4. Presidents (chairpersons) and senior judges: appointment, status, role and powers

3.2.4.1. Appointment of the presidents

"[...] [T]he power of the President to appoint the chairmen of all courts without any involvement of the Council of Justice [...] appears to be problematic."

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §60 See also CDL(1999)088, Interim report on the constitutional reform In the Republic of Moldova, §26

"[The draft according to that] Chief Judges of the various courts with the exception of the Chief Judge of the Supreme Court are elected by [the parliament.] is problematic from the point of view of judicial independence. The election of the respective Chief Judge by his peers would be preferable."

CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system, p.3

"[...] [R]egarding the appointment of senior judges, involving their peers in the appointment process would have been more in keeping with the principle of the independence of the judiciary."

CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina, Chapter B.I, §9

"[...] [T]he President and the Vice President of the Court of Cassation are elected by Parliament at the proposal of the President, whereas the other members of the Court are elected by the Assembly without any such intervention by the President. This difference of treatment between members of the same court does not appear to be justified [...]."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 2

"[...] As long as the Constitution of Serbia authorises the National Assembly to appoint the president of the courts, the risk of politicisation may, at least, be diminished by limiting such appointment to one non-renewable term."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §71

"The appointment of court presidents by the organs of judicial self-administration [...] would go too far as well if this term were to refer only to the Congress of Judges. Even after the reduction of the functions of court presidents, there is indeed a danger that these positions can be abused in order to exert pressure on judges to decide cases in a certain way. However, such appointments should be rather made by the High Judicial Council, which has a higher democratic legitimacy than the organs of judicial self-administration. If the term 'organs of judicial selfadministration' were to include the High Judicial Council then this should be spelled out explicitly."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §18

"The Venice Commission and the Directorate welcome the proposed system of election of court presidents by the judges of the same court by secret ballot which is in line with the requirements of the principle of internal independence of the judiciary [...]."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, § 84

"Paragraph 13/2 sets out that candidates for president of courts, in addition to having the normal qualifications, competence, and worthiness to perform the judicial function, must also have the capacity to manage and organise the activities of the courts. [...] All these criteria appear to be appropriate to take into account in choosing a president of a

court. It is also to be welcomed that these prerequisites are set out in a normative text, which is far from being the case in all member States.

In evaluating these matters, account is to be taken of the candidate's record (paragraph 13/4) in any court where he or she has performed a managerial function, the duration of his or her judicial experience and experience as a manager, the opinion of the board of all judges of the court to which the candidate belongs, as well as the candidates for president of a court, the opinions of the board of judges in which the candidate performs a judicial function, of the court for which the president is proposed, as well as boards of all judges of an immediate higher court are to be taken into account. If a previous president is among the candidates, the evaluation of his or her previous mandate is to be taken into consideration. These criteria appear to be appropriate.

Nevertheless, the question is once again the manner in which these criteria are evaluated. This is all the more important as, by definition, a person who is a candidate for president of courts for the first time will not have had the opportunity to show his or her managerial skills. This means that the criteria seem to be subjective: does the candidate have the skills required, taking into account that he or she will not have had the opportunity to show said skills? This might be revisited."

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia, §§50-52

3.2.4.2. Term of appointment, tenure, re-appointment

"[...] [A]ppointing court presidents with administrative functions for a limited period of time does not violate the European standards. However there is not a single standard – in several European countries the principle is that also court presidents are irremovable."

CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §41

"[...] [T]he limitation of the term of office of chairpersons appears to be a guarantee of independence where the executive authorities have a decisive influence on the appointment procedure for chairpersons. In this latter case, according to the Venice Commission, appointments should be for a fixed term and there should be a limit on possible renewals. The influence of chairpersons may grow ever stronger over a long period of time and renewable terms of office may also substantially jeopardise the independence of a Chairperson, who may at some point be influenced in his/her work by the desire to be reappointed by the executive. However, a short-term appointment risks undermining courts presidents' possibilities to realise effective leadership and to ensure a solid and strong courts' organisation.

[...] It is recommended that immediate reappointment be excluded from the draft law. Further, as analysed above, the appointment of court presidents by the judges of the same court ensures a better guarantee for the independence compared to the current system where court presidents are appointed by the High Council of Justice. However, the Venice Commission and the DHR cannot see the reason why the term of office of court presidents which is five years in the current system, is reduced to three years in the draft amendments. On the contrary, in an appointment system which guarantees better internal independence as the newly proposed one, the court presidents may even have a longer term of office to ensure a solid and strong courts' organisation.

Having regard in particular to the proposed appointment system of court presidents, three years term appears rather short. The Commission and the Directorate recommend thus the extension of the term of office of court presidents."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §§86, 88, 90, and 91

"[...] The possibility and hope to be reappointed might influence the attitude of a judge towards the executive in such a way that his/her independence and even his/her integrity could be jeopardised. Excluding any possibility of re-appointment is also a guarantee against politicization. On the other hand a short-term appointment can undermine courts presidents' possibilities to realise effective leadership and to ensure a solid and strong courts' organisation. The Venice Commission finds the appointments of court presidents for a longer term without or a shorter term with the possibility of renewal in general as compatible with the principle of judicial independence. However, the proposed term of office of four years (and the reappointment for the same period) in the Armenian context appears rather short, taken into account that the procedure for election and appointment, as proposed by the Draft Law and as regulated in the Judicial Code, will take time and will most probably start already in the third year of taking up by the court presidents of their functions. [...]"

CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §§30, 31

"[...] The provisions providing for the automatic termination of the mandates of court chairperson upon the enactment of the draft amendment law is problematic and should be removed."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §101

3.2.4.3. Powers of the presidents

"[...] [T]he competence of the court chairperson should stay purely administrative and should not interfere with the judicial functions of judges."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §93

"It is not clear what is meant by being responsible for the management of the 'comprehensive performance' of the Court and its administration. This may be a translation problem [...], but the powers and responsibilities of Court Presidents need to be very clearly defined."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §62

"[...] It is thus welcomed that the High Council of Justice is indicated as the unique authority in the draft Law, to formally initiate disciplinary proceedings against judges. The limitation of court presidents' competence to 'inform' the High Council on

disciplinary misconduct of a judge is also a positive step which strengthens 'internal' judicial independence."

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §23

"The President of the Supreme Court and the presidents of local courts have extraordinarily vast powers. Some of the amendments aim to reduce the scope of these powers, for instance, the competence to initiate disciplinary proceedings is transferred to the Judicial Council, which is welcomed. [...]."

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

"However, this also means that the President of the court may order more frequent assessments of a judge where he or she decides that it is necessary. It is not clear why the President of the court should be deciding on the timing and frequency of the assessment. He or she may have the power to signal the need for an assessment or request for a disciplinary investigation. However, it should not be the President's responsibility to make decisions on those issues."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §86

"Article 37 of the Draft law confers the right to the president of the court to examine the files of a case assigned to a judge. This right is very largely defined as it may be exercised in relation to: a) a petition filed by a party to a proceeding; b) a request filed by the Protector of Human Rights and Freedoms; c) initiation of a procedure to establish disciplinary accountability; d) an application for recusal of a judge; e) an application to expedite proceedings (application for review); withdrawal of an allocated case, and f) in other cases where so stipulated by law. In the cases referred to in paragraph 1 of Article 37, the president of the court may request the judge to deliver him/her data in writing or a report on the cases and on the reasons due to which such cases were not finalised within the statutory deadline or within a reasonable time.

This provision confers the president of the court a very large right to interfere in the cases assigned to the judges of the court and thus threatens to undermine the internal independence of these judges. Only when there are serious and objective indications of the dysfunction of the judge can such interference be justified. The Venice Commission recommends to add this as a prerequisite condition, and to delete, among the reasons given to examine the case, a) ('a petition filed by a party to a proceeding') and f) ('in other cases where so stipulated by law'), as they are too large."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§23, 24

"Article 8.3 sets out what judges should do when there are any attempts to influence them or put undue pressure on them. It might be useful to recommend that the president of the court in question act in support of the individual judge concerned when notifying the judicial community and the law enforcement agencies of this situation."

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, §51

3.2.5 Remedies against the problem of the length of procedure

"[...] [I]n parallel to introducing the right of a fair trial within reasonable time, the respective superior court or directly the Supreme Court should be entrusted with a specific compensatory and acceleratory remedy against the excessive length of procedure."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §10

"[The law] enables the President of the NJO to designate another court based on the vague criterion of 'adjudicating cases within a reasonable period of time'. This relates to Articles 11.3 and 11.4 of the Act on T ransitional Provisions of 30 December 2011, which were adopted on the constitutional level in order to overcome the annulment of a similar provision on the legislative level by Constitutional Court judgment no. 166/2011 of 20 December 2011. The Constitutional Court had found that provision contrary to the European Convention on Human Rights. The fact, that some courts in Hungary are so small that the designation of such a court would effectively amount to the designation of a single judge or a special chamber, further adds to this. Even though the reasonable time requirement is part of both Article XXVIII Fundamental Law and Article 6.1 ECHR, it is not absolute, but forms a field of tension with the often conflicting right to a fair trial with respect to the fact that having and exercising more procedural rights necessarily goes hand in hand with a longer duration of the proceedings. Taking into account the importance of the right to a lawful judge for a fair trial, the state has to resort to other less intrusive means, in particular to provide for a sufficient number of judges and court staff. Solutions by means of arbitrary designation of another court cannot be justified at all."

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, §90

"[...] It seems that the aim of these Articles is to address the serious problem of dilatory or vexatious proceedings and thus protect the right to a fair trial. Such an aim should be welcomed.

The possibility to apply to a higher court with the request to remedy unjustified delay can be an effective tool for the protection of the right to a fair trial. However, the reasons for the dilatory or vexatious proceedings could be many: inefficient and/or cumbersome regulations, increased caseload, lack of training or recourse, etc. Thus, in order to eliminate the problems, the reasons for such delays need to be analysed in order to be addressed correctly.

The basis for this set of provisions is the obligation of a member state, under Article 13 of the European Convention on Human Rights, to provide an effective remedy including, as a last resort, paying damages if a violation of the Convention occurs. Article 6 of the European Convention on Human Rights requires that court proceedings be carried out within a reasonable period of time. The State must provide individuals with an effective remedy against the violation of this requirement.

The starting point for a regulation should be to view financial compensation as one of several remedies. Financial compensation must thus not be the only remedy or the remedy to be considered first. It all depends on the circumstances of the specific case. The payment of an 'indemnity' may not always be necessary and/or in some cases should not be the only available remedy. This means that, as far as possible, violations

should primarily be redressed or remedied within the framework of the process in which they arise. For this to be possible, courts and administrative authorities must be aware of all the issues that concern the European Convention on Human Rights in both procedural and material terms. At the same time, individuals cannot remain passive in their contacts with courts and authorities.

It should be emphasised that the Contracting States have great freedom to choose how they fulfil their commitments in this regard. There are various alternatives for damage-regulation for violations of the European Convention on Human Rights, for example a reduction of a criminal sentence could be an effective remedy in certain cases.

The legislation of a state may also contain a number of proactive safeguards to ensure that judges handle cases without undue delay. For instance, there could be provisions giving a party the right to request the acceleration of the proceedings of a case in court. If a case has been unreasonably delayed, the case could be given priority in the court. Under such provisions the president of a court may have the responsibility to intervene in situations where there is a serious risk that a single case cannot be settled within a reasonable period of time. If a case or matter is not moved forward to a ruling within a reasonable period of time, the president of the court could be obliged to have another judge take over the case.

In both the draft amendments to the laws on judges and on the organisation of courts, the problem of delays in court proceedings within the administration of justice is dealt with. The draft amendments to Article 28 of the Law on judges contain a new procedure for the notification of the duration of proceedings [...]. The draft amendments of the Law on the organisation of courts have three new provisions, Article 8A – 8C, which include elements such as the 'pro-active safeguards' mentioned above. These elements of the draft are to be welcomed.

However, draft Article 8A – 8C also introduces a procedure where a request for and a decision on damages are interlinked with the concept of the acceleration of the case handling. The damages, or 'the appropriate indemnity', will be decided beforehand and a system with parallel processes is introduced accordingly.

This decision on damages will serve as a sort of penalty or fine, forcing the judge to deal with the case. This could put him/her under pressure, which in turn could endanger the principle of a fair trial. The principle of state liability followed by the liability of the judge under certain conditions set out in Article 6 of the Law on judges, could also increase this pressure. In following the management of and decision-making in a case, new and unforeseen facts or aspects may be brought into the case or otherwise change the conditions under which justice is or should be rendered in that case. It is therefore important to underline that it is the State that is responsible under the European Convention on Human Rights and not the individual judge."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, §§87-95

"In principle, fining lawyers for causing deliberate delay of court proceedings is acceptable as long as standards of fair trial are respected. No automatic sanction can be foreseen and the circumstances in each case need to be examined individually."

CDL-AD(2014)016, Opinion on the draft amendments to the criminal procedure and civil procedure codes of Albania, §16

"A major issue [...] is the backlog of some 12.000 cases at the Supreme Court. Many of the pending cases relate to issues of immovable property. The Minister of Justice and the President of the Supreme Court agree that the Court should reduce its case-load through more uniformisation judgements.

In uniformisation judgements, the plenum of the Supreme Court decides on the provisions of the law, which have been interpreted differently by various appeals courts or – preventively – when such diverging interpretations are likely. These decisions have the force of binding precedent and should allow deciding similar cases more quickly. Given that uniformisation judgements are not abstract but are given in individual cases, the Venice Commission's delegation did not object to this practice."

[Another] solution [to reduce backlog] was to transform the Supreme Court into a real cassation court, which should not take any evidence and look into points of law only. In addition, any first instance jurisdiction should be removed from the Supreme Court. The Venice Commission's delegation supported this idea."

CDL-AD(2014)016, Opinion on the draft amendments to the criminal procedure and civil procedure codes of Albania, §§22-23 and 25

3.3. BUDGETARY AND STAFF AUTONOMY

"It is [...] important that courts are not financed on the basis of discretionary decisions of official bodies, but in a stable way on the basis of objective and transparent criteria. It would be more practical to entrust one institution (preferably the HJC) with the competence to draft all parts of the budget for the system of the judiciary as a whole.

Additional guarantees may also be applied to ensure financial independence of the judiciary, such as the prohibition of reducing the budget of courts in comparison to the previous financial year or without the consent of the HJC, except in the case of a general reduction of the State Budget."

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia §§124, 125

"[The practice according to which, contrary to the principle of budgetary autonomy of the magistracy, the Ministry of Justice in fact controls every detail of the courts' operational budgets] contains obvious dangers of undue interference in the independent exercise of their functions."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 3

"[...] [T]he parliamentary budget battles [...] are undoubtedly of a political nature. [...] While wanting to ensure greater independence of judges and courts, and thus to bring about their depoliticization, [by involving the Council of Justice into this battles] it may turn out that they will, quite to the contrary, be engulfed in the political debate. Without deviating from the principle of having a separate budget for the judiciary and, in order to allow for a de facto judicial independence, these of powers and budgetary struggles could rather be left with Minister of Justice or the Cabinet as a whole which will feel politically responsible for the treatment eventually accorded to the judiciary in the matters of proper funding."

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §48

"[...] The independence in financial matters, i.e. the right of the judiciary to be granted sufficient funds to properly perform its functions and to have a role in deciding how these funds are allocated, is one of the main elements of the institutional (and also individual) independence of the judiciary. [...]

The budgets of courts and prosecutors' offices are determined at the level of the State (state courts), the Republika Srpska (RS courts), the Federation (Central FBiH Courts), the cantons (cantonal courts), and the Brcko District (BD courts). The Federation, due to its structure, bears the brunt of the budget fragmentation, which directly undermines the efficiency of the judiciary of the Entity.

No uniform rules exist in this area with the result that there are quite different budgets allocated to different courts and prosecutors' offices. Moreover, judicial bodies become easily vulnerable to pressure from the institution deciding on the budget.

The HJPC has made an initiative aimed at centralising the financing of the judiciary and bringing it to the state level. So far, this initiative has not been implemented, although the centralisation of the financing could be counted among the most important steps to be taken. On a lower scale, consideration should be given by the Federation, in the long run, to the financing of the judiciary (both courts and prosecutor's office) being concentrated at the entity level. In the short run, the Federation might consider at least bringing the financing of salaries of judges and prosecutors to the Federation level and leaving, for the time being, the financing of the expenditure relating to the running of courts to the cantonal levels."

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §§95-98

"[...] In order to guarantee judicial independence, it is paramount that the courts receive sufficient funds to live up to their obligations to ensure fair trials in accordance with international standards. The judiciary shall, [...] be financed directly from the Republic's budget, which is commendable. Furthermore, Article 57 par 2 states that sufficient funds should be provided for the courts' exercise of their constitutional powers.

In order to ensure that the funds allocated to the judiciary are sufficient, it would be advisable to ensure that the views of the judiciary are taken into consideration in budgetary procedures. The High Judicial Council could represent the judiciary in this regard and have some influence on budgetary decisions regarding the needs of the judiciary. [...]"

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §§24,25

"Article 35(4) stipulates that 'Legal associates, senior legal associates and legal advisors shall be appointed by the High Judicial and Prosecutorial Council'. As far as legal associates and legal advisors shall assist judges in their work, it may be advisable to allow the involvement of the Court and the judges in the selection process. The advisors shall closely work with judges and the operation of the Court may be more efficient if the judges have a say in the selection of their advisors."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §72

"According to Article 48(5), 'At the end of each budget year, the Presidents of the Courts shall inform the Parliamentary Assembly of Bosnia and Herzegovina on the

execution of the budget of the respective court'. The rationale for such a procedure is questionable, and it may also have a negative impact on the independence of the judiciary. The President of the Court should be relieved from such a legal obligation and, at the same time, the highest possible standards of transparency for budgetary expenditures by the courts should be provided."

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina, §81

"Under Article 25 of the draft Law, the HJPC prepares a draft annual budget, which is then submitted, through the Ministry of Justice, to the Ministry of Finance and Treasury of BiH for approval. Under Article 23.2 of the draft Law, the HJPC may also make recommendations relating to the annual budgets of courts and prosecutors' offices. The system of financing the judiciary remains, however, highly fragmented, with the budgets determined at several different levels (BiH, the Entities, the FBiH cantons, the District Brcko).

The extent of the competences seems to be in line with European standards, with the exception of the reservations made under Sections D, E and F above."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§67-68

4. COUNCIL OF JUSTICE[5]

4.1. FUNCTIONS, REMIT AND DUTIES

"Many European democracies have incorporated a politically neutral High Council of Justice or an equivalent body into their legal systems – sometimes as an integral part of their Constitution – as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State. [...]."

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §5

"A report on judicial councils in Europe, commissioned by the Netherlands in the late 1990s, distinguishes two main models of judicial councils: the Southern European model, in which the council primarily focuses on the management of the judiciary; and the Northern European model, in which the council has extended powers in the area of administration, court management and budgeting. . [...]."

CDL-AD(2014)008*, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §22*

"To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council

[5] *This section speaks of specialized bodies which deal with judicial appointments, promotions, disciplinary proceedings against judges and, more generally, secure autonomy of the judicial system vis-a-vis other branches of the Government. These bodies are often called "councils of justice" but the name, as well as composition and powers may vary from one country to another. Some countries have no councils of justice at all.*

have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers."

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §32

See also CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, §§88-89

"The role of the high judicial council can vary to a large extent [...].

The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. [...]. "

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§24, 25

See also CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §59

"While the participation of the judicial council in judicial appointments is crucial it need not take over the whole administration of the justice system, which can be left to the Ministry of Justice."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §26

"[...] [I]n part three of Article 126, the Amendments refer to the judges' qualification commission. The Venice Commission maintains its position that there is no need for two separate bodies [i.e. judicial council and the qualification commission] [...]."

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §40

"It is thus a positive step that the High Council of Justice be the sole authority to initiate disciplinary proceedings against judges, which would provide for more guarantees compared to a system of plurality of disciplinary authorities competent to initiate those proceedings. [...] The proposed system provides also for a clear division of tasks between the body in charge of investigating (the High Council of Justice) and the body in charge of deciding on the imposition of the disciplinary sanction, i.e. the Disciplinary Board. This is in line with international recommendations. [...]."

CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §15

"[...] It is striking that, while the recommendation by the High Qualifications Commission is to be based exclusively on objective criteria, the High Council of Justice can apparently disagree with a recommendation for reasons that are not determined

by the law. This opens the door to arbitrary decisions. It is strongly recommended to circumscribe the role of the High Council of Justice in a much more transparent way. Taking into account the characteristics of the decisionmaking process before the High Qualifications Commission and the composition of the High Council of Justice, the role of the High Council of Justice should be made of a marginal nature, short of being removed."

CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §50

"[A legislative measure] establishes that the Minister of Justice shall have the power to authorize leaves of absence of the presidents of district and appellate courts. This provision may be considered to confer on the Executive Power an administrative competence over certain judges that contravenes the principle of independence of the Judiciary. It seems that it would be more coherent with this principle to confer that competence to the Council of the Judiciary."

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §39

"It is not uncommon in Europe to have some kind of inspection body that supervises judges [...] to some extent, to see if they perform their duties correctly. Some countries have such institutions, others manage without them. However, from a comparative perspective it is clear that the powers of the T urkish HSYK to supervise and control the judges [.] are not only greater than in most other European countries, but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial [...] powers, in a politicised manner that has been quite controversial.

The core issue with regard to the future independence, efficiency and legitimacy of the Turkish judiciary is whether the recent institutional reform will lead to a change in the way the substantial powers of the HSYK are used, or whether the tradition for political interference will be continued within the new framework."

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §§50, 51

"The system of judicial self-government is too complicated. There are too many institutions: meetings of judges on different levels, conferences of judges, the Congress of judges of Ukraine, council of judges of respective courts and Council of Judges of Ukraine which is a different organ than the High Council of Justice. The structure should be simplified to be effective. This pyramid structure can become an obstacle for building a real self-government and the scope for 'judicial politics' seems enormous. The dispersal of powers through many bodies seems to lead to a potentially confusing situation where different bodies would exercise the same powers."

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §122

"The President of the Supreme Court and the presidents of local courts have extraordinarily vast powers. Some of the amendments aim to reduce the scope of these powers, for instance, the competence to initiate disciplinary proceedings is transferred to the Judicial Council, which is welcomed. [...]"

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan, §17

"[...] [The] [p]rovisions relating to the training of judges and the establishment of a National Institute of Justice [...] should be more detailed and should determine the main action of the Institute. The Institute should be controlled by the Supreme Judicial Council rather than the Ministry of Justice. [...]."

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"The amendments to Article 128 [of the Constitution] reflect the proposed competences of the Judicial Council to elect and release from duty the President of the Judicial Council and of the Supreme Court, and are therefore to be welcomed. [...]."

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §26

"In order to ensure that the funds allocated to the judiciary are sufficient, it would be advisable to ensure that the views of the judiciary are taken into consideration in budgetary procedures. The High Judicial Council could represent the judiciary in this regard and have some influence on budgetary decisions regarding the needs of the judiciary. This influence could be exercised by preparing a draft budget or by commenting on a draft received from a competent ministry. Against this background, it is recommended that the Constitutional Law be amended by adding certain provisions on the budgeting process that would envisage a role for the High Judicial Council."

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §25

"The [High Judicial and Prosecutorial Council] has broad competences [...]: it appoints judges and prosecutors [...], decides on the suspension of judges, determines criteria for the assessment of judges and prosecutors, decides on the appeals in disciplinary proceedings, gives its views on the annual budget for courts and prosecutors' offices, gives its opinions on draft laws and regulations concerning the judiciary etc. [...].

Article 24 of the draft Law gives the HJPC power to require courts, prosecutors' offices and state authorities, as well as judges and prosecutors to provide it with information, documents and other materials in connection with the exercise of its competencies. It can also have access to all premises of courts and prosecutors' offices and their records. Such competences confirm that the HJPC is the central organ within the judiciary.

Under Article 25 of the draft Law, the HJPC prepares a draft annual budget, which is then submitted, through the Ministry of Justice, to the Ministry of Finance and Treasury of BiH for approval. Under Article 23.2 of the draft Law, the HJPC may also make recommendations relating to the annual budgets of courts and prosecutors' offices. The system of financing the judiciary remains, however, highly fragmented, with the budgets determined at several different levels (BiH, the Entities, the FBiH cantons, the District Brcko).

The extent of the competences seems to be in line with European standards, with the exception of the reservations made under Sections D, E and F above."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§65-68

"The structural unit of the High Council of Justice provided for in draft Article 351(1) seems to be an investigative body with very wide and discretionary powers. It is absolutely free to search all possible information on candidates [to judicial positions], without almost any restriction, since these research powers, including those concerning personal details, are covered by the candidate's consent (draft Art. 35(4)). First, it is by no means clear in the draft law how the structural unit of the High Council of Justice will be composed and which working methods will be used. For dealing with highly confidential information, special requirements for the members of such a unit must be laid down in the legislation and also the conditions for their appointment/selection by the High Council and their responsibilities must be made clear."

CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §55

"In the Commission's view, this provision enables the High Council of Justice to determine its own rules of procedure by adopting an appropriate 'statute', but does not allow for important matters governing its powers and affecting the rights and duties of magistrates to be so regulated. These matters should rather be regulated by a law adopted by Parliament."

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary, p. 3

"The obligation [of the Council] to provide an annual report to the National Assembly seems reasonable.

The information provided to the public on the activities of the Council will also assist in rendering the judges' work at the Council more transparent. It will notably allow the public to see that there are sanctions against judges that have committed disciplinary offences etc."

*CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§35, 36 See also CDL-AD(*2014)008*, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71, 72*

4.2. COMPOSITION OF THE JUDICIAL COUNCIL

4.2.1. General approach

"There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from

other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions."

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §28

"An autonomous Council of Justice that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. [...]."

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §9

"As regards this body, the Venice Commission repeats its observations on the two obstacles to be avoided: corporatism and politicisation [...]

[...] [P]oliticisation can be avoided if Parliament is solely required to confirm appointments made by the judges."

CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §§21, 22

"The Venice Commission does not consider that there can be, in itself, any objection to the election of a substantial component of the Supreme Judicial Council by the Parliament."

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, §29

"[...] [A] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §29

See also CDL-AD(2008)006*, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §76*

"[...] [I]n a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

[...] In general, it seems legitimate to give Parliament an important role in designating members of the Council [of Justice] [...]."

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§9, 19

See also CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §13

4.2.2. Judicial members of the Council and lay members: search of appropriate balance[6]

"The European Charter on the statute for judges [,..]states: 'In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are

[6] *This section should be read in conjunction with section 4.2.4 below on lay members of the judicial councils*

judges elected by their peers following methods guaranteeing the widest representation of the judiciary' [...].

The CCEJ commends the standards set by the European Charter 'in so far as it advocated the intervention [...] of an independent authority with substantial judicial representation chosen democratically by other judges'."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§19, 20

"Under current international standards, there is no uniform model for the composition of judicial and/or prosecutorial councils. [...].

Several international instruments, however, provide that when a judicial council is established, a substantial part of its members should be recruited from among judges. [...]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§27, 28

"[The] Commission welcomes the proposal [...] to have the Judicial Council composed of nine judges out of twelve members [...]."

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §57

"Changes in the government or parliament should not influence the judiciary. In the particular case of the HJC, such changes will not affect its elected members, but they may influence the appointment and termination of office of ***ex officio*** members. [...]"

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §22

"[...] [A]mong the judicial members of the Judicial Council there should be a balanced representation of judges from different levels and courts, and this principle should be explicitly added."

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §23

"It is recommended that the Constitutional Law be amended so that the High Judicial Council is composed of a substantial number of judges from both the first instance and appellate level courts, who are to be elected, or at least proposed, by their peers, following a transparent procedure laid down in the Constitutional Law. [...]"

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan, §20

"The number of judges in the entire composition of the Council (only 8 out of 24 members) does not seem to be adequate. The limitation of the number of judges to one third falls short of the standards requiring a substantial judicial representation within such institutions. The Venice Commission has stressed that '[i]n all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges'."

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law 'on the status of judges' of Kyrgyzstan, §24

"The [High Judicial Council] would thus have 11 judges among its 15 members. This proportion seems even too high and could lead to inefficient disciplinary procedures. While calling for an appeal to a court against disciplinary decisions of judicial councils

is required, the Venice Commission insists that the non-judicial component of a judicial council is crucial for the efficient exercise of the disciplinary powers of the council."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §41

See also CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §§74-76

"[...] [M]embers from the basic courts and members from higher courts should also be ensured a fair representation within the judicial members of the Judicial Council."

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §39

"In its previous Opinion, the Venice Commission emphasised the importance of ensuring that not only judges, but also the 'users of the judicial system' such as advocates, representatives of the civil society and academia, have a seat in the NJC, as uniformity 'can easily lead to mere **introspection and a lack of both public accountability and understanding of external needs and demands' (paragraph 45).**

The Hungarian legislator addressed this criticism in Section 106 AOAC. Although the NJC is composed solely by judges, the external perspective is now introduced, as other persons than judges persons will be able to attend the meeting of the NJC with consultative vote. In addition to the President of the NJO, the Minister for Justice and the Prosecutor General, Section 106 AOAC refers to the President of the Hungarian Bar Association, the President of the Hungarian Chamber of Notaries Public as well as experts and representatives of any civil society and other interest groups, which can be invited by the President of the NJC, but who are not members of the NJC. Although the Venice Commission acknowledges that States – if they are to establish a judicial council – have a large margin of appreciation in regulating the composition of judicial councils, the Commission is still of the opinion that the composition of the Council should be 'pluralistic' and the Council should not be composed of judges only. It is important that such a pluralistic composition is achieved not only by inviting non-judges as guests, but also by including them as full members with voting rights."

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, §§33, 34

"Article 10.1 provides that members of the Disciplinary Board from among judges shall be elected by the General Assembly of Judges, as follows: 2 judges from the Supreme Court of Justice, 2 judges from the Courts of Appeal and 1 judge from the courts. It is to be welcomed that judges are elected by their peers. However, it is not clear what the rationale is for composing the Disciplinary Board mainly of representatives of the senior judiciary. Why are the judges requested to elect of 4 out of 5 judges from the Supreme and appellate courts? Furthermore it should be expressly mentioned that election is done by secret ballot."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and

Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §52

4.2.3. Representation of the executive in the Council; *ex officio* members

"The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, [and] at the appeal stage [...]. [I]t is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government."

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §16

"Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. [...] Such presence does not seem, in itself, to impair the independence of the council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §33

See also CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §97

"[...] The Proposal [...] removes all participation of prosecutors from the HJC but retains powers of the HJC in respect of prosecutors (incompatibility requirements and discipline). However, the HJC should have no such powers if there is a separate prosecutorial council."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §42

"[...] It seems that the Volkov judgment does not rule out ***ex officio*** members. They could be members of the HCJ without a right to vote."

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, §57

4.2.4. Lay members : importance of having the civil society represented

"[...] The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council's objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised. Furthermore, in a system guided by democratic

principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.

[...] [A] basic rule appears to be that a large proportion of the membership [of the Supreme Council of Justice] should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members. [...]"

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§9-12

See also CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§27 and 30

"[...] It is common practice that 'judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sector' and the Venice Commission even recommends that a substantial part of the members be non-judicial. [■■■]

[...] [I]nstead of excluding legal professionals altogether, consideration might be given to adding members on behalf of the professional community, which would not excessively broaden the size of the HJPC, while ensuring the representation of the users of the judicial system."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§30,31

"Corporatism can be avoided by ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body. They must be usefully counterbalanced by representation of civil society (lawyers, law professors and legal, academic or scientific advisors from all branches)."

CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution, §66

See also CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, §§21, 22

See also CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ ODIHR, §102

See also CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation *and Administration of Courts of Hungary, §45*

"[...] It is advisable for judicial councils to include members who are not themselves representatives of the judicial branch. But, such members should preferably be appointed by the legislative branch instead of by the executive."

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §34

"In the Venice Commission's view, this composition of an equal number of judges and lay members would ensure inclusiveness of the society and would avoid both politicisation and autocratic government.

A crucial additional element of this balance would be that the President of the Judicial Council should be elected by the Judicial Council from among its lay members (with the exception of the Minister of Justice) by a majority of two thirds, and should have a casting vote. [.]

[...] Like for the Plenary, among the judicial members of the disciplinary panel there should be a balanced representation of judges from all different levels and courts (see infra the comments on the amendments to the laws)."

CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, §§20-22

"With the proposed new composition of the Judicial Council, a parity between judicial and lay members is sought to be achieved. The Venice Commission welcomes this new composition, which would avoid both the risk of politicisation and the risk of self-perpetuating government of judges.

However, the parity of judicial and lay members would not pertain in disciplinary proceedings, as the Minister of Justice could not sit and vote in such cases and, as a consequence, the judges would have a majority [...]. Therefore [.] a crucial additional element of this balance would be to add a provision in Article 127 of the Constitution on a smaller disciplinary panel within the Judicial Council with a parity of judicial and lay members (with the exclusion of the Minister of Justice). The details concerning this disciplinary panel could be regulated by the Law, taking into account the importance of reconciling the independence of the judiciary and at the same time ensuring accountability."

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §§20, 21

"[...] [T]he organisation of a competition to choose the civil society representatives on the Disciplinary Board is to be welcomed. However, it would be desirable that the criteria for selection of candidates as well as the mechanism for the appointment and functioning of the Commission which is intended to select candidates be specified in the law itself rather than in a regulation. Furthermore, it should be made clear that the Minister's function in appointing these persons is a formal one and that the appointment is carried out in accordance with the recommendations of the Commission which selects candidates."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §54

"[...] [T]he Venice Commission recommends that the authorities consider election of the lay members of the JC by a qualified majority in the Parliament. In its Report on Judicial Appointments the Venice Commission emphasised that it is 'strongly in favour of the [depoliticisation] of [Judicial Councils] by providing for a qualified majority for the election of its parliamentary component' (§ 32). At the same time the Venice Commission is mindful of the fact that requiring a too high number of votes from the non-majority MPs may lead to a political stalemate, where few people would be able to block elections of lay members to the JC." CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §67

4.2.5. Qualification requirements for the candidates to the council; incompatibilities and quotas

"It is vital that the members of the Council have sufficient practical experience to carry out their work. Therefore, the requirement of seven years' experience provided [...] seems adequate."

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §51

"The requirement of 10 years of experience for judges [to be eligible at the Council] should be reconsidered because it will make the election of qualified candidates from all levels of the judiciary, especially from first level courts, very difficult."

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, §36

"[...] [T]he amendments could provide that should a chairman of a court be elected in the Council, he or she would have to resign from his or her position as chairman while of course retaining his or her position as an ordinary judge."

CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §50

"[...] [I]n order to insulate the judicial council from politics its members should not be active members of parliament."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §32

"[...] Out of 15 members [of the Judicial Council] 4 must belong to the non-majority communities, and, in addition, three more must be elected by the double majority vote by the Parliament.

In its 2005 Opinion, the Venice Commission stated that the provisions concerning representatives of the non-majority communities 'are to be welcomed' (§ 40). The question is whether the direct ethnic quota for selecting candidates is still an acceptable solution in the present-day conditions.

Ethnic-based criteria for selecting State officials are suspect, and it is particularly true in respect of the judiciary. In the 2014 Opinion on the high judicial and prosecutorial council of the Bosnia and Herzegovina the Venice Commission emphasised that 'the judiciary should not be organised along ethnic lines'. That being said, such method of selecting candidates is not ruled out. Mechanisms of power-sharing between different ethnic communities are to be assessed in the light of the country's recent history; ethnic criterion for eligibility to political posts may be defendable in the aftermath of a civil war but must be reconsidered after a passage of time – see, in particular, the 2005 opinion on the constitutional situation in Bosnia and Herzegovina. [■■■]

In the Macedonian context the proposed Amendment serves to protect non-majority communities. Furthermore, ethnic quotas do not close access to the JC for the candidates from the majority communities. Consequently, the case of ***Sejdic and Finci*** cannot serve as a precedent. That being said, the method of the Court's reasoning, namely the 'dynamic' approach to the analysis of the ethnic-based election criteria, still applies.

The Venice Commission recalls in this respect that Point 10 of the UN Basic Principles on the Independence of the Judiciary requires that judges are appointed without discrimination based on the ground of 'national origin'. Recommendation of the Committee of Ministers of the Council of Europe no. R(94)1224 calls for merit-based

appointment of judges with regard to 'qualifications, integrity, ability and efficiency' (see Principle 1, point 1(2)-c). Similar principles are proclaimed by the European Charter on the statute for judges: see, for example, point 2.1, which requires that judicial appointments are based on capacities and that the candidates should not be excluded on the basis of their ethnic origin. The principle of 'merit-based' appointment is cited with approval by the Venice Commission in its Report on Judicial Appointments, §§ 10 and 3637.

In the opinion of the Venice Commission, there is a certain tension between the principle of 'merit-based' selection of judges and selection of members of the JC along ethnic lines. The solution proposed in the 2005 and 2014 Amendments – namely the ethnic quotas for nonmajority communities in the Judicial Council – appears to be even more radical than the legal mechanism of 'double majority' provided originally by the Constitution for the election of the members of the JC.

That being said, in the circumstances the Venice Commission is prepared to maintain its previous recommendation. The 'double majority' principle can hardly be applied in the context of election of judicial members of the JC. Further, the Commission reiterates that the ethnic quota in the specific context of the country is supposed to protect minorities and may thus be regarded as a sort of a 'positive discrimination'. Therefore, direct ethnic quotas remain another possible mechanism securing adequate representation of non-majority communities. The authorities must consider, however, whether ethnic quotas should exist in relation to the lay members of the JC elected by the Parliament."

CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, §§58, 60-65

"[...] The draft Law indicates that the composition of the [High Judicial and Prosecutorial Council] needs to reflect the ethnical composition of BiH, with at least six members of each of the Constituent Peoples and an appropriate number of members from among Others. Equal gender representation should also be ensured. These requirements were already present in the 2004 Law, but at the time, no numbers were given, the Law simply spoke of 'general representativeness' (Article 4.4). The need to have at least six representatives of each Constituent People, together with the requirement of the gender equality, may make the selection of appropriate members very difficult and inflexible [...]

[...] [I]n a country of the size of BiH, using a requirement for a certain ethnic composition for the HJPC will make it very difficult in practice to also meet the requirement of ensuring an equal representation of the sexes. The Venice Commission strongly supports policies aimed to ensure gender balance in public institutions and believes they should be welcomed and that all efforts in this direction should be praised. However, an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence – taking the country's size and population into account – may undermine the effective functioning of the system".

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§32 and 35

4.2.6. Chair of the Council; structure and working bodies of the Council

"It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the chair of the council could be elected by the Council itself from among the non-judicial members of the council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council."

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §35

"There may be different approaches with regard to the role of presidents of supreme courts within judicial councils. Some countries choose not to impose any restrictions and allow the President of the Supreme Court to be elected/appointed President of the Council and hold both positions simultaneously (as still is the case in Serbia, but is now proposed to be abandoned). In view of enhancing the independence of the judiciary others may prefer to separate the administrative positions within the judiciary and the membership in the Council; and therefore, should the president of the court be appointed President of the Council, this person should then resign from his or her position at the Supreme Court [...]."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §23

"The Minister for Justice has been given a new power to address proposals to the Supreme Judicial Council for the purposes of appointing and dismissing the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Chief Prosecutor, for determining the number of judges, prosecutors and investigators and for appointing, promoting, demoting, moving and dismissing all judges, prosecutors and investigators. Formerly, such proposals could only be made by the heads of the different branches of the Judiciary, the prosecution service and the investigation service. The Commission does not consider the conferring of a power to make such a proposal on a Minister of the Government is in itself objectionable as an interference with the independence of the Judiciary. Again, the doctrine of separation of powers does not require that there can be no involvement by either of the other two branches of power in a decision to appoint or dismiss a judge. The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members independence and impartiality [...]. [...]

There is, however, a case to be made that when the [Supreme Judicial] Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it. [...]"

CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria §§34-35

"The Minister of Justice as the chairman of the Supreme Council of Justice should not be able to block the discussion of a particular issue within this body. When the Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it".

CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, §5

"In addition, the Commission considers that [the proposed measure], providing that the President chairs the Council of Justice, could prove rather problematic. Having the President as the Chair is not necessarily the best solution (although provided for in a number of European Constitutions) and his or her role as the Chair should be purely formal. In this regard, the Commission wishes to recall the European Charter on the Statute for Judges, which stresses the importance of the absolute independence of this body from both the executive and the legislative powers."

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §58

"It is very positive, as part of the balance sought, that the President of the Judicial Council will be elected by the Judicial Council itself by a two-third majority among its lay members."

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §22

"[...]Taking into account the powers granted to the HCJ, it should work as a full time body and the elected members, unlike the ex officio members, should not be able to exercise any other public or private activity while sitting in the HCJ."

CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, §30

"The election of the Chairman of the Board by its members, by secret ballot [...] is to be welcomed. However, it would be desirable for the Board also to elect a Vice-Chairman to act in the absence of the Chairman rather than the arrangement provided for in Article 12.3 that in the absence of the Chairman the oldest member present should take the chair.

With regard to the provision for the removal of the Chairman, as well as a reasoned proposal from three members (Article 12.4) there also needs to be a vote of the members of the Board, who should not have to wait for three months of inaction before taking action themselves. A 2/3 majority could also apply as in the case of the removal of ordinary members."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§58-59

"[...] [I]t is not appropriate for the President and the Vice Presidents of the [High Judicial and Prosecutorial Council] to be chosen along ethnic lines and the decision on their election should not be left to the Parliamentary Assembly. In addition, this system of rotating presidents weakens the HJPC.

[...] [I]t is important that the draft Law provide restrictive grounds for which the Parliamentary Assembly may decide to dismiss the president and vice-president. It is hard to imagine the reasons (except resignation), which may result in a decision being made by the Parliamentary Assembly to end the term of office of the president and

vice-president, but retaining membership in the HJPC. There should be input from an expert body before Parliament takes a decision. In addition, unlike the election process where there is a prior selection limiting the choice of the Parliamentary Assembly, in the decision on dismissal, the Parliamentary Assembly is not limited and acts on its own. This is inappropriate and needs to be reconsidered."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§47, 48

"The work of the [High Judicial and Prosecutorial Council] should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.

In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly 'may remove the Presidency or a member of the Presidency from the Council'. [...]."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71, 72

See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§35, 36

"The 2004 Law created the [High Judicial and Prosecutorial Council] as a single and uniform body. Although this is not entirely unusual, ideally the two professions – judges and prosecutors – should be represented by separate bodies. For this reason the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils.

However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. The Venice Commission's requirement is that: 'If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's appointment and disciplinary proceedings because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings'.

The Venice Commission therefore welcomes the establishment by the draft Law of two subcouncils: one for judges and one for prosecutors. It seems to be a balanced solution which, on the one hand, prevents excessive interference of one of the legal professions into the work of the other while, on the other hand, making it possible to maintain the current structure of the HJPC as a common organ of/for judges and prosecutors."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§58-59 and 61

4.3. PROCEDURAL ASPECTS OF APPOINTMENT/ELECTIONS OF THE MEMBERS OF THE COUNCIL

"[...] [The Venice Commission is] aware that the participation of the legislative power in the election of the members of a judicial council is, to an extent, common practice – reflecting the conviction that 'in a system guided by democratic principles,

it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament'. [...]

In the context of BiH it is crucial that a clear separation of state powers be maintained to ensure the independence of the judiciary – especially – on the institutional level, because institutions such as the HJPC are not (yet) provided with an explicit constitutional basis. For this reason, the Venice Commission is convinced that, in the particular context of BiH, involving the legislative power in the election of the members of the HJPC will lead to a highly politicised process where the merits of the individual nominees are unlikely to have any significant effect on the outcome.

[...] [T]he Venice Commission is convinced that, in the particular context of BiH, involving the legislative power in the election of the members of the HJPC will lead to a highly politicised process where the merits of the individual nominees are unlikely to have any significant effect on the outcome.

It is recommended that a substantial element or a majority of the members of the HJPC be elected by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. [...]."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§43-45

"The National Assembly should not be given a real choice of candidates and the 'authorised nominators' should only propose one candidate per vacant position. In this way, the National Assembly will have a right of veto. This seems to be the only solution which would avoid political considerations being taken into account in the nomination of the Council members."

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §48

"[The Commission] considers however that the non-judge members should rather be elected by Parliament than by the President of the Republic."

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, §57

"[...][T]he delegation reiterated the proposal of the Commission to have the parliamentary component of the Council elected with a qualified majority. This would make sure that this component reflected the composition of the political forces in Parliament and would effectively make it impossible that the majority in Parliament fills all positions with its own candidates as it had been the case in the past."

CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria, §15

See also CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria, §25

See also CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §§19, 21

See also CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, §25

"[...][A] solution should therefore be found ensuring that the opposition also has some influence on the composition of the Council. One possibility would be to require a two-thirds (as in Spain) or three-fourths majority for the election of members by Parliament, another to provide that one of the two lawyer members should be designated by the parliamentary opposition. In any case, the presence of members nominated by

the opposition but elected by parliament should be ensured while taking procedural safeguards against the risk of a stalemate."

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §19

"The Venice Commission is of the opinion that elections from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of the Council.

It is a matter for the Georgian authorities to decide which solution is appropriate, but the antideadlock mechanism should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance."

CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§52-53

"[...] By leaving the definition of the election procedure [of the members of the High Judicial and Prosecutorial Council] to a separate regulation to be adopted by the Parliamentary Assembly in the future, the draft Law makes it difficult to assess the extent to which the requirement of transparency of the procedure has been met. [...]

This election procedure should be developed in the law [...]."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§41-42

"Article 5.2 delegates the determination of the procedure for the election of the judges' component of the Council to the Congress of Judges. While it is possible to have practical questions of the procedure decided by the Congress, at least its principles should be set out in the draft Law. For example, in order to be in line with the standards it is necessary to provide that the Council of Judges has to elect judges respecting the proportion between all instances of courts, including first instance courts."

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law 'on the status of judges' of Kyrgyzstan, §31

"It is not necessary to create an electoral register or directory for the judges who are allowed to vote in the Council elections. It is difficult to see how a president of a court could ignore a colleague in the distribution of ballot papers or how an individual who is not a judge would obtain such a ballot."

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §53

"This Article sets out that for each polling station the electoral commission shall appoint polling boards consisting of three judges who are not running for election. It is not clear how these judges are selected. Will it be a random selection? This should be clarified."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §41

"[...] [D]ecisions on appointments of judges and prosecutors cannot be delegated to commissions. The election of judges and prosecutors is by a majority vote of all members, but for the election of judges the decision must be supported by at least seven judges, and likewise for prosecutors. This prevents either judges or prosecutors from imposing their will on the other profession."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §57

"[...] The draft Law therefore leaves the entire process of the election of two members of the HJC to the discretion of the Bar Association and the joint session of deans of law faculties. This approach is questionable because – although the respect for the autonomy of these institutions is relevant in the context of self-governance or other internal matters – the election of the HJC member is clearly not an internal matter of the university or the Bar Association. It is in the interest of society as a whole (rather than the legal community, academia or the judiciary) that the HJC operate in an effective and efficient manner so as to uphold the independence of the judiciary and the rule of law. The procedures for the election of the HJC candidates as well as detailed requirements for the candidates should be set out in this Law."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §48

"[...] [T]he procedure of selecting the HJPC members could be regarded as deficient in some respects. Of the 15 members, two are selected by members of the House of Representatives, of the Parliamentary Assembly of BiH and of the Council of Ministers of BiH; two are selected by the Bar Chambers of the Entities; five or six by prosecutors, and five or six by judges. Due to this procedure, the selection could be vulnerable to inter-institutional and inter-personal rivalries in the judiciary".

CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, §88

"[...] It should be expressly mentioned that election [of members of the Disciplinary Board] is done by secret ballot."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §52

"The decision to provide for a majority presence of members elected by the judiciary in the HSYK is to be welcomed. However, [...] the second sentence seems to give every judge and prosecutor the right to vote: 'for the total number of regular and substitute Council members to be elected'.

If this is so, it does not leave much room for the election of minority candidates (i.e. candidates who do not share the opinions of the majority), because the candidates who are voted for by the majority of the voters could cover all the seats and exclude those supported by the votes from a minority. It is true that the submission of the candidatures is made on an individual basis and not within the framework of 'multi-person' lists (Articles 20 and 21) and electioneering is prohibited (Article 25), but these rules do not exclude the possibility of informal electoral majority agreements aimed at avoiding the election of candidates who are the expression of minority orientations, which should, in any case, be present in the body if the HSYK is to be representative of the entire judiciary.

In the original proposal of the Government for a new Article 159, it was stated that each voter could vote for only one candidate, which is a way of promoting a pluralistic composition. [...]

The electors should be authorised to vote for a smaller number of candidates than the number of members to be elected. This would lead to the representation of the broad range of interests in compliance with the principle of democracy. Moreover, the possibility of being elected again for the members at the end of their term of office could be subject to criticism. [...]."

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §§36-38

"[...] [I]t would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections.

The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardise the continuity in membership of the High Judicial Council. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council.

In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. While the Commission was informed that there are no cases pending in Georgia, any such change must be regarded with concern.

[...] The Commission is cognisant of the dilemma which the Georgian authorities face. Nevertheless, even though the composition of the current High Council of Justice seems unsatisfactory, the Venice Commission recommends that the members complete their mandate. However, it would seem possible to apply transitory measures which would bring the current Council closer to the future method of composition, for example by providing that incumbent chairmen of courts should resign as chair in order to remain on the Judicial Council. [...]."

CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, §§69-72 and 74

4.4. STATUS OF MEMBERS

"Granting immunity to members of the Council guarantees their independence and allows them to carry out their work without having to constantly defend themselves against, for instance, unfounded and vexatious accusations."

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, §26

"Alleged criminal conduct by members of the HSYK should be investigated and prosecuted in the normal way. Presumably this is intended to give protection to members of the HSYK against arbitrary or unjustified accusations. However, it seems to go very far indeed to provide, as Article does, that the Plenary of the HSYK must authorise an investigation and prosecution for an offence committed by an elected council member even in the case of personal offences which are nothing to do with the performance of their duties as members of the HSYK. In other opinions, the Venice Commission has been critical of overbroad immunities being granted to judges. In this case, it is difficult to see why members of the HSYK should have an immunity from investigation and prosecution unless this immunity is waived by

the HSYK. The only exception to this provision seems to relate to flagrante delicto cases (Article 38.9)."

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, §68

"[...] [T]he members of the HJC should exercise their functions as a full-time profession."

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, §43

"Under the draft Law, members of the [High Judicial and Prosecutorial Council] shall serve a term of four years and may be re-elected once (Article 9). No one may be elected for more than two consecutive terms (Article 3.7). The length of the term of office is a standard one, as in most countries, members of judicial councils are elected for a rather short period of time (three years in the Netherlands, six years in 'the former Yugoslav Republic of Macedonia' etc.). In some countries, members of the judicial council have life tenure (Canada, Cyprus etc.) or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §49

"Councillors who are not ***ex officio*** members may be elected for a five-year term, with no possibility for re-election. The preclusion from immediate re-election is destined to enhance the guarantees of independence of the [...] members [of the High Council of Justice].

Since there is no gradation in the turnover of the Council, the elected members would end their terms simultaneously. Thus the composition of the Council would change almost entirely, with the exception of the ex-officio members. The influence of the ex-officio members within the Council might thereby be unduly strengthened. In addition, a severe lack of continuity in the Council's work might result, due to the fact that the new members would have to familiarise themselves with the tasks of the Council and the transition from one composition to another would cause certain initiatives undertaken by previous councillors to be abandoned or forgotten."

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, §§20, 21

"The three years mandate of the Council's members could give rise to problems related to the independence and impartiality of the Council. Because of the relative short mandate Parliament will have a possibility of political influence on the selection of the judges, especially in the light of Parliament's powers to appoint the two thirds non-judicial members.

Article 4.4 provides for the non-reappointment of the members of the Council. This is unusual. Such limits usually exist for the Head of State. The purpose of this provision is probably to ensure the independence and impartiality of the members. This can be better ensured by providing for a single but long term."

CDL-AD(2011)019, Opinion on the introduction of changes to the constitutional law 'on the status of judges' of Kyrgyzstan, §§26, 27

"Members [of the Disciplinary Board as a body which examines disciplinary cases and applies disciplinary sanctions to judges] will be selected for a fixed term of six years (Article 9.4) and this is to be welcomed, as well.

According to Article 9.5 'the term of office of a member of the Disciplinary Board is extended ***de jure*** until the establishment of a college in a new composition'. It is recommended to extend the term of the member until the examination of the cases, in which the member is involved, is completed."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §§50-51

"According to the second paragraph of Article 12 'Elected members of the Council may be reelected, but not consecutively'. It would be advisable for the draft Law to provide for guidance on the minimum amount of time that should pass between the terms. For instance, will it be considered 'non-consecutive' if a member is re-elected shortly after his or her term ends due to the early dismissal or retirement of another member of the HJC?"

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §33

"[...] Indeed, conviction of a member of the Council for the criminal offence itself renders him/her dishonourable to exercise the function."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §53

"[...] Decisions on suspending a member should be linked to the gravity of the charges against him or her and/or be based on the reasoning that suspending the member is necessary for the effective functioning of the HJC. [...]

Although according to Article 43, any member of the HJC has the right to initiate the dismissal of any other member, there are no mechanisms in the draft Law which would provide for the suspension or dismissal of the ***ex officio*** (non-elected) members if they act in violation of the Constitution or the law. [...]."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§30 and 32

"[...] It would [...] be more appropriate to deal with 'breach of duty' cases through the usual disciplinary procedure, which should be clearly set out by the draft Law and an appeal to a court of law should be provided [...]. The proportionality principle should be adequately taken into account and the dismissal [of a member of the Judicial Council] should only be applied as a measure of last resort."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §58

"According to **Article 11.2** the reasoned proposal of the Disciplinary Board to revoke the term of office of a member of the Disciplinary Board shall be submitted to the body that appointed or elected that member in order to revoke and replace him/her with another member. The Board should itself be able to dismiss the member rather than simply remitting the matter to the body which elected the member to revoke the appointment. The credibility of the Disciplinary Board would be undermined if this body failed to do so. However, there needs to be a very clear provision to invoke the procedure where a member fails to attend to duties to ensure that proper notice is given."

CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, §56

"[...] [The law] seems to mean that a person can be removed from the [High Judicial and Prosecutorial Council] for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.

Disqualification may be linked to a criminal or a disciplinary offense. Membership may also be suspended where the member's status as a judge or prosecutor is suspended, for instance due to an on-going criminal investigation or for other reasons under the law.

In addition, the decision on cessation has been transferred from the HJPC to the Parliamentary Assembly. This decision does not seem to require a qualified majority. When taken together with the very vague drafting of certain of the situations (if a member fails to perform duties in a proper, effective or impartial manner; when the member commits an act due to which he or she no longer merits to perform the duties on the Council; etc.), this may lead to politicisation – or the impression of politicisation – of the activities of the HJPC, whose members depend on the Parliamentary Assembly not only for their election, but also when exercising their mandate.

In particular, [...] the Parliamentary Assembly is empowered to dismiss the member of the HJPC where 'the member fails to perform his/her duties in a proper, effective or impartial manner' [...].

However, it is not clear how the effective and proper performance of the HJPC member will be evaluated and what the procedures for such an evaluation are. This needs to be reconsidered.

Article 10.1.e sets out that dismissal may arise 'if the member fails to fulfil the obligations arising from the function he/she performs due to illness or for other reasons'. The inability of the HJPC member to perform functions should indeed result in dismissal, even if this was caused by objective reasons. However, the period of time he or she is absent should be taken into account: a minimum period of time must be clearly defined after which the dismissal of the member may be sought.

All these provisions should be much more precise and decisions on cessation/ dismissal should not be left to the Parliamentary Assembly."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§51-56

"Article 18 of the Draft law deals with the dismissal of a Judicial Council member. According to **Article 18, para. 1** the grounds for dismissal are: '1) he/she discharges his/ her duties unconscientiously and unprofessionally; 2) he/she is convicted of an offence which makes him/her unworthy of discharging duties of the Judicial Council member'.

The notions 'unconscientiously and unprofessionally' and 'unworthy of discharging duties' are too vague, and can lead to an arbitrary application of the power to dismiss members of the Judicial Council. It is strongly recommended to define these dismissal grounds more closely. Council's members are also dismissed if a disciplinary sanction is imposed (Article 18, para. 2). However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure.

It is important to make it clear in the law that the Council's motion concluding that a Council member has to be dismissed should not be based on the substance of the position/decision of the concerned member in respect of individual files. This is essential for ensuring the independence and autonomy of the Judicial Council."

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, §§45-48

"A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the {High Judicial Council], whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of 'lack of confidence'. Article 41 clearly defines the reasons that can lead to a dismissal of the HJC members. The disciplinary procedure must only focus on the question whether the HJC member failed to perform his or her duties 'in compliance with the constitution and law'. This question must not be confused with the question whether said member still enjoys the confidence of the judges who participated in his or her election. In addition, the disciplinary procedure has to guarantee the HJC member a fair trial. It is noted that a general reference to a fair trial is made under Article 46a, but further details on related guarantees would be needed.

In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, i.e. whether an 'impeachment' of a member is allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how, by whom and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. [...].

[,..]Members of judicial councils are independent and often have to make decisions that are unpopular or will not please judges. In subjecting them to a vote of no confidence, their independence will be reduced, making them too dependent on the wishes of the judges and removing them from their role of pursuing the goals of an independent and efficient judiciary for the state as a whole. Furthermore, such a vote is difficult to reconcile with the disciplinary functions of a judicial council. The Venice Commission therefore strongly recommends for such a procedure not to be introduced."

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, §§66-70

4.5. OTHER SELF-REGULATORY BODIES OF THE JUDICIARY

"The Law on Bodies of Judicial Self-regulation is relatively short and establishes two bodies of judicial self-regulation: (1) the Congress of Judges and (2) the Council of Judges. [...]

Article 5 provides for the aims of the two bodies of judicial self-regulation, which are to protect the rights and lawful interests of judges, to assist in improving the judicial system and proceedings, and to represent the interests of judges in dealings with state

bodies, public associations and international organisations. It seems, therefore, that the idea is to provide a framework to form coherent standpoints for the judicial community with respect to all questions concerning judges.

Regulating self-regulation seems to be a contradiction, however, if such a law is deemed necessary its provisions should not be too rigid. Although it is important to provide a solid basis for judges' self-regulation, it is important not to suffocate it.

In this respect, there are a number of provisions that raise doubt. First, **Article 4.4** provides that the status of individuals exercising the activities of judicial self-regulation is governed by the Law on civil service. The content of this Law is not known to the Venice Commission, but it might be too rigid if it provides for strict regulations on responsibilities or perhaps even regulations subordinating the representatives to the administration.

Second, it seems unnecessary for the Congress to be convened by the President of the Kyrgyz Republic, as foreseen by Article 6.2. This provision contradicts the very idea of selfregulation.

Third, Article 8.4 sets out that *'The organisational, technical, material, financial and methodological resources for the activity of the Council of Judges shall be provided by the Judicial department of the Kyrgyz Republic.'* This could create a strong dependency that would be incompatible with the idea of self-regulation.

Fourth, the rules for the election of the representatives are also very rigid, for instance, the prohibition of the re-election of members of the Council of Judges for a second consecutive term **(Article 8.8)**. This means a complete turnover in the membership every three years. Some continuity may be desirable, perhaps the terms of office could be staggered (partial renewal).

The Venice Commission would [...] recommend the following: [...] [i]nclude, in this Law, how the Council's various representational and advisory functions are to be carried out. It should also be clarified in which cases binding decisions are adopted and what the legal consequences of those binding decisions are."

CDL-AD(2008)040, Opinion on the Constitutional Law on bodies of Judicial self-regulation of Kyrgyzstan, §§6, 11-16, and 23

"[...] Concerning **Article 127.5.1 item 1**, which refers to meetings of judges of local and appellate courts, these apparently can discuss the performance of specific judges and take decisions on these issues binding for the judges. This does not appear to be an appropriate provision. Judicial independence requires that judges should not be subjected to peer pressure in relation to any specific cases. Article 127.5.2 also provides that the judges' meetings of the Supreme Court and the high specialized courts have the same powers. This should be deleted or at least clarified to make clear that pressure may not be brought on a judge concerning an individual case.

In relation to **Article 130**, which provides for a number of persons to be present at the Congress of Judges (including the President of Ukraine, the speaker of the ***Verkhovna Rada,*** and the Minister for Justice), it is not clear why politicians should be present at these meetings. The presence of politicians may well lead to political pressure being brought. While it is specified that the invited persons may not participate in the voting, it is not clear why their presence is necessary at all.

Draft **Article 131** provides for a new system for the election of delegates to the Congress of Judges. The Venice Commission has previously recommended a

proportionate representation of the various orders of jurisdiction (CDL-AD(2010)026, para. 96). The same comment could be made here concerning the representation on the basis of the meetings of judges."

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, §§69-71

"The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

Given the comprehensive powers of the Council of Justice and the broad administrative mandate of the Judicial Administration under its auspices, it does seem desirable to provide also for these other institutions, and their specific roles appear to be logically determined. The problems which may be involved accordingly do not relate to the number of institutions as such but mainly to the question whether the overall power vested in the system may be too great.

[...] The acceptance of parliamentary control over the disciplinary board is inconsistent. On one hand there is the far-reaching solution concerning the judicial administration and the rights of the Council of Justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication."

CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §§11, 12, and 64

Reference Documents

Guidelines and studies

CDL-AD(2007)028, Report on Judicial Appointments

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges

Opinions on specific countries

CDL(1994)011, Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993

CDL(1995)73rev, Opinion on the regulatory concept of the Constitution of the Republic of Hungary

CDL(1995)074rev, Opinion on the Albanian law on the organisation of the judiciary (chapter VI of the Transitional Constitution of Albania

CDL-INF(1996)002, Opinion on the regulatory concept of the Constitution of the Republic of Hungary

CDL-INF(1996)006, Opinion on the draft Constitution of Ukraine

CDL-INF(1996)008, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by i: the President of the Republic & ii: the Agrarian and Communist groups of parliamentarians

CDL-INF(1997)006, Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic)

CDL-CR-PV(1998)004, Meeting of the Working Group on Albania of the Sub-commission on Constitutional Reform with the Constitutional Commission of Albania

CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania

CDL-INF(1998)015, Opinions on the constitutional regime of Bosnia and Herzegovina CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria

CDL(1999)078, Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina

CDL(1999)088, Interim report on the constitutional reform In the Republic of Moldova CDL-INF(2000)005, Opinion on the draft law of Ukraine on the judicial system CDL-INF(2001)017, Report on the Revised Constitution of the Republic of Armenia CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria

CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia

CDL-AD(2002)032, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein

CDL-AD(2002)033, Opinion on the Draft Amendments to the Constitution of Kyrgyzstan CDL-AD(2003)012, Memorandum: Reform of the Judicial System in Bulgaria CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria

CDL-AD(2003)019, Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine

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"

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia, by the Venice Commission and OSCE/ODHIR CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia

CDL-AD(2005)038, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in "the former Yugoslav Republic of Macedonia"

CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia

CDL-AD(2006)016, Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova

CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia

CDL-AD(2008)007, Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia

CDL-AD(2008)009, Opinion on the Constitution of Bulgaria CDL- AD(2008)010, Opinion on the Constitution of Finland

CDL-AD(2008)038, Opinion on the Constitutional Law on Court Juries of Kyrgyzstan CDL-AD(2008)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan

CDL-AD(2008)040, Opinion on the Constitutional Law on bodies of Judicial self-regulation of Kyrgyzstan

CDL-AD(2008)041, Opinion on the Draft Amendments to the Constitutional Law on the Supreme Court and Local Courts of Kyrgyzstan

CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria

CDL-AD(2009)023, Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia

CDL-AD(2009)055, Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan

CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe CDL-AD(2010)026, Joint opinion on the law on the judicial system and the status of judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe

CDL-AD(2010)029, Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe

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

CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria

CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro

CDL-AD(2011)012, Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan

CDL-AD(2011)017, Opinion on the Introduction of Changes to the Constitutional Law "On the Status of Judges" of Kyrgyzstan

CDL-AD(2011)019, Opinion on the draft law on the council for the selection of judges of Kyrgyzstan

CDL-AD(2011)033, Joint opinion on the draft law amending the law on the judiciary and the status of judges and other legislative acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe

CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary

CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro

CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia CDL-AD(2013)007, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia

CDL-AD(2013)008, Amicus curiae brief on the Immunity of Judges for the Constitutional Court of Moldova

CDL-AD(2013)010, Opinion on the Draft New Constitution of Iceland CDL-AD(2013)012, Opinion on the fourth amendment to the Fundamental Law of Hungary CDL-AD(2013)013, Joint opinion of the Venice Commission and the Directorate for Justice and Human Dignity of the Directorate General of Human Rights and Rule of Law (DG I) of the Council of Europe on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia

CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine

CDL-AD(2013)015, Opinion on the draft law on the courts of Bosnia and Herzegovina CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco

CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine

CDL-AD(2013)035, Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan CDL-AD(2014)006, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina

CDL-AD(2014)016, Opinion on the draft amendments to the criminal procedure and civil procedure codes of Albania

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic

CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents)

CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial

Council, the competence of the Constitutional Court and special financial zones

CDL-AD(2014)028, Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia

CDL-AD(2014)030, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and Rule of Law (DGI) of the Council of Europe, on the draft Laws amending the Administrative, Civil and Criminal Codes of Georgia CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia

CDL-AD(2014)038, Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro

Rule of Law Checklist

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I. INTRODUCTION

1. At its 86th plenary session (March 2011), the Venice Commission adopted the Report on the Rule of Law (CDL-AD(2011)003rev). This report identified common features of the Rule of Law, *Rechtsstaat* and *Etat de droit.* A first version of a checklist to evaluate the state of the Rule of Law in single States was appended to this report.

2. On 2 March 2012, the Venice Commission organised, under the auspices of the UK Chairmanship of the Committee of Ministers of the Council of Europe, in co-operation with the Foreign and Commonwealth Office of the United Kingdom and the Bingham Centre for the Rule of Law, a conference on "The Rule of Law as a practical concept". The conclusions of this conference underlined that the Venice Commission would develop the checklist by, *inter alia,* including some suggestions made at the conference.

3. A group of experts made up of Mr Bartole, Ms Bilkova, Ms Cleveland, Mr Craig, Mr Helgesen, Mr Hoffmann-Riem, Mr Tuori, Mr van Dijk and Sir Jeffrey Jowell prepared the present detailed version of the checklist.

4. The Venice Commission wishes to acknowledge the contribution of the Bingham Centre for the Rule of Law, notably for the compilation of the selected standards in part III. The Commission also wishes to thank the secretariats of the Consultative Council of European Judges (CCJE), the European Commission against Racism and Intolerance (ECRI), the Framework Convention for the Protection of National Minorities and the Group of States against Corruption (GRECO), as well as of OSCE/ODIHR and of the European Union Agency for Fundamental Rights (FRA) for their co-operation.

5. The introductive part (I) first explains the purpose and scope of the report and then develops the interrelations between the Rule of Law on the one side and democracy and human rights on the other side ("the Rule of Law in an enabling environment").

6. The second part (II, benchmarks) is the core of the checklist and develops the various aspects of the Rule of Law identified in the 2011 report: legality; legal certainty; prevention of abuse of powers; equality before the law and non-discrimination and access to justice; while the last chapter provides two examples of particular challenges

to the Rule of Law (corruption and conflict of interest, and collection of data and surveillance).

7. The third part (III, selected standards) lists the most important instruments of hard and soft law addressing the issue of the Rule of Law.

8. The present checklist was discussed by the Sub-Commission on the Rule of Law on 17 December 2015 and on 10 March 2016, and was subsequently adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016).

A. **Purpose and scope**

9. The Rule of Law is a concept of universal validity. The «need for universal adherence to and implementation of the Rule of Law at both the national and international levels" was endorsed by all Members States of the United Nations in the 2005 Outcome Document of the World Summit (§ 134). The Rule of Law, as expressed in the Preamble and in Article 2 of the Treaty on European Union (TEU), is one of the founding values that are shared between the European Union (EU) and its Member States[1]. In its 2014 New Framework to Strengthen the Rule of Law, the European Commission recalls that "the principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional law and international organisations /.../ to regulate the exercise of public powers" (pp. 3-4). In an increasing number of cases States refer to the Rule of Law in their national constitutions[2].

10. The Rule of Law has been proclaimed as a basic principle at universal level by the United Nations – for example in the Rule of Law Indicators -, and at regional level by the Organization of American States – namely in the Inter-American Democratic Charter – and the African Union – in particular in its Constitutive Act. References to the Rule of Law may also be found in several documents of the Arab League.

11. The Rule of Law is mentioned in the Preamble to the Statute of the Council of Europe as one of the three "principles which form the basis of all genuine democracy", together with individual freedom and political liberty. Article 3 of the Statute makes respect for the principle of the Rule of Law a precondition for accession of new member States to the Organisation. The Rule of Law is thus one of the three intertwined and partly overlapping core principles of the Council of Europe, with democracy and human rights. The close relationship between the Rule of Law and the democratic society has been underlined by the European Court of Human Rights through different expressions: "democratic society subscribing to the Rule of Law", "democratic society based on the Rule of Law" and, more systematically, "Rule of Law in a democratic society". The achievement of these three principles – respect for human rights, pluralist democracy and the Rule of Law – is regarded as a single objective – the core objective – of the Council of Europe.

12. The Rule of Law has been systematically referred to in the major political documents of the Council of Europe, as well as in numerous Conventions and Recommendations. The Rule of Law is notably mentioned as an element of common

[1] *See, for example, FRA (Fundamental Rights Agency) (2016), Fundamental rights: challenges and achievements in 2015 – FRA Annual report 2013, Luxembourg, Publications Office of the European Union (Publications Office), Chapter 7 (upcoming).*

[2] *Cf. CDL-AD(2011)003rev, § 30ff.*

heritage in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as a founding principle of European democracies in Resolution Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ), and as a priority objective in the Statute of the Venice Commission. However, the Council of Europe texts have not defined the Rule of Law, nor has the Council of Europe created any specific monitoring mechanism for Rule of Law issues.

13. The Council of Europe has nevertheless acted in several respects with a view to promoting and strengthening the Rule of Law through several of its bodies, notably the European Court of Human Rights (ECtHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of Judges of Europe (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights and the Venice Commission.

14. In its Report on the Rule of Law of 2011[3], the Venice Commission examined the concept of the Rule of Law, following Resolution 1594(2007) of the Parliamentary Assembly which drew attention to the need to ensure a correct interpretation of the terms "Rule of Law", "Rechtsstaat" and "Etat de droit" or "preeminence du droit", encompassing the principles of legality and of due process.

15. The Venice Commission analysed the definitions proposed by various authors coming from different systems of law and State organisation, as well as diverse legal cultures. The Commission considered that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures. The Commission warned against the risks of a purely formalistic concept of the Rule of Law, merely requiring that any action of a public official be authorised by law. "Rule by Law", or "Rule by the Law", or even "Law by Rules" are distorted interpretations of the Rule of Law[4].

16. The Commission also stressed that individual human rights are affected not only by the authorities of the State, but also by hybrid (State-private) actors and private entities which perform tasks that were formerly the domain of State authorities, or include unilateral decisions affecting a great number of people, as well as by international and supranational organisations. The Commission recommended that the Rule of Law principles be applied in these areas as well.

17. The Rule of Law must be applied at all levels of public power. *Mutatis mutandis,* the principles of the Rule of Law also apply in private law relations. The following definition by Tom Bingham covers most appropriately the essential elements of the Rule of Law: "All persons and authorities within the State, whether public or private,

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[3] *CDL-AD(2011)003rev.*

[4] *See Parliamentary Assembly of the Council of Europe, Motion for a resolution presented by Mr Holovaty and others, The principle of the rule of law, Doc. 10180, § 10. In this context, see also the Copenhagen document of the CSCE, para. 2: "[participating States] consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression."*

should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts"[5].

18. In its report, the Commission concluded that, despite differences of opinion, consensus exists on the core elements of the Rule of Law as well as on those of the Rechtsstaat and of the Etat de droit, which are not only formal but also substantive or material (materieller Rechtsstaatsbegriff).These core elements are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law.

19. Since its 2011 Report was oriented towards facilitating a correct and consistent understanding and interpretation of the notion of the Rule of Law and, therefore, aimed at facilitating the practical application of the principles of the Rule of Law, a "checklist for evaluating the state of the Rule of Law in single countries" was appended to the report, listing these six elements, broken down into several sub-parameters.

20. In 2012, at a conference which the Venice Commission organised in London under the auspices of the UK Foreign Office and in co-operation with the Bingham Centre for the Rule of Law, it launched the project to further develop the checklist as a ground-breaking new, functional approach to assessing the state of the Rule of Law in a given State.

21. In 2013, the Council of the European Union has begun implementing a new Rule of Law Dialogue with the member States, which would take place on an annual basis. It underlined that "respecting the rule of law is a prerequisite for the protection of fundamental rights" and called on the Commission "to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues"[6]. In 2014, the European Commission adopted a mechanism for addressing systemic Rule of Law issues in Member States of the European Union (EU). This "new EU Framework to strengthen the Rule of Law" establishes an early warning tool based on "the indications received from available sources and recognised institutions, including the Council of Europe"; "[i]n order to obtain expert knowledge on particular issues relating to the rule of law in Member States, the (European) Commission ... will as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission"[7].

22. At the United Nations level, following the publication of "Rule of Law Indicators" in 2011[8], the United Nations General Assembly adopted in 2012 a Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and

[5] *Tom Bingham, The Rule of Law (2010).*

[6] *Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council Meeting, Luxembourg, 6-7 June 2013, part c, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf.*

[7] *Communication from the European Commission to the European Parliament and the Council, 'A new EU Framework to strengthen the Rule of Law', COM(2014) 158 final/2, http://ec.europa.eu/justice/effective- justice/files/com_2014_158_en.pdf.*

[8] *This document is a joint publication of the United Nations Department of Peacekeeping Operations (DPKO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR).*

International Levels, recognising that the "Rule of Law applies to all States equally, and to international organizations".

23. The sustainable development agenda with its 17 Sustainable Development Goals (SDGs) and 169 targets to be delivered by 2030 was unanimously adopted by the UN General Assembly in September 2015. The SDGs, which comprise a number of Goals, are aimed to be truly transformative and have profound implications for the realization of the agenda, envisaging "[a world] in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development." Goal 16 commits States to "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". The achievement of Goal 16 will be assessed against a number of targets, some of which incorporate Rule of Law components, such as the development of effective accountable and transparent institutions (target 16.6) and responsive, inclusive participatory and representative decision making at all levels (target 16.7). However, it is Target 16.3, committing States to "Promote the rule of law at the national and international levels and ensure equal access to justice for all" that offers a unique opportunity for revitalizing the relationship between citizens and the State. This Checklist could be a very important tool to assist in the qualitative measurement of Rule of Law indicators in the context of the SDGs.

24. The present checklist is intended to build on these developments and to provide a tool for assessing the Rule of Law in a given country from the view point of its constitutional and legal structures, the legislation in force and the existing case-law. The checklist aims at enabling an objective, thorough, transparent and equal assessment.

25. The checklist is mainly directed at assessing legal safeguards. However, the proper implementation of the law is a crucial aspect of the Rule of Law and must therefore also be taken into consideration. That is why the checklist also includes certain complementary benchmarks relating to the practice. These benchmarks are not exhaustive.

26. Assessing whether the parameters have been met requires sources of verification (standards). For legal parameters, these will be the law in force, as well as, for example, in Europe, the legal assessments thereof by the European Court of Human Rights, the Venice Commission, Council of Europe monitoring bodies and other institutional sources. For parameters relating to the practice, multiple sources will have to be used, including institutional ones such as the CEPEJ and the European Union Agency for Fundamental Rights.

27. The checklist is meant as a tool for a variety of actors who may decide to carry out such an assessment: These may include Parliaments and other State authorities when addressing the need and content of legislative reform, civil society and international organisations, including regional ones – notably the Council of Europe and the European Union. Assessments have to take into account the whole context, and avoid any mechanical application of specific elements of the checklist.

28. It is not within the mandate of the Venice Commission to proceed with Rule of Law assessments in given countries on its own initiative; however, it is understood that when the Commission, upon request, deals with Rule of Law issues within the framework of the preparation of an opinion relating a given country, it will base its analysis on the parameters of the checklist within the scope of its competence.

29. The Rule of Law is realised through successive levels achieved in a progressive manner: the more basic the level of the Rule of Law, the greater the demand for it. Full achievement of the Rule of Law remains an on-going task, even in the well-established democracies. Against this background, it should be clear that the parameters of the checklist do not necessarily all have to be cumulatively fulfilled in order for a final assessment on compliance with the Rule of Law to be positive. The assessment will need to take into account which parameters are not met, to what extent, in what combination etc. The issue must be kept under constant review.

30. The checklist is neither exhaustive nor final: it aims to cover the core elements of the Rule of Law. The checklist could change over time, and be developed to cover other aspects or to go into further detail. New issues might arise that would require its revision. The Venice Commission will therefore provide for a regular updating of the Checklist.

31. The Rule of Law and human rights are interlinked, as the next chapter will explain. The Rule of Law would just be an empty shell without permitting access to human rights. Vice- versa, the protection and promotion of human rights are realised only through respect for the Rule of Law: a strong regime of Rule of Law is vital to the protection of human rights. In addition, the Rule of Law and several human rights (such as fair trial and freedom of expression) overlap[9]. While recognising that the Rule of Law can only be fully realised in an environment that protects human rights, the checklist will expressly deal with human rights only when they are linked to specific aspects of the Rule of Law[10].

32. Since the Venice Commission is a body of the Council of Europe, the checklist emphasises the legal situation in Europe, as expressed in particular in the case-law of the European Court of Human Rights and also of the Court of Justice of the European Union within its specific remit. The Rule of Law is however a universal principle, and this document also refers, where appropriate, to developments at global level as well as in other regions of the world, in particular in part III enumerating international standards.

B. **The Rule of Law in an enabling environment**

33. The Rule of Law is linked not only to human rights but also to democracy, *i.e.* to the third basic value of the Council of Europe. Democracy relates to the involvement of the people in the decision-making process in a society; human rights seek to protect individuals from arbitrary and excessive interferences with their freedoms and liberties and to secure human dignity; the Rule of Law focuses on limiting and independently reviewing the exercise of public powers. The Rule of Law promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules.

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[9] *See FRA (2014), An EU internal strategic framework for fundamental rights: joining fundamental rights: joining forces to achieve better results. Luxembourg, Publications Office of the European Union (Publications Office).*

[10] *On the issue, see in particular the Report on the Rule of Law adopted by the Venice Commission, CDL- AD(2011)003rev, § 59-61. The report also underlines (§ 41) that "[a] consensus can now be found for the necessary elements of the Rule of Law as well as those of the Rechtsstaat which are not only formal but also substantial or material' (emphasis added).*

34. The Rule of Law has become "a global ideal and aspiration"[11], with a common core valid everywhere. This, however, does not mean that its implementation has to be identical regardless of the concrete juridical, historical, political, social or geographical context. While the main components or "ingredients"[12] of the Rule of Law are constant, the specific manner in which they are realised may differ from one country to another depending on the local context; in particular on the constitutional order and traditions of the country concerned. This context may also determine the relative weight of each of the components.

35. Historically, the Rule of Law was developed as a means to restrict State (governmental) power. Human rights were seen as rights against intrusions by holders of this power ("negative rights"). In the meantime the perception of human rights has changed in many States as well as in European and international law. There are several differences in the details, but nonetheless there is a trend to expand the scope of civil and political rights, especially by acknowledging positive obligations of the State to guarantee effective legal protection of human rights vis-a-vis private actors. Relevant terms are "positive obligations to protect", "horizontal effects of fundamental rights" or "Drittwirkung der Grundrechte".

36. The European Court of Human Rights has acknowledged positive obligations in several fields, for instance related to Art. 8 ECHR[13]. In several decisions the Court has developed specific positive obligations of the State by combining Art. 8 ECHR and the Rule of Law[14]. Even though positive obligations to protect could not be solely derived from the Rule of Law in these cases, the Rule of Law principle creates additional obligations of the State to guarantee that individuals under their jurisdiction have access to effective legal means to enforce the protection of their human rights, in particular in situations when private actors infringe these rights. Thus the Rule of Law creates a benchmark for the quality of laws protecting human rights: legal provisions in this field – and beyond[15] – have to be, *inter alia,* clear and predictable, and non-discriminatory, and they must be applied by independent courts under procedural guarantees equivalent to those applied in conflicts resulting from interferences with human rights by public authorities.

37. One of the relevant contextual elements is the legal system at large. Sources of law which enshrine legal rules, thus granting legal certainty, are not identical in all countries: some States adhere largely to statute law, save for rare exceptions, whereas others include adherence to the common law judge-made law.

38. States may also use different means and procedures – for example related to the fair trial principle – in criminal proceedings (adversarial system as compared to inquisitorial system, right to a jury as compared to the resolution of criminal cases by judges). The material means that are instrumental in guaranteeing fair trial, such as legal aid and other facilities, may also take different forms.

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[11] *Rule of Law. A Guide for Politicians, HIIL, Lund/The Hague, 2012, p. 6.*

[12] *Venice Commission Report on the Rule of Law, CDL-AD(2011)003rev, § 37.*

[13] *See for example ECtHR, Centro Europe 7 and di Stefano v. Italy, 38433/09, 7 June 2012, § 134, 156; Barbulescu v. Romania, 61496/08, 12 January 2016, § 52ff.*

[14] *See ECtHR, Sylvester v. Austria, 36812/97 and 40104/98, 24 April 2003, § 63; P.P. v. Poland, 8677/03, 8 January 2008 § 88.*

[15] *As Rule of Law guarantees apply not only to human rights law but to all laws.*

39. The distribution of powers among the different State institutions may also impact the context in which this checklist is considered. It should be well-adjusted through a system of checks and balances. The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well- functioning judiciary, whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law.

40. At the international level, the demands and implications of the Rule of Law reflect the particularities of the international legal system. In many respects that system is far less developed than national constitutional and legal systems. Apart from special regional systems like that of the European Union, international systems have no permanent legislator, and for most cases no judiciary with obligatory jurisdiction, while the democratic characteristics in decision-making are still very weak.

41. The European Union's supranational nature led it to develop the concept of Rule of Law as a general principle of law applicable to its own legal system. According to the case law of the Court of Justice of the European Union, the Rule of Law includes the supremacy of law, the institutional balance, judicial review, (procedural) fundamental rights, including the right to a judicial remedy, as well as the principles of equality and proportionality.

42. The contextual elements of the Rule of Law are not limited to legal factors. The presence (or absence) of a shared political and legal culture within a society, and the relationship between that culture and the legal order help to determine to what extent and at what level of concreteness the various elements of the Rule of Law have to be explicitly expressed in written law. Thus, for instance, national traditions in the area of dispute settlement and conflict resolution will have an impact upon the concrete guarantees of fair trial offered in a country. It is important that in every State a robust political and legal culture supports particular Rule of Law mechanisms and procedures, which should be constantly checked, adapted and improved.

43. The Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.

II. **BENCHMARKS**

1. Legality[16]

1. Supremacy of the law

Is supremacy of the law recognised?

I. Is there a written Constitution?

II. Is conformity of legislation with the Constitution ensured?

III. Is legislation adopted without delay when required by the Constitution?

IV. Does the action of the executive branch conform with the Constitution and other laws[17]?

[16] *The principle of legality is explicitly recognised as an aspect of the Rule of Law by the European Court of Justice, see ECJ, C-496/99 P, Commission v. CAS Succhi di Frutta, 29 April 2004, § 63.*

[17] *This results from the principle of separation of powers, which also limits the discretion of the executive: cf. CM(2008)170, The Council of Europe and the Rule of Law, § 46.*

V. Are regulations adopted without delay when required by legislation?

VI. Is effective judicial review of the conformity of the acts and decisions of the executive branch of government with the law available?

VII. Does such judicial review also apply to the acts and decisions of independent agencies and private actors performing public tasks?

VIII. Is effective legal protection of individual human rights vis-a-vis infringements by private actors guaranteed?

44. State action must be in accordance with and authorised by the law. Whereas the necessity for judicial review of the acts and decisions of the executive and other bodies performing public tasks is universally recognised, national practice is very diverse on how to ensure conformity of legislation with the Constitution. While judicial review is an effective means to reach this goal, there may also be other means to guarantee the proper implementation of the Constitution to ensure respect for the Rule of Law, such as a priori review by a specialised committee[18].

2. **Compliance with the law**[19]

Do public authorities act on the basis of, and in accordance with standing law[20]?

I. Are the powers of the public authorities defined by law[21]?

II. Is the delineation of powers between different authorities clear?

III. Are the procedures that public authorities have to follow established by law?

IV. May public authorities operate without a legal basis? Are such cases duly justified?

V. Do public authorities comply with their positive obligations by ensuring implementation and effective protection of human rights?

VI. In cases where public tasks are delegated to private actors, are equivalent guarantees established by law[22]?

45. A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law. In so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law. Equivalent guarantees should be established by law whenever public powers are delegated to private actors – especially but not

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[18] *The Venice Commission is in principle favourable to full review of constitutionality, but a proper implementation of the Constitution is sufficient: cf. CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115ff. See especially the section on Constitutional Justice (II.E.3).*

[19] *On the hierarchy of norms, see CDL-JU(2013)020, Memorandum – Conference on the European standards of Rule of Law and the scope of discretion of powers in the member States of the Council of Europe (Yerevan, Armenia, 3-5 July 2013).*

[20] *The reference to « law » for acts and decisions affecting human rights is to be found in a number of provisions of the European Convention on Human Rights, including Article 6.1, 7 and Articles 8.2, 9.2, 10.2 and 11.2 concerning restrictions to fundamental freedoms. See, among many other authorities, ECtHR Amann v. Switzerland, 27798/95, 16 February 2000, § 47ff; Slivenko v. Latvia, 48321/99, 9 October 2003, § 100; X. v. Latvia, 27853/09, 26 November 2013, § 58; Kurić and Others v. Slovenia, 26828/06, 12 March 2014, § 341.*

[21] *Discretionary power is, of course, permissible, but must be controlled. See below II.C.1.*

[22] *Cf. below II.A.8.*

exclusively coercive powers. Furthermore, public authorities must actively safeguard the fundamental rights of individuals vis-a-vis other private actors[23].

46. "Law" covers not only constitutions, international law, statutes and regulations, but also, where appropriate, judge-made law[24]*, such as common-law rules, all of which is of a binding nature. Any law must be accessible and foreseeable*[25].

3. **Relationship between international law and domestic law**

Does the domestic legal system ensure that the State abide by its binding obligations under international law? In particular:

i. Does it ensure compliance with human rights law, including binding decisions of international courts?

ii. Are there clear rules on the implementation of these obligations into domestic law[26]?

47. The principle pacta sunt servanda (agreements must be kept) is the way in which international law expresses the principle of legality. It does not deal with the way in which international customary or conventional law is implemented in the internal legal order, but a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"[27] *or to respect customary international law.*

48. The principle of the Rule of Law does not impose a choice between monism and dualism, but pacta sunt servanda applies regardless of the national approach to the relationship between international and internal law. At any rate, full domestic implementation of international law is crucial. When international law is part of domestic law, it is binding law within the meaning of the previous paragraph relating to supremacy of law (II.A.2). This does not mean, however, that it should always have supremacy over the Constitution or ordinary legislation.

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[23] *For a recent reference to positive obligations of the State to ensure the fundamental rights of individuals vis-à-vis private actors, see ECtHR Bărbulescu v. Romania, 61496/08, 12 January 2016, § 52ff (concerning Article 8 ECHR).*

[24] *Law "comprises statute law as well as case-law", ECtHR Achour v. France, 67335/01, 29 March 2006, § 42; cf Kononov v. Latvia [GC], 36376/04, 17 May 2010, § 185.*

[25] *ECtHR The Sunday Times v. the United Kingdom (No. 1), 6538/74, 26 April 1979, § 46ff. On the conditions of accessibility and foreseeability, see, e.g., ECtHR Kurić and Others v. Slovenia, 26828/06, 26 June 2012, § 341ff; Amann v. Switzerland, 27798/95, 16 February 2000, § 50; Slivenko v. Latvia, 48321/99, 9 October 2003, § 100. The Court of the European Union considers that the principles of legal certainty and legitimate expectations imply that "the effect of Community legislation must be clear and expectable to those who are subject to it": ECJ, 212 to 217/80, Amministrazione delle finanze dello Stato v. SRL Meridionale Industria Salumi and Others, 12 November 1981, § 10; or "that legislation be clear and precise and that its application be foreseeable for all interested parties": CJEU, C-585/13, Europäisch-Iranische Handelsbank AG v. Council of the European Union, 5 March 2015, § 93; cf. ECJ, C-325/91, France v Commission, 16 June 1993, § 26. For more details, see II.B (legal certainty).*

[26] *Cf. Article 26 (pacta sunt servanda) and Article 27 (internal law and observance of treaties) of the 1969 Vienna Convention on the Law of Treaties; CDL-STD(1993)006, The relationship between international and domestic law, § 3.6 (treaties), 4.9 (international custom), 5.5 (decisions of international organisations), 6.4 (international judgments and rulings); CDL-AD(2014)036, Report on the Implementation of Human Rights Treaties in Domestic Law and the Role of Courts, § 50.*

[27] *Article 27 of the Vienna Convention on the Law of Treaties; see also Article 46 (Provisions of internal law regarding the competence to conclude treaties).*

4. **Law-making powers of the executive**

Is the supremacy of the legislature ensured?

i. Are general and abstract rules included in an Act of Parliament or a regulation based on that Act, save for limited exceptions provided for in the Constitution?

ii. What are these exceptions? Are they limited in time? Are they controlled by Parliament and the judiciary? Is there an effective remedy against abuse?

iii. When legislative power is delegated by Parliament to the executive, are the objectives, contents, and scope of the delegation of power explicitly defined in a legislative act[28]?

49. Unlimited powers of the executive are, de jure or de facto, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature[29].

5. **Law-making procedures**

Is the process for enacting law transparent, accountable, inclusive and democratic?

i. Are there clear constitutional rules on the legislative procedure[30]?

ii. Is Parliament supreme in deciding on the content of the law?

iii. Is proposed legislation debated publicly by parliament and adequately justified *(e.g.* by explanatory reports)[31]?

iv. Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input[32]?

v. Where appropriate, are impact assessments made before adopting legislation *(e.g.* on the human rights and budgetary impact of laws)[33]?

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[28] *See Article 80 of the German Constitution; Article 76 of the Italian Constitution; Article 92 of the Constitution of Poland; Article 290.1 of the Treaty on the Functioning of the European Union, which states that "[t]he essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power".*

[29] *ECtHR Sunday Times, above note 25.*

[30] *On the need to clarify and streamline legislative procedures, see e.g. CDL-AD(2012)026, § 79; cf. CDL-AD(2002)012, Opinion on the draft revision of the Romanian Constitution, § 38ff.*

[31] *According to the European Court of Human Rights, exacting and pertinent review of (draft) legislation, not only a posteriori by the judiciary, but also a priori by the legislature, makes restrictions to fundamental rights guaranteed by the Convention more easily justifiable: ECtHR Animal Defenders International v. the United Kingdom, 48876/08, 22 April 2013, §106ff.*

[32] *UN Human Rights Committee, General Comment No. 25 (1996), Article 25 (Participation in Public Affairs and the Right to Vote) – The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, – provides that "[c]itizens also take part in the conduct of public affairs by exerting influence through public debate" (§ 8). Available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=453883fc22&skip=0&query=general comment 25. The CSCE Copenhagen Document provides that legislation is "adopted at the end of a public procedure" and the 1991 Moscow Document (http://www.osce.org/odihr/elections/14310) states that "[L]egislation will be formulated and adopted as the result of an open process" (§ 18.1).*

[33] *ECtHR Hatton v. the United Kingdom, 36022/97, 8 July 2003, § 128: "A governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake." See also Evans v. the United Kingdom, 6339/05, 10 April 2007, § 64. About the absence of real parliamentary debate since the adoption of a statute, which took place in 1870, see Hirst (No. 2) v. the United Kingdom, 74025/01, 6 October 2005, § 79. In Finland, the instructions for law-drafting include such a requirement.*

iv. Does the Parliament participate in the process of drafting, approving, incorporating and implementing international treaties?

50. As explained in the introductory part, the Rule of Law is connected with democracy in that it promotes accountability and access to rights which limit the powers of the majority.

6. **Exceptions in emergency situations**

Are exceptions in emergency situations provided for by law?

i. Are there specific national provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?

ii. Does national law prohibit derogation from certain rights even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope[34]?

iii. Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?

iv. What is the procedure for determining an emergency situation? Are there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?

51. The security of the State and of its democratic institutions, and the safety of its officials and population, are vital public and private interests that deserve protection and may lead to a temporary derogation from certain human rights and to an extraordinary division of powers. However, emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general. Strict limits on the duration, circumstance and scope of such powers is therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law[35]. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.

52. The relevant provisions of the International Covenant on Civil and Political Rights, of the European Convention on Human Rights and the American Convention on Human Rights are similar[36]. They provide for the possibility of derogations (as distinguished from mere limitations of the rights guaranteed) only in highly exceptional circumstances. Derogations are not possible from "the so-called absolute rights: the right to life, the prohibition of torture and inhuman or degrading treatment or

[34] *Cf. Article 15 ECHR ("derogation in time of emergency"); Article 4 ICCPR; Article 27 ACHR. For an individual application of Article 15 ECHR, see ECtHR A. and Others v. the United Kingdom, 3455/05, 19 February 2009, § 178, 182: a derogation to Article 5 § 1 ECHR was considered as disproportionate. On emergency powers, see also CDL-STD(1995)012, Emergency Powers; CDL-AD(2006)015, Opinion on the Protection of Human Rights in Emergency Situations.*

[35] *CDL-AD(2006)015, § 33.*

[36] *Article 15 ECHR: Article 4 ICCPR; Article 27 ACHR.*

punishment, and of slavery, and the nullum crimen, nulla poena principle" among othe[37]. Item II.A.6.i summarises the requirements of these treaties.

7. **Duty to implement the law**

What measures are taken to ensure that public authorities effectively implement the law?

i. Are obstacles to the implementation of the law analysed before and after its adoption?

ii. Are there effective remedies against non-implementation of legislation?

iii. Does the law provide for clear and specific sanctions for non-obedience of the law[38]?

iv. Is there a solid and coherent system of law enforcement by public authorities to enforce these sanctions?

v. Are these sanctions consistently applied?

53. Although full enforcement of the law is rarely possible, a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws. The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced[39]. The duty to implement the law is threefold, since it implies obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers.

54. Obstacles to the effective implementation of the law can occur not only due to the illegal or negligent action of authorities, but also because the quality of legislation makes it difficult to implement. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking a posteriori whether it may be and is effectively applied is very important. This means that ex ante and ex post legislative evaluation has to be performed when addressing the issue of the Rule of Law.

55. Proper implementation of legislation may also be obstructed by the absence of sufficient sanctions (lex imperfecta), as well as by an insufficient or selective enforcement of the relevant sanctions.

8. **Private actors in charge of public tasks**

Does the law guarantee that non-State entities which, fully or in part, have taken on traditionally public tasks, and whose actions and decisions have a similar impact on ordinary people as those of public authorities, are subject to the requirements of the Rule of Law and accountable in a manner comparable to those of public authorities[40]?

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[37] *CDL-AD(2006)015, § 9. On derogations under Article 15 ECHR, see more generally CDL-AD(2006)015, § 9ff, and the quoted case-law.*

[38] *On the need for effective and dissuasive sanctions, see e.g. CDL-AD(2014)019, § 89; CDL-AD(2013)021, § 70.*

[39] *The need for ensuring proper implementation of the legislation is often underlined by the Venice Commission: see e.g. CDL-AD(2014)003, § 11: "the key challenge for the conduct of genuinely democratic elections remains the exercise of political will by all stakeholders, to uphold the letter and the spirit of the law, and to implement it fully and effectively"; CDL-AD(2014)001, § 85.*

[40] *Cf. Article 124 of the Constitution of Finland: "A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered."*

56. There are a number of areas where hybrid (State-private) actors or private entities exercise powers that traditionally have been the domain of State authorities, including in the fields of prison management and health care. The Rule of Law must apply to such situations as well.

B. Legal certainty

1. Accessibility of legislation

Are laws accessible?

i. Are all legislative acts published before entering into force?

ii. Are they easily accessible, *e.g.* free of charge via the Internet and/or in an official bulletin?

1. Accessibility of court decisions

Are counts decisions accessible?

i. Are court decisions easily accessible to the public[41]?

ii. Are exemptions sufficiently justified?

57. As court decisions can establish, elaborate upon and clarify law, their accessibility is part of legal certainty. Limitations can be justified in order to protect individual rights, for instance those of juveniles in criminal cases.

2. Foreseeability of the laws

Are the effects of laws foreseeable[42]?

i. Are the laws written in an intelligible manner?

ii. Does new legislation clearly state whether (and which) previous legislation is repealed or amended? Are amendments incorporated in a consolidated, publicly accessible, version of the law?

58. Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it[43].

59. The necessary degree of foreseeability depends however on the nature of the law. In particular, it is essential in criminal legislation. Precaution in advance of dealing with concrete dangers has now become increasingly important; this evolution is legitimate due to the multiplication of the risks resulting in particular from the changing technology. However, in the areas where the precautionary approach of laws apply, such as risk law, the prerequisites for State action are outlined in terms that are considerably broader and more imprecise, but the Rule of Law implies that the principle of foreseeability is not set aside.

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[41] *ECtHR Fazlyiski v. Bulgaria, 40908/05, 16 April 2013, § 64-70, in particular § 65; Ryakib Biryukov v. Russia, 14810/02, 17 January 2008, in particular § 30ff; cf. Kononov v. Latvia, 36376/04, 17 May 2010, § 185.*

[42] *ECtHR The Sunday Times v. the United Kingdom (No. 1), 6538/74, 26 April 1979, § 46ff; Rekvényi v. Hungary, 25390/94, 20 May 1999, § 34ff.*

[43] *ECtHR The Sunday Times v. the United Kingdom (No. 1), 6538/74, 26 April 1979, § 49.*

3. Stability and consistency of law

Are laws stable and consistent?

i. Are laws stable, to the extent that they are changed only with fair warning[44]?

ii. Are they consistently applied?

60. Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself: law must also be capable of adaptation to changing circumstances. Law can be changed, but with public debate and notice, and without adversely affecting legitimate expectations (see next item).

4. Legitimate expectations

Is respect for the principle of legitimate expectations ensured?

61. The principle of legitimate expectations is part of the general principle of legal certainty in European Union law, derived from national laws. It also expresses the idea that public authorities should not only abide by the law but also by their promises and raised expectations. According to the legitimate expectation doctrine, those who act in good faith on the basis of law as it is, should not be frustrated in their legitimate expectations. However, new situations may justify legislative changes going frustrating legitimate expectations in exceptional cases. This doctrine applies not only to legislation but also to individual decisions by public authorities[45].

5. Non-retroactivity

Is retroactivity of legislation prohibited?

i. Is retroactivity of criminal legislation prohibited?

ii. To what extent is there also a general prohibition on the retroactivity of other laws[46]?

iii. Are there exceptions, and, if so, under which conditions?

6. Nullum crimen sine lege and nulla poena sine lege principles

Do the *nullum crimen sine lege* and *nulla poena sine lege* (no crime, no penalty without a law) principles apply?

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[44] *The Venice Commission has addressed the issue of stability of legislation in the electoral field: Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, II.2; Interpretative Declaration on the Stability of the Electoral Law, CDL-AD(2005)043.*

[45] *For example, individuals who have been encouraged to adopt a behaviour by Community measures may legitimately expect not to be subject, upon the expiry of this undertaking, to restrictions which specifically affect them precisely because they availed themselves of the possibilities offered by the Community provisions: ECJ, 120/86, Mulder v. Minister van Landbouw en Visserij, 28 April 1988, § 21ff. In the case-law of the European Court of Human Rights, the doctrine of legitimate expectations essentially applies to the protection of property as guaranteed by Article 1 of the First Additional Protocol to the European Convention on Human Rights: see e.g. ECtHR Anhaeuser-Busch Inc. v. Portugal [GC], 73049/01, 11 January 2007, § 65; Gratzinger and Gratzingerova v. the Czech Republic [GC] (dec.), 39794/98, 10 July 2002, § 68ff; National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, 21319/93, 21449/93, 21675/93, 21319/93, 21449/93 and 21675/93, 23 October 1997, § 62ff.*

[46] *See Article 7.1 ECHR, Article 15 ICCPR, Article 9 ACHR, Article 7.2 of the African (Banjul) Charter on Human and Peoples' Rights [ACHPR] for criminal law; Article 28 of the Vienna Convention on the Law of Treaties for international treaties.*

62. People must be informed in advance of the consequences of their behaviour. This implies foreseeability (above II.B.3) and non-retroactivity especially of criminal legislation. In civil and administrative law, retroactivity may negatively affect rights and legal interests[47]. However, outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally). The legislator should not interfere with the application of existing legislation by courts.

7. Res judicata[48]

Is respect of *res judicata* ensured?

i. Is respect for the *ne bis in idem* principle (prohibition against double jeopardy) ensured?

ii. May final judicial decisions be revised?

iii. If so, under which conditions?

63. Res judicata implies that when an appeal has been finally adjudicated, further appeals are not possible. Final judgments must be respected, unless there are cogent reasons for revising them[49].

8. Prevention of abuse (misuse) of powers[50]

Are there legal safeguards against arbitrariness and abuse of power *(detournement de pouvoii)* by public authorities?

i. If yes, what is the legal source of this guarantee (Constitution, statutory law, case-law)?

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[47] *The principle of non-retroactivity does not apply when the new legislation places individuals in a more favourable position. The European Court of Human considers that Article 7 ECHR includes the principle of retrospectiveness of the more lenient criminal law: see Scoppola v. Italy (No. 2), 10249/03, 17 September 2009.*

[48] *Article 4 Protocol 7 ECHR, Article 14.7 ICCPR, Article 8.4 ACHR (in the penal field); on the respect of the principle of res judicata, see e.g. ECtHR Brumărescu v. Romania, 28342/95, 28 October 1999, § 62; Kulkov and Others v. Russia, 25114/03, 11512/03, 9794/05, 37403/05, 13110/06, 19469/06, 42608/06, 44928/06, 44972/06 and 45022/06, 8 January 2009, § 27; Duca v. Moldova, 75/07, 3 March 2009, § 32. The Court considers respect of res judicata as an aspect of legal certainty. Cf. Marckx v. Belgium, 6833/74, 13 June 1979, § 58.*

[49] *Cf. The Council of Europe and the Rule of Law – An overview, CM(2008)170, 21 November 2008, § 48.*

[50] *Protection against arbitrariness was mentioned by the European Court of Human Rights in a number of cases. In addition to those quoted in the next note, see e.g. Husayn (Abu Zubaydah) v. Poland, 7511/13, 24 July 2014, § 521ff; Hassan v. the United Kingdom, 29750/09, 16 September 2014, § 106; Georgia v. Russia (I), 13255/07, 3 July 2014, § 182ff (Article 5 ECHR); Ivinović v. Croatia, 13006/13, 18 September 2014, § 40 (Article 8 ECHR). For the Court of Justice of the European Union, see e.g. ECJ, 46/87 and 227/88, Hoechst v. Commission, 21 September 1989, § 19; T-402/13, Orange v. European Commission, 25 November 2014, § 89. On the limits of discretionary powers, see Appendix to Recommendation of the Committee of Ministers on good administration, CM/Rec(2007)7, Article 2.4 ("Principle of lawfulness"): "[Public authorities] shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred".*

ii. Are there clear legal restrictions to discretionary power, in particular when exercised by the executive in administrative action[51]?

iii. Are there mechanisms to prevent, correct and sanction abuse of discretionary powers *(detournement de pouvoir)?* When discretionary power is given to officials, is there judicial review of the exercise of such power?

iv. Are public authorities required to provide adequate reasons for their decisions, in particular when they affect the rights of individuals? Is the failure to state reasons a valid ground for challenging such decisions in courts?

64. An exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions violates the Rule of Law.

65. It is contrary to the Rule of Law for executive discretion to be unfettered power. Consequently, the law must indicate the scope of any such discretion, to protect against arbitrariness.

66. Abuse of discretionary power should be controlled by judicial or other independent review. Available remedies should be clear and easily accessible.

67. Access to an ombudsperson or another form of non-contentious jurisdiction may also be appropriate.

68. The obligation to give reasons should also apply to administrative decisions[52].

D. Equality before the law and non-discrimination

1. Principle

Does the Constitution enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination?

2. Non-discrimination[53]

Is respect for the principle of non-discrimination ensured?

i. Does the constitution prohibit discrimination?

ii. Is non-discrimination effectively guaranteed by law?

iii. Do the Constitution and/or legislation clearly define and prohibit both direct and indirect discrimination?

69. The principle of non-discrimination requires the prohibition of any unjustified unequal treatment under the law and/or by law, and that all persons have guaranteed equal and effective protection against discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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[51] *CM(2008)170, The Council of Europe and the Rule of Law, § 46; ECtHR Malone, 8691/79, 2 August 1984, § 68; Segerstedt-Wiberg and Others v. Sweden, 62332/00, 6 June 2006, § 76 (Article 8). The complexity of modern society means that discretionary power must be granted to public officials. The principle by which public authorities must strive to be objective ("sachlich") in a number of States such as Sweden and Finland goes further than simply forbidding discriminatory treatment and is seen as an important factor buttressing confidence in public administration and social capital.*

[52] *See e.g. Article 41.1.c of the Charter of Fundamental Rights of the European Union. Cf. also item II.E.2.c.vi and note 126.*

[53] *See for exemple, Article 14 ECHR; Protocol 12 ECHR; Articles 12, 26 ICCPR, Article 24 ACHR; Article ACHPR.*

3. Equality in law

Is equality in law guaranteed?

Does the constitution require legislation (including regulations) to respect the principle of equality in law[54]? Does it provide that differentiations have to be objectively justified?

Can legislation violating the principle of equality be challenged in the court?

Are there individuals or groups with special legal privileges? Are these exceptions and/or privileges based on a legitimate aim and in conformity with the principle of proportionality?

Are positive measures expressly provided for the benefit of particular groups, including national minorities, in order to address structural inequalities?

70. Legislation must respect the principle of equality: it must treat similar situations equally and different situations differently and guarantee equality with respect to any ground of potential discrimination.

71. For example, rules on parliamentary immunities, and more specifically on inviolability, "should ... be regulated in a restrictive manner, and it should always be possible to lift such immunity, following clear and impartial procedures. Inviolability, if applied, should be lifted unless justified with reference to the case at hand and proportional and necessary in order to protect the democratic workings of Parliament and the rights of the political opposition"[55].

72. "The law should provide that the prohibition of discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or compensate for disadvantages suffered by persons on grounds [of belonging to a particular group], or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved[56]."

4. Equality before the law

Is equality before the law guaranteed?

i. Does the national legal order clearly provide that the law applies equally to every person irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status[57]? Does it provide that differentiations have to be objectively justified, on the basis of a reasonable aim, and in conformity with the principle of proportionality[58]?

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[54] *Cf. e.g. CDL-AD(2014)010, § 41-42; CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia, § 44ff: equality should not be limited to citizens and include a general non-discrimination clause.*

[55] *CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities (§ 200); ECtHR Cordova v. Italy, No. 1 and No. 2, 40877/98 and 45649/99, 30 January 2003, § 58-67.*

[56] *ECRI (European Commission against Racism and Intolerance) Recommendation No. 7, § 5.*

[57] *For example, Article 1.2 Protocol 12 ECHR makes clear that "any public authority" – and not only the legislator – has to respect the principle of equality. Article 26 ICCPR States that "All persons are equal before the law and are entitled without discrimination to the equal protection of the law". "The principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union": CJEU, C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission, 14 September 2010, § 54.*

[58] *A distinction is admissible if the situations are not comparable and/or if it is based on an objective and reasonable justification: See ECtHR Hämäläinen v. Finland, 37359/09, 26 July 2014, §*

ii. Is there an effective remedy against discriminatory or unequal application of legislation[59]?

73. The Rule of Law requires the universal subjection of all to the law. It implies that law should be equally applied, and consistently implemented. Equality is however not merely a formal criterion, but should result in substantively equal treatment. To reach that end, differentiations may have to be tolerated and may even be required. For example, affirmative action may be a way to ensure substantive equality in limited circumstances so as to redress past disadvantage or exclusion[60].

E. Access to justice [61]

1. Independence and impartiality

a. Independence of the judiciary

Are there sufficient constitutional and legal guarantees of judicial independence?

i. Are the basic principles of judicial independence, including objective procedures and criteria for judicial appointments, tenure and discipline and removals, enshrined in the Constitution or ordinary legislation[62]?

ii. Are judges appointed for life time or until retirement age? Are grounds for removal limited to serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions? Is the applicable procedure clearly prescribed in law? Are there legal remedies for the individual judge against a dismissal decision[63]?

iii. Are the grounds for disciplinary measures clearly defined and are sanctions limited to intentional offences and gross negligence[64]?

108: "The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see Burden v. the United Kingdom GC, no. 13378/05, § 60, ECHR 2008)".

[59] *Cf. Article 13 ECHR; Article 2.3 ICCPR ; Article 25 ACHR ; Article 7.1.a ACHPR.*

[60] *Cf. Article 1.4 and 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination (CEDR); Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 5.4 of the Convention on the Rights of Persons with Disabilities (CRPD).*

[61] *On the issue of access to justice and the Rule of Law, see SG/Inf(2016)3, Challenges for judicial independence and impartiality in the member States of the Council of Europe, Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe as a follow-up to his 2015 report entitled "State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe.*

[62] *CDL-AD(2010)004, § 22: "The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts".*

[63] *Cf. CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, § 49ff; CDL-AD(2010)004, § 33ff; for constitutional justice, see "The Composition of Constitutional Courts", Science and Technique of Democracy No. 20, CDL-STD(1997)020, p. 18-19.*

[64] *"Judges… should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)": CDL-AD(2010)004, § 61.*

iv. Is an independent body in charge of such procedures[65]?

v. Is this body not only comprised of judges?

vi. Are the appointment and promotion of judges based on relevant factors, such as ability, integrity and experience[66]? Are these criteria laid down in law?

vii. Under which conditions is it possible to transfer judges to another court? Is the consent of the judge to the transfer required? Can the judge appeal the decision of transfer?

viii. Is there an independent judicial council? Is it grounded in the Constitution or a law on the judiciary[67]? If yes, does it ensure adequate representation of judges as well as lawyers and the public[68]?

ix. May judges appeal to the judicial council for violation of their independence?

x. Is the financial autonomy of the judiciary guaranteed? In particular, are sufficient resources allocated to the courts, and is there a specific article in the budget relating to the judiciary, excluding the possibility of reductions by the executive, except if this is done through a general remuneration measure[69]? Does the judiciary or the judicial council have input into the budgetary process?

xi. Are the tasks of the prosecutors mostly limited to the criminal justice field[70]?

xii. Is the judiciary perceived as independent? What is the public's perception about possible political influences or manipulations in the appointment and promotion of the judges/prosecutors, as well as on their decisions in individual cases? If it exists, does the judicial council effectively defend judges against undue attacks?

xiii. Do the judges systematically follow prosecutors' requests ("prosecutorial bias")?

xiv. Are there fair and sufficient salaries for judges?

74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.

75. The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure including in budgetary matters – and whether the judiciary appears as independent and impartial[71].

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[65] *OSCE Kyiv Recommendations on Judicial Independence, § 9.*

[66] *Cf. CM/Rec(2010)12, § 44*

[67] *The Venice Commission considers it appropriate to establish a Judicial Council having decisive influence on decisions on the appointment and career of judges: CDL-AD(2010)004, § 32.*

[68] *"A substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself": CDL-AD(2007)028, § 29.*

[69] *CDL-AD(2010)038, Amicus Curiae Brief for the Constitutional Court of the "the former Yugoslav Republic of Macedonia" on amending several laws relating to the system of salaries and remunerations of elected and appointed officials.*

[70] *Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system; CDL-AD(2010)040, § 81-83; CDL-AD(2013)025, Joint Opinion on the draft law on the public prosecutor's office of Ukraine, § 16-28.*

[71] *See in particular ECtHR Campbell and Fell v. the United Kingdom, 28 June 2014, 7819/77 and 7878/77, § 78.*

76. Limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.

77. Legislation on dismissal may encourage disguised sanctions.

78. Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s) (see section II.E.2 below).

79. It is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so.

80. Though the non-consensual transfer of judges to another court may in some cases be lawfully applied as a sanction, it could also be used as a kind of a politically-motivated tool under the disguise of a sanction[72]. Such transfer is however justified in principle in cases of legitimate institutional reorganisation.

81. "[I]t is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges". Judicial councils "should have a pluralistic composition with a substantial part, if not the majority, of members being judges[73]." That is the most effective way to ensure that decisions concerning the selection and career of judges are independent from the government and administration[74]. There may however be other acceptable ways to appoint an independent judiciary.

82. Conferring a role on the executive is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation[75]. Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided[76]. An appropriate balance should be found between judges and lay members[77]. The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary[78].

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[72] *Cf. CDL-AD(2010)004, § 43.*

[73] *CDL-AD(2010)004, § 32.*

[74] *Cf. Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges (Principle I.2.a), which reflects a preference for a judicial council but accepts other systems.*

[75] *CDL-AD(2007)028, Report on Judicial Appointments, § 44ff. The trend in Commonwealth countries is away from executive appointments and toward appointment commissions, sometimes known as judicial services commissions. See J. van Zyl Smit (2015), The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law), available at http://www.biicl.org/documents/689_bingham_centre_compendium.pdf.*

[76] *CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, § 21, 22.*

[77] *See CDL-PI(2015)001, Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, ch. 4.2, and the references.*

[78] *CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, § 28; see also, e.g., CDL-AD(2007)draft, Report on Judicial Appointments by the Venice Commission, § 33; CDL-AD(2010)026, Joint opinion on the draft law on the judicial system and the status of judges of Ukraine, § 97, concerning the presence of ministers in the judicial council.*

83. Sufficient resources are essential to ensuring judicial independence from State institutions, and private parties, so that the judiciary can perform its duties with integrity and efficiency, thereby fostering public confidence in justice and the Rule of Law[79] *Executive power to reduce the judiciary's budget is one example of how the resources of the judiciary may be placed under undue pressure.*

84. The public prosecutor's office should not be permitted to interfere in judicial cases outside its standard role in the criminal justice system – *e.g.* under the model of the "Prokuratura". Such power would call into question the work of the judiciary and threaten its independence[80].

85. Benchmarks xii-xiv deal, first of all, with the perception of the independence of the judiciary. The prosecutorial bias is an example of absence of independence, which may be encouraged by the possibility of sanctions in case of "wrong" judgments. Finally, fair and sufficient salaries are a concrete aspect of financial autonomy of the judiciary. They are a means to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals[81].

a. ***Independence of individual judges***

Are there sufficient constitutional and legal guarantees for the independence of individual judges?

i. Are judicial activities subject to the supervision of higher courts – outside the appeal framework -, court presidents, the executive or other public bodies?

ii. Does the Constitution guarantee the right to a competent judge («natural judge pre-established by law")[82]?

iii. Does the law clearly determine which court is competent? Does it set rules to solve any conflicts of competence?

iv. Does the allocation of cases follow objective and transparent criteria? Is the withdrawal of a judge from a case excluded other than in case a recusal by one of the parties or by the judge him/herself has been declared founded[83]?

86. The independence of individual judges must be ensured, as also must the independence of the judiciary from the legislative and, especially, executive branches of government.

87. The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judges when applying the law. Judges should not be subject to supervision by their colleague-judges, and a fortiori to any executive hierarchical power, exercised for example by civil servants. Such supervision would contravene their individual independence, and consequently violate the Rule of Law[84].

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[79] *CM/Rec(2010)12, § 33ff; CDL-AD(2010)004, § 52ff.*

[80] *CDL-AD(2010)040, § 71ff.*

[81] *Cf. CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, § 81.*

[82] *CDL-AD(2010)004, § 78; see e.g. European Commission on Human Rights, Zand v. Austria, 7360/76, 16 May 1977, D.R. 8, p. 167; ECtHR Fruni v. Slovakia, 8014/07, 21 June 2011, § 134ff.*

[83] *On the allocation of cases, see CM/Rec(2010)12, § 24; CDL-AD(2010)004, § 73ff. The OSCE Kyiv Recommendations cite as a good practice either random allocation of cases or allocation based on predetermined, clear and objective criteria (§ 12).*

[84] *CM/Rec(2010)12, § 22ff; CDL-AD(2010)004, § 68ff; CM/Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system, § 19;*

88. "The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. ... It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential"[85].

b. ***Impartiality of the judiciary***[86]

Are there specific constitutional and legal rules providing for the impartiality of the judiciary[87]?

i. What is the public's perception of the impartiality of the judiciary and of individual judges?

ii. Is there corruption in the judiciary? Are specific measures in place against corruption in the judiciary *(e.g.* a declaration of assets)? What is the public's perception on this issue[88]?

89. Impartiality of the judiciary must be ensured in practice as well as in the law. The classical formula, as expressed for example by the case-law of the European Court of Human Rights, is that "justice must not only be done, it must also be seen to be done"[89]*. This implies objective as well as subjective impartiality. The public's perception can assist in assessing whether the judiciary is impartial in practice.*

90. Declaration of assets is a means of fighting corruption because it can highlight any conflict of interest and possibly lead to scrutiny of any unusual income[90].

c. ***The prosecution service: autonomy and control***

Is sufficient autonomy of the prosecution service ensured?

i. Does the office of the public prosecution have sufficient autonomy within the State structure? Does it act on the basis of the law rather than of political expediency[91]?

ii. Is it permitted that the executive gives specific instructions to the prosecution office on particular cases? If yes, are they reasoned, in writing, and subject to public scrutiny[92]?

iii. May a senior prosecutor give direct instructions to a lower prosecutor on a particular case? If yes, are they reasoned and in written form?

CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges), § 72.

[85] *CDL-AD(2010)004, § 79.*

[86] *Article 6.1 ECHR; Article 14.1 ICCPR; Article 8.1 ACHR; Article 7.1.d ACHPR. See also the various aspects of impartiality in the Bangalore principles of judicial conduct, Value 2, including absence of favour, bias or prejudice.*

[87] *See e.g. ECtHR Micallef v. Malta [GC], 17056/06, 15 October 2009, § 99-100.*

[88] *On corruption, see in general II.F.1.*

[89] *See e.g. ECtHR De Cubber v. Belgium, 9186/80, 26 October 1984, § 26: Micallef v. Malta, 17056/06, 15 October 2009, § 98; Oleksandr Volkov v. Ukraine, 21722/11, 9 January 2013, § 106.*

[90] *CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law «on the status of judges» of Kyrgyzstan, § 15.*

[91] *See in particular CM/Rec(2000)19, § 11ff; CDL-AD(2010)040, § 23ff.*

[92] *Cf. CDL-AD(2010)040, § 22.*

iv. Is there a mechanism for a junior prosecutor to contest the validity of the instruction on the basis of the illegal character or improper grounds of the instruction?

v. Also, can the prosecutor contesting the validity of the instruction request to be replaced[93]?

vi. Is termination of office permissible only when prosecutors reach the retirement age, or for disciplinary purposes, or, alternatively, are the prosecutors appointed for a relatively long period of time without the possibility of renewal[94]?

vii. Are these matters and the grounds for dismissal of prosecutors clearly prescribed by law[95]?

viii. Are there legal remedies for the individual prosecutor against a dismissal decision[96]?

ix. Is the appointment, transfer and promotion of prosecutors based on objective factors, in particular ability, integrity and experience, and not on political considerations? Are such principles laid down in law?

x. Are there fair and sufficient salaries for prosecutors[97]?

xi. Is there a perception that prosecutorial policies allow selective enforcement of the law?

xii. Is prosecutorial action subject to judicial control?

91. There is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. In conformity with the principle of legality, the public prosecution service must act only on the basis of, and in accordance with, the law[98]. This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle)[99].

92. Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

93. *The concerns relating to the judiciary apply, mutatis mutandis, to the prosecution service, including the importance of assessing legal regulations, as well as practice.*

94. Here again[100], sufficient remuneration is an important element of autonomy and a safeguard against corruption.

95. Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular on behalf of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias.

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[93] *Cf. CDL-AD(2010)040, § 53ff.*

[94] *CDL-AD(2010)040, § 34ff, 47ff.*

[95] *CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, § 39.*

[96] *CDL-AD(2010)040, § 52.*

[97] *CDL-AD(2010)040, § 69.*

[98] *See II.A.1.*

[99] *CDL-AD(2010)040, § 7, 53ff.*

[100] *See II.E.1.a.xiv for judges.*

96. As in other fields, the existence of a legal remedy open to individuals whose rights have been affected is essential to ensuring that the Rule of Law is respected.

d. ***Independence and impartiality of the Bar***

Are the independence and impartiality of the Bar ensured?

i. Is there a recognised, organised and independent legal profession (Bar)[101]?

ii. Is there a legal basis for the functioning of the Bar, based on the principles of independence, confidentiality and professional ethics, and the avoidance of conflicts of interests?

iii. Is access to the Bar regulated in an objective and sufficiently open manner, also as remuneration and legal aid are concerned?

iv. Are there effective and fair disciplinary procedures at the Bar?

v. What is the public's perception about the Bar's independence?

97. The Bar plays a fundamental role in assisting the judicial system. It is therefore crucial that it is organised so as to ensure its independence and proper functioning. This implies that legislation provides for the main features of its independence and that access to the Bar is sufficiently open to make the right to legal counsel effective. Effective and fair criminal and disciplinary proceedings are necessary to ensure the independence and impartiality of the lawyers.

98. Professional ethics imply *inter alia* that "[a] lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation"[102]. He or she "shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact"[103], "shall not assume a position in which a client's interest conflict with those of the lower[104] and «shall treat client interest as paramount»[105].

2. ***Fair trail[106]***

a. ***Access to courts***

Do individuals have an effective access to courts?

i. *Locus standi* (right to bring an action): Does an individual have an easily accessible and effective opportunity to challenge a private or public act that interferes with his/her rights[107]?

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[101] *See Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer.*

[102] *International Bar Association – International Principles of Conduct for the Legal Profession, 1.1.*

[103] *Ibid., 2.1.*

[104] *Ibid., 3.1.*

[105] *Ibid., 5.1.*

[106] *Article 6 ECHR, Article 14 ICCPR, Article 8 ACHR, Article 7 ACHPR. The right to a fair trial was recognised by the European Court of Justice, as "inspired by Article 6 of the ECHR": C-174/98 P and C-189/98 P, Netherlands and Van der Wal v Commission, 11 January 2000, § 17. See now Article 47 of the Charter of Fundamental Rights.*

[107] *"The degree of access afforded by the national legislation must also be sufficient to secure the individual's «right to a court», having regard to the principle of the Rule of Law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity*

ii. Is the right to defence guaranteed, including through effective legal assistance[108]? If yes, what is the legal source of this guarantee?

iii. Is legal aid accessible to parties who do not have sufficient means to pay for legal assistance, when the interests of justice so require[109]?

iv. Are formal requirements[110], time-limits[111] and court fees reasonable[112]?

v. Is access to justice easy in practice[113]? What measures are taken to make it easy?

vi. Is suitable information on the functioning of the judiciary available to the public?

99. Individuals are usually not in a position to bring judicial proceedings on their own. Legal assistance is therefore crucial and should be available to everyone. Legal aid should also be provided to those who cannot afford it.

100. This question addresses a number of procedural obstacles which may jeopardise access to justice. Excessive formal requirements may lead to even serious and well- grounded cases being declared inadmissible. Their complexity may further necessitate recourse to a lawyer even in straightforward cases with little financial impact. Simplified standardised forms easily accessible to the public should be available to simplify judicial procedures.

101. Very short time-limits may in practice prevent individuals from exercising their rights. High fees may discourage a number of individuals, especially those with a low income, from bringing their case to court.

102. Responses to the preceding questions concerning procedural obstacles, should enable a preliminary conclusion to be made regarding how access to the court is guaranteed. However, a complete reply should take into account the public's perception on these matters.

103. The judiciary should not be perceived as remote from the public and shrouded in mystery. The availability, in particular on the internet, of clear information regarding how to bring a case to court is one way of guaranteeing effective public engagement with the judicial system. Information should be easily accessible to the whole population,

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to challenge an act that is an interference with his rights", ECtHR Bellet v. France, 23805/94, 4 December 1995, § 36; cf. ECtHR M.D. and Others v. Malta, 64791/10, 17 July 2012, § 53.

[108] *Article 6.3.b-c ECHR, Article 14.3 ICCPR; Article 8.2 ACHR; the right to defence is protected by Article 6.1 ECHR in civil proceedings, see e.g. ECtHR Oferta Plus SRL v. Moldova, 14385/04, 19 December 2006, § 145. It is recognised in general by Article 7.1.c ACHPR.*

[109] *Article 6.3.c ECHR, Article 14.3.d ICCPR for criminal proceedings; the right to legal aid is provided up to a certain extent by Article 6.1 ECHR for civil proceedings: see e.g. ECtHR A. v. the United Kingdom, 35373/97, 17 December 2002, § 90ff; for constitutional courts in particular, see CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 113.*

[110] *For constitutional justice, see CDL-AD(2010)039rev, § 125.*

[111] *For constitutional justice, see CDL-AD(2010)039rev, § 112; for time limits for taking the decision, see § 149.*

[112] *On excessive court fees, see e.g. ECtHR Kreuz v. Poland (no. 1), 28249/95, 19 June 2001, § 60-67; Weissman and Others v. Romania, 63945/00, 24 May 2006, § 32ff; Scordino v. Italy, 36813/97, 29 March 2006, § 201; Sakhnovskiy v. Russia, 21272/03, 2 November 2010, § 69; on excessive security for costs, see e.g. ECtHR Aït-Mouhoub v. France, 22924/93, 28 October 1998, § 57-58; Garcia Manibardo v. Spain, 38695/97, 15 February 2000, § 38-45; for constitutional justice, see CDL-AD(2010)039rev, § 117.*

[113] *On the need for an effective right of access to court, see e.g. Golder v. the United Kingdom, 4451/70, 21 January 1975, § 26ff; Yagtzilar and Others v. Greece, 41727/98, 6 December 2001, § 20ff.*

including vulnerable groups and also made available in the languages of national minorities and/or migrants. Lower courts should be well-distributed around the country and their court houses easily accessible.

b. ***Presumption of innocence***[114]

Is the presumption of innocence guaranteed?

i. Is the presumption of innocence guaranteed by law?

ii. Are there clear and fair rules on the burden of proof?

iii. Are there legal safeguards which aim at preventing other branches of government from making statements on the guilt of the accused[115]?

iv. Is the right to remain silent and not to incriminate oneself nor members of one's family ensured by law and in practice[116]?

v. Are there guarantees against excessive pre-trial detention[117]?

104. The presumption of innocence is essential in ensuring the right to a fair trial. In order for the presumption of innocence to be guaranteed, the burden of proof must be on the prosecution[118]. Rules and practice concerning the required proof have to be clear and fair. The unintentional or purposeful exercise of influence by other branches of government on the competent judicial authority by prejudging the assessment of the facts must be avoided. The same holds good for certain private sources of opinion like the media. Excessive pretrial detention may be considered as prejudging the accused's guilt[119].

c. ***Other aspects of the right to a fair trial***

Are additional fair trial standards enshrined in law and applied in practice?

i. Is equality of arms guaranteed by law? Is it ensured in practice[120]?

ii. Are there rules excluding unlawfully obtained evidence[121]?

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[114] *Article 6.2 ECHR; Article 15 ICCPR; Article 8.2 ACHR; Article 7.1.b ACHPR.*

[115] *ECtHR Allenet de Ribemont v. France, 15175/89, 10 February 1995, § 32ff. On the involvement of authorities not belonging to the judiciary in issues linked to a criminal file, see CDL-AD(2014)013, Amicus Curiae Brief in the Case of Rywin v. Poland (Application Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry). The European Court of Human Rights decided on the Rywin case on 18 February 2016: see in particular § 200ff. On the issue of the systematic follow-up to prosecutors' requests (prosecutorial bias), see item II.E.1.a.xiii.*

[116] *ECtHR Saunders v. the United Kingdom, 19187/91, 17 December 1996, § 68-69; O'Halloran and Francis v. the United Kingdom, 5809/02 and 25624/02, 29 June 2007, § 46ff, and the quoted case-law. On the incrimination of members of one's family, see e.g. International Criminal Court, Rules of Procedure and Evidence, Rule 75.1.*

[117] *Cf. Article 5.3 ECHR.*

[118] "*The burden of proof is on the prosecution": ECtHR Barberá, Messegué and Jabardo v. Spain, 10590/83, 6 December 1988, § 77; Telfner v. Austria, 33501/96, 20 March 2001, § 15; cf. Grande Stevens and Others v. Italy, 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014, § 159.*

[119] *Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), IV.*

[120] *See e.g. Rowe and Davis v. the United Kingdom, 28901/95, 16 February 2000, § 60.*

[121] *See e.g. Jalloh v. Germany, 54810/00, 17 July 2006, § 94ff, 104; Göçmen v. Turkey, 72000/01, 17 October 2006, § 75; O'Halloran and Francis v. the United Kingdom, 5809/02 and 25624/02, 29 June 2007, § 60.*

iii. Are proceedings started and judicial decisions made without undue delay[122]? Is there a remedy against undue lengths of proceedings[123]?

iv. Is the right to timely access to court documents and files ensured for litigants[124]?

v. Is the right to be heard guaranteed[125]?

vi. Are judgments well-reasoned[126]?

vii. Are hearings and judgments public except for the cases provided for in Article 6.1 ECHR or for *in absentia* trials?

viii. Are appeal procedures available, in particular in criminal cases[127]?

ix. Are court notifications delivered properly and promptly?

105. The right to appeal against a judicial decision is expressly guaranteed by Article 2 Protocol 7 ECHR and Article 14.5 ICCPR in the criminal field, and by Article 8.2.h ACHR in general. This is a general principle of the Rule of Law often guaranteed at constitutional or legislative level by domestic legislation, in particular in the criminal field. Any court whose decisions cannot be appealed would run the risk of acting arbitrarily.

106. All aspects of the right to a fair trial developed above may be inferred from the right to a fair trial as defined in Article 6 ECHR, as elaborated in the case-law of the European Court of Human Rights. They ensure that legal subjects are properly involved in the whole judicial process.

d. ***Effectiveness of judicial decisions***

Are judicial decisions effective?

i. Are judgments effectively and promptly executed[128]?

ii. Are complaints for non-execution of judgments before national courts and/or the European Court of Human Rights frequent?

iii. What is the perception of the effectiveness of judicial decisions by the public?

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[122] *Article 6.1 ECHR; Article 8.1 ACHR; Article 7.1.d ACHPR (« within reasonable time »).*

[123] *CDL-AD(2010)039rev, § 94. See e.g. ECtHR Panju v. Belgium, 18393/09, 28 October 2014, § 53, 62 (the absence of an effective remedy in case of excessive length of proceedings goes against Article 13 combined with Article 6.1 ECHR).*

[124] *This right is inferred in criminal matters from Article 6.3.b ECHR (the right to have adequate time and facilities for the preparation of one's defence): see e.g. Foucher v. France, 22209/93, 18 March 1993, § 36.*

[125] *Cf. ECtHR Micallef v. Malta, 17056/06, 15 October 2009, § 78ff; Neziraj v. Germany, 30804/07, 8 November 2012, § 45ff.*

[126] *"Article 6 § 1 (Article 6-1) obliges the courts to give reasons for their judgments": ECtHR Hiro Balani v. Spain, 18064/91, 9 September 1994, § 27; Jokela v. Finland, 28856/95, 21 May 2002, § 72; see also Taxquet v. Belgium, 926/05, 16 November 2010, § 83ff. Under the title "Right to good administration", Article 41.2.c of the Charter of Fundamental Rights of the European Union provides for "the obligation of the administration to give reasons for its decisions".*

[127] *On appeals procedures, see ODIHR Legal Digest of International Fair Trial Rights, p. 227.*

[128] *See e.g. Hirschhorn v. Romania, 29294/02, 26 July 2007, § 49; Hornsby v. Greece, 18357/91, 19 March 1997, § 40; Burdov v. Russia, 59498/00, 7 May 2002, § 34ff ; Gerasimov and Others v. Russia, 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 167ff.*

107. Judicial decisions are essential to the implementation of the Constitution and of legislation. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not executed.

3. **Constitutional justice (if applicable)**

Is constitutional justice ensured in States which provide for constitutional review (by specialised constitutional courts or by supreme courts)?

i. Do individuals have effective access to constitutional justice against general acts, *i.e.,* may individuals request constitutional review of the law by direct action or by constitutional objection in ordinary court proceedings[129]? What "interest to sue" is required on their part?

ii. Do individuals have effective access to constitutional justice against individual acts which affect them, *i.e.* may individuals request constitutional review of administrative acts or court decisions through direct action or by constitutional objection[130]?

iii. Are Parliament and the executive obliged, when adopting new legislative or regulatory provisions, to take into account the arguments used by the Constitutional Court or equivalent body? Do they take them into account in practice?

iv. Do Parliament or the executive fill legislative/regulatory gaps identified by the Constitutional Court or equivalent body within a reasonable time?

v. Where judgments of ordinary courts are repealed in constitutional complaint proceedings, are the cases re-opened and settled by the ordinary courts taking into account the arguments used by the Constitutional Court or equivalent body[131]?

vi. If constitutional judges are elected by Parliament, is there a requirement for a qualified majority[132] and other safeguards for a balanced composition[133]?

vii. Is there an *ex ante* control of constitutionality by the executive and or/legislative branches of government?

108. The Venice Commission usually recommends providing for a constitutional court or equivalent body. What is essential is an effective guarantee of the conformity of governmental action, including legislation, with the Constitution. There may be other ways to ensure such conformity. For example, Finnish law provides at the same time for a priori review of constitutionality by the Constitutional Law Committee and for a

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[129] *CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 96.*

[130] *CDL-AD(2010)039rev, § 62, 93, 165.*

[131] *CDL-AD(2010)039rev, § 202; CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, § 9, 10.*

[132] *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), § 18, 19; CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 19; CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, § 24.*

[133] *CDL-AD(2011)010, Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the State prosecutor's office and the law on the judicial council of Montenegro, § 27; CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, § 33; CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, § 13; The Composition of Constitutional Courts, Science and Technique of Democracy No. 20, CDL-STD(1997)020, pp. 7, 21.*

posteriori judicial control in case the application of a statutory provision would lead to an evident conflict with the Constitution. In the specific national context, this has proven sufficient[134].

109. Full judicial review of constitutionality is indeed the most effective means to ensure respect for the Constitution, and includes a number of aspects which are set out in detail above. First, the question of locus standi is very important: leaving the possibility to ask for a review of constitutionality only to the legislative or executive branch of government may severely limit the number of cases and therefore the scope of the review. Individual access to constitutional jurisdiction has therefore been developed in a vast majority of countries, at least in Europe[135]*. Such access may be direct or indirect (by way of an objection raised before an ordinary court, which refers the issue to the constitutional court)*[136]*. Second, there should be no limitation as to the kinds of acts which can be submitted to constitutional review: it must be possible to do so for (general) normative as well as for individual (administrative or judicial) acts. However, an individual interest may be required on the part of a private applicant.*

110. The right to a fair trial imposes the implementation of all courts' decisions, including those of the constitutional jurisdiction. The mere cancellation of legislation violating the Constitution is not sufficient to eliminate every effect of a violation, and would at any rate be impossible in cases of unconstitutional legislative omission.

111. This is why this document underlines the importance of Parliament adopting legislation in line with the decision of the Constitutional Court or equivalent body[137]*. What was said about the legislator and the executive is also true for courts: they have to remedy the cases where the constitutional jurisdiction found unconstitutionality, on the basis of the latter's arguments.*

112. "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"[138]*. A qualified majority implies a political compromise and is a way to ensure a balanced composition when no party or coalition has such a majority.*

113. Even in States where ex post control by a constitutional or supreme court is possible, ex ante control by the executive or legislative branch of government helps preventing unconstitutionalities.

F. Examples of particular challenges to the Rule of Law

114. There are many examples where particular actions and decisions offend the Rule of Law. However, because they are topical and pervasive at the time of the drafting

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[134] *CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115ff.*

[135] *There is only one (limited) exception in the Council of Europe member States with a constitutional jurisdiction: CDL-AD(2010)039rev, § 1, 52-53.*

[136] *CDL-AD(2010)039rev, § 1ff, 54-55, 56 ff.*

[137] *Cf. CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 71.*

[138] *CDL-STD(1997)020, p. 21.*

of this document, two such examples are presented in this section: corruption and conflict of interest; and collection of data and surveillance.

1. Corruption[139] and conflict of interest

a. Preventive measures

What are the preventive measures taken against corruption?

i. In the exercise of public duties, are specific rules of conduct applicable to public officials? Do these rules take into account:

1) the promotion of integrity in public life by means of general duties (impartiality and neutrality etc.);

2) restrictions on gifts and other benefits;

3) safeguards with respect to the use of public resources and information which is not meant to be public;

4) regulations on contacts with third parties and persons seeking to influence a public decision including governmental and parliamentary work?

ii. Are there rules aimed at preventing conflicts of interest in decision-making by public officals, *e.g.* by requiring disclosure of any conflicts in advance?

iii. Are all categories of public officials covered by the above measures, *e.g.* civil servants, elected or appointed senior officials at State and local levels, judges and other holders of judicial functions, prosecutors etc. ?

iv. Are certain categories of public officials subject to a system of disclosure of income, assets and interests, or to further requirements at the beginning and the end of a public office or mandate *e.g.* specific integrity requirements for appointment, professional disqualifications, post-employment restrictions (to limit revolving doors or so-called "pantouflage")?

v. Have specific preventative measures been taken in specific sectors which are exposed to high risks of corruption, e.g. to ensure an adequate level of transparency and supervision over public tenders, and the financing of political parties and election campaigns?

b. Criminal law measures

What are the criminal law measures taken against corruption?

i. To what extent does bribery involving a public official constitute an offence?

ii. Is corruption defined in policy documents or other texts, in conformity with international standards? Are there criminal law provisions aimed at preserving public integrity, *e.g.* trading in influence, abuse of office, breach of official duties?

iii. Which public officials are within the scope of such measures, *e.g.* civil servants, elected or appointed senior officials including the head of State and members of government and public assemblies, judges and other holders of judicial functions, prosecutors etc. ?

iv. What consequences are attached to convictions for corruption-related offences? Do these include additional consequences such as exclusion from a public office or confiscation of profits?

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[139] *On the issue of corruption, see Group of States Against Corruption (GRECO), Immunities of public officials as possible obstacles in the fight against corruption, in Lessons learned from the three Evaluation Rounds (2000-2010) – Thematic Articles.*

c. Effective compliance with, and implementation of preventive and repressive measures

How is effective compliance with the above measures ensured?

i. How is the overall level of compliance with anti-corruption measures and policies perceived domestically?

ii. Does the State comply with the results of international monitoring in this field?

iii. Are effective, proportionate and dissuasive criminal and administrative sanctions provided for corruption-related acts and non-compliance with preventive mechanisms?

iv. Are the bodies responsible for combating corruption and preserving public sector integrity provided with adequate resources, including investigative powers, personnel and financial support? Do these bodies enjoy sufficient operational independence from the executive and the legislature[140]?

v. Are measures in place to make the above bodies accessible to individuals and to encourage disclosure of possible corrupt acts, notably reporting hotlines and a policy on whistle-blowers[141] which offers protection against retaliation in the workplace and other negative consequences?

vi. Does the State itself assess the effectiveness of its anti-corruption policies, and is adequate corrective action taken when necessary?

vii. Have any phenomena been observed in practice, which would undermine the effectiveness or integrity of anti-corruption efforts, *e.g.* manipulation of the legislative process, non-compliance and non-enforcement of court decisions and sanctions, immunities, interference with the enforcement efforts of anti-corruption and other responsible bodies – including political intimidation, instrumentalisation of certain public institutions, intimidation of journalists and members of civil society who report on corruption?

115. Corruption leads to arbitrariness and abuse of powers since decisions will not be made in line with the law, which will lead to decisions being arbitrary in nature. Moreover, corruption may offend equal application of the law: it therefore undermines the very foundations of the Rule of Law. Although all three branches of powers are concerned, corruption is a particular concern for the judiciary, prosecutorial and law enforcement bodies, which play an instrumental role insafeguarding the effectiveness of anti-corruption efforts. Preventing and sanctioning corruption-related acts are important elements of anti-corruption measures, which are addressed in a variety of international conventions and other instruments[142].

116. Preventing conflicts of interest is an important element of the fight against corruption. A conflict of interest may arise where a public official has a private interest (which may involve a third person, e.g. a relative or spouse) liable to influence, or appearing to influence, the impartial and objective performance of his or her official

[140] *On the issue of corruption in the judiciary, see II.E.1.c.ii.*

[141] *See Recommendation CM/Rec(2014)7 on the protection of whistle-blowers, of the Council of Europe's Committee of Ministers*

[142] *See for example the United Nations Convention against Corruption; Criminal Law Convention on Corruption (CETS 173); Civil Law Convention on Corruption (CETS 174); Additional Protocol to the Criminal Law Convention on Corruption (CETS 191); CM/Rec(2000)10 on codes of conduct for public officials; CM/Res (97) 24 on the twenty guiding principles for the fight against corruption.*

duties.[143] *The issue of conflicts of interest is addressed in international conventions and soft law*[144]*. Legislation on lobbying and the control of campaign finance may also contribute to preventing and sanctioning conflicts of interest*[145].

2. Collection of data and surveillance

a. ***Collection and processing of personal data***

How is personal data protection ensured?

i. Are personal data undergoing automatic processing sufficiently protected with regard to their collection, storing and processing by the State as well as by private actors? What are the safeguards to secure that personal data are:

- processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency");

- collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes ("purpose limitation")?

- adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimisation")?

- accurate and, where necessary, kept up to date ("accuracy")?

- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed ("storage limitation");

- processed in a way that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage ("integrity and confidentiality")[146]?

ii. Is the data subject provided at least with information on:

- the existence of an automated personal data file, its main purposes;

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[143] *CM/Rec(2000)10 on codes of conduct for public officials, Article 13.*

[144] *United Nations Convention against Corruption, in particular Article 8.5; CM/Rec(2000)10, Appendix – Model code of conduct for public officials, Articles 13ff; cf. CM/Res (97) 24 on the twenty guiding principles for the fight against corruption.*

[145] *The Venice Commission adopted in 2013 a Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) (CDL-AD(2013)011). The European Committee on Legal Co-operation (CDCJ) carried out in 2014 a feasibility study on a Council of Europe legal instrument concerning the legal regulation of lobbying activities. It is expected that the draft recommendation will be submitted for approval to the CDCJ plenary meeting in November 2016.*

[146] *An early document (of 1981) is Article 5 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS 108) ; see also Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Articles 6, 7; in the meantime in the EU a "Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)" has been agreed on (Interinstitutional File 2012/0011 (COD) of Dec 15, 2015). Principles of data protection are enshrined in Art. 5. See also a "Proposal for a Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purpose of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data" (Interinstitutional file: 2012/0010 (COD) of 16 December 2015. In 2013 the OECD adopted "The OECD Privacy Framework", with "principles" in Part 2.*

- the identity and the contact details of the controller and of the data protection officer;
- the purposes of the processing for which the personal data are intended;
- the period for which the personal data will be stored;
- the existence of the right to request from the controller access to and rectification or erasure of the personal data concerning the data subject or to object to the processing of such personal data;
- the right to lodge a complaint to the supervisory authority and the contact details of the supervisory authority; the recipients or categories of recipients of the personal data;
- where the personal data are not collected from the data subject, from which source the personal data originate;
- any further information necessary to guarantee fair processing in respect of the data subject[147].

iii. Does a specific independent authority ensure compliance with the legal conditions under domestic law giving effect to the international principles and requirements with regard to the protection of individuals and of personal data[148]?

iv. Are effective remedies provided for alleged violations of individual rights by collection of data[149]?

117. The increasing use of information technology has made the collection of data possible to an extent which was unthinkable in the past. This has led to the development of national and international legal protection of individuals with regard to automatic processing of personal information relating to them. The most important requirements of such protection are enumerated above. These are also applicable mutatis mutandis to data processing for security purposes.

b. ***Targeted surveillance***

What are the guarantees against abuse of targeted surveillance?

i. Is there a mandate in the primary legislation and is it restricted by principles like the principle of proportionality?

ii. Are there norms providing for procedural controls and oversight?

iii. Is an authorisation by a judge or an independent body required?

iv. Are there sufficient legal remedies available for an alleged violation of individual rights[150]?

118. Surveillance may seriously infringe the right to private life. The developments of technical means make it easier and easier to use. Ensuring that it does not provide the State an unlimited power to control the life of individuals is therefore crucial.

[147] *See the Proposal for a Regulation quoted in the previous footnote, Article 14; Directive 95/46/EC, Articles 10-11; CETS 108, Article 8.*

[148] *CDL-AD(2007)014, § 83.*

[149] *Cf. Articles 8 and 13 ECHR.*

[150] *Cf. Articles 8 and 13 ECHR.*

119. Targeted surveillance must be understood as covert collection of conversations by technical means, covert collection of telecommunications and covert collection of metadata)[151].

Strategic surveillance

c. ***Strategic surveillance***

What are the legal provisions related to strategic surveillance which guarantee against abuse?

i. Are the main elements of strategic surveillance regulated in statute form, including the definition of the agencies which are authorised to collect such intelligence, the detailed purposes for which strategic surveillance can be collected and the limits, including the principle of proportionality, which apply to the collection, retention and dissemination of the data collected[152]?

ii. Does the legislation extend data protection/privacy also to non-citizens/non-residents?

iii. Is strategic surveillance submitted to preventive judicial or independent authorisation? Are there independent review and oversight mechanisms in place[153]?

iv. Are effective remedies provided for alleged violations of individual rights by strategic surveillance[154]?

120. Signals intelligence must be understood as means and methods for the interception of radio – including satellite and cell phone and cable-borne communications[155].

121. "One of the most important developments of intelligence oversight in recent years has been that signals intelligence... can now involve monitoring "ordinary telecommunications" (it is "surveillance") and it has a much greater potential for affecting human rights.[156]*"*

d. ***Video surveillance***

What are the guarantees against abuse of video surveillance, especially of public places[157]?

i. Is video surveillance performed on grounds of security or safety requirements, or for the prevention and control of criminal offences, and submitted in law and in practice to the requirements laid down in Article 8 ECHR[158]?

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[151] *The level of the interference metadata collection involves in private life is disputed. The CJEU has extended privacy protection to metadata as well. The case law of the ECtHR so far accepts that lesser safeguards can apply for less serious interferences with private life. see CDL-AD(2015)006 §62, 63, 83. Where no prior judicial authorisation is provided for metadata collection, there must at least be strong independent post hoc review.*

[152] *CDL-AD(2015)011, § 8, 69, 129; cf. ECtHR Liberty and others v. the United Kingdom, 58240/00, 1 July 2008, § 59 ff; Weber and Saravia v. Germany (dec.) 54934/00, 29 June 2006, § 85 ff.*

[153] *CDL-AD(2015)011, § 24-27, 115ff, 129.*

[154] *Cf. Articles 8 and 13 ECHR; CDL-AD(2015)011, § 26, 126 ff.*

[155] *CDL-AD(2015)011, § 33.*

[156] *CDL-AD(2015)011, § 1.*

[157] *See e.g. CJEU, C-212/13, František Ryneš v. Úřad pro ochranu osobních údajů, 11 December 2014.*

[158] *CDL-AD(2007)014, § 82.*

ii. Are people notified of their being surveyed in places accessible to the public?
iii. Do people have access to any video surveillance that may relate to them?

III. SELECTED STANDARDS

III. **a. General Rule of Law Standards**

1. **Hard Law**

Council of Europe, European Convention on Human Rights (1950) http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005

European Union (EU), Charter of Fundamental Rights of the EU (2009) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:0J.C_.2010.083.01.0389.01.ENG

United Nations (UN), International Covenant on Civil and Political Rights (1966) (ICCPR) http://www.unhcr.org/refworld/pdfid/3ae6b3aa0.pdf

Council of Europe, Statute of the Council of Europe, Preamble (1949) http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001

OAS, American Convention on Human Rights ('Pact of San Jose') (1969) http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

African Union (AU), Constitutive Act

http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf

African Union (AU) Charter on Democracy, Elections and Governance (2007), Article 3

http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_G0VERNANCE.pdf

2. **Soft Law**

a. **Council of Europe**

European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, CDL-AD (2011)003rev

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e

Council of Europe Committee of Ministers, 'The Council of Europe and the Rule of Law', CM(2008)170http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CM%20170_en.pdf

The European Commission for the Efficiency of Justice's Evaluation of European Judicial Systems project

http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes6Suivi_en.pdf

b. **European Union**

EU, Justice Scoreboard (ongoing annual reports) http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm

Communication from the European Commission to the European Parliament and the Council, 'A new EU Framework to strengthen the Rule of Law', COM(2014) 158 final/2. http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf

Council of the EU, Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union (2013)

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf

EU Accession Criteria ('Copenhagen Criteria') http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en

c. **Other International Organisations**

Conference on Security and Co-operation in Europe (CSCE, now OSCE), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE ("the Copenhagen document") (1989)

http://www.osce.org/odihr/elections/14304?download=true

Organization for Security and Co-operation in Europe, Decision No. 7/08, 'Further strengthening the rule of law in the OSCE area' (2008). http://www.osce.org/mc/35494?download=true

Organization of American States (OAS), Inter-American Democratic Charter (2001), http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

Conference on Security and Co-operation in Europe (CSCE, now OSCE), Document of the Moscow meeting of the Conference on the Human Dimension of the CSCE ("the Moscow document) (1991)

http://www.osce.org/odihr/elections/14310?download=true

d. **Rule of Law Indicators**

World Justice Project Rule of Law Index

http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

Vera-Altus Rule of Law Indicators http://www.altus.org/pdf/dimrol_en.pdf

The United Nations Rule of Law Indicators

http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf

World Bank's World Governance Indicatorshttp://info.worldbank.org/governance/wgi/index.aspx#home

III. b. Standards relating to the Benchmarks

A. **Legality**

1. **Hard Law**

ECHR Articles 6ff, in particular 6.1, 7, 8.2, 9.2, 10.2 and 11.2

EU, Charter of Fundamental Rights of the EU (2009), Article 49 (concerning the principles of legality and proportionality of criminal offences and penalties) http://www.europarl.europa.eu/charter/pdf/text_en.pdf

UN, ICCPR Articles 14ff, in particular 14.1, 15, 18.3, 19.3, 21; 22.3

UN, International Covenant on Civil and Political Rights (1966), Article 4 (emergency derogations must be strict), 15 (nullum crimen, nullum poena) http://www.unhcr. org/refworld/pdfid/3ae6b3aa0. pdf

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 16(4), 19 http://www2.ohchr.org/english/bodies/cmw/cmw.htm

Rome Statute of the International Criminal Court (1998), Article 22

http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

AU Charter on Democracy, Elections and Governance (2007), Article 10
http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_G0VERNANCE.pdf

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Article 27
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

2. **Soft Law**

UN, Universal Declaration of Human Rights (1948), Article 11(2) (concerning criminal offences and penalties)
http://www.un.org/en/documents/udhr/index.shtml

Organization of American States (OAS), American Declaration of the Rights and Duties of Man (1948), Article XXV (protection from arbitrary arrest)
http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf

Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government (1998), Principles II, VIII
http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf

Charter of the Commonwealth (2013), Sections VI, VIII
http://thecommonwealth.org/sites/default/files/page/documents/CharteroftheCommonwealth.pdf

Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (2012), para 20(2)
Available at http://aichr.org/documents

B. **Legal certainty**

1. **Hard Law**

ECHR Articles 6ff, in particular 6.1, 7, 8.2, 9.2, 10.2 and 11.2

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Article 9
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Article 7(2) http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf

League of Arab States (LAS), Arab Charter on Human Rights (Revised) (2004), Article 16 http://www.refworld.org/docid/3ae6b38540.html

2. **Soft Law**

UN, Universal Declaration of Human Rights (1948), Article 11 http://www.un.org/en/documents/udhr/index.shtml

UN, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012), para 8 http://www.unrol.org/article.aspx?article_id=192

ASEAN, Human Rights Declaration (2012), para 20(3)
Available at http://aichr.org/documents

C. **Prevention of abuse of powers**

1. **Hard Law**

UN, International Covenant on Civil and Political Rights (1966), Article 17 (interference with freedoms)

http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 14 (interference with freedoms), 15 (deprivation of property)

http://www2.ohchr.org/english/bodies/cmw/cmw.htm

UN, Convention on the Rights of the Child (1989), Article 37(b) (arbitrary arrest or detention) http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Article 14 http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf

2. **Soft Law**

Council of Europe Committee of Ministers, 'The Council of Europe and the Rule of Law', CM(2008)170, section 46

http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CM%20170_en.pdf

UN, Universal Declaration of Human Rights (1948), Articles 9, 12, 17 http://www.un.org/en/documents/udhr/index.shtml

Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government (1998), Principle VII http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf ASEAN Human Rights Declaration (2012), paras 11-12, 21 (arbitrary deprivations of life, liberty, privacy)

Available at http://aichr.org/documents

D. **Equality before the law and non-discrimination**

1. **Hard Law**

a. **Council of Europe**

ECHR (1950), Article 14

b. **European Union**

Charter of Fundamental Rights of the EU (2009), Articles 20-21 http://www.europarl.europa.eu/charter/pdf/text_en.pdf

EU Equality Directives, including Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

c. **Other international organisations**

UN, International Covenant on Civil and Political Rights (1966), Articles 2, 14(1), 26 (equality before courts and tribunals)

http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

UN, International Convention on the Elimination of All Forms of Racial Discrimination (CEDR) (1969), especially Article 5

http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 1, 7, 18 http://www2.ohchr.org/english/bodies/cmw/cmw.htm

UN, International Covenant on Economic, Social and Cultural Rights (1966), Article 3 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

UN, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)

http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

UN, Convention on the Rights of Persons with Disabilities (CRPD) (2006) http://www.un.org/disabilities/convention/conventionfull.shtml

UN, Convention on the Rights of the Child (1989), Article 2 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

International Committee of the Red Cross and Red Crescent Societies, Geneva Conventions (1949), Common Article 3

https://www.icrc.org/ihl/WebART/375-590006

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Articles 3, 19 http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf

AU Charter on Democracy, Elections and Governance (2007), Article 8

http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Articles 3, 24 http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

LAS, Arab Charter on Human Rights (Revised) (2004), Articles 2, 9 http://www.refworld.org/docid/3ae6b38540.html

2. **Soft Law**

Council of Europe, Recommendation CM/Rec(2007)7 of the Committee of Ministers to member States on good administration, Article 3 https://wcd.coe.int/ViewDoc.jsp?id=1155877

European Commission for Democracy through Law (Venice Commission), Report on the scope and lifting of parliamentary immunities, CDL-AD(2014)011 http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)011-e

UN, Universal Declaration of Human Rights (1948), Articles 1, 2, 6-7, 16-17, 22-23 http://www.un.org/en/documents/udhr/index.shtml

UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012), sections 12, 14 http://www.unrol.org/article.aspx?article_id=192

UN Human Rights Committee, General Comment No. 32 (2007), Article 14: Right to equality before courts and tribunals and to a fair trial http://www1.umn.edu/humanrts/gencomm/hrcom32.html

The Commonwealth, Harare Commonwealth Declaration (1991), para 4

http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf

The Commonwealth, Singapore Declaration of Commonwealth Principles (1971), Principle 6

http://thecommonwealth.org/sites/default/files/history-items/documents/Singapore%20Declaration.pdf

ASEAN, Human Rights Declaration (2012), paras 2, 7-9 Available at http://aichr.org/documentsOAS, American Declaration of the Rights and Duties of Man (1948), Articles II, XVII

http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf

OAS, Inter-American Democratic Charter (2001), Article 9 http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

South Asian Association for Regional Cooperation (SAARC), Charter of Democracy (2011) http://saarc-sec.org/SAARC-Charter-of-Democracy/88/

E. **Access to justice**

1. **Hard Law**

ECHR (1950), Article 6

Charter of Fundamental Rights of the EU (2009), Articles 41, 47, 48, 50 http://www.europarl.europa.eu/charter/pdf/text_en.pdfDirective 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings http://eur- lex.europa.eu/legal-content/EN/TXT/?qid=1455724770445&uri=CELEX:32010L0064

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on theright to information in criminal proceedings

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455724843769&uri=CELEX:32012L0013

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455724901649&uri=CELEX:32013L0048

UN, International Covenant on Civil and Political Rights (1966), Articles 9, 14 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

UN, International Convention on the Elimination of All Forms of Racial Discrimination (1969), Article 6

http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

UN, Convention on the Rights of the Child (1989), Articles 12(2), 40 http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Articles 16, 18 http://www2.ohchr.org/english/bodies/cmw/cmw.htm

Rome Statute of the International Criminal Court (1998), Article 55

http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Articles 8, 25 http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

LAS, Arab Charter on Human Rights (Revised) (2004), Articles 7, 9 http://www.refworld.org/docid/3ae6b38540.html

LAS, The Riyadh Arab Agreement for Judicial Cooperation (1983), Articles 3-4 http://www.refworld.org/docid/3ae6b38d8.html

2. **Soft Law**

a. **Council of Europe**

Council of Europe Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL- AD(2010)004

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e

Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040 http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e

Venice Commission, Report on Judicial Appointments, CDL-AD(2007)028 http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e

Venice Commission, Compilation of Venice Commission opinions, reports and studies on Constitutional Justice, CDL-PI(2015)002

http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29002-e

Venice Commission, Compilation of Venice Commission Opinions and Reports concerning Prosecutors, CDL-PI(2015)009

http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29009-e

Venice Commission, Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, CDL-PI(2015)001

http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e

Council of Europe, Recommendation CM/Rec(94)12 of the Committee of Ministers to member States on the Independence, Efficiency and Role of Judges (1994) https://wcd.coe.int/ViewDoc.jsp?id=524871&Site=CM&BackColorInternet=C3C3C3&BackCo lorIntranet=EDB021&BackColorLogged=F5D383

Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities https://wcd.coe.int/ViewDoc.jsp?id=1707137

Council of Europe, Recommendation CM/Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&Instra netI mage=2719990&SecMode=1&DocId=366374&Usage=2

Council of Europe, Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system https://wcd.coe.int/ViewDoc.jsp?id=1979395&Site=CM&BackColorInternet=C3C3C3&BackC olorIntranet=EDB021&BackColorLogged=F5D383

Consultative Council of European Judges (CCJE), Opinion No. 1 on standards concerning the independence of the judiciary and the irremovability of judges

(2001) https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%201_EN. pdf

Council of Europe, Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer https://wcd.coe.int/ViewDoc.jsp?id=380771&Site=CM&BackColorInternet=C3C3C3&BackCo lorIntranet=EDB021&BackColorLogged=F5D383

b. **European Union**

European Network of Councils for the Judiciary, Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary (2012)

http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclaration_de_dublin_recj_def.pdf

European Network of Councils for the Judiciary, Judicial Ethics: Principles, Values and Qualities (2010)

http://encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf

European Network of Councils for the Judiciary, Resolution on Transparency and Access to Justice (2009)

http://encj.eu/images/stories/pdf/opinions/resolutionbucharest29may_final.pdf

Council of Bars and Law Societies in Europe, Charter of Core Principles of the European Legal Profession (2006) and Code of Conduct for European Lawyers (1988, latest amendment 2006)

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

European Association of Judges, Judges' Charter in Europe (1997) http://www.richtervereinigung.at/international/eurojus1/eurojus15a.htm

c. **United Nations**

UN, Universal Declaration of Human Rights (1948), Articles 8, 10 http://www.un.org/en/documents/udhr/

UN Human Rights Council Resolution 25/4, Integrity of the judicial system (2014) http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/25/4

UN Human Rights Council, Resolution 23/6, Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (2013)

http://daccess-dds-ny.un.org/doc/U N DOC/GEN/G13/148/94/PDF/G1314894.pdf?OpenElement

UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012), para 13 http://www.unrol.org/article.aspx?article_id=192

UN Human Rights Committee, General Comment No. 32 (2007), Article 14: Right to equality before courts and tribunals and to a fair trial http://www1.umn.edu/humanrts/gencomm/hrcom32.html

UN Office on Drugs and Crime Judicial Group on Strengthening Judicial Integrity, The Bangalore Principles of Judicial Conduct (2002)

http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

UN OHCHR, Principles relating to the Status of National Institutions (The Paris Principles) (1993), section 2 (Composition and guarantees of independence and pluralism) http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx

UN Basic Principles on the Role of Lawyers (welcomed by General Assembly resolution 45/166, 1990)

http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

UN Guidelines on the Role of Prosecutors (welcomed by General Assembly resolution 45/166, 1990)

http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx

UN Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") (referenced by UN Commission on Human Rights, resolution 1989/32) http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/03/SR-Independence-of-Judges-and-Lawyers-Draft-universal-declaration-independence-justice-Singhvi-Declaration- instruments-1989-eng.pdf

UN Basic Principles on the Independence of the Judiciary (endorsed by General Assembly resolutions 40/32 and 40/146, 1985)

http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

International Association of Prosecutors, Standards of professional responsibility and Statement of the essential duties and rights of prosecutors (1999) http://www.iap-association.org/getattachment/34e49dfe-d5db-4598-91da- 16183bb12418/Standards_English.aspx

OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems (Ljubljana)

http://www.osce.org/mc/17347?download=true

OSCE, Brussels Declaration on Criminal Justice Systems (2006) http://www.osce.org/mc/23017?download=true

d. **The Commonwealth of Nations**

Charter of the Commonwealth (2013), section 7

http://thecommonwealth.org/sites/default/files/page/documents/CharteroftheCommonwealth.pdf

Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government (2003), Principles III-VI http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf

Harare Commonwealth Declaration (1991), para 4

http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf

Limassol Conclusions on Combating Corruption within the Judiciary (2002) http://www.cmja.org/downloads/limassolconclusionwithannexe.pdf

e. **Organization for Security and Co-operation in Europe**

Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, 'Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability' (2010) http://www.osce.org/odihr/KyivRec?download=true

Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, Legal Digest of International Fair Trial Rights, http://www.osce.org/odihr/94214.

f. **Other International Organisations**

OAS, American Declaration of the Rights and Duties of Man (1948), Articles XVII, XXVI

http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf

OAS, Inter-American Democratic Charter (2001), Articles 2-4 http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

African Union (AU), Constitutive Act (2000), Article 4(m) http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Articles 7, 26 http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf

ASEAN, Human Rights Declaration (2012), para 5 Available at http://aichr.org/documents

SAARC, Charter of Democracy (2011) http://saarc-sec.org/SAARC-Charter-of-Democracy/88/

g. **Other**

American Bar Association Rule of Law Initiative – Arab Council for Judicial and Legal Studies, Justice Sector Benchmarks – A User's Guide for Civil Society Organizations http://www.albersconsulting.eu/justicebenchmarks.html

The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (J. van Zyl Smit, Report of Research Undertaken by Bingham Centre for the Rule of Law) (2015) http://www.biicl.org/documents/689_bingham_centre_compendium.pdf

Bingham Center for the Rule of Law, Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges (2016) http://www.biicl.org/documents/868_cape_town_principles_-_february_2016.pdf

F. Examples of particular challenges to the Rule of Law

1. **Hard Law**

a. **Corruption**

Council of Europe, Criminal Convention against Corruption, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173

Council of Europe, Civil Convention on Corruption, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174

Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/191

UN, Convention Against Corruption (2003) http://www.unodc.org/unodc/en/treaties/CAC/

OAS, Inter-American Convention against Corruption (1996) http://www.oas.org/juridico/english/treaties/b-58.html

b. **Collection of data and surveillance**

Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108

European Union, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN

2. **Soft Law**

a. **Corruption**

Council of Europe, Recommendation CM/Rec(2000)10 of the Committee of Ministers to members States on codes of conduct for public officials,

https://wcd.coe.int/ViewDoc.jsp?id=353945&Site=CM&BackColorInternet=C3C3C3&BackCo

lorIntranet=EDB021&BackColorLogged=F5D383

CM/Res (97) 24 on the twenty guiding principles for the fight against corruption

https://wcd.coe.int/ViewDoc.jsp?id=593789&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

Group of States Against Corruption (GRECO), Immunities of public officials as possible obstacles in the fight against corruption, in Lessons learned from the three Evaluation Rounds (2000-2010) – Thematic Articles

https://www.coe.int/t/dghl/monitoring/greco/general/Compendium_Thematic_Articles_EN.pdf

European Union, regular EU-Anti Corruption report, e.g. COM(2014) 38 final as of 3 February 2015

http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr 2014 en.pdf

b. **Collection of data and surveillance**

European Commission for Democracy through Law (Venice Commission), Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights, CDL- AD(2007)014

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282007%29014-e

European Commission for Democracy through Law (Venice Commission Report on the Democratic Oversight of Signals Intelligence Agencies, CDL-AD(2015)011 http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282015%29011-e

Compilation of Venice Commission opinions and reports concerning prosecutors [1]

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[1] *This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 112th Plenary Session (6-7 October 2017)*

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I. INTRODUCTION

This document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning prosecutors – their status, functions, guarantees of independence, their accountability, internal organisation of the prosecution service, its relation to other branches of the government, etc. This compilation does not concern fair trials guarantees and impartiality of the courts. Its aim is to provide an overview of the doctrine of the Venice Commission on this topic.

The compilation is intended to serve as a source of reference for drafters of constitutions and of legislation on the prosecution service, researchers, as well as for the Venice Commission's members, who are requested to prepare opinions and reports concerning legislation dealing with such issues. When referring to elements contained in this compilation, please cite the original document but not the compilation as such.

The compilation is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the opinions from which extracts are cited in the compilation relate to individual countries and take into account the specific situation there. The citations will therefore not necessarily be applicable in other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

Venice Commission reports and studies, quoted in this compilation seek to present general standards for all member and observer States of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Each citation in the compilation has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to gain a full understanding of the Commission's position on a particular issue, it is useful to read the complete chapter in the Compilation on the relevant theme you are interested in. Most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this compilation (venice@coe.int).

II. LEVEL OF REGULATION – CONSTITUTIONAL AND LEGISLATIVE

"It is not necessary for much organisational detail [on the prosecution service] to be included in the Constitution; an ordinary law of Parliament should be sufficient and would be more flexible. [...]"

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution [...].

It would not be essential to set out in the Constitution detailed provisions regarding public prosecution. All that would be required would be:

- A guarantee of the independence of the general prosecutor of the Republic in the performance of his functions;
- The method of his appointment;
- The method of his removal from office."

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"[...] Less fundamental matters can be fixed by laws passed by the Parliament such as the term of office, age of retirement, remuneration and pension of the general prosecutor, and the organisation of the prosecution service and the conditions of employment of its staff. This would be preferable to fixing these matters by regulations or decrees of the government, if public confidence in the independence of the system from the government is to be maintained. [...]"

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"[...] 'When, not only the fundamental principles but also very specific and 'detailed rules' on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk. This also increases the risk, for the future adoption of eventual necessary reforms, of long-lasting political conflict and undue pressure and cost for society.'"

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §18

"[...] [A]ny functions conferred on the prosecutor should be referred to in [the law dealing with the prosecutor's office] and should not be contained elsewhere."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §21

"[...] The cases when a member of a prosecutor's council can be dismissed should be specified in the Act. Such a provision of course deserves having the status of cardinal act."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §53

"[...] BiH is not the only country in which a judicial council has been created by ordinary legislation; this is also the case in, for instance, Denmark and Hungary. Yet, an explicit constitutional basis would facilitate the role of the HJPC as the guarantor of the independence of the judiciary."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §24

"[...] The criteria for the assessment are to be determined by the HJPC. Since the performance is one of the criteria in the appointment and, since, moreover, negligence or carelessness in the performance constitutes a disciplinary offence, it would be important to have at least the basic criteria of the assessment stated expressly in the draft Law."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §83

"Also, according to this system, all 18 judicial and prosecutorial members of the HJPC – as well as its president and two vice-presidents – shall be elected by the Parliamentary Assembly of BiH in a procedure which *is to be determined by a separate regulation* adopted by the Parliamentary Assembly. By leaving the definition of the election procedure to a separate regulation to be adopted by the Parliamentary Assembly in the future, the draft Law makes it difficult to assess the extent to which the requirement of transparency of the procedure has been met. It remains undetermined whether, for instance, the elections will require a qualified majority – as would be strongly recommended in order to avoid political appointments and to promote the election of persons with a high reputation acceptable to a wide majority – or whether members of the civil society will have the possibility of participating or overseeing the procedure.

This election procedure should be developed in the law and, as stated in Recommendation CM/Rec(2010)12: 'Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions'."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§41 and 42

"[...] The grounds for dismissal should be stated in the Constitution, e.g. stated misbehaviour or incapacity. [...]"

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

III. FUNCTIONS AND POWERS OF THE PROSECUTION SERVICE

2.1. POWERS IN THE CRIMINAL FIELD

2.1.1. Investigation and prosecution of crimes on behalf of the State in criminal cases

"[...] [M]ost systems provide for a monopoly on criminal prosecutions by the state or an organ of the state."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §15

"Systems of criminal justice vary throughout Europe and the World. The different systems are rooted in different legal cultures and there is no uniform model for all states. There are, for example, important differences between systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. There are systems where prosecution is mandatory (the legality principle) and others where the prosecutor has discretion not to prosecute where the public interest does not demand it (the opportunity principle). In some systems there is lay participation in the fact-finding and/or law-applying process through the participation of jurors, assessors or lay judges, with consequences for the rules of criminal procedure and evidence. Some systems allow for private prosecution while others do not do so or recognise the possibility of private prosecution only on a limited basis. Some systems recognise the interests of a victim in the outcome of criminal proceedings as a *'partie civile'* where others recognise only a contest between the prosecutor representing the public or the state and the individual accused."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II the Prosecution Service, §7

"The Recommendation (2000)19 of the Committee of Ministers on the Role of public prosecution in the criminal justice system *allows for a plurality of models of the Prosecution Service. [...]"*

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 28

"As regards the basic models referred to in the Concept, one could suggest that the function of the general prosecutor and the other public prosecutors should be confined to the prosecution of crime, through the criminal courts, and should not be extended to the protection of the public interest in civil matters and administrative causes. [...]"

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"[...] The direction in which the Venice Commission would recommend to go has been clearly formulated in Recommendation 1604 (2003) of the Parliamentary Assembly, which states: 'the power and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal-justice system, with separate, appropriately located and effective bodies established to discharge any other function."

CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, §76

"It is particularly positive that the Draft Law proposes a significant reduction of the number of tasks of the Prosecution Service by specifying that provisions not related

to the prosecution service's core role, such as its participation in civil cases and the supervision of the compliance with the law, will expire within three years from the entry into force of the Draft Law, thereby providing sufficient time to draft legislation which will transfer these responsibilities to other bodies. This will also allow the Prosecution Service to focus on its core task of criminal prosecution. [...]"

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §11

"In the case of Montenegro, the fact that the Constitution prescribes, in its Article 134, that there is a 'unique' State Prosecution Service inevitably tended to favour the choice which has been made to establish the special public prosecutor within the framework of the existing prosecution service. Otherwise, the authorities would have been compelled to embark on the difficult process of attempting to amend the Constitution. At the same time, if a special public prosecutor's office is to serve a useful purpose, a degree of autonomy within the framework of the existing prosecution service is necessary."

CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §14

2.1.2. Specific powers of the prosecution related to criminal investigations

2.1.2.1. Decision to prosecute or not to prosecute

"[...] In conformity with the principle of legality, the public prosecution service must act only on the basis of, and in accordance with, the law. This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle).'

CDL-AD(2016)007, Rule of Law Checklist, §91

"[...] it is important to clarify, in the law, whether individual prosecutors shall act on the basis of the principle of legality (meaning prosecution of all cases fulfilling the elements of a crime) or the principle of opportunity (which allows for prosecutorial discretion as to the decision of whether or not to prosecute). [.]"

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §106

"Articles 7-12 relate to the conducting and carrying out of criminal investigation. These provisions seem appropriate to ensure that the prosecutors control of the investigative powers is secured. Article 10 empowers the prosecutor to decide on the exemption from criminal liability of a person 'for opportunity reasons' and it would appear that at least to this extent the Moldovan prosecution authorities are to operate the opportunity principle. It is obviously desirable that a prosecutor should have these powers so as, for example, to give immunity to a witness in return for testimony against a more important participant in crime. However, it is necessary that criteria for the exercise of this power should be set out."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §24

"Although Article 34.1.d, which mentions the prosecutor's discretion in decision-making, seems to confirm that the opportunity principle applies, this fundamental distinction should be more clearly specified, and, if the principle of opportunity is to be applied, the rights of victims, including remedies for decisions not to prosecute, should be provided for."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §32

"The fact that so much of the prosecutor's work is subject to scrutiny by courts of law also provides a form of accountability. In systems where the prosecutor does not control the investigation, the relationship between the prosecutor and the investigator necessarily creates a degree of accountability. The biggest problems of accountability (or rather a lack of accountability) arise when the prosecutors decide not to prosecute. If there is no legal remedy – for instance by individuals as victims of criminal acts – then there is a high risk of non-accountability."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §45

"In most cases the decision to prosecute will be made simply on the basis of whether there is sufficient evidence to prosecute. In some cases, there may be matters unrelated to the weight of evidence tending to suggest that a prosecution may be undesirable. These may relate to the circumstances of the offender or the victim, or to the damage a prosecution might cause to the interests of a third party. Exceptionally, there may be cases where a prosecution would risk causing damage to wider interests, social, economic or relating to questions of security. Where such public interest questions arise, care should be taken not to violate the rule of law, and while the prosecutor may think it wise to consult with persons having a special expertise, he or she should retain the power to decide whether a prosecution is in fact in the public interest. If the prosecutor can be subject to an instruction in such a case, then that instruction should be reasoned and where possible open to public scrutiny."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §56

"The prosecutor must act fairly and impartially. Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner. It is not the prosecutor's function to secure a conviction at all costs. The prosecutor must put all the credible evidence available before a court and cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case. Where evidence tending to favour the accused cannot be disclosed (for example, because to do so would compromise the safety of another person) it may be the duty of the prosecutor to discontinue the prosecution."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §17

"Furthermore, paragraphs 24-36 of Recommendation Rec(2000)19 provide for a number of important duties of the public prosecutor towards individuals. Quite a number of these are not referred to at all in the draft Law, such as the duty not to initiate or continue prosecution when an impartial investigation shows the charge to be unfounded, not to present evidence that they know or believe on reasonable grounds was obtained illegally, and to disclose to the other parties (meaning primarily the accused) 'any information which they possess that may affect the justice of the proceedings'."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §107

2.1.2.2. Supervision of the investigation by the prosecutors and the courts

"[...] In any case, prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges. In some countries a 'prosecutorial bias' seems to lead to a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §73

"[...] [T]here is a need to clarify that the power given by paragraph 1.2 to conduct an 'interview' with a detained person is limited to the purpose of the role of supervision established by this provision. Insofar as there is no such limitation, this paragraph should be amended to establish that it is so restricted.

Moreover, there is a need to clarify the scope of the power of a public prosecutor under paragraphs 3 and 4 to release someone held under someone else's purported authority as it appears to cover not only detention by an administrative decision but also one that is a consequence of 'a judicial judgment'. Insofar as these provisions do extend to detention pursuant to a judicial judgment rather than just making reference to a particular category of establishment in which persons can be held, it would be necessary to make it clear that they concern situations when a person is held in such establishments without a valid judicial judgment or beyond the term specified in it."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§104 and 105

"Article 23 contains a provision allowing a judge to issue a decision on the application of a special prosecutor obliging a bank to monitor payment operations and to report them to the special prosecutor. It is recommended that clear criteria for the grant of an order to this effect be set out in the law, especially considering that sanctions are provided for the cases of failure to execute the decision [...].

It is welcomed that an appeal is provided against such decisions [...]."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§62 and 63

"It would be important to include a provision to the effect that data containing relevant information helpful to an accused person cannot be withheld from that person [by the prosecutor's office] in the event of a prosecution being brought."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §67

"Article 6 sets out the obligation to co-operate with the Public Prosecutor's Office by making those who refuse to do so criminally responsible. It should be remembered that the Public Prosecutor's Office's activities may jeopardise certain fundamental rights such as privacy, the confidentiality of communications, right to the protection of personal data etc. A proper balance between the different rights must be established by appropriate judicial control."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §21

"The fourth paragraph of Article 5 should make it clear that orders given to the police and investigative bodies by prosecutors should be subject to judicial control. This paragraph corresponds to Article 102 of the draft Law, which mentions that police

and investigative body operations must be subject to judicial control, not just control by prosecutors."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §18

"[...] Leaving the choice of the court to the accusing party is a serious violation of the adversarial principle and gives an unfair advantage to the prosecution. The possibility to select the court should be withdrawn from the Prosecutor General."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §84

2.1.3. Specialized prosecutors

"[...] [T]he Draft Law does not provide for specialisation within the Public Prosecutor's Office, for example on anti-corruption, organized crime or juvenile justice. Such a possibility could be authorised together with procedural guarantees ensuring that the same level of protection of individual's rights applies as for ordinary prosecutors."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §48

"[...] [A]lthough not proposing or advocating in favour of a unique or universal model of anticorruption agency, the above [international] instruments clearly define an international obligation for states to ensure institutional specialisation in the sphere of corruption, i.e to establish specialised bodies, departments or persons (within existing institutions) in charge of fighting corruption through law enforcement.

Key requirements for a proper and effective exercise of such bodies' functions, as they result from the above instruments, include:

- independence/autonomy (an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence);
- accountability and transparency;
- specialised and trained personnel;

adequate resources and powers.

The use of special prosecutors in such cases [(corruption, money laundering, trade of influence etc.)] has been successfully employed in many countries. The offences in question are specialised and can better be investigated and prosecuted by specialised staff. In addition, the investigation of such offences very often requires persons with special expertise in very particular areas. Provided that the special prosecutor is subject to appropriate judicial control, there are many benefits to and no general objections to such a system. The decision whether such a system would be useful and appropriate in the current circumstances of Montenegro is essentially a policy choice for the relevant authorities in that country."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§17, 18 and 23

"The international instruments which define the duties of prosecutors lay a particular emphasis on the duty of prosecutors to deal with crimes committed by public officials. Specialised offices to investigate such cases have become quite common in the recent years. The Venice Commission in its opinions has been supportive of the

establishment of specialised anticorruption investigation/prosecution units enjoying a certain autonomy from the general prosecution system.

The model for such offices varies. In some cases the special prosecutor's office remains formally part of the general prosecution structure but as an autonomous unit, so that it cannot be instructed by other, more senior, prosecutors or by the government. In other cases a completely independent office has been established."

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §§46 and 47

"[...] [The OECD Report on Specialised Anti-Corruption Institutions] suggests that special anti-corruption departments or units within the police or the prosecution service could be subject to separate hierarchical rules and appointment procedures or that police officers dealing with corruption cases, although institutionally placed within the police, report in individual cases only and directly to the competent prosecutor."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §55

"Article 53 (adding Article 148/c) proposes to establish a new Prosecutor's Office of the Special Anti-corruption Structure (SAS). Creation of such special structure may have a positive effect on the fight against corruption; it is important that the special prosecutors enjoy at least the same independent status as ordinary prosecutors. [...]"

CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §89

2.2. OTHER FUNCTIONS OF THE PROSECUTION SERVICE

"In the opinion of Consultative Council of European Prosecutors the constitutional history and legal tradition of a given country may thus justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with Council of Europe values. The only historical model existing in Ukraine is the Soviet (and czarist) model of "prokuratura". This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards."

CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, §16

"[...] [T]he Commission would support a very different approach to the powers of the prosecutor's office which results from a text adopted by the Parliamentary Assembly. While it is not binding on Member States, the Parliamentary Assembly of the Council of Europe, in Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, having recited (at paragraph 6) that the various non-penal law responsibilities of public prosecutors *'give rise to concern as to their compatibility with the Council of Europe's basic principles'* went on to declare its opinion (at paragraph 7):

'it is essential... that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function. "

CDL-AD(2005)014. Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, §56

"[...] It is therefore necessary to be guided by the general democratic principles of a law- governed state. Foremost amongst them is the principle of separation of powers and its consequent principle: the autonomy of individual branches of authority and the principle of balance (equilibrium) of powers. That means prosecution organs should not overstep the bounds of areas reserved for legislative authority, executive power and an independent judiciary. It is therefore necessary to do away with those functions of the prosecutor's office that do not conform to those principles and may actually constitute a threat to their implementation."

CDL-AD(2005)014. Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, §13

2.2.1. Participation in civil proceedings in the interests of private individuals or State entities

"Under Article 39 the representation of citizens' interests in court is still a function of the prosecutor. The Venice Commission has in the past observed that this function should only be conferred on prosecutors in cases where citizens are unable to act on their own behalf by reason of disability or some other such cause, and in no case should it be conferred on prosecutors to the exclusion of the right of a citizen to seize the court directly."

CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, §24

"[.] The role of the prosecutor should be limited to make an appeal in cases where he or she is a party to the proceedings. [...]

[...] The prosecutor may also initiate civil proceedings to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings. [...] [I]t is important that this should only be subsidiary [...]. [.] [T]he main task of the prosecutor is to represent the interest of the state and general interest, it may also be questioned whether the prosecutor is necessarily the most appropriate person to undertake this function, or whether it might not be more appropriately exercised by a body such as an ombudsman."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §§29-30

"Section 27.1.b and 27.4 APS give the prosecutor wide powers to interfere in relations between private parties ('prosecutors . may use their powers to take action in lawsuits between other parties', 'prosecutors shall have the right to seek redress even if they were not party to the proceedings'). While they may be required in some specific cases (e.g. urgent action on behalf of a fugitive to safeguard his or her rights) such wide controlling powers should be narrowly defined in the APS."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §35

"However, there is also a need to clarify that the ability of public prosecutors to act on behalf of minors and others subject to legal incapacity does not allow them unilaterally to override the capacity of parents, of legal representatives or of others already authorized

to act on their behalf and, if this is not the case, to amend the provision to ensure that this protection exists. This concern does not, of course, apply where a court has already removed the capacity of the parents, etc. for reasons specified in the relevant legislation. Furthermore, there ought to be an opportunity for the person said to be incapable of independently protecting his or her rights/exercising procedural competences to be able to challenge such an alleged incapacity. The role of the prosecutor in representing the individual should be only subsidiary and both the individual and any person entitled to represent the individual should be able to challenge this representation in court.

Although it might be implied, Article 24.2 should explicitly provide that a public prosecutor can represent the interests of an individual only after having presented justification for his or her intervention and after the acceptance of these grounds by the court."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§82 and 85

"The Venice Commission remarks very positively that the competence of the State Prosecutor in property law matters have been dropped and were not implemented in the new Constitution; [...]."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §18

"As there is no mention in paragraph 3 of Article 24 of the role of public prosecutors to represent state interests being excluded in the case of state companies, this provision might be interpreting as permitting them to act on behalf of those companies which would be entirely inappropriate given the role entrusted to their management. [...]"

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §89

"[...] [The prosecutors] should not intervene where other governmental entities have that role, this limitation is qualified by the specification that public prosecutors can act where the protection of state interests is not 'duly carried out', which could leave considerable leeway to public prosecutors as to the assessment made by these other governmental entities as to the need to bring proceedings in court and indeed allow the former to override the latter's judgment. This does not seem appropriate and this paragraph should be amended to restrict the power of representation simply to situations in which no other governmental entity has the capacity to provide representation. In analogy to the procedure provided for in Article 24.2, the prosecutor should be allowed to take over the representation of state interests from other state bodies under Article 24.3 only after the approval by a court."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §87

2.2.2. Right to initiate extraordinary review proceedings

"Section 30.6 APS appears to override the *res iudicata* effect of final court decisions: 'Prosecutors may seek a legal remedy against final court decisions'. This competence is 'subject to a separate act with reference to reasons and in the cases defined by law'. However, it seems that these 'final' court decisions are first and second instance decisions, which are still open to cassation by the Curia."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §40

"Article 25.5 provides that the Prosecutor General and his/her deputies as well as heads of regional public prosecutor's offices can file a claim for revision of a judgment by the Supreme Court against judgments passed in civil, administrative and economic matters. Contrary to the provisions of Article 25.4 and 24.6, Article 25.5 does not require the presence of any new circumstances for the claim. This may be unintended or be an error of translation. If however indeed a power were conferred upon the prosecutor to claim the revision of a final judgment in the absence of any new circumstances, this would be a violation of the *res judicata* principle as well as Article 6 of the European Convention and should be changed."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §99

"Without a court warrant, the powers in Article 24.5, especially the free access to premises and access to databases are inappropriate where a representative role is being played by public prosecutors and when they are only needed to establish the grounds for representation. However, the objectives implied in these powers could still be attained by resort to preliminary or interim judicial rulings, i.e. the normal means that exist in civil procedure.

Once the grounds for the representation of the interests of individuals or the state are established, Article 24.6 gives the prosecutor a number of powers, including initiating reviews of court decisions initiated by other persons. Article 24.6 should clearly state that in representing individual or state interests, the prosecutor only benefits from the procedural rights of the party which he or she represents."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§93 and 95

"Under Article 17 of the present Law, it remains a task for the State Prosecutor's Office to 'apply legal remedies for the purpose of protection of constitutionality and legality'. The Delegation was informed that this task is similar to the institute of cassation in the interest of law, which exists also in other countries. It is available only in the field of criminal and administrative law and results in a request for re-opening of a final case by the Chief State Prosecutor to the Supreme Court for the benefit of human rights protection. In these circumstances there is no objection to such a possibility, which is quite distinct from the general supervisory powers over courts, which the prosecutor enjoyed, for example, in the Soviet Union [...]".

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro,§26

2.2.3. General supervision of "legality" of actions of other State bodies, private individuals and entities. Other powers of the prosecution in non-criminal field

"The revised Article 104 par 1 retains the quite extensive supervisory powers of the Office of the Prosecutor. Such a "supervisory" prosecution model is in fact reminiscent of the old Soviet *prokuratura* model. At the same time, over the last decades, many post-communist democracies have sought to deprive their prosecution services of extensive powers in the area of general supervision, by transferring such prerogatives to

other bodies, including national human rights institutions (such as an Ombudsperson). The rationale for such reforms was to abolish what was considered to be an over-powerful and largely unaccountable prosecution service. Maintaining the prosecution service as it is in the Constitution could mean retaining a system where vast powers are vested in only one institution, which may pose a serious threat to the separation of powers and to the rights and freedoms of individuals. The maintenance of such wide prosecutorial supervisory powers has been repeatedly criticized by international and regional organizations, among them OSCE/ODIHR and the Venice Commission. In numerous opinions on this topic, including specifically on the legal framework regulating the prosecution service in the Kyrgyz Republic, the OSCE/ODIHR and the Venice Commission have recommended, for the abovementioned reasons, that the supervisory role of prosecutors be abandoned and that their competences be restricted to the criminal sphere. [...]"

CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" in the Kyrgyz Republic, §98

"In its 2012 *Opinion on the Draft Law on the Public Prosecutors Office of Ukraine,* the Commission once more emphasized, as a central issue in the context of judicial reforms in exSoviet countries, the necessity to remove powers outside of the criminal law field from the prosecutor's competences. It also found problematic, *inter alia* in light of Article 6 of the ECHR, the prosecutor's ability to represent the interests of citizens. The Commission acknowledged that, in the past, such competences might have been justified as a way to address the failure of the responsible institutions to ensure the proper application of laws and observance of human rights. In the Commission's view, a modern and efficient European prosecution service should concentrate on the criminal law sphere, which should represent its main, if not only, area of concern. Powers relating to the general supervision of legality should be taken over by courts and human rights protection by ombudsperson institutions. Maintaining such far-reaching competences and related powers would result in the prosecution service remaining an unduly powerful institution, posing a serious threat to the separation of powers in the state and to the rights and freedoms of individuals.

The Commission pointed out in this context that the Committee of Ministers' Recommendation on the role of public prosecutors outside the criminal justice system *providing for limitations on the powers the public prosecutor may have outside the criminal law field* "should not be seen as recommending that prosecution services should have such powers." *In addition, as recommended by the Committee of Ministers in its recommendation, where the public prosecution has a role outside the criminal justice system,* "appropriate steps should be taken to ensure that this role is carried out with special regard to the protection of human rights and fundamental freedoms and in full accordance with the rule of law, in particular with regard to the right to a fair trial [...]." *Any related powers should be defined in a clear and restrictive manner and be subject to judiciary control.*

[...] The ability to represent the interests of citizens is, however, problematic as prosecutors are also mandated to act in pursuit of the state interest, which could clearly run counter to the interests of any individual being represented. There are other bodies – such as the ombudsperson – that would be better suited to defend the interests of the individual against the state."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§42, 43 and 49

"As regards the powers of senior prosecutors set out in Article 30, the second paragraph should not be used to disregard final judgments, and appeals for extraordinary retrial should be subject to strict conditions. [...] As regards 'subject prosecutors', Article 31 indicates as one of their chief functions, in addition to criminal actions, the bringing of 'popular actions'. [...] As provided by Article 97 of the Law on the Constitutional Court, not only any party but also the Public Prosecutor's Office has the legal capacity to bring such an action. The scope of this action and the risk of creating a judicial overload by exercising it make it inadvisable to grant legal capacity to several levels of the Public Prosecutor's Office as this needs to be used consistently and in a coherent and centralised fashion."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §37

"[...] There are no objections to limited powers of prosecutors, for example as regards the status of persons or in disciplinary proceedings against the legal profession. Moreover it is also possible to entrust the prosecutor's office with the task of defending the state interest in court proceedings outside the field of criminal law. However, a general supervisory power of the prosecutor both over the state administration and the court system is not in line with the principles of separation and the division of powers which are found in democratic constitutions."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §38

"Article 6 refers to various powers which are conferred on the prosecution service. Some of these are very far reaching. They include the power to demand from legal entities, irrespective of their type of ownership, as well as from individuals, documents, materials, data and other information. There is also power to summon any official person or citizen and demand verbal or written explanations. This power can be exercised for the purpose of carrying out criminal prosecution but may also be exercised in relation to any infringements of fundamental human rights and freedoms or violations of legal order. This seems to go much further than a power exercised only for the purpose of criminal prosecution and again appears to be redolent of a *prokuratura* as a 'fourth power' operating outside of the constraints of a court of law and carrying out its own system of justice. There is also a power to 'freely enter the offices of state institutions, enterprises, irrespective of their type of property, as well as of other legal entities'. This presumably includes private companies. In addition to the power of entry there is a power to have access to all documents and materials. Again, what is striking about Article 6 is that all of these powers appear to be exercisable by the prosecutor without reference to a court of law, without the necessity to obtain a warrant or to have the approval of a judge. The exercise of many of these powers should indeed be made dependent on a court warrant."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §22

"The extensive powers which are conferred on the prosecutor's office to act without the authority of a court and which were criticised in previous Venice Commission

opinions are all retained. For example, under Article 9 orders of the Public Prosecutor are binding upon all public authorities, and all citizens can be required to appear before the public prosecutor upon his or her summons and to provide explanations. In the case of non-appearance without a valid excuse an official or a citizen may be brought before the prosecutor by the militia. Officials and citizens are liable under law for failure to carry out the lawful orders of the public prosecutor.

Article 56 gives the public prosecutor power to enter premises of public authorities and local authorities, citizens' associations, enterprises, institutions, organisations whatever their ownership and to have access to documents and materials, and to require their production. The prosecutor can request that decisions, instructions, orders and other acts and documents be produced for verification and obtain information on the status of legality and measures to ensure it. These powers can be exercised when carrying out supervision of the observance and application of laws. Given the comprehensive nature of the power to supervise the observance of laws, these powers are very far reaching indeed."

CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, §§22-23

"According to Section 4.3 APS, business entities and other organisations have to provide data and documents to the prosecutor, performing duties in his or her official capacity, within a deadline set by the prosecutor. Such a general statement certainly goes too far and should be better defined. In the field of criminal law, Section 4.3 limits these powers through the Code of Criminal Procedure. It seems however that no such limitation exists in non-penal matters, even if there are no sanctions against the refusal to provide such data and documents.

Section 4.4 APS gives prosecutors the power to enter various premises and rooms simply by presenting their identity cards. It seems that these powers extend even to private persons ('premises or rooms at the disposal of the organ or person affected by the procedure'). [...] Such powers should be restricted to public institutions and entry into private premises (and of course searches) against the will of the owner of the premises should be possible only on the basis of a court warrant."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§23-24

"In Bulgaria, [...] the prosecution is also in charge of the "general supervision of legality" (see Article 127 §§ 5 and 6 of the Constitution; Article 136 § 5 of the JSA). This is a loosely defined competency to intervene in the name of the State in administrative (non-criminal) cases and even in private disputes, conduct checks and issue binding orders even where there is no case to answer under the Criminal Code.

[...] In particular, Article 145 of the JSA allows prosecutors to "require documents, explanations, other materials", "conduct checks in person", summon individuals for questioning, and issue binding orders "within the competence" of the prosecution service. Since this "competency" (related to the general oversight of legality) is described very vaguely, coercive powers listed in Article 145 have no clear limits. In addition, Article 145 § 4 imposes on private individuals and companies the obligation to cooperate with the prosecutors, in particular by "letting them [i.e. the prosecutors] access to the premises and places concerned". Again, this provision appears to give

the prosecution almost an unfettered power to enter private premises, whenever the "interests of the legality" call for it.

In the opinion of the Venice Commission, coercive powers of the prosecution service outside of the criminal law sphere should be seriously restricted, if not totally suppressed. The JSA should describe, with sufficient precision, in which cases (falling outside of the scope of the Criminal Procedure Code) the prosecutors may seize documents, summon people for questioning, enter private premises, issue binding orders, etc. If such actions interfere with privacy, secrecy of correspondence, etc., they should be accompanied by appropriate procedural safeguards (such as the requirement of a "reasonable cause", the need to obtain prior judicial authorisation, etc.)."

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §§41-43

"It is unclear what is meant by representing the general interests of society and defending the legal order, whether this is to be interpreted as requiring the prosecution service to exercise functions of general supervision over and above criminal prosecution, or whether this is merely to be understood as qualifying the way in which criminal prosecution was to be conducted."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §10

"Section 28.4 APS empowers prosecutors to 'dissolve or wind up' a legal entity if it is in 'contravention' of the 'Fundamental Law and any other legal regulation'. There are many violations of a law, which do not warrant a dissolution of a legal entity (e.g. minor infringements of tax legislation). A dissolution of an entity in such a case is likely to violate the freedom of association. The law should specify which violations of law justify dissolution."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §36

"[...] The Prosecutor General should not have the function of coordinating and taking an active part in actions of civil society and private bodies. Civil society requires freedom from the state and should not work under state control; the exercise by the Prosecutor General of preventive-style oversight of civil society action, even if it were only consultative in nature, can deter civil society from its activities."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §17

2.2.4. Right of legislative initiative

"[...] It would, however, be undesirable that a Prosecutor-General should have power to initiate legislation or participate in parliamentary debates. Similarly, the nature of participation in the plenary sessions of courts should be defined so as to make it clear that the Prosecutor-General is not exercising any judicial function, assuming this is in fact the case."

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §24

"[...] [T]he draft law provides that where the prosecutor considers it expedient, he or she shall participate in meetings of any commissions, committees and other collective bodies established by the bodies of executive power, representative bodies, local self-

government bodies or the President [...]. Such rights serve to build the prosecutor's power vis-a-vis other state organs and create a sort of super-authority within the state which is very dangerous to the development of a democratic, law-abiding state."

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §25

"[...] The prosecutor may, of course, hand down an opinion on a legal act within his scope of interest being dealt with by parliament. Upon a motion of the legislative authorities, he may take part in committee work on the appropriate draft law. He should not, however, be endowed with the formal right of legislative initiative. He may enjoy the right to submit a motion or a request to parliament or the government, which have the right to initiate legislation. His participation in parliamentary sittings should be possible only at the invitation of parliament or a parliamentary committee. That is required by the rules of the balance of power. [...]"

CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation, §62

IV. STATUS OF THE PROSECUTORS – INDEPENDENCE AND ACCOUNTABILITY

3.1. APPOINTMENT AND TERM OF OFFICE

3.1.1. Appointment of the Prosecutor General

"The Venice Commission, when assessing different models of appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the requirement of *democratic legitimacy* of such appointments, on the one hand, and the requirement of *depoliticisation,* on the other. Thus, an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicisation of the prosecution office.

The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. [...]

[...] [T]he nomination of the candidate should be based on his/her objective legal qualifications and experience, following clear criteria laid down in the Draft Law. It is not sufficient for a candidate for such a high office to be subjected to the general qualification requirements that exist for any other prosecutorial position; the powers of the Chief Prosecutor require special competencies and experience. [...]"

CDL-AD(2Q15)Q39, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oScE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §19, 20 and 27

"According to Article 65(2) of the draft revised Constitution, the Prosecutor General is elected for a six years term by a majority of the total members of the Parliament. The requirement of a qualified majority in Parliament for the election of the Prosecutor General is recommended."

CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §83

"No single, categorical principle can be formulated as to who – the president or Parliament – should appoint the Prosecutor General in a situation when he is not subordinated to the Government^...] Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.

In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. [...]

[.] A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office. [...]

If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment [.].

In any case, the Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §§35-38, 40

"It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, *carte blanche* in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the government. It might consist of the occupants for the time being of some or all of the following positions:

- The President of each of the courts or of each of the superior courts.
- The Attorney General of the Republic.
- The President of the Faculty of Advocates.
- The civil service head of the state legal service.
- The civil service Secretary to the Government.
- The Deans of the University Law Schools.

A public announcement would be made inviting written applications for the position of general prosecutor and stating the qualifications required for the position; it is suggested that these should be not less than those required for appointment to high judicial office. The Commission would examine the applications and submit to the government (or to Parliament if that is preferred) not more than, say, three names all of whom the Commission considered to be suitable for appointment. The government (or Parliament, as the case might be) would be free to make the selection from those names. In order to emphasise the importance of the position of general prosecutor he might be

appointed by the President of the Republic on the nomination of the government (or Parliament) although the President would have no power to reject the nomination. A possible variation of the above proposal is that the selection of nominee that is made by the government should be approved by Parliament before submission to the President. Not all the matters set out need to be stated in the Constitution which might merely say 'the general prosecutor of the Republic shall be appointed by the President of the Republic on the nomination of the (government) (with the approval of Parliament) (Parliament)'. The other matters would be set out in a law of Parliament."

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, pp. 6 – 7

"[...] It is necessary that some committee of technically qualified persons should examine whether candidates for this position [as Prosecutor General] have the appropriate qualifications and meet the relevant criteria. [...] There are a number of options which could include the Superior Council simply giving an opinion on the suitability of all the candidates or alternatively ranking them in order of preference. [...]"

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §42

"Article 41 deals with the appointment of the Prosecutor General and the eligibility conditions are not generally inappropriate. However, the requirement in paragraph 2.3 that eligibility for appointment as Prosecutor General of Ukraine is dependent upon holding one of the positions listed in Article 15 – all of which are Higher Public Prosecutor positions – means that it will not be possible to appoint persons from outside the public prosecution service but a documented professional background in the prosecution system, notwithstanding the potential desirability of drawing on such outside experience, which could be especially valuable where a significant change in the role of public prosecutors is being effected by the provisions of the Draft Law. There is a need for further consideration of the appropriateness of restricting eligibility for appointment to this post in this way."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §118

"It is to be welcomed that [...] the Prosecutorial Council will elect the Chief Special prosecutor from among those having applied to the public advertisement and based on the evaluation of their expert knowledge and competence to discharge the function of Chief Special Prosecutor, including by the way of interviews conducted by the Prosecutorial Council with the candidates meeting the requirements set out by the draft law [...].

It is also to be welcomed that the conditions for the election of the Chief Special Prosecutor and special prosecutors have been broadened [...] to enable the access not only of prosecutors, but also of persons having at least 12 years (for the Chief Special Prosecutor) or 10 years (for special prosecutors) of work experience as a judge or attorney, to such positions. In addition, persons *"whose previous work shows that he/she has special knowledge and competences to work on the cases falling under the jurisdiction of the Special Public Prosecutor's Office"* will be eligible for such positions (see Articles 12 and 13 of the revised Draft Law). This should reduce the risk of the Special Prosecutor's Office being too inward looking and may help to foster a more independent outlook. [...]"

CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §§34 and 36

"Under Section 22.2.a ASPGPOPEPC the Prosecutor General will, after the expiry of his or her mandate, continue to exercise his powers until the beginning of the mandate of the new Prosecutor General.

There is, however, a transition problem when the mandate of the Prosecutor General expires. Section 22.2.a ASPGPOPEPC means that 1/3 plus one member of Parliament can effectively keep him or her in office by blocking the election of a new Prosecutor General and they could thus extend his or her mandate indefinitely. It is not clear to what extent this question was considered in detail when the Fundamental Law and the ASPGPOPEPC were passed. However, the Fundamental Law lays down a long mandate of nine years of service for the Prosecutor General and it would seem unacceptable that a minority of the members of Parliament can in fact keep him or her in office indefinitely by creating a deadlock in the election of a successor.

There may be various solutions. One possibility may be to prescribe a deadline – in the Fundamental Law or the ASPGPOPEPC – within which Parliament must have elected a new Prosecutor General. Another solution might be simply to repeal Section 22.2.a ASPGPOPEPC, so that the mandate of the Prosecutor General automatically expires after the termination of his or her mandate. Both solutions of course create the problem that there may be a period without a formally elected Prosecutor General but this may put the necessary pressure on Parliament to elect the successor. What needs to be avoided as well is that the same blocking 1/3 minority can indefinitely extend an interim period under the Deputy Prosecutor General, who was appointed by the outgoing Prosecutor General."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§55, 57, and 59

"The revised Draft Amendments provide for the positions of the High Justice Inspector (HJI) and Prosecutor General (PG). These office-holders cannot be elected through a proportionate system. There is no single model for their election; at the same time, it seems desirable that such important appointments should attract a high degree of consensus, and (if this is attainable) without compromising on the qualities of the successful candidate. However, it is difficult to see a principled argument for requiring a 2/3^{rds} majority rather than a 3/5^{ths} – again, this is more a political than a legal question."

CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §21

"Numerous welcomed references are made throughout the draft Law to respect the principle of non-discrimination. However, certain questions should be avoided. For example, the second paragraph, relating to the procedure for electing the Deputy Prosecutor General, proposes in Article 43 that where the holder of the post is a man, the woman who received the most votes will be the Deputy and vice versa. The necessary respect for the principle of equality and non-discrimination must be combined, however, with the need for respect for and legitimacy of the person occupying the post. The number of votes should therefore be the chief criterion, not just being of one or the other gender. Situations should be avoided where a person having received fewer votes gets the post for simply being a man or a woman, since doing so could undermine the

confidence placed by society in such an important post. It is therefore recommended gender balanced lists be drawn up and that the Prosecutor General and his/her Deputy be elected from the list which has received the most votes."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §40

3.1.2. Appointment of the lower prosecutors

3.1.2.1. Appointing body

"All prosecutors [...] are appointed and dismissed by parliament with no qualified majority. The prosecutorial system [...] is therefore totally under the control of the ruling party or parties: [t]his is not in conformity with European standards."

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §104;

See also CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §12

"[...] [I]n a system that is as fragmented as Bosnia and Herzegovina, it would be very unhelpful and not recommended that the appointment competence be moved from the State level (the HJPC) to the Entity level (the parliaments). This would increase the risk of politicisation and should be avoided."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §80

"[...] [T]he Deputies are appointed and removed by the Prosecutorial Council directly whereas the competence to appoint and remove the Prosecutors remains with Parliament (at the proposal of the Prosecutorial Council). This seems to indicate a distinction between the deputies, seen as civil servants, and prosecutors who would have some kind of political mandate. Such a logic might be appropriate for the Chief State Prosecutor but not for the high state prosecutors and even less so for basic state prosecutors."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §29

"[...] [T]he system of subjecting the prosecution to political control is not in contrast with European standards. [...] [T]he appointment of the Supreme State Prosecutor by parliament can be deemed acceptable, but it would have been necessary to require a qualified majority. [...]

It is instead not acceptable to have entrusted the Parliament with the power to appoint all the other state prosecutors. Presumably, these are lawyers who must be selected in view of their technical expertise, and who perform their tasks under the direction of the Supreme State Prosecutor. In fact, they are civil servants, who do not need to be elected and who need to perform their duties without a fixed term."

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §§108-109

"[...] It seems [the] appointments [of deputy prosecutors] are entirely in the hands of the Chief Prosecutor. In a hierarchical system such as that of BiH, giving so much power over appointments to a single individual especially without any requirement to consult with anybody else, could be a recipe for the Chief Prosecutor to select deputies chosen for their compliance and lacking the necessary independence of thought necessary in a good prosecutor."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §81

"[...] [T]he recommendation for appointment [of inferior prosecutors] should come from the Prosecutor General with the Superior Council having the right to refuse to appoint a person but only for good reason. [...]"

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §44

"[...] [T]he ambition should be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutorial Council rather than the Parliament since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters. [...]"

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §32

"It is welcome that state prosecutors and heads of state prosecution offices will be appointed (for five years, as stipulated by the Constitution) by the Prosecutorial Council."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §74

"[...] In order to prepare the appointment of qualified prosecutors expert input will be useful. This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §48

"It seems that in relation to appointments an expert body, not an elected body, which would assess candidates performance at examinations and interviews is a necessary part of any system in which appointments based on merit are made. [...]"

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §47

"As mentioned in Article 57, the written examination to be conducted for persons applying for election as state prosecutors for the first time is to be set and corrected by a commission established within the Prosecutorial Council. It is questionable whether the use of elected representatives is appropriate for such a task. On the other hand, to guarantee impartiality and fairness in the procedure for electing state prosecutors, some outside input would be desirable."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §78

"If the Prosecutor General is to override such advice [from an advisory expert body] it should be on the basis of a reasoned decision and the fact that advice is being overridden should be disclosed. There are other possible means by which safeguards could be built into the system without unreasonably fettering the Prosecutor General's power to run his office effectively. For example, some jurisdictions have introduced the concept of an Inspectorate which carries out an examination of the way in which an

office has been run and decisions taken and certifies that these decisions were properly made or alternatively makes recommendations for what should happen in the future.

The Venice Commission thus in principle accepts 'external' as well as 'internal' advisory bodies. The choice of model should depend on an overall assessment of the nature of the relevant prosecution system. The Prosecutor General should have an advisory board, possibly consisting of some of his own senior officials and with appropriate outside participation, to whom he would report and from whom he could seek advice, without at the end of the day putting him in a situation where he cannot reject that advice where appropriate.

The advantage of establishing a body with a mixed composition would be that it allows prosecutors to receive regular feedback from society about their work. Such a body could also provide valuable external advice or input to Parliament. It would therefore seem prudent to arrange for a prosecutors' council with at least some external representation, for example in relation to appointment of prosecutors above a certain level. This would (and should) not compromise the power of the Prosecutor General to make the final decision in appointment matters."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§48, 51, and 51

"[...] [T]he written examination to be conducted for persons applying for election as state prosecutors for the first time is to be set and corrected by a commission established within the Prosecutorial Council. It is questionable whether the use of elected representatives is appropriate for such a task. On the other hand, to guarantee impartiality and fairness in the procedure for electing state prosecutors, some outside input would be desirable."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §78

3.1.2.2. Qualification requirements

"[...] [I]t is mandatory to ensure that appointments of prosecutors and deputy prosecutors are made on the basis of objective criteria. These criteria in turn must be established in advance by law or in conformity with the procedure provided by law, on the basis of a transparent procedure and that decisions must be reasoned."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §34

"The draft Law [...] sets out general requirements that persons wishing to be appointed as [...] prosecutors need to satisfy, as well as requirements for the appointments to the different [...] prosecutor's offices. General requirements include citizenship of BiH, a good medical record, professional competence, the bar exam and the absence of any criminal proceedings. These appear to be appropriate and in line with European standards."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §73

"Among the qualifications for becoming a prosecutor in Article 11, the requirement to be a professional lawyer (third paragraph) should be clarified to show whether this means all law graduates or only those who have been advocates and are registered with

the bar. The profession of prosecutor should be open to all those who have followed law studies satisfactorily, have passed the necessary prosecutor examinations and had the necessary training.

The fourth paragraph of Article 11 stipulates the requirement to 'speak at least two official languages' without specifying the level of knowledge required. Prosecutors already working as such should be allowed time to learn the second language. In addition, the second language concerned may not always be used in a specific case, because another language than that learned may be required. It seems therefore difficult to guarantee the right to use local languages, as set out in Article 32.23 or Article 63 of the preliminary draft Law."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §§26-27

"The new draft opens positions in the Prosecutor's Office to judges as well as prosecutors, and takes account of experience in other legal matters when calculating whether candidates have the necessary experience. In the opinion of the Venice Commission, such a broadening of the opportunity to work in the Prosecutor's Office can only be to the advantage of prosecutors themselves and to the functioning of the Office, provided it is implemented in such a way as to ensure fairness of competition between persons whose experience will not always be directly comparable, and that experienced prosecutors are given comparable opportunities to apply for positions within the judiciary."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §40

"Chapter 2 deals with recruitment of [...] prosecutors and Section 1 deals with the traineeship period. Article 8 sets out the qualifications of trainees. Among the qualities required of a trainee [...] prosecutor is the following (Article 8(g)):

'Not to have physical or mental health problems or disabilities which will prevent to perform the profession of [...] prosecutorship throughout the country, or not to have handicaps such as unusual difficulties for speaking or controlling movement of organs that may be regarded as odd by other people. '

This provision is far too broad and would not be regarded as generally acceptable according to European standards in its approach to how to deal with persons under a physical or mental disability. The test of something appearing odd to other people seems an inappropriate one.

Article 8(h) disqualifies persons who have been convicted of an intentionally committed crime and punished by imprisonment of more than six months. It seems inappropriate that any person who has committed an intentional offence serious enough to be punished by imprisonment of any duration should be regarded as suitable for appointment as a [...] prosecutor. [...]

[...] [I]t seems extraordinary that physical appearance should be a valid criterion for suitability for appointment as a judge or prosecutor. So far as concerns behaviour and reactions it needs to be clarified what is meant by these and what type of behaviour or reaction would disqualify a candidate."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§31-32 and 35

"The Draft Law [...] introduces additional requirements for candidates to prosecutorial positions, including subjective personality criteria such as personal integrity (Article 19.3), a faultless reputation (Article 23.1 .f) and, to a certain degree, observance of the rules and standards of professional ethics (Article 21.2.e and Article 23.2.d). Especially in a younger democracy, it would be important to ensure that these subjective criteria contribute to efficiency and do not allow for bias and abuse. The Draft Law should specify how to determine whether or not the candidates meet those criteria and perhaps also make it possible for candidates to challenge decisions on appointments in court.

Similarly, there is a need to clarify the way in which the health check required under Article 24 for appointment and after every five years of service is to be implemented, with a view to ensuring that the information gathered thereby is not disclosed or stored in a manner incompatible with the right to respect for private life. If needed, appropriate arrangements should be made to safeguard the right in a manner consistent with Article 8 ECHR. Moreover, it would be useful to specify which criteria will be of relevance in the *'psychological and psychiatric assessment of candidates for prosecutor's office and of prosecutors in office'."*

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§102 and 103

"Article 33 provides for background checks on candidate public prosecutors who have passed the proficiency test and is, in principle, appropriate. [...]"

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §110

"However, the provision then goes on to say that in making the list, 'care shall be taken of the national composition of the population, adequate representation of members of national minorities, as well as knowledge of professional legal terminology in national minority languages using court'. It is unclear what this means in practice. What happens if the original list based on professional competence, etc., does not contain anyone from a particular national minority or with the necessary language skills? Is the list to be supplemented? Presumably, if it can be supplemented with persons who did not have the necessary professional skills to make it on to the original list, they must at least reach some acceptable minimum standard. Is a quota to be fixed? These matters need to be clarified in the text of the Law, as the practical implications of the current provision are very vague. [...]"

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia. §32

3.1.2.3. Appointment procedure

"Article 21 of the Draft Law sets out the principles of a competition-based appointment of prosecutors, through an objective, impartial and transparent selection process. This is a welcome new provision."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §100

"[...] Normally one would expect that appointments would be made only of persons who had succeeded in the competitive examination and that they would be made in the order in which the candidates had been successful unless there was very good reason to the contrary."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §45;

See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §77

"As regards the system for entering on a prosecutor's career, implementing regulations should clearly indicate the existence of objective proof such as written papers in the competitive examination concerned."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §52

"The appointment process starts with a public announcement of vacancies that must be well- publicised. The announcement is followed by nominations of candidates by special departments set up by the judicial or prosecutorial sub-councils of the HJPC for nominations for vacancies in the different courts and prosecutors' offices consisting of four or five judges or prosecutors. This suggests that candidates cannot apply for a certain position directly, but only through the sub-councils. Such a practice could be seen as problematic, as it could undermine the transparency and openness of the process."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §76

"This Article, which regulates the nomination and election of candidates for public prosecutor's office, is rephrased and seems not to have introduced any major changes, except for the introduction of the obligation to publish the list of candidates on the Internet site of the State Prosecutorial Council. The obligation to publish the list of candidates is to be welcomed."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §31

"[...] [T]he HJPC is both the body making the decision [on appointment] and hearing the appeal. There does not appear to be any provision for an appeal to a court of law, which should be added."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §78

"The Venice Commission has in the past welcomed systems where the process of appointing prosecutors 'avoids unilateral political nominations', and where several State authorities and bodies participate in the appointment process and seek consensus on candidates. While the right to nominate candidates should be clearly defined, advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society. [...]"

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §17

3.1.3. Term of office; early termination of office not for prosecutor's fault

"[...] Article 122 of the Constitution should be amended to provide for a longer mandate than the current five years and should exclude re-election in order to protect persons appointed as Prosecutor General from political influence."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §117

"[...] [T]he proposed seven year term of the Prosecutor General rather than the current five years is to be welcomed as this is both a sufficiently long period that goes beyond the term of any one government or of the President, and it also removes a significant threat to independence by excluding re-appointment. This gives effect to the Venice Commission's general recommendation concerning the term of office for a Prosecutor General."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §89

"[...] for the institution to be in line with Council of Europe standards, the Prosecutor General should be appointed for a single term, either considerably longer than five years or until retirement. The grounds for dismissal (serious violations of the law) should be laid down in the constitution, or at the very least the constitution should refer to a law setting out these grounds.'"

CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §41

"It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office. That would ensure the greater stability of the prosecutor and make him or her independent of current political change.

If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment so that again no question of attempting to curry favour with politicians arises. On the other hand, there should be no general ban on the Prosecutor General's possibilities of applying for other public offices during or after his term of office."

CDL-AD(2010)040, European Standards as regards the independence of the judicial system: Part II – the Prosecution Service, §§37-38

"Prosecutors should be appointed until retirement. [...]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §50

"[...] Since it is obvious that prosecutors (as is also the case in Montenegro) may of course be removed under disciplinary proceedings, fixed term appointments in combination with a possibility of reappointment cast doubt on the independence of the prosecution service. This is, of course, emphasised in systems such as that in Montenegro where there is considerable political influence on appointment decisions."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §34

"It would be desirable to state explicitly that an appointment as a public prosecutor is, subject to the provisions on dismissal, until the retirement age specified in Article 63."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §114

"[...] The general prosecutor's period of office should not be co-terminus with that of the government since this would tend to lead to the assumption in the public mind of his political allegiance."

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"It is to be welcomed that, as provided by Article 48, a person may only be elected as Supreme Public Prosecutor for a maximum of two terms."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §31

"Article 95.3 sets out that 'when a judge or a prosecutor reaches the mandatory retirement age, his/her term shall automatically cease'. It is recommended to provide more flexibility by allowing a judge to finish considering/deliberating a case or else retirement could disrupt the work of the court, which may result in the re-hearing of a case."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §123

"[...] [D]ismissal under Article 52.1.10 and Article 61 in the case of the liquidation or reorganisation of the public prosecutor's office employing him or her appears to lack any safeguards against this being used to undermine the guarantees of independence in Articles 16 and 17. There is a need to introduce the possibility to challenge the reorganisation decision in court."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §149

3.2. EXTERNAL AND INTERNAL INDEPENDENCE

3.2.1. Place of the prosecution service within the system of separation of powers: is it a part of the executive, the judiciary, or a power on its own?

"While the independence of judges and the judiciary in general have their origin in the fundamental right for persons to a fair trial [...] the independence of prosecutors and the prosecution system does not have such a common standard."

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §7

"[...] [T]he major reference texts allow for systems where the prosecution service is not independent from the executive. Nonetheless, where such systems are in place, guarantees must be provided at the level of the individual case to ensure that there is transparency concerning instructions that may be given."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §16

"It should be noted that the Constitution defines the prosecution system as part of the 'Judicial Authority' (Chapter IX of the Constitution). This has important consequences for the independence of the prosecution from other state bodies including the courts. Recommendation 2000 (19) of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution makes a clear distinction between the prosecution and judicial functions. The explanatory memorandum states that while the task of both

public prosecutors and judges is to apply the law or to see that it is applied, judges do this reactively, in response to cases brought before them, whereas the public prosecutor pro-actively, acts in order to the application of the law. The independence of the prosecutors from the Judiciary should be made explicit."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §6

"As the prosecutor acts on behalf of society as a whole and because of the serious consequences of a criminal conviction, the prosecutor must act fairly, impartially and to a high standard. Even in systems where the prosecutor is not part of the judiciary, the prosecutor is expected to act in a judicial manner.

It is therefore important that the qualities required for prosecutors be similar to those of a judge and that suitable procedures for appointment and promotion are in place. [...]"

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§11 and 12;

See also CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §17

"[...] While the Constitution should confer independence on the system as well as on the general prosecutor care will have to be taken to maintain a balance between, on the one hand, the protection of subordinate prosecutors from interference by the Government, Parliament, the police or the public and, on the other hand the authority and responsibility of the general prosecutor for ensuring that they carry out their functions properly."

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"Under Council of Europe standards, the public prosecutor's office may either be subordinate to the executive or independent. However, adequate safeguards must be in place to ensure the transparency of any exercise by the Government of prosecution powers. Paragraph 13 of the Committee of Ministers of the Council of Europe's Recommendation Rec (2000) 19 sets out certain conditions which should be met where the prosecutor's office is part of or subordinate to the executive. [...]"

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §26

"[...] While judges should be independent, this concept is not fully applicable to the prosecutors; it is more accurate to speak of 'autonomy' rather than full-fledged 'independence' of the prosecution service. Certain asymmetry of institutions and procedures applicable to the two branches of the judiciary is inevitable."

CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, §40

"There are no international standards that require the independence of the prosecution service. But, at the same time, it is clear that there is a general tendency towards introducing the independence of the prosecution service. [...] At the same time it is important to avoid that the prosecutors' independence becomes a threat to the judges' independence."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §20

"[...] The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. [...]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §26

See also CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §84

"Yet, certain more detailed standards and recommendations do exist. Thus, the Committee of Ministers of the Council of Europe requires member States to ensure that public prosecutors are free from 'unjustified interference' with their professional activities. The Rome Charter, adopted by the CCPE in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE encourages the general tendency towards greater independence of the prosecution system. In many member states of the Council of Europe, a tendency of giving more independence to the prosecution service may be seen, particularly as regards decisions reached by the prosecution in criminal cases. [...] The Venice Commission further notes that in many countries 'subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases'. That being said, a general tendency of giving more independence to the prosecution service has not yet transformed itself into a binding rule that is uniformly applied across Europe."

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §16

"The fundamental principle which should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have confidence in the system which is essential in any healthy society."

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"The ambiguity of the draft with respect to the independence of the procuracy is however not the prime concern with respect to the model of prosecution developed in the draft law. The principle of independence alone is no guarantee of a democratic prosecution model. Indeed, it can lead to the creation of an all-powerful prosecutor's office which is a threat to the democratic functioning of other state organs, including courts of law. It was precisely in communist states that the prosecutor's office became a tool of repression as a result of such separation, its broad scope of authority and its exemption from all supervision. [...]"

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §23

"[...] It is, of course, legitimate to site the prosecution service either in the judiciary or the executive, and if it is sited in the judiciary then a clear distinction has to be drawn between courts of law and the branch of the judiciary exercising the prosecution power (see in particular paragraphs 17 – 20 of Recommendation Rec 2000 (19) on the Role of Public Prosecution in the Criminal Justice System which deals with the relationship between public prosecutors and court judges)."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §13

"The independent status of the general prosecutor and the public prosecution service does not necessarily preclude the possibility of an annual report to Parliament describing in general terms his work but without commenting on individual cases. However, it does mean that a decision by him to prosecute in a particular case, or not to prosecute, cannot be appealed against, or overturned by any executive or parliamentary authority. [...]"

CDL(1995)073rev., Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"The deletion of Article 104 on special reports to be provided upon the request by Parliament and by Government is to be welcomed because it removes a possibility to exert political pressure on the Chief State Prosecutor in individual cases."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §55

"[...] [I]t should be made clear that the prosecutor should not have an obligation to report to the National Assembly on the details of individual cases. "

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §25

3.2.2. Impeachment of the Prosecutor General by the Parliament or dismissal by the President[2]

"In many systems there is accountability to Parliament. In countries where the prosecutor general is elected by Parliament, it often also has the power to dismiss him or her. In such a case, a fair hearing is required. [...] [Accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §42

"[...] [It] seems inappropriate for a Prosecutor General removed from that position on a vote of no confidence – which would presumably turn on improper performance of duties – to continue in post as a public prosecutor."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §125

"It is proposed to remove the competence of the Verkhovna Rada to declare no confidence in the Prosecutor General, thus forcing him or her to resign. This is a very welcome proposal, which has been strongly recommended by the Venice Commission in its past opinions on the ground that the Verkhovna Rada should not have the right to express a motion of no confidence (which is a purely political instrument) in the Prosecutor General who is not a member of the Government. The removal of this competence is therefore strongly supported by the Venice Commission [...]."

CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §12

"In Section 23.2 ASPGPOPEPC it is set forth that, based on the recommendation of the President of Republic, Parliament may exempt (dismiss) the Prosecutor General from office if the Prosecutor General is unable to fulfil his or her duties arising from the mandate for reasons beyond his/her control. Similarly, as per Section 23.7 ASPGPOPEPC, based

on the recommendation of the President of Republic, Parliament shall pronounce the Prosecutor General's forfeiture of office in a decision if the Prosecutor General fails to fulfil his/her duties arising from his/her mandate for reasons falling within his/her control or commits a crime established in a final and absolute judgment or otherwise becomes unworthy of his/her office. The Prosecutor General should have a right to be heard before exemption or forfeiture from office."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §61

"No procedures are set forth as to how the Parliament should arrive at their decision. There are no provisions, for example, entitling the Public Prosecutor [...] to make a defence, to call evidence or address the Parliament, nor are the procedures to be adopted by the Parliament on the occasion of such a vote set out."

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §58

"[...] Article 106.11 of the Constitution should be amended to provide that the President can dismiss the Prosecutor General only for specific grounds and that the Prosecutor General should benefit from a fair hearing. Furthermore, Article 122 of the Constitution should be amended to remove the no confidence vote against the Prosecutor General. [...]

It is noted in this connection that Article 52.3 provides that the Prosecutor General should be dismissed from office by the President for inability to perform duties for health reasons, violation of compatibility requirements, administrative liability for corruption offences, a criminal conviction, loss of Ukrainian citizenship, recognition as missing or dead and voluntary resignation. It is positive that Article 52.3 establishes grounds for dismissal. Most of these grounds require an independent assessment by a court before they can be relied upon and it does not, therefore, seem inconsistent with the Constitution to provide for some independent assessment of the appropriateness of removing the Prosecutor General.

[...] [A] preliminary procedure before the High Qualifications and Disciplinary Commission of Prosecutors should be introduced in order to advise the President or the Verkhovna Rada on possible violations of professional responsibilities of the Prosecutor General. Of course, such a procedure would not be binding upon the President or the Verkhovna Rada. Such a procedure would make it clear that such a step should be exceptional and thus protect the Public Prosecution Service from improper influence."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§120, 121, and 122

"[...] [C]riminal prosecution against the Prosecutor General can now only be initiated by a prosecutor appointed by the SCP [the Superior Council of Prosecutors] (Article 35. 5), and not, as in the current Law, by the Parliament at the proposal of the Speaker. This is a welcome stipulation intended to enhance the independence of the Prosecutor General. However, since the Prosecution Service is a hierarchically organized and centralized body, it may be difficult for prosecutors to investigate criminal cases against other prosecutors (especially against the Prosecutor General). The Draft Law should clarify how investigations into possible criminal conduct of prosecutors

are to be undertaken, and ensure that a mechanism exists whereby independence from the hierarchy of the Prosecution Service is guaranteed to those in charge of such investigations. Consideration may be given to assigning this task to an existing independent body or creating a separate independent body for this purpose.

[...] It is also noted that, among the reasons for dismissal of prosecutors, thus including the Prosecutor General, Article 61 lists 'being medically regarded as unable to work for fulfilling the duties'. This should be determined by a medical certificate. It should also be made clear whether the decision of the President to dismiss the Prosecutor General on this account is subject to judicial challenge so as to provide a safeguard against any abuse of this power.

In view of the above comments, it is recommended to include in the Draft Law a specific mechanism for the dismissal of the Prosecutor General, distinct from the provisions regulating dismissal of other prosecutors and based on clear conditions and criteria [...]"

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§113, 127 and 128

3.2.3. Financial independence: budget of the prosecution service, remuneration of the prosecutors, staffing of the prosecutor's offices

"[...] [An] own budget [for the prosecutor's service] which is to be approved by the Parliament [...] is an appropriate provision and [it] is a good guarantee for the independence of the prosecutor's service."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, *§69*

"[...] The financial independence of the Public Prosecutor's Office must be ensured without resorting to funds involving the carrying out of certain actions or donations from private or foreign sectors."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §59

"As stated by Article 32 of the draft law, financial resources for the Special Office are to be provided from the general budget of the State Prosecutor's Office. Additional indications on the criteria or indicators taken as a basis for the budget proposal, its author (by the Chief Special Prosecutor?) and the deciding authority (is it the Parliament, upon adoption of the general budget or by subsequent decision of the Supreme Prosecutor?) would be recommended."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §72

"Like for judges, remuneration in line with the importance of the tasks performed is essential for an efficient and just criminal justice system. A sufficient remuneration is also necessary to reduce the danger of corruption of prosecutors."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §69

"[...] The possibility to provide individual bonuses and housing can lead to corruption or to undermine the independence of the prosecutor as distribution or allocation of these benefits will include an element of discretion. Only bonuses, for which completely objective criteria are defined, can avoid this problem.

Furthermore, the sort of material support envisaged by Article 88 seems inappropriate. The needs addressed should be adequately met out of the salaries of public prosecutors. [...]"

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§179 and 180

"[...] It would be useful to set out in the law at least criteria for establishing the minimum number of positions that guarantee the effectiveness of the Office and how this number can be changed. [...]

Finally and most importantly, in view of its potential impact on the capacity, efficiency and quality of work of the Office, and its autonomy, the recruitment procedure applicable to the above categories [of support staff] should also be adequately regulated by the law. The absence, in the current draft, of any such information – whether recruitment may be organised through competition or other modalities – is a source of concern."

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§68 and 71

"[...] Additional guarantees likely to increase the autonomy and the efficiency of the Special Office may include, for instance, establishing the Chief Special Prosecutor's capacity as budget administrator."

CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §24

"Here again, sufficient remuneration is an important element of autonomy and a safeguard against corruption*."*

CDL-AD(2016)007, Rule of Law Checklist, §94

3.2.4. Hierarchical organization of the prosecutorial system: instructions and reporting obligations

"[...] [T]he independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.

[...] The main element of such 'external' independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.

The independence of the prosecution service as such has to be distinguished from any 'internal independence' of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. [...]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §§28, 30 and 31

"The hierarchical model is an acceptable model although it is perhaps more common where prosecution services are sited within the judiciary for the individual prosecutor to be independent. The hierarchical model is more commonly found where the prosecution service is regarded as a part of the executive. A hierarchical system will lead to unifying proceedings, nationally and regionally and can thus bring about legal certainty. [...] What is more a matter of concern is the obvious contradiction between the principle of the autonomy of the individual prosecutor referred to in Article 2(4) and the principle of hierarchical control referred to in Article 2(5)."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §15

"There is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. *[.]*

Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

[...] Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular on behalf of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias."

CDL-AD(2016)007, Rule of Law Checklist, §§91, 92 and 95

"That said, in the interest of ensuring consistency of prosecutorial acts with prosecutorial policy, a certain degree of hierarchical interference may be legitimate, if combined with appropriate rules and guarantees. In addition, to avoid the risk of corporatism in this profession, specific arrangements may be helpful, such as the appropriate inclusion of outside/civil society input in self-governing bodies of prosecutors.

[...] [A]ctions, inactions and acts of prosecutors may be challenged with the superior prosecutor and the decision taken by the latter can be challenged further in court (Article 34.4). While this provision, especially as regards the availability of judicial supervision, is in principle to be welcomed, it raises several issues.

First, it leaves some room for potential abuse, since Article 34.4 does not specify who may challenge the actions, inactions and acts of prosecutors, or how often they may do so. Some limitation as to who may challenge (e.g. only interested parties) and how often they may do so (e.g. a decision not to prosecute may only be challenged once) would serve the interest of legal certainty and clarity. As it stands, anyone could potentially challenge the decision not to prosecute someone, and such challenges could be made numerous times. Whilst this issue may be regulated in the Criminal Procedure Code, the necessary clarifications should be provided, either by expressly stating the modalities of such appeals, or by reference to other applicable provisions, e.g. in the Criminal Procedure Code."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§75, 107 and 108

"[The provision] sets out the principles upon which the activity of the prosecution service is organised. These are duties to carry out activities in accordance with the law, the duty of transparency, the principle of independence, the principle of the autonomy of the individual prosecutor *'which allows them to take decisions by their own with regard to files and cases under their examination'* and the principle of internal hierarchical control and judicial control. [...]"

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors service of Moldova, *§14*

"The Law on the organisation and procedure of the Office of Procurator should define the procuracy as a system of relatively independent authorities preferably organised in correspondence to the court system. It would be for the higher authority to control the level immediately below. However, the highest authority should not directly control the lowest one. In this way, the system of prosecution would be protected against direct political intervention or influence."

CDL-INF(1996)006, Opinion on the Draft Constitution of Ukraine, Section VII, p.14

"It is because of questions of this sort that it is important to specify exactly what is meant by describing the system as hierarchical. The important thing is to specify what exactly is the power of instruction given to anybody within the system, to whom exactly this power is given, what precisely is the scope of authority of individual prosecutors, when they may make decisions on their own initiative, which decisions require to be approved by a more senior prosecutor, which decisions may be reviewed or set aside, and by whom and on what grounds. [...]"

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors service of Moldova, §37

"[...] Article 3.6 of the Draft Law provides that the prosecutor's work *'may be subject to review from the superior prosecutor and the court',* in accordance with the Draft Law and the Code of Criminal Procedure.

[...] It is important for prosecutors that the law provides clear rules as to when and by whom such revision may be done (any superior prosecutor or only the immediate supervisor), and on what grounds and under what conditions. Moreover, the extent to which the superior prosecutor may review the work of subordinates should likewise be specified [...].

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§36 and 38

"Article 38 [...] deals with the establishment of the number of public prosecutors. This number is to be related to performance benchmarks. The earlier provision allowed for the determination of that number by the [Prosecutorial] Council on the proposal of the Minister of Justice, on the initiative of the Supreme Public Prosecutor. The involvement of the Minister of Justice in this decision is absent in the new text. This change reinforces the autonomy of the Prosecutor's Office and aims at providing an objective basis for the decision concerning numbers and should be welcomed. [...]"

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §28

"It is important to be clear about what aspects of the prosecutor's work do or do not require to be carried out independently. The crucial element seems to be that the

decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy (for example giving priority to certain types of cases, time limits, closer cooperation with other agencies etc.) seems to be an issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role.

Some specific instruments of accountability seem necessary especially in cases where the prosecutor's office is independent. The submitting of public reports by the Prosecutor General could be one such instrument. Whether such reports should be submitted to Parliament or the executive authority could depend on the model in force as well as national traditions. When applicable, in such reports the Prosecutor General should give a transparent account of how any general instruction given by the executive have been implemented. [...]

[...] The biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy – for instance by individuals as victims of criminal acts – then there is a high risk of non-accountability."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, *§§43-45*

"According to Draft art. 65(3), the Prosecutor's Office shall be accountable to the Parliament. Like any state authority, the prosecutor's office needs to be accountable to the public and in many systems, there is accountability to Parliament. However, in such a situation the risk of politicisation should be avoided. [...] [Accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out. In case the accountability leads to a dismissal procedure, a fair hearing should be guaranteed.

CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §82

"[...] [Relationships within the prosecution system between the different layers of the hierarchy should be governed by clear, unambiguous and well-balanced regulations (Principle XIV of the Rome Charter). [...]

The internal functional autonomy of prosecutors should likewise be reinforced. Thus, it would be appropriate to make it clear in the law that decisions regarding the pursuance and treatment of criminal cases are carried out without undue interference from the Government. [...]"

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oScE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§ 17 and 90

"[...] The whole question of parliamentary accountability of prosecutors raises a delicate and difficult question. It is certainly reasonable that a prosecutor should be answerable for public expenditure and the efficiency of the office, but there is an obvious danger in making a prosecutor answerable for the decisions in relation to individual prosecutions. Not only is there a risk of populist pressure being taken into account in relation to particular cases raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature. It would therefore be important to clarify the extent to which the prosecutor is to be accountable to Parliament and for what matters."

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §25

"[...] It needs to be made very clear in what circumstances the prosecutor's autonomy can be overridden by a senior prosecutor. [...] [I]f the prosecutor's decision is incorrect or illegal [...] a superior prosecutor can override it. But what is meant by incorrect? Is it enough for a senior prosecutor to decide that he or she would have made a different decision or must the junior prosecutor have acted outside the scope of his or her authority? The latter alternative is clearly to be preferred [...]."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, *§16*

«[...] If the Supreme State Prosecutor can take all acts directly, even without giving an instruction to the prosecutor in charge of the case, any control of illegal instruction could easily be avoided by directly ordering such acts.

[...] [D]irect exercise of authority by the Supreme State Prosecutor must not be used to circumvent guarantees against illegal instructions."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§34 and 108

"The possibility to make a request to commit an instruction [from a higher prosecutor] in writing and the suspension of the instruction until the instruction is written is welcomed [...]

According to paragraph 5, 'if the prosecutor finds the instruction incompatible with a rule of law or his/her legal conviction, he/she may request exemption from the administration of the given affair in writing with a view to his/her legal position. Any such request may not be refused; in this case, the administration of the given affair shall be entrusted to another prosecutor or the superior prosecutor may withdraw the given affair within his/her own competence.' This regulation is fully in line with Recommendation Rec(2000)19. Nonetheless, the Venice Commission is of the opinion that '[a]n allegation that an instruction is illegal is very serious and should not simply result in removing the case from the prosecutor who has complained. Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction'."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§67 and 69

See also CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §59

"[...] Article 18 on the mandatory instructions of a higher-ranking public prosecutor to a lower- ranking public prosecutor – should be revisited in order to cover the situation of a prosecutor dealing with an instruction that runs counter to his/her conscience; an appeal to an independent prosecutorial body against alleged illegal instructions should be introduced; [...]."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §42

"Section 13.1 APS provides that superior prosecutors may take over cases from subordinate prosecutors or assign cases to other subordinate prosecutors. However, the Act does not provide any criteria under which cases can be removed from subordinate prosecutors. Without such criteria, the removal of cases can be arbitrary. Subordinate prosecutors are not independent but they perform their activity under the authority of the Prosecutor General. Nonetheless, the removal of cases from a prosecutor without criteria could be abused to assign a case to another prosecutor who is more willing to follow an illegal instruction. Of course this will not happen in normal practice but the law should provide guarantees even against mere possibilities of abuse. There should be criteria for taking away cases from subordinate prosecutors."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §32

"For prosecutors, it is an offence to fail to comply with instructions of a superior prosecutor, unless such compliance would constitute a violation of law or of the provisions of Article 67 of the draft Law. This does not seem to be in compliance with paragraph 10 of Recommendation Rec(2000)19 which provides that: 'All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.' Even this safeguard is not sufficient. In cases of illegal instructions, the prosecutor should have the possibility of making an appeal to an independent body, e.g. the prosecutorial council. A simple replacement of the prosecutor does not prevent an illegal instruction from being carried out."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §106

"[...] [T]he power to give instructions [to a junior prosecutor] extended only to general instructions but not to giving instructions how to deal with particular cases. [...] Such a limitation should be clearly spelled out in the Law."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §19

"Consequently, where a prosecutor other than the prosecutor general is given an instruction he or she has a right to have the instruction put in writing but Recommendation 2000 (19) does not prevent the allegedly illegal instruction from being given nonetheless. The prosecutor is also entitled to initiate a procedure to allow for his or her replacement by another prosecutor where an instruction is believed to be illegal or contrary to his or her conscience.[...]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §58

"[...] It is recommended to stipulate that all specific orders by a superior prosecutor must always be made in writing and that verbal orders must either be confirmed in writing, or withdrawn. The lower-ranking prosecutor should also be entitled to request further reasoning for the instruction, which should also be provided in writing. In addition, as underlined by the Venice Commission, *'[i]n case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction'."*

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §72

"Moreover, in view of the country-specific circumstances, it would also be appropriate to underline the protection against hierarchical interference in individual cases by stipulating that any specific orders or instructions given to a public prosecutor by a Higher Public Prosecutor must always be made in writing together with the right of the public prosecutor concerned to be able to request further reasoning for the instruction, which should also be provided in writing."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §61

"Article 12 refers to the prosecutor taking measures envisaged by the law in order to restore citizens' legitimate rights that were infringed through the illegal actions of criminal investigation bodies. It is assumed that in exercising such powers the prosecutor remains at all times subordinate to any court of law which may have seisin of a case and if that is not the case the law should be amended to ensure this. However, since the investigation bodies are subject to the prosecutor's control in the case of an obvious illegality it seems correct that the prosecutor should have power to require the investigation bodies to put right anything that was incorrectly done."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §25

"In order to avoid undue instructions, it is essential to develop a catalogue of such guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. Such guarantees should cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System:

Part II – the Prosecution Service, §32

"Article 3.3 states that: '[t]he principle of Prosecution Service' independence requires its political neutrality and excludes the possibility of Prosecution Service' subordination to legislative and executive authority, as well as of influence or interference from other state bodies and authorities in the Prosecution Service' activity[1]. This is a clear statement [...] [h]owever, it is suggested to exclude influence and interference from any source and not just from state bodies and authorities.

[...] According to earlier opinions of the Venice Commission on the matter, the two principles mentioned – procedural independence and procedural hierarchy – are not mutually exclusive in their application, but have to be applied in a concerted and harmonious way. [...] [T]he Draft Law does not provide sufficiently clear guidance on how these two principles should be harmonized in practice [...]."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§33 and 35

"Under Article 28(3) the Prosecutor General is entitled to issue written orders, resolutions, and mandatory instructions and is also entitled to revoke, suspend or cancel acts issued by prosecutors if they run counter to the law. Articles 32(5) and (6) appear to enable any person within the hierarchy of the prosecution service to issue mandatory

instructions to more junior persons. The prosecutor general's power to suspend or cancel acts is confined to acts issued by prosecutors which run counter to the law. It would seem from this that the prosecutor general may not override the decision to prosecute or not to prosecute merely because he disagrees with a decision if in fact that decision was taken in accordance with the law but as already stated the scope of senior prosecutors' powers to override the decisions of their juniors requires clarification."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §34

"The text is careful to make it clear that in addition to the possibility of a senior prosecutor overruling a junior one, a court of law may also be used to contest a prosecutor's decisions and actions of a procedural character. Again, it is not clear how far this extends. Can a court of law compel a prosecutor to institute a prosecution? Can a court of law restrain a prosecutor from prosecuting? These issues are of course linked to the question whether the prosecution service of Moldova is to operate the opportunity principle or the legality principle. This is a matter which ought to be specified in an article which deals with the principles upon which the activity of the service is based."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §18

"Is there any provision whereby a review of a prosecutorial decision may be sought? If that is the case, it is important to ensure that the system could not be paralysed. Clearly any system would be unworkable where a person affected by a decision could appeal in succession to superior prosecutors all the way up the system to the prosecutor general.

[...] [I]f every single instruction or decision of any prosecutor can be appealed right up the line to the prosecutor general such that the decision of a territorial prosecutorial can be overridden by the decision of a prosecutor of the level of the court of appeal, which in turn can be overridden by a prosecutor in the general prosecutor's office which in turn can be overridden by the head of a subdivision of the general prosecutor's office, which in turn can be overridden by the deputy of the prosecutor general, which in turn can be overridden by the first deputy of the prosecutor general and which can finally be overridden by the prosecutor general, the system would appear to be highly cumbersome, slow and inefficient."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §§36 and 39

"Articles 157-160 provide for inspection supervision in state prosecution offices by the Ministry of Justice through the use of Judicial Inspectors. It is not clear how this can be in line with the independence of the prosecution service (as guaranteed by article 134 of the Constitution) or with other systems of control, for example by the Prosecutorial Council and by the Ethics Commission. At the very least there appears to be a high degree of duplication which is undesirable. In the opinion of the Venice Commission, the Ministry of Justice should not have a function of day-to-day control of the prosecution office although an input into overall general policy questions would be reasonable. [...]"

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §113

"[...] [T]he draft law, which deals with the independence of the Prosecutor, prohibits 'any interference of the [...] media [...] with the prosecutor's activity'. This is

a potentially dangerous provision. There exists a justified fear that such a formulation encroaches on media freedom. Care must be taken to protect the media's right to criticize the prosecutor; where this oversteps what is lawful by, for example, causing prejudice to a forthcoming trial, it should be dealt with only by way of a judicial decision."

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §28

"[...] [I]t is recommended to ensure that all general instructions and policy guidelines issued to special prosecutors should be published, including in the annual report submitted by the Special Office to the Prosecutorial Council (and the Parliament)."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §59

"These provisions have been amended and the overall tenor is to make it clear that the Ministry of Justice's supervision relates only to the organisation of work and the application of the rule book in relation to the administration, especially in relation to matters such as filing, keeping official records and proper work and operation of administration and not to prosecutorial decision making. Article 159 as it now stands seems to make this clear. More generally, it is important that the inspection supervision (control) be conducted in such a way so as to ensure effective respect of independence of the prosecutorial activity of individual public prosecutors and their functional immunity. It is recommended that this important requirement be explicitly stated by the Draft law."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §65

"Article 11 [...] introduces an obligation, for the new Office [of the special public anti-corruption prosecutor], to prepare a regular (six-month) activity report, to be submitted to the Supreme Public Prosecutor, as part of the institutional supervision of the latter over the Special Office. It is welcomed that, as recommended by the Venice Commission, the Office shall also submit an annual activity report to the Prosecutorial Council and make it available to the public by publishing it on its website. Additional ad-hoc reports may be prepared at the request of the Supreme Public Prosecutor or of the Prosecutorial Council. [...]"

CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro, §30

3.2.5 Transfers, secondments, etc.

"[...] The principle of irremovability applies to judges and not to prosecutors. Nonetheless, prosecutors should have a possibility to appeal against compulsory transfers."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §80

"The issue of secondment always bears in it on the one side the necessity to overcome functional problems by allocating human resources efficiently – sometimes against the will of the concerned persons – in order to insure the fulfillment of the tasks required [...] and, on the other side, the legitimate interest of the persons involved and the avoidance of potential abuse. [...] [F]orced secondment is something to be looked at with care, because it can endanger the independence of the office holder."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §45

"[...] One of the provisions [...], allows [...] prosecutors, who have been found unsuccessful in one region, to be transferred to another region. Again, one can see the possible potential for using this as a means of exerting pressure on the individual [...] prosecutor. It would be important that the procedural safeguards for any [...] prosecutor who is to be transferred under compulsion should be set out in the law and the criteria for such transfer clearly stated together with the possibility for the [...] prosecutor affected to answer any case which is made against him or her and to have a right of appeal to a court of law against any decision to transfer.

Article 36 provides for [...] prosecutors to change from one branch to the other which does not give rise to objection in principle, but see paragraph 47 above. Article 37 deals with the appointment of [...] prosecutors to the Ministry of Justice and these appointments are made by the Minister. This latter procedure seems to give scope for the executive to exercise influence and control over the judiciary and at the very least to have potential to interfere with the independence of individual judges. [...]"

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§48-49

"Article 40 is concerned with the administrative positions in the office of public prosecutors. The term of office prescribed for administrative positions, other than that of the Prosecutor General, is five years and, as this seems to be renewable, it has already been noted that there is a need to strengthen the arrangements to ensure that the possibility of such reappointment does not lead to the holders of these positions compromising their independence.

[...] However, this role of the Prosecutors' Council of Ukraine in relation to appointments [of prosecutors to administrative positions] is only one of making recommendations and, while the grounds for dismissal are elaborated in the Draft Law, there are no provisions specifying the criteria for appointment, and (perhaps even more importantly given the risk of improper influence) for reappointment, to administrative positions. There is thus a need for the inclusion in the Draft Law – possibly in Article 40 – both of the criteria required for such appointments (essentially ones relating to experience, integrity, judgment and management) and the process whereby this is to be assessed. Furthermore, it would also be appropriate for the Draft Law to require a reasoned decision for refusing to follow the recommendations of the Prosecutors' Council of Ukraine."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§49 and 116

"In introducing secondment against the will of a prosecutor, the potential risks should be balanced by safeguards. While a full appeal with suspensive effect against a secondment order might lead to an inability to deal with urgent situations of staff shortages, the prosecutor who is being seconded could be allowed to file a protest to the Prosecutorial Council, which would at least allow for an ex post review of the contended secondment. This would also allow some scrutiny of the rather vague term 'other justified reasons'."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §48

"Article 84 specifically deals with the secondment/transfer of a prosecutor to another Prosecutor's Office without his or her consent (emphasis added), in cases of reorganization of the Public Prosecutor's Office leading to the lowering the number of positions of public prosecutors involving the termination of certain such position. While the secondment under Articles 81 and 82 appears to be temporary (for a period 'up to one year'), no such mention is made under Article 84, which seems to mean that, in this case, the secondment/transfer is not only compulsory but also permanent. Here again, it is essential to ensure that a possibility to appeal against such a measure is provided."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §46

3.3. IMMUNITIES OF PROSECUTORS, CRIMINAL CHARGES AGAINST PROSECUTORS

"It is important for their independence that prosecutors enjoy inviolability, although this should not be absolute (an exception may be made, for example, in cases of corruption). As stated in Article 35.1, inviolability (partial or full) of prosecutors is meant to contribute to the protection of prosecutors' independence in decision-making. Article 35 actually appears to cover both functional (substantial) immunity and procedural guarantees (judicial inviolability).

The restriction on powers of search and seizure in Article 35.2 aimed at protecting the inviolability of a prosecutor is in principle appropriate. However, the restriction extends only to 'his/her' goods, objects, documents or correspondence rather than what is in his or her possession. This could lead to unjustified interference with the right to respect for private life under Article 8 of the ECHR and to a breach of the prohibition on self-incrimination under Article 6(1) as a result of undue emphasis on who has title to the items in question at the time of the search and seizure. Hence, the inviolability mentioned in Article 35 should cover all items in the prosecutor's possession.

Article 35.3 notes that a prosecutor *'cannot be held legally liable for his/her opinion expressed within criminal prosecution and in the process of contributing to justice'*. Whilst this provision appears to cover some aspects of the prosecutorial function, e.g. statements by the prosecutor that in his/her opinion, a person is guilty of a crime, it does not cover the entire range of actions undertaken by prosecutors in the fulfilment of their duties, such as ordering various investigative activities, procedural actions, etc. The provision should be phrased more widely, for example by stating that the prosecutor enjoys inviolability/immunity for lawful official actions taken in the course of his/her duties."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§110-112

"A prosecutor, like a judge, [...] may be subject to certain restrictions aiming to safeguard his or her impartiality and integrity.

[.] It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone.

Therefore, the Commission focuses on methods to limit the risk of improper interference, which range from conferring independence on a prosecutor, subject to such powers of review, inspecting or auditing decisions as may be appropriate, to

the prohibition of instructions in individual cases, to procedures requiring any such instructions to be given in writing and made public. In this connection the existence of appropriate mechanisms to ensure the consistency and transparency of decision making are of particular importance.

Prosecutors should not benefit from a general immunity, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.

There are various standards on the acceptability of involvement of civil servants in political matters. A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges. Prosecutors should avoid public activities that would conflict with the principle of their impartiality."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §§17, 19, 22, 61-62;

See also CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§33 and 34

"[...] While some protection of prosecutors from arbitrary or abusive process emanating from another organ such as the police might be desirable, it would be preferable if any limitation on the power to commence a criminal process was subject to judicial control. [...]"

CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §27

"Article 91 deals with the liability of the prosecutor for damage caused to an injured party 'in the proceedings by the state prosecutor as a result of his/her performing of the duties of his/her prosecutorial office unlawfully, unprofessionally or unconscientiously.' This article makes a reasonable distinction between wider liability of the State towards the victim (arg. 'unlawfully, unprofessionally or unconscientiously') and more narrow liability of the prosecutor towards the State which already compensated the victim (arg. 'deliberately'). This means that the victim has a wider claim against the State and the State can recover the compensation paid only when the prosecutor caused the damage deliberately."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §94

"Section 3.5-7 APS provide the Prosecutor General and prosecutors with the same level of immunity as members of Parliament. Such wide immunity clearly goes too far. [...]"

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §21

"[...] Under the new provision, criminal investigations as to whether [...] prosecutors have committed criminal offences in connection or in the course of their duties or in relation to conduct considered incompatible with the requirements of their status and duties, are to be carried out through the HSYK's own inspectors with the approval of the HSYK. As an alternative, an investigation may be carried out through a [...] prosecutor more senior than the one who is to be investigated. [...]

Nevertheless, under Article 82, which is in line with Article 159 of the Constitution, permission of the Minister for Justice (as the Council's President) is still needed,

even if a proposal by the relevant Chamber of the HSYK is first required. Therefore, consideration might be given to transferring the competences from the Minister to the HSYK and its inspectors [...].”

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§83-84

“[...] Procedural immunity has to be lifted by the Prosecutorial Council unless there are strong indications that false accusations are levelled against the prosecutor in order to exert pressure.”

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §93

“Article 88 provides that [...] prosecutors alleged to have committed an offence cannot be arrested, searched, or interrogated nor can their houses be searched except in cases where an offender is found committing an offence *flagrante delicto.* In previous opinions, the Venice Commission has criticised the exclusion of [...] prosecutors from provisions relating to arrest, search or interrogation, except in cases where such arrests or other procedures would interfere directly with the operation of a court of law.”

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §88

“[...] Article 2.II states that the Chamber of Deputies of the Plurinational Legislative Assembly will be able to bring charges against, among others, judges of the highest courts, including the Constitutional Court, the State Prosecutor General and the Deputy Prosecutor General, for offences committed in the exercise of their functions. This provision creates a direct threat of politicisation of the system by leaving the charge in the hands of the Chamber of Deputies which, despite having great political legitimacy, is not a judicial body and may decide not to proceed with a trial for purely political reasons. Clearly, the State Prosecutor General, the Deputy Prosecutor General and the judges of higher courts must be publicly accountable for their actions, but a decision to bring or not to bring charges should lie with the Public Prosecutor’s Office and not with the Executive or Legislative. If the charge were brought by the Public Prosecutor’s Office, the Chamber of Deputies might exercise a veto corresponding to its political function and in that case society would be informed about the whole debate.”

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor’s Office of Bolivia, §13

“[...] [T]here would appear to be no inherent objection to certain categories of persons being tried by a specially constituted court, since the use of military tribunals to try persons in the military or of a country’s cassation court to try government ministers has never been suggested by the European Court of Human Rights to be contrary to the right to be tried by an independent and impartial tribunal established by law, although it has found their use to try civilians to be generally unacceptable [...].”

CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, §20

“The Draft Law introduces the institution of a Special Prosecutor whose role is to examine allegations of crimes committed by the Chief Prosecutor and make recommendations to the Prosecutorial Council concerning the possible dismissal of the Chief Prosecutor. [...]

The idea of creating a Special Prosecutor who obtains his/her temporary mandate from the Prosecutorial Council and may carry out investigations into the alleged misbehaviour of the Chief Prosecutor is laudable. However, the status of the Special Prosecutor, as well as his/her powers, is not entirely clear in the Draft Law, and the terminology used may be somewhat misleading.

[...] On this point, the Venice Commission, OSCE/ODIHR and the CCPE/DGI consider that the Special Prosecutor should not be a part of the hierarchical system of the prosecutors' offices, and should be answerable to the Prosecutorial Council only; otherwise his/her independence would be compromised. At the same time, the Special Prosecutor should have certain powers which ordinary prosecutors do have, and enjoy similar privileges.

[...] Finally, the Draft Law must explain clearly the nature of the decisions taken as a result of the 'investigation'. In particular, what happens if the report of the Special Prosecutor establishes the existence of a 'probable cause' to believe that the Chief Prosecutor has committed a crime (Article 9^2 par 10), but the recommendation contained in the report is not followed by the Prosecution Council or by the Parliament and the Chief Prosecutor is thus not dismissed? Does this mean that the Chief Prosecutor may not be prosecuted anymore in relation to the facts which led to the opening of the 'investigation'? If such decision means that the Chief Prosecutor would be 'acquitted', this may imply that the 'investigation' conducted by the Special Prosecutor is in essence a criminal investigation and must comply with all guarantees of fair trial enshrined in Article 6 of the European Convention of Human Rights. Furthermore, the Draft Law should specify that once the report is adopted by the Parliament, a criminal investigation may be initiated against the Chief Prosecutor; if this leads to the raising of criminal charges, this is to be dealt with by criminal courts and the Chief Prosecutor should then be treated as any other citizen. [...]

In any event, whatever the nature of the "investigation", this procedure should be subjected to specific safeguards, including, amongst other things, the rights of the defence. The Chief Prosecutor should be entitled to appear before the body taking the decision, present his/her arguments and benefit from other procedural guarantees which are appropriate for this kind of procedure and commensurate with the gravity of the potential sanction. [...] If, following his/her dismissal, the Chief Prosecutor is brought to trial, he/she should enjoy all guarantees of the right to a fair trial provided by Article 6 of the European Convention of Human Rights, and should benefit from the presumption of innocence.

[...] First of all, it would not be reasonable to require that the procedure of appointment of the Special Prosecutor should be triggered by the majority of the members of the Council – a smaller number of members should suffice. Ideally, each member of Prosecutorial Council should be able to initiate a discussion within the Prosecutorial Council on the appointment of a Special Prosecutor.

Second, as regards the second phase – the appointment of the Special Prosecutor – it should be possible to have this decision taken by a *simple majority* of the members of the Prosecutorial Council. One should bear in mind that members of the Prosecutorial Council are supposed to be eminent persons appointed specifically to oversee the actions of the Chief Prosecutor. If five of them consider that there is a need for an investigation and agree on the person who should be the Special Prosecutor, such an investigation

should be opened. After all, the opening of an investigation does not amount to the definite dismissal of the Chief Prosecutor. Furthermore, the discontinuation of the investigation should not be decided by the Special Prosecutor alone; whatever his/her findings are, they should be presented to the Prosecutorial Council which should then decide whether or not these constitute sufficient grounds for dismissing the Chief Prosecutor.

Third, it would be important for the public to be able to scrutinise the process whereby the Prosecutorial Council and other bodies consider the report of the Special Prosecutor. It is therefore recommended to require the publication of the report of the Special Prosecutor upon its completion, with the proviso that some information which should remain confidential for a legitimate reason, such as whistle-blower protection, may be withheld or redacted by the Special Prosecutor.

Finally, the Government should not have the power to block this process: once the Prosecutorial Council, after having heard the report by the Special Prosecutor, decides that there is a 'probable cause' to believe that the Chief Prosecutor has committed a crime, the file should go directly to the Parliament.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oScE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§66, 67, 72, 74, 75, 81-84

3.4. CONFLICTS OF INTEREST

"A prosecutor, like a judge, may not act in a matter where he or she has a personal interest [...]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §17

"[...] [S]ome involvement with the private sector, such as business activities and membership of certain organisations, will also have the potential to be incompatible with the performance of the role of public prosecutor [...]".

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §68

"[The provision] prevents prosecutors from acting as members of Parliament or of local authorities, or being members of political parties or engaging in party political activity or being members of executive or supervision boards of trade associations or other legal associations established in order to gain a benefit. These appear to the writer to be appropriate provisions and not to be in conflict with the provisions of paragraph 6 of Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe."

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §52

"[...] Judges and prosecutors may not be members of political parties and those who become members are deemed to have resigned from the profession. The question of judges and prosecutors joining political parties is one which is at times controversial and it may be reasonable in the developmental state of Turkey to impose such a condition."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §53

"Prosecutors cannot be involved in any political activity and this is clearly regulated by Hungarian law which follows European practice. Section 44.1 ASPGPOPEPC states that 'Prosecutor may not be a member of Parliament, Member of the European Parliament, local municipality board representative, mayor or state leader.'

Hungarian law contains also anti-corruption rules which are welcome (financial disclosure rules in Section 44.2 et al. ASPGPOPEPC). As per Section 45 ASPGPOPEPC, prosecutors may not be the senior officers or members obliged to participate in business associations, cooperation companies and cooperatives, or the members of the supervisory boards (members with unlimited liability) of the above mentioned institutions and the members of individual businesses."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§64-65

"This Article has been amended to permit meetings of professional associations of prosecutors to take place during work time, provided they do not "disturb the process of work". This appears to be a reasonable provision."

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §28

"Article 90.3 of the draft Law would prohibit the judge and prosecutor from membership of any management or supervisory board of the public or private company or any other legal entity. This seems very broad and would prohibit membership of any charitable or non-profit organisation which had legal personality, possibly including even professional organisations."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §117

"Furthermore, it seems inconsistent with the essential function of public prosecutors for any of them to be engaged, as paragraph 4 authorises, in establishing and managing 'printhouses, social welfare companies, healthcare establishments' and founding print media. Indeed it could put them into situations of potential conflict of interest. It would be more appropriate for these services to be bought in by a regular procurement process and this paragraph should thus be amended accordingly.[...]"

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §178

"The situation with regard to remuneration seems to be more complicated. The draft Law should provide general restrictions on the type of remunerated work that is incompatible with a [...] prosecutor's position. Any offer of remunerated work that may lead to or appear to lead to improper influence, must be declined. However, receiving remuneration should not systematically be linked to disciplinary misconduct. For instance, where a litigant is a student at or involved in work with a university or research institution at which the [...] prosecutor is engaged in academic work, it would be unreasonable to demand from the [...] prosecutor to abandon the academic work altogether. However, this may (and in some cases must) lead to self-recusal and/or a declaration of conflict of interest.

Article 92 of the draft Law requires a [...] prosecutor to seek the opinion of the HJPC on whether activities he or she intends to undertake are in conflict with his or her duties under the law. Presumably this should be confined to cases where the [...] prosecutor has reason to have at least a doubt about the issue."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§95 and 118

"Article 89.3 of the draft Law provides that judges and prosecutors may not be members of any organisation that discriminates on various grounds, including sex and sexual orientation. There are various churches and religions which do so discriminate and it is perhaps not intended to prevent judges and prosecutors being adherents of or practising such religions."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §115

"Article 93 of the draft Law requires judges and prosecutors to provide an annual financial report concerning their activities outside their duty as a judge or as a prosecutor. However, the provision falls short of requiring a judge to declare all of his or her assets. It should be noted that full asset disclosure has proved a valuable weapon in combating corruption in other countries."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §120

"The introduction of a bar on exercising the functions of a prosecutor where directly subordinated to a relative is not specifically required by European and international standards but could well contribute to strengthening public confidence in the public Prosecution Service. Its implementation would require effective monitoring of the process of appointing and promoting prosecutors."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §83

3.5. PERFORMANCE ASSESSMENT, DISCIPLINARY LIABILITY AND PROCEEDINGS

3.5.1. Performance assessment and promotions

"Article 43 refers to assessment of the prosecutor. The system requires an assessment examination every five years. This procedure is somewhat doubtful. It seems that if there is to be continuing assessment of prosecutors then it should take place on an ongoing basis. For example, in Ireland there are twice yearly reviews of every prosecutor by a superior officer and the system is based on a discussion between the employee and the employer who try to reach agreement on how the employee is performing and what training or further development are required. This is intended to ensure that problems are identified at an early stage. It is difficult to justify a system which would allow persons to continue for as long as five years without pointing out that they were not performing satisfactorily and then would confront them with a negative assessment. Of course, in Moldova care has to be taken that a system does not interfere with the proper autonomy of prosecutors. However, it still seems that it would be appropriate that there be an assessment of the performance of prosecutors at intervals much closer than five years and that any deficiencies would be referred to and addressed as soon as they arose rather than waiting for such a long interval."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §46

"Article 59 deals with promotion. Subject to regulations approved by the Superior Council, promotion is decided by superior officers. There is a need for a greater degree of objective transparency in this process such as recommendation of suitability by an appropriate board. This needs to be spelled out in the Article. It is not clear who is to appraise 'professional and personal achievements' but it should not be left to the sole discretion of an immediate superior."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §50

"[...] There is a need for [...] objective transparency in [the] process [of promotion of prosecutors] such as recommendation of suitability by an appropriate board. [...] [Because] it should not be left to the sole discretion of an immediate superior."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §50

"[...] The concept of 'moral characteristics' as a criterion for promotion has been removed from the list and this is to be welcomed. The new list of criteria includes a number of new matters which include obeying the rules on professional ethics, and the substitution of a revised performance evaluation and development system in place of the earlier appraisal system. The new criteria seem on the whole to be more appropriate than the old, and in the case of prosecutors go some way to implement paragraph 7 of Recommendation Rec(2000)19".

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §41

"[...] If the [Prosecutorial] Council is to have a role [in evaluations], it would be preferable that this role be confined to that of oversight with the actual evaluations being carried out by a technical body. [...]

In the opinion of the Venice Commission, the evaluation commission should be much more independent of the Council than is proposed. It is difficult to justify why the eminent lawyers should excluded from this process. The Venice Commission believes, on the contrary, that the input of some 'outsiders' would help to guarantee impartiality and independence. In addition, the possibility of an appeal against the decisions of the evaluation commission should be clearly provided."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§83-84

" [...] [T]here is an appeal to a court against erroneous or untrue assessments (Section 52.4 ASPGPOPEPC), which is positive [...]."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§64-65

"The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §76

"The possible cases of dismissal covered in Article 18 raise a problem in paragraph 6, which provides that dismissal may be the outcome of 'receiving a definitive report of 'unsatisfactory' for the post in question following the performance assessment for public prosecutors'. This is a factor which should be regulated with greater precision to prevent it becoming a route for undue interference and impartiality. The competent authority should be specified, together with the circumstances in which these grounds may be applied. Otherwise the paragraph should be deleted."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §31

"As an objective basis for disciplinary action, a performance evaluation system should be introduced in the Law. Such a system should provide for objective criteria for evaluation and include necessary guarantees for appeals against negative evaluations."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §127

"Some of proposed sub-criteria, in particular the quantitative ones (see Article 77), would need careful consideration, to ensure that measuring quantity of work will not be done merely by counting cases without due regard to their weight. The number of 'convicting' judgments should in no circumstances be a criterion. No prosecutor should have a personal interest in securing a conviction. Certainly, if a prosecutor has an unusually high number of acquittals it is reasonable to ask why this is the case; yet, it is not appropriate to measure this as a criterion either of quality or quantity of work without any further enquiry.

Similarly, success on appeal should not be a criterion. While it is reasonable to examine the track record of any prosecutor whose 'results' diverge more than 20% from the average, the evaluator must remain open to considering possible explanations likely to justify these figures.

As regards the practice of assessing the quality of work by examining random cases, this seems a reasonable approach, as is the practice of inviting the person evaluated to put forward examples of good work he or she has done.

[...] It is recommended however that the provisions of the draft law be reviewed to clearly specify that the case-load of heads of prosecution offices as well as their evaluation criteria should adequately take into account their managerial tasks."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§86-88 and 91

"In addition, since the decision assessing the performance of a judge is to be made by the President of the court, it would be desirable that the President of the court not have the sole decision in this matter. Cases where Presidents of courts abuse their position with regard to ordinary judges are not unknown in many countries. A similar point may be made about the power of the Chief Prosecutor to assess the performance of all the subordinate prosecutors. There is, however, an appeal to the relevant sub-council."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §84

"[...] The arrangements for providing the incentives listed are not in themselves problematic; however, as regards the awarding of bonuses in particular, the observation

in the 2008 Opinion that this should be done *'in a very objective, impartial and transparent manner (...) [and that there] are doubts about a body which is largely selected by prosecutors exercising such functions'* remains relevant. It would be appropriate, therefore, for the provision of incentive measures to be reasoned and to be linked as much as possible to the procedure for performance evaluation. [...]"

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §114

3.5.2. Grounds for disciplinary liability and sanctions

"[...] [T]here should be personal liability on prosecutors only if they have acted in bad faith or in some very improper manner, such, for example, as taking decisions while under the influence of alcohol or drugs."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §53

"Article 62 deals with disciplinary violations. Some of these provisions are somewhat vague and potentially dangerous and could perhaps be used to undermine a prosecutor or to control him. Criterion (b) referring to unequal interpretation or application of legislation is particularly dangerous. This seems to be capable of being applied in a very subjective manner. There is a need to distinguish between failure to work and the more subjective assessment of the quality of decisions which are made. If the latter is to be second-guessed unless in a severe case where decisions are patently insupportable then there is a problem with the autonomy of the individual concerned."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §52

"[...] Persons who leave their posts without permission or excuse for more than 10 days or who do not attend work for a total of 30 days in the year are deemed to have resigned from the profession. There does not seem to be any exception in this last provision made for persons who are ill and this should be remedied."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §§48-49

"Article 64 provides that the cutting of salary relates to unauthorised absence. Condemnation is a written notification indicating a fault and can be imposed for conduct harming respect and trust for the official position, discrediting the service by dressing in an inappropriate manner, using state owned instruments for private purposes, ill-treatment towards colleagues and other persons. The risk of abusing disciplinary power has been reduced by the fact that the final decision on disciplinary sanction is now made by the HSYK, but such a risk still remains. It is therefore highly recommended that the regulations on disciplinary sanctions be revised in order to reduce the reasons for such sanctions, to secure proportionality and to limit disciplinary sanctions to severe violations of the duties of [...] a prosecutor."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §63

"It seems that causing a perception of something rather than actually doing it are not appropriate criteria for carrying out a serious sanction on a [...] prosecutor. A perception may be entirely wrong and it should be necessary to prove that the [...] prosecutor has engaged in misconduct rather than that some persons think he or she might have done.

This is carried to extremes in Article 68(e) which permits a change of location where a judge is deemed to have:

'caused a perception that he has been involved in bribery or extortion even though no material evidence is obtained. "

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §71

"[...] [A]lthough the specificity of the service might warrant dismissal for almost any offence, this would perhaps be disproportionate in the case of minor administrative offences (e.g., with respect to motoring) [...]."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §137

"In relation to the commission of a criminal offence conviction for an offence followed by imprisonment for at least six months is grounds for dismissal. This is a clear provision and there is no difficulty implementing it. However, there seems to be a somewhat lenient approach to prison sentences. It should be taken into account that in many states normally any kind of prison sentence means that a prosecutor is no longer qualified as a prosecutor. This is quite important to protect the reputation of the whole prosecution service [...]."

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §56

"According to the Article 95.1.e, the term of office of a judge or a prosecutor shall cease 'if he/she was sentenced to prison by a final verdict'. Criminal conviction may not necessarily result in a prison sentence, however, the conviction, in most cases, should lead to the termination of office."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §122

"Article 66 is concerned with the suspension of a public prosecutor's powers when on secondment or in the course of a pre-trial investigation or judicial proceedings, pursuant to Articles 155-158 of the Criminal Procedure Code, and is appropriate. However, it would be clearer if the relevant Articles of the Criminal Procedure Code were specifically stated in paragraph 1.2. Furthermore, it should be made clear that the suspension is of the prosecutor's powers but not of his or her salary or material or social support."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §153

"In Section 87.3 ASPGPOPEPC the prosecutor is entitled to a salary of an amount that is equal to the total of his/her basic salary and regular supplements for the duration of suspension. Fifty per cent of this amount may be withheld until the termination of suspension. There are no criteria when 50 per cent of the salary can be retained. This could be used to put pressure on the prosecutor. Discretion should be removed in this case."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §79

"Article 44 should explicitly rule out that an acquittal of a person accused by a prosecutor can result in disciplinary proceedings against the prosecutor unless the charges were brought due to gross negligence or maliciously. It seems that because of fear of performance indicators and of disciplinary proceedings prosecutors exert pressure on the judges to avoid acquittals. Currently prosecutors seem to feel obliged to win all cases lest they face disciplinary action. In a democratic system under the rule of law, prosecutors are parties subject to the principle of the equality of arms and necessarily lose cases without this resulting in disciplinary action against them."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §128

"Article 50 is concerned with the disciplinary sanctions that may be applied against a public prosecutor and these are appropriate. However, paragraph 1 stipulates that these sanctions may not be applied against the Prosecutor General. This may be appropriate given the wide discretion over his or her removal but this stipulation still leaves it unclear as to whether disciplinary proceedings can nonetheless be instituted against the Prosecutor General, albeit without the possibility of imposing any sanctions. This uncertainty arises because the applicability of Articles 44-49 to the Prosecutor General is not explicitly excluded. There is thus a need to clarify the disciplinary liability of the Prosecutor General."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §137

"[...] The sanction of a 20% cut in salary for a period of three months for a minor disciplinary offence (Article 98) seems disproportionate."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §95

"Disciplinary sanctions are "in force" one year from their application, during which the prosecutor cannot be promoted to a higher position and cannot benefit from incentive measures (Article 42.5). It is suggested to reconsider this provision. On the one hand, a warning or a reprimand is usually not 'in force' for a specific period of time, but simply stands. On the other hand, it appears inflexible to exclude promotion etc. for a certain time regardless of the individual circumstances."

It is important, in light of their independence, that prosecutors have security of tenure. The terms under which they may be sanctioned (even removed from office) should therefore be phrased clearly and unambiguously. [...]

In addition, in accordance with Article 42.2 stating that disciplinary sanctions must be proportionate to the severity of the offence committed, it is recommended that disciplinary offences in Article 39 be set out according to levels of severity or gravity."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§117, 118 and 120

3.5.3. Disciplinary proceedings[2]

"[...] A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified. The body, for

[2] *On this topic see also Chapter 4.2.3 below on the procedures before the prosecutorial council*

example, might be of similar composition to the nominating body described in paragraph 5 above or consist of the remaining members of the National Jurisdiction Council. Alternatively the body might consist of three judges appointed by the presidents of their courts. It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of *ex officio* members rather than be appointed *ad hoc*, in order to avoid suggestions that its members have been chosen so as to obtain a particular result. [...]"

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.7

"[...] [I]t would be preferable that disciplinary decisions be made by a small body none of whose members is also on the Prosecutorial Council, and which would contain an element of independent outside participation. Should the proposed scheme be maintained, it would be advisable to specify, in line with Article 136 of the Constitution (stressing the autonomy of the state prosecution), that the Chair of the Prosecutorial Council entrusted with disciplinary decisions, as well as the Chair of the Disciplinary panel, must be lay members, not state prosecutor members [...]"

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §100

"In the case of prosecutors other than the Public Prosecutor of the Republic decisions on dismissal are taken by the Council of Public Prosecutor. [...] Again, there are no provisions relating to the right of a prosecutor to appear before the council and make a defence or to know in advance the case to be made."

CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", §61

"Articles 152 *et seq* establish [specific bodies] within the Public Prosecutor's Office to deal with disciplinary proceedings. Due to their complexity, they risk to be over-burdened, something that should be simplified. The right to a fair hearing and access to an independent judge who will supervise the trial must not be infringed. It would therefore be advisable not to establish special courts for this purpose as these may lead to inequitable results both for the victim/private party through possible corporatism and for the prosecutor."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §53

"[...] However, disciplinary measures should not be decided by the superior who is thus both accuser and judge, like in an inquisitorial system. Some form of prosecutorial council would be more appropriate for deciding disciplinary cases."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §77

"[...] [S]ince a [disciplinary] complaint may be initiated by a person who is a member of the Council or represented on the Council, there should be a provision excluding such a person from participating in the ensuing proceedings."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §96

"[...] If a member of the Superior Council of Prosecutors has initiated the proposal [for disciplinary proceedings] then clearly that person should not vote on the proposal or take part in the decision made by the Superior Council. However, the present text does allow him or her to vote [...] and it seems that this would be the case even for the person accused. It is important to ensure that people who can initiate disciplinary proceedings do not themselves participate in making the decision as it is necessary that such decisions are made by a fair and impartial tribunal even though there is an appeal to the Superior Council and thereafter to the courts."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §66

"The 3 years extension of disciplinary liability for the violations mentioned under Article 39 (b), (c) and (e) is problematic. Firstly, because of the vagueness of the formulation of the violations concerned (see comments below). Secondly, the focus is on the nature of the violations rather than the reasons for disciplinary action not being taken before the regular time-limit of one year. Such reasons may include deliberate concealment or cases where the facts only come to light in judicial proceedings (especially ones in which a miscarriage of justice is established) at a later date. It is only these latter considerations which should justify a departure from the limitation period. [...]

[T]he same issue of impartiality does arise in a different form as there is no provision precluding the SCP member who has initiated disciplinary proceedings from taking part in the determination of an appeal against a decision of the Disciplinary Board.

Disciplinary proceedings may also be taken against members of the Superior Council. If any such member appeals a decision against him/herself taken by the Disciplinary Board, the Draft Law should prevent him/her from hearing the case against him/herself, so as to avoid any threats to the impartiality required of members of the Superior Council. [...]"

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§116, 122 and 123

"[...] Article 65.6 of the draft Law sets out that in proceedings against judges, the commissions should be composed of judges, while in proceedings against prosecutors, it shall consist of prosecutors – this solution is to be welcomed. [...]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §95

"[...] [S]ince the disciplinary plaintiff is elected after obtaining the opinion of the session of the Supreme State Prosecution Office, among its prosecutors, one may wonder how objective the disciplinary plaintiff is likely to be where the complainant is the Supreme State Prosecutor. An alternative may be, to ensure complete autonomy and independence to the 'disciplinary plaintiff', that she/he be not a state prosecutor of the Supreme State Prosecution Office and be not elected 'after obtaining the opinion of the session of the Supreme State Prosecution Office'."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §99

"The new proposal in Article 112 is that the Disciplinary Prosecutor should be a judge appointed by the Prosecutorial Council on a proposal of the President of the Supreme Court. While one can see merit in such a solution, it would be desirable to make it clear that the appointee will not act in a judicial capacity while exercising the function of Disciplinary Prosecutor. An alternative, to avoid that disciplinary investigations against public prosecutors be conducted by a judge and that the President of the Supreme Court be involved, would be that the disciplinary prosecutor be appointed by the Prosecutorial Council from among qualified lawyers, with the same requirements of the lay members of the Council. This would give increased autonomy and independence to the disciplinary investigations, which is of particular importance both for the public prosecutors and the general public.

As regards the Disciplinary Committee, it is welcome that Article 114 now provides that the president of the Committee must be a lawyer member of the Prosecutorial Council [...]. The new provision enhances the credibility and democratic legitimation of the disciplinary procedure while at the same times minimising the risk that the objectivity of the process is questioned. Under the draft, however, the members of the Committee are appointed on the nomination of the Supreme Public Prosecutor (in the capacity of President of the Council). For the reasons explained above, this remains a problematic solution and should be reconsidered.

The new paragraph 3 of Article 114 provides that the Supreme Public Prosecutor shall not be a member of the Disciplinary Committee. [...] [t]his appears to be a desirable provision [■■■]."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §§52- 54

"In disciplinary cases, including of course the removal of prosecutors, the prosecutor concerned should also have a right to be heard in adversarial proceedings. [...]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §52

"Furthermore, consideration should be given to the inclusion of a power in this provision to suspend a public prosecutor pending the outcome of disciplinary proceedings. This is an important element of international standards on the investigation of serious human rights violations."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §133

"Article 71 [...] provides for the right of a [...] prosecutor to defend himself or herself in disciplinary cases. The Article requires that the [...] prosecutor be informed in a way which includes separately and clearly the actions attributed to him or her, the subject matter of the investigation and the place, time and aspects of the actions which are alleged to have occurred. The [...] prosecutor has the right to require the testimony of the witness and the collection of evidence in his or her favour. They have the right to examine the files in person or through their legal representatives and to receive copies and may also defend themselves orally or in writing before the HSYK or via their legal representatives. These provisions seem clear and appropriate and the amendment is a considerable improvement to the text. The right of defence will be regulated in a more detailed manner, increasing the protection of the [prosecutor] concerned. Nevertheless, such procedural safeguards in the disciplinary proceeding

are not a sufficient substitute for legal remedies against decisions which interfere with subjective rights [of prosecutors] and the absence of any right of appeal to a court of law is a serious defect in the draft Law."

CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §75

"The Draft Law should also be amended to include a provision that allows a challenge to the member of the agency performing disciplinary proceedings and his or her recusal in cases when there are reasons for doubts concerning his or her impartiality.

There is also a need to clarify the point of the provision made in paragraph 6 specifying the non-disclosure of any dissenting opinions as these could be important for the exercise of the right of appeal under Article 51. Insofar as a public prosecutor does not have access to them for this purpose, the provision should be amended accordingly."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §§135 and 136

"[...] Given the power of the disciplinary commissions to dismiss a [...] prosecutor, an appeal to a court of law would be essential, at least for cases where a serious penalty was imposed."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §110

"This Article provides for the right of the prosecutor, subject to disciplinary sanction, to appeal to the Administrative Court. However, the basis for the exercise of this right is not clear. Is it a right to a rehearing – which is preferable – or is it purely procedural review?"

CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §38

"Furthermore there is a need to clarify whether or not the power [of the disciplinary body] to interrogate individuals is governed by the privilege against self-incrimination and, insofar as it is not, the protection afforded by this privilege needs to be extended to any such interrogation."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §171

V. PROSECUTORIAL COUNCIL

"While a number of countries have established prosecutorial councils, there is no uniform standard binding on all European states for such councils.

The Venice Commission believes that these councils, where they exist, are an appropriate structure to ensure the transparency and protection of lower-ranked prosecutors, by providing valuable input in the appointment and disciplinary processes."

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§13 and 14

"Very little work has been done to lay down international standards in relation to Prosecutorial Councils, unlike the situation with regard to Judicial Councils. While it is tempting to apply the standards relating to the latter to Prosecutorial Councils, there are some differences between the judiciary and the prosecution which are significant for the organisation of their respective councils."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §37

"[...] In different countries there are different models which permit to the management of appointments and disciplinary liability of prosecutors, and the creation of a separate Prosecutorial Council is one of them. Another avenue is to have a joint Judicial and Prosecutorial Council (with separate chambers, if necessary).[3] That being said, creation of two separate councils is definitely a legitimate option, and may even be preferable in countries with a strong prosecution service and week judiciary, since the presence of the prosecutors in the joint Council may be perceived as a threat to the independence of judges. Therefore, the Venice Commission considers that the choice made by the drafters – to have two separate councils – is acceptable."

CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, §87

4.1. FUNCTIONS AND POWERS OF THE PROSECUTORIAL COUNCIL

"[The function of t]he Prosecutorial Council is [...] 'to ensure the independence of state prosecutorial service and state prosecutors'. Its function should also be to oversee that prosecutorial activity be performed according to the principle of legality.

[...] [A]ll members of the prosecutorial council [are] elected and dismissed by the parliament. No qualified majority is required. This [...] leaves the Council in the hands of the parliament majority; this, coupled with the appointment and dismissal of all prosecutors by parliament with no qualified majority, makes the prosecutorial system [...] too vulnerable to political pressure and jeopardises the possibility for the prosecutorial functions to be carried out in an independent manner according to the principle of legality."

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §§110-111

"[...] [T]he ambition should be that as much competence as possible in relation to appointment and removal issues should rest with the Prosecutorial Council rather than the Parliament since this would, on balance, appear at least to limit the practical risks of undue political influence on these matters. [...]"

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §32

"Article 74 regulates the functions of the National Council for the Public Prosecutor's Office, but none of them allow it to issue compulsory decisions (in this draft Law, the Council appears to be a simple consultative body on prosecution policy and does not possess any competence for appointing or for disciplinary measures). In this way, the institution is deprived of the ability to prevent both internal and external influences from affecting sensitive subjects such as access to and performance of the prosecutorial function."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §44

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[3] *See CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, §88, where the Venice Commission welcomed the splitting of the Council into two chambers – one for judges and another for prosecutors. On this topic see also Chapter 3.4.3 on disciplinary proceedings*

"Article 75 deals with the status of the Qualifications and Disciplinary Commissions. However, its structure suggests that these Commissions are regarded as something merely auxiliary to the Public Prosecution Service rather than the key element in its regulation and selfgovernance. In this connection, it is particularly surprising that these Commissions – unlike, for example, the National Prosecution Academy of Ukraine – do not have the status and other attributes of a legal entity. Moreover, no separate budgetary arrangements have been made for the Qualifications and Disciplinary Commission and the absence of these will necessarily undermine their independence. It would, therefore, be appropriate to amend this provision to rectify these omissions and thereby underline the importance of the role that is to be played by these Commissions."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §161

"The work of the HJPC should be as transparent as possible; it should be accountable to the public through widely disseminated reports and information. The duty to inform may also include an obligation to submit the report to the Parliamentary Assembly about the state of affairs in the judiciary or prosecution service. However, this should not be transformed into a formal accountability of the HJPC to the legislative or executive branches of power.

In this respect, Article 25.3 is clearly problematic as it stipulates where reports receive a negative assessment, the Parliamentary Assembly 'may remove the Presidency or a member of the Presidency from the Council.' This provision should be deleted. On the other hand, it should be a right, not a duty of the President of the HJPC to attend the Parliamentary Assembly's session and/or engage in the discussion of the report."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§71-72

4.2 COMPOSITION OF THE PROSECUTORIAL COUNCIL AND THE STATUS OF ITS MEMBERS

4.2.1. Election/appointment of the members of the prosecutorial council

"[...] There is no European standard to the effect that members of a prosecutorial council cannot be elected by parliament. [...]

This position has not prevented the Venice Commission from subsequently questioning legislation providing parliament with very significant powers as to electing members of a prosecutorial council. [...]"

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§43 and 44

"It is recommended that a substantial element or a majority of the members of the HJPC be *elected* by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. [...]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §45

"[...] [I]t is very important that the Prosecutorial Council is conceived as a *pluralistic body,* which includes MPs, prosecutors, members of civil society and a Government official. [...]

If the Chief Prosecutor is elected and removed by a simple majority of votes in Parliament (see Article 9^1 par 4 and Article 9^2 par 12), it becomes all the more important for the Prosecutorial Council to have a *sufficient non-political component*, to prevent the parliamentary majority from imposing its will upon this body.

It is welcome that a significant number of members of the Council are prosecutors elected by their peers (four out of nine), and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. [...]"

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oScE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§33, 35 and 36

"[...] [The] prosecutorial council [...] cannot be an instrument of pure self-government but [should derive] its own democratic legitimacy from the election of at least a part of its members by Parliament."

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §41

"The 2004 Law created the HJPC as a single and uniform body. Although this is not entirely unusual, ideally the two professions – judges and prosecutors – should be represented by separate bodies. For this reason the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils.

However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. [...]"

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§58-59

"The composition of the National Council for the Public Prosecutor's Office, which is regulated in Article 72, also presents problems. It is currently composed exclusively of prosecutors. The President is the State Prosecutor General, followed by the departmental prosecutors and subject prosecutors; the only non-prosecutor member is the Director of the Disciplinary Proceedings.

The Venice Commission has compared many systems and has always considered that where such a type of council exists – its establishment is not an obligation – it should be composed not only of prosecutors but also of other actors such as lawyers or legal academics from appropriate branches of law. The composition of the National Council for the Public Prosecutor's Office should not grant unduly large internal powers to the public prosecutors, which would prevent them from being publicly accountable and their actions should be transparent."

CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia, §§42-43

"[...] Under this provision, practicing defence lawyers cannot be members of the Prosecutorial Council elected by Parliament within the "civil society quota" (Article 8^1 par 2 (d)). [...] [G]iven the limited powers of the Prosecutorial Council and the fact that under normal circumstances, it sits only twice a year and deals only with matters related to the appointment and removal of the Chief Prosecutor, it is not clear why a defence lawyer should not be able to serve on this body. [...] With regard to the conflict of interest argument, this risk may be reduced by more specific and narrowly formulated conflict of interest rules. In any event, in the proposed setup the

Prosecutorial Council does not have any say in the appointment or dismissal of lower prosecutors who participate in criminal trials. The Venice Commission has in the past emphasized the importance of including, in the appointment process of prosecutorial councils or similar bodies, legal professionals with non-political expertise, and has expressly mentioned members of the Bar among them. It is of course for the Georgian authorities to decide whether it is justified to retain this prohibition in the Draft Law. However, the Venice Commission, OSCE/ODIHR and the CCPE/DGI note that it would be unwise to automatically exclude a whole class of independent legal professionals, who might have necessary expertise in matters debated in the Council, from being represented on the Prosecutorial Council; if some restrictions are necessary, they should be formulated as narrowly as possible."

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oScE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§53 and 54

"[...] [A]ll members of the prosecutorial council are appointed and dismissed by parliament with no qualified majority. The prosecutorial system [...] is therefore totally under the control of the ruling party or parties: [t]his is not in conformity with European standards."

CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §104;

See also CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §13

"In addition, an anti-deadlock mechanism should be foreseen for the election of the eminent lawyers, e.g. a three-fifth majority for subsequent voting, as provided for in Article 91 of the Constitution for the election of the lay members of the Judicial Council, or the proposal of a higher number of candidates and the election with the absolute majority of the components of the Parliament, or the election by Parliament using a proportional system, or to transfer of the power to elect to university faculties and lawyers' representatives."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §49;

See also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §23

"[...] The balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers also seems appropriate. It is also welcome that the power to appoint half of the members of the Prosecutorial Council be given to different bodies: it helps to avoid a corporatist management of the prosecution service and can provide a democratic legitimacy to it. Furthermore, it is wise that the Minister of Justice should not him- or herself be a member but it is reasonable that an official of that Ministry should participate. One may wonder however whether ten members, in addition to the president, are not too many, since there are reportedly only 140 state prosecutors in Montenegro."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §38

"[...] The self-governing nature of the SCP might be questioned given the *ex officio* membership of the Minister of Justice and of the President of the Superior Council

of Magistracy. It is suggested to consider their membership being one without voting rights.

Regarding the civil society members of the SCP, it could be useful to specify, in the light of their relevance to the functioning of the criminal justice system, the most relevant sectors that they should come from (the bar, human rights NGOs etc.) and their suitable legal training/experience. In addition, their appointment by the Parliament seems problematic if the goal is really to have a Council free of political influence. If this system is maintained, one option could be to establish a committee within Parliament, on which all parties are represented equally, to deal, according to a transparent procedure, with the issue of appointment of civil society members. Another solution could be to provide for their appointment by representatives of their profession – Lawyers' Union, assembly of university senates, etc.

Prosecutors who are elected as members of the SCP are detached from office while serving on the Council. For the sake of their independence and impartiality while serving on the Council, it is suggested to preclude SCP members from becoming candidates for the appointment as Prosecutor General, for example by placing a bar on those who have been members within the 12 months prior to the process of selection."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§131-133

"[...] [I]n the particular context of BiH, involving the legislative power in the election of the members of the HJPC will lead to a highly politicised process where the merits of the individual nominees are unlikely to have any significant effect on the outcome."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §44

"Article 18 still provides that, out of the five public prosecutor members elected by the Prosecutorial Conference, only one is elected from among basic Public Prosecutor's Offices, while four are elected from among public prosecutors belonging to the Supreme, Special and High Public Prosecutor's Offices. To ensure a proportional and fair representation of all levels of the prosecution service, at least two members should be elected from among Basic Public Prosecutor's Offices, taking also into account that the Supreme Public Prosecutor is *ex officio* the President of the Prosecutorial Council. [...]"

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §21

"Unlike the current composition of the [High Judicial and Prosecutorial Council], the draft Law provides that the HJPC shall not include members of the professional legal community (currently elected by the Bar Associations). The Venice Commission has, in its 2012 Opinion on legal certainty and the independence of the judiciary in BiH, questioned the wisdom of having judges, prosecutors, and legal professionals present in the HJPC, an institution which both determines the criteria for the appointment of judges and prosecutors and then carries out this appointment itself. However, instead of excluding legal professionals altogether, consideration might be given to adding members on behalf of the professional community, which would not excessively broaden the size of the HJPC, while ensuring the representation of the users of the judicial system."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §31

"[...] [T]he right to appoint a member of the [Prosecutorial] Council should remain with the Protector of Human Rights [i.e. the ombudsman] or at least the President of Montenegro should be obliged to consult with the Protector before making his or her proposal. As for qualifications, relevant human rights experience should be a criterion."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §53

"This amendment introduces specific criteria concerning professional knowledge etc. for the appointment of prosecutors and their deputies. Even more detailed criteria shall be laid down by the Prosecutorial Council.

The amendment should be welcomed especially in the light of the strong political influence on appointments of prosecutors [...]. Thus, the amendment underlines that the criteria must be linked strictly to professional knowledge and qualifications. Furthermore, the wording appears to be sufficiently broad in order not to preclude any relevant criteria."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §§38-39

"Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's' appointment and disciplinary proceedings [...]. [...]"

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, §66

"[...] [U]nder the Draft Law the politicisation of the Council is somehow reduced by the fact that two out of the four members elected by the Parliament come from civil society and not from the ranks of MPs. However, these candidates still have to obtain the approval of the governing majority (see Article 8^1 par 2 (d)) which may predetermine their position for the entire period of their service. In order to make those persons less dependent on the will of the ruling majority, it is necessary to put in place additional guarantees, applied both at the stages of *nomination* and of *election* of candidates.

First of all, the nomination of members of civil society and academia (Article 8^1 par 2 (d)) should be done in a transparent manner, with the selection process following clear rules and criteria, which should be set out in the Draft Law. A range of options could be considered here. One possibility (the simplest option) is for certain office holders to gain membership of the Council automatically, e.g. the head of a law faculty, or the President of the Bar Association may become *ex officio* members of the Prosecutorial Council without being elected by Parliament.

Additionally, a possible option would be to appoint one or more members of the judiciary to the Prosecutorial Council. Judges could bring their own practical expertise in the criminal justice system to the work of the Council, and would also help enhance the independence of this body, and thereby the public's trust in the Council's work. A range of possible judges could be considered for this position, including chairpersons of certain courts (e.g. the Supreme Court, the Tbilisi city court and/or regional courts).

An alternative solution, which is closer to the scheme proposed by the Draft Law, would be to give the nominating power to one or several independent bodies outside of the Ministry of Justice or the Prosecutorial Council, such as the High Council of Justice, the Bar Association, or a body representing law universities and academic institutions. In this process, consideration should be given to the need to achieve proper gender balance amongst the candidates. The nominating power may also be given to certain well-established NGOs, which will increase transparency of the Prosecutorial Council and public trust in its autonomy. In cases where the power to nominate candidate would belong to external actors, the Parliament should still retain the power to approve or not approve them.

At the same time, if there are too many nominating bodies, and, as a result, too many candidates, it might be useful to establish a parliamentary committee composed of an equal number of representatives of all parties represented in Parliament. The role of such committee would be to pre-select a certain number of candidates and propose them to the Parliament for elections. It is important to ensure the plurality of candidates at this stage: the Parliament should have at least two or ideally three candidates for each vacant position to choose from.

At the stage of elections by the Parliament it is important to ensure that the resulting composition of the four Council members elected by the Parliament is not politically monolithic. To achieve this, two alternative solutions may be considered: election by a qualified majority or the introduction of quotas for the opposition.

The most radical solution would be to require that at least two out of the four members elected by Parliament are elected by *qualified majority* (one member representing the Parliament, and one member representing civil society). This would ensure that at least two members of the Council are elected as the result of a compromise, which would somehow counterbalance those two members whose election depends more on the support of the ruling majority, and the fact that the Minister of Justice sits on the Council *ex officio*.

Since such a qualified majority may be hard to achieve in the current political context in Georgia, an alternative solution is also possible: the Draft Law might introduce *quotas for members appointed by opposition parties.* This means that opposition parties should have the right to appoint at least one member of the Council, regardless of their number of seats in Parliament. Given the current relative strength of the opposition in the Georgian Parliament, the opposition might even be given two seats out of four: one for an MP and one for a representative of civil society whom the opposition wishes to nominate. Whichever solution is chosen, the parliamentary majority would still control more seats in the Prosecutorial Council, due to the participation of the Minister of Justice, but its decisive influence within the Council would be reduced and the Council would become more politically balanced; in order to pass important decisions or to block them, candidates chosen by the parliamentary majority would need to obtain support of those elected by qualified majority or appointed by the opposition, or those members which are elected by the Conference of Prosecutors."

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§45-52

"To ensure geographical diversity, the Draft Law may further provide that no more than one vacancy on the Prosecutorial Council should be filled by a representative of a particular region or the city of Tbilisi (including the Chief Prosecutor's Office and district Prosecutor's Offices of the city of Tbilisi). Regarding the need to achieve proper gender balance in the composition of the Prosecutorial Council, it is noted that in accordance with the 1995 UN Beijing Platform of Action, States should establish the goal, if necessary through positive action, of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary. It is recommended include a similar requirement of gender balanced representation in the Draft Law."

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oScE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §58

"[...] The draft Law indicates that the composition of the HJPC needs to reflect the ethnical composition of BiH, with at least six members of each of the Constituent Peoples and an appropriate number of members from among Others. Equal gender representation should also be ensured. These requirements were already present in the 2004 Law, but at the time, no numbers were given, the Law simply spoke of 'general representativeness' (Article 4.4).The need to have at least six representatives of each Constituent People, together with the requirement of the gender equality, may make the selection of appropriate members very difficult and inflexible (see below and Sections D and F). In addition, the Venice Commission has already stated in its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the powers of the High Representative (CDL-AD(2005)004), that the judiciary should not be organised along ethnic lines.

In addition, in a country of the size of BiH, using a requirement for a certain ethnic composition for the HJPC will make it very difficult in practice to also meet the requirement of ensuring an equal representation of the sexes. The Venice Commission strongly supports policies aimed to ensure gender balance in public institutions and believes they should be welcomed and that all efforts in this direction should be praised. However, an inflexible legal provision setting a quota along ethnic and gender lines over those of professional competence – taking the country's size and population into account – may undermine the effective functioning of the system.

Article IX.3 of the Constitution of Bosnia and Herzegovina, which stipulates that 'Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina', does not refer to exact quotas, but refers instead to a general representation of the peoples of Bosnia and Herzegovina. The same wording appeared in the previous version of the draft Law and, in the given circumstances, it would be preferable to revert back to that version."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§32, 35 and 36

"So far as concerns the election of the other members, the two members from the General Prosecutor's office and the six members from the territorial and specialized prosecutors' offices, it is not stipulated whether these are elected separately by their own offices or all together in a general meeting of prosecutors. Presumably, however,

the latter would not work since the larger offices would be in a position to outvote the smaller."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §60

4.2.2. Term of office of the members of the prosecutorial Council

"[...] [I]n most countries, members of judicial councils are elected for a rather short period of time (three years in the Netherlands, six years in 'the former Yugoslav Republic of Macedonia' etc.). In some countries, members of the judicial council have life tenure (Canada, Cyprus etc.) or the length of the term corresponds to that of the primary office of the member. All these solutions are legitimate."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §49

"It is envisaged in Article 18 that there should be a four year term of office for the Council. This is a reasonable period. Members can be re-elected provided that at least four years have expired since their previous term of office (Article 25). This seems a reasonable provision as it would be undesirable for persons to remain on the Council for too long a period."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §40

"Article 76 foresees a term of office for the elected SCP members of 4 years, but sets no limit to the number of times SCP members may be re-elected. This may have the undesirable effect of entrenching certain individuals in the SCP bureaucracy, and of SCP members losing their connection to prosecutorial practice, since during their term on the Council its members are not active prosecutors (Article 72.8). It is recommended to consider limiting SCP members to a single term in office or providing for some gap before re-election (two terms being the maximum suitable).

135. It is also noted that the duration of terms of members coincides with that of the SCP President. A period of 3 years for the latter might be more appropriate so that candidates can be assessed from their initial service on the Council. Moreover, an arrangement whereby not all members are elected at the same time (one-third every two years), which could also limit the potential issue of the prosecutorial members being subordinate to the Prosecutor General, may be considered. [...]"

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§134 and 135

4.2.3. Election/appointment/dismissal of the President of the prosecutorial council. Other bodies of the council

"The election of the chairman by of the Council by its members is welcomed (Article 85)."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §62

"[...] [T]here are no common European standards on who should preside a prosecutorial council [...].

However, the introduction of an election-based system may be seen as a step towards improving the autonomy (guaranteed by Article 164 of the Constitution) and the legitimacy of the SPC [...]".

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§31 and 32

"Even if the Minister is a member of the Prosecutorial Council *ex officio,* having him/her chair the Council may raise doubts as to the independence of this body. It would be advisable to have the Chairperson elected by the members of the Prosecutorial Council from their ranks (with the Minister him/herself ideally being excluded as a possible nominee). The Council shall be given opportunity and time (e.g., one month from the date when all members have been appointed and it is fully functional), to elect its own Chair by simple majority. Should it fail to do so, the Minister of Justice may still be entitled to assume the Chairperson's position *ex officio."*

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oScE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §40

"[...] [T]he hierarchical nature of the prosecution service and the obligation on the Supreme State Prosecutor to manage the prosecution service makes it appropriate that that person should also chair the Prosecutorial Council. [...]"

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §38

"Article 8 of the draft Law provides that the Parliamentary Assembly is to elect a President and two Vice Presidents of the HJPC who are to rotate their offices every 16 months during the four-year term of the HJPC. Essentially, they are supposed to act as a *troika.* These three officers cannot be from the same Constituent People or from among Others. For the same reason as under Section D above (election of the members of the HJPC) with respect to the composition of the HJPC, it is not appropriate for the President and the Vice Presidents of the HJPC to be chosen along ethnic lines and the decision on their election should not be left to the Parliamentary Assembly. In addition, this system of rotating presidents weakens the HJPC."

"[...] [I]t is important that the draft Law provide restrictive grounds for which the Parliamentary Assembly may decide to dismiss the president and vice-president. It is hard to imagine the reasons (except resignation), which may result in a decision being made by the Parliamentary Assembly to end the term of office of the president and vice-president, but retaining membership in the HJPC. There should be input from an expert body before Parliament takes a decision. In addition, unlike the election process where there is a prior selection limiting the choice of the Parliamentary Assembly, in the decision on dismissal, the Parliamentary Assembly is not limited and acts on its own. This is inappropriate and needs to be reconsidered."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§47 and 48

"In addition, although there is provision in paragraph 1 of Article 82 for secretariats to be 'in place' to provide organisational support to the Qualifications and Disciplinary Commissions, there is no provision made in the Draft Law for the selection criterion or procedure for appointing those who will work in these secretariats. It is not clear whether they will be drawn from public prosecutors, although there is a reference in paragraph 2 to their salary, welfare support and social protection being governed by the Draft Law – strangely referring to its title rather to 'the present law' or provisions in it – and the Law

on Public Service. There is, however, no specific mention of secretariat members in the later provisions of the Draft Law dealing with issues of salary, welfare support and social protection. It is clearly important that secretariat members have substantial experience in order to undertake their important task and their disciplinary record should also be unblemished. Appropriate selection criteria, as well as an appointment procedure, should thus be added to this provision. Furthermore, appropriate arrangements to secure the independence of those working for the Commissions are needed and Article 82 should be amended accordingly."

CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §173

4.2.4. Procedures before the prosecutorial council[5]

"This Article sets out that the sessions of the SPC are open to the public, if the SPC does not decide to work in closed session, in accordance with its rules of procedure. [...]

This amendment should be welcomed and will contribute to the transparency of the SPC's activity. However, the majority of the SPC's procedures are of a personal nature (election, dismissal) and the persons involved (candidates to positions of prosecutors or prosecutors in office) are not political actors, they are therefore not expected to reveal their personal data to the public. Security or other reasons related to the protection of personal data might also require closed sessions."

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§39 and 40

"The HJPC is empowered to set up commissions which can make decisions and perform tasks on its behalf (Article 17 of the draft Law). This is a valuable provision given the wide range of functions proposed to be assigned to the HJPC. However, decisions on appointments of judges and prosecutors cannot be delegated to commissions. The election of judges and prosecutors is by a majority vote of all members, but for the election of judges the decision must be supported by at least seven judges, and likewise for prosecutors. This prevents either judges or prosecutors from imposing their will on the other profession."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §57

"The Venice Commission therefore welcomes the establishment [...] of two sub-councils: one for judges and one for prosecutors. It seems to be a balanced solution which, on the one hand, prevents excessive interference of one of the legal professions into the work of the other while, on the other hand, making it possible to maintain the current structure of the HJPC as a common organ of/for judges and prosecutors.

Each sub-council shall have 11 members – nine members elected from among judges or prosecutors and two members elected on behalf of the legislative and executive powers. The sub-councils nominate judges and prosecutors, assess their performance, and decide on the status of individual judges and prosecutors (temporary assignment, disciplinary proceedings, termination of the terms of office, etc.). Neither judges nor prosecutors should have any influence over each other's disciplinary issues or appointments. Although all members of the HJPC have a vote, and therefore the non-judge members are in a position to influence the vote, the requirement that a candidate for judicial office be supported by seven of the nine judge members makes it impossible

for a candidate to succeed without the judges' support and unlikely that a candidate with the necessary judicial support will be defeated.

[...] Even though the Venice Commission has repeatedly expressed concerns about systems with such mixed councils, it is of the opinion that – in the particular context of BiH – such a system is appropriate, provided that the two sub-councils in the HJPC are afforded a maximum amount of autonomy."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§61, 62 and 64

"Another Commission shall be established [within the Prosecutorial Council], as part of the Council's tasks under the draft law, to evaluate the performance of prosecutors. In addition to the fact that this is likely to lead to a considerable concentration of power for the Council, one may wonder whether this would not be better handled by a specialised inspectorate rather than the Council."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §64

"Article 71.4 of the draft Law provides for random assignment of cases in a manner preselected by an HJPC decision. It needs to be made clear that this has to be subject to the obligation to provide a commission which does not contain persons from the same court or prosecution office as the accused and which contains persons of appropriate rank. The mechanics of achieving this are not clear."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §111

"[...] It is envisaged that in matters such as conducting examinations to determine appointments, or in dealing with the disciplinary matters, the Council would operate through small commissions consisting normally of three members. Such a model is open to a number of criticisms.

Firstly, the conferring of such important powers on a small body which will exercise them directly creates a very powerful body which may be susceptible to corruption. There is an argument that the powers in relation to appointments, promotions and discipline should not all be exercised by the same small group of people.

Secondly, the Council will not merely make decisions of principle but will be involved in the operational day-to-day work. In that case, one may wonder whether the electoral method of choosing a council, while appropriate for a body intended to be representative and to exercise a general supervisory role, is the best way to select persons who will have a very technical role. For example, one of the functions of a Commission composed of members of the Council dealing with examinations will be to set and correct examination questions (see Article 57). This is hardly a function one would normally confer on an elected body whose function should rather be to oversee and guarantee the integrity of the process rather than to be involved in its technical aspects. It is also envisaged that the Council will itself conduct interviews for positions in the prosecution service (Article 58)."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §§6567

"Under the present Article 32(4), the decision of the Prosecutorial Council on a complaint is final and cannot be challenged in court. The amendment introduces an appeal to an administrative court against a decision of the Prosecutorial Council.

This is an improvement, which is in line with the practice in many European countries."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §37

"Article 98 provides for appeals against decisions of the Superior Court Council of Prosecutors to a court of law. It is not clear whether this appeal is by way of a full re-hearing on the merits or whether it is merely a procedural appeal on grounds of excess of jurisdiction, failure to observe proper procedures or the like."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §64

"[...] Many of the decisions of the Prosecutorial Council are indeed of sufficient importance that an appeal to a court of law should be provided as well as the possibility of procedural review. [■■■]"

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §68

"The new article 36b [...] provides that a candidate shall be entitled to have an insight into documentation of *other candidates,* the results of written tests, assessments of the *other* candidates and opinions on *other* candidates and to deliver a written statement thereon. [...] [T]his provision can open the door to nasty business and false allegations between candidates. Such a provision can bring much unnecessary and undeserved damage to the candidates. The question is also, if this provision is not conflicting with the right on privacy. In general one has to be very careful with the outcome of assessments, because the objective and impartial quality of that outcome can be controversial."

CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §40

"Article 81 rightly foresees non-participation of SCP members on matters where doubts about their objectivity may exist. It may be useful to be more explicit at least in two clear-cut cases: first, to specify that members of the SCP should not hear cases brought against themselves, and second, that they should not hear cases they themselves have initiated [...]."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §138

4.2.5. Status of the members of the supreme prosecutorial council. Early termination of office of the members of the prosecutorial council

"[...] This is a source of concern as it may mean that the electing body would have the possibility to confirm a Prosecutor member even when there are grounds for his/her dismissal. The decision of the Prosecutorial Council should directly result in dismissal without the intervention of a political organ."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §54

"A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the SPC, whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of 'lack of confidence'. Article 41 clearly defines the reasons that can lead to a dismissal of the SPC members. The disciplinary procedure must therefore only focus on the question whether the SPC member failed to perform his or her duties *'in compliance with the constitution and law'.* This question must not be confused with the question whether said member still enjoys the confidence of the public prosecutors and deputy public prosecutors who participated in his or her election. The disciplinary procedure has to guarantee the SPC member a fair trial. While a reference to a fair trial is made under Article 46a, details on related guarantees should be provided.

In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, for instance, an 'impeachment' of a member is allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. In fact, the draft Law lacks specific provisions on disciplinary issues in respect of SPC members and merely focuses on dismissal. An appeal to a court of law should also be provided.

[...] Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced."

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§52-54 and 56

"Article 28 deals with dismissal from the Council. Members are to be dismissed if they discharge their duties *'unconscientiously and unprofessionally* or are convicted of an offence making them *'unworthy of discharging the duties of a Prosecutorial Council member*' It is strongly recommended to define these dismissal grounds more closely. For example, it is not clear what sort of offence would make one 'unworthy' to be a member of the Council. Prosecutor members are also dismissed if a disciplinary sanction is imposed. However, in some cases disciplinary sanctions may be imposed for relatively minor matters, in which case dismissal will be a disproportionate measure. In addition, the law should also provide for unjustified failure to perform duties as a ground for dismissal."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §53

"In addition, Article 28 should ensure a fair hearing for the person to be dismissed and that the decision can be appealed to a court. Dismissal should be decided upon by the other members of the Council, with a qualified majority, without the member concerned."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §55

"[...] The Commission reiterates its recommendation that the provision on remission of the dismissal decision to the electing body – an external, and sometime political

body – be deleted and that the dismissal be decided upon by the other members of the Council, with a qualified majority, without the member concerned."

CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §26

"The Draft Law should include provisions that describe the status of the members of the Prosecutorial Council; this is essential to guarantee both the independence and the stability of this body.

"First, the Draft Law should specify that members of the Prosecutorial Council participate in the work of this body in their personal capacity, and may not receive instructions from individuals or bodies outside the Council in the exercise of their functions as members of the Prosecutorial Council.

[...] it should not be easy to remove a member of the Council from his/her position. While early removal should always be possible in cases of gross misconduct or incompatibility, such decisions should at all times be based on specific grounds enumerated in the Draft Law, and should be confirmed by the majority of the members of the Council itself.

There is only one provision which deals with the early termination of office of members of the Council: Article 8^1 par 3 appears to suggest that if a prosecutor elected to the Council is dismissed from service, his/her membership in the Prosecutorial Council shall also be terminated before the expiry of the usual four-year term. This may create a dangerous situation, as under the current law, the dismissal of an ordinary prosecutor is the prerogative of the Chief Prosecutor. It means that the Chief Prosecutor, using his disciplinary powers, would be able to remove from the Council those prosecutors who voted for the opening of the investigation against him/her. Again, since the prosecutorial members of the Council sit there in their personal capacity, it should be for the Council itself to decide whether or not one of its members should leave the Council.

At the same time, the grounds for early removal may be different for those members of the Council who sit there in their personal capacity and those members who sit in the Council *ex officio*. If a member of the Prosecutorial Council have been elected in his/her personal capacity, he/she should not automatically be removed from the Council if his/her title or job changes during the term of service."

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and oScE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §§60-64

"[...] [I]t seems [...] that a person can be removed from the HJPC for immoral behaviour. This seems to be imprecise and therefore unsatisfactory from the standpoint of legal standards.

Disqualification may be linked to a criminal or a disciplinary offense. Membership may also be suspended where the member's status as a judge or prosecutor is suspended, for instance due to an on-going criminal investigation or for other reasons under the law.

In addition, the decision on cessation has been transferred from the HJPC to the Parliamentary Assembly. This decision does not seem to require a qualified majority. When taken together with the very vague drafting of certain of the situations (if a member fails to perform duties in a proper, effective or impartial manner; when the member commits an act due to which he or she no longer merits to perform the duties

on the Council; etc.), this may lead to politicisation – or the impression of politicisation – of the activities of the HJPC, whose members depend on the Parliamentary Assembly not only for their election, but also when exercising their mandate.

The inability of the HJPC member to perform functions should indeed result in dismissal, even if this was caused by objective reasons. However, the period of time he or she is absent should be taken into account: a minimum period of time must be clearly defined after which the dismissal of the member may be sought."

CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §§51-53 and 55

"Furthermore, elected members of the SPC may be dismissed by the National Assembly (even if on proposal by the SPC in the case of public prosecutors or deputy public prosecutors, by the Bar Association for lawyers, by deans of faculties of law for professors). This role of the National Assembly could easily lead to the politicisation of the work of the SPC as its decisions are not strictly based on objective grounds. The danger of politicisation in this situation is clear when compared to a system of an independent Prosecution Service, but it is even more pronounced than in the case of a Prosecution Service that comes under the Executive (where the decisions on dismissal made by a minister – or other state official – and the political accountability of the minister are, in principle, separate from each other).

There is an additional factor that increases the danger of politicisation: the proposed vote of confidence in the dismissal procedure. A vote of confidence has its place in the political sphere and is a tool that should only apply in the political decision-making process. [...]

A vote of confidence should be seen as specific to political institutions and is not suited for institutions such as the SPC. The members of the SPC are elected for a fixed term and their mandates should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons (see comments under Chapter V below). The Venice Commission therefore strongly recommends that the amendment to Article 9a on the suspension of office due to a vote of confidence not be kept."

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§27, 28 and 38

"The exemption (dismissal) of members of the prosecutors' council without any criteria is problematic. As per Section 9.2 ASPGPOPEPC more than one half of the valid votes cast shall be required for exemption from membership. The council can dismiss one of its members by simple majority. The cases when a member of a prosecutor's council can be dismissed should be specified in the Act. Such a provision of course deserves having the status of cardinal act."

CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §53

"It is noted that the Prosecutorial Council is to fix the amount of its members' emoluments for their work on the Council. In the opinion of the Commission, it is not wise for a body of the State to set its own emoluments."

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §58

"[...] [I]n view of the wide powers of members of the Prosecutorial Council, no member should be entitled, while serving on the Council, to be promoted within the service. [...]"

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §52; See also CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro, §24

VI. REFERENCE DOCUMENTS

Guidelines and studies

CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e *CDL-AD(2016)007, Rule of Law Checklist*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e

Opinions on specific countries

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic

http://www.venice.coe.int/webforms/documents/?pdf=CDL(1995)073-e *CDL-INF(1996)006, Opinion on the Draft Constitution of Ukraine* http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1996)006-e *CDL-AD(2004)038, Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor, §26*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)038-e *CDL-AD(2005)014, Opinion on the Federal Law on the Prokuratura (Prosecutor's Office) of the Russian Federation*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)014-e *CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of"the former Yugoslav Republic of Macedonia"* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)011-e *CDL-AD(2007)047, Opinion on the Constitution of Montenegro* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)047-e *CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)005-e *CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)019-e *CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)048-e *CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria*

http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)041-e *CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)004-e *CDL-AD(2011)007, Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)007-e *CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)008-e *CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)006-e *CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)025-e *CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)008-e *CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)029-e

CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)041-e *CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)042-e *CDL-AD(2015)002, Final Opinion on the revised draft Law on special public Prosecutor's office of Montenegro*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)002-e *CDL-AD(2015)003, Final Opinion on the revised draft Law on the public Prosecution Office of Montenegro*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)003-e *CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)005-e *CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)026-e *CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)039-e *CDL-AD(2015)045, Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)045-e *CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania*

http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)009-e *CDL-AD(2016)025, Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution" in the Kyrgyz Republic* http://www.venice.coe.

int/webforms/documents/?pdf=CDL-AD(2016)025-e *CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)013-e *CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria* http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)018-e

Report on the independence of the judicial system: Part I: The independence of judges

On the basis of comments by:
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INTRODUCTION

1. By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the Venice Commission to give an opinion on "European standards as regards the independence of the judicial system". The Committee is "interested both in a presentation of the existing *acquis* and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe".

2. The Commission entrusted the preparation of this report to its Sub-Commission on the Judiciary, which held meetings on this subject in Venice on 16 October 2008, 11 December 2008, 12 March 2009, 10 December 2009 and 11 March 2010.

3. The Sub-Commission decided to prepare two reports on the independence of the Judiciary, one dealing with prosecution and the present report on judges, prepared on the basis of comments by Mr Neppi Modona (CDL-JD(2009)002), Ms Nussberger (CDL-JD(2008)006), Mr Zorkin (CDL-JD(2008)008) and Mr Torfason.

4. In December 2008, Mr Desch, representing the European Committee on Legal Co-operation (CDCJ) and Ms Laffranque, President of the Consultative Council of European Judges (CCJE) participated in the work of the Commission. Ms Laffranque also provided written comments (CDL-JD(2008)002).

5. The present report was discussed at meetings of the plenary sessions of the Commission on 17-18 October 2008, 12-13 December 2008, 12-13 June 2009, 9-10 October 2010 and 11-12 December 2009 and was adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

I. PRELIMINARY REMARKS

6. The independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people.

7. The independence of the judges and – as a consequence – the reputation of the judiciary in a given society depends on many factors. In addition to the institutional rules guaranteeing independence, the personal character and the professional quality of the individual judge deciding a case are of major importance. The legal culture as a whole is also important.

8. Institutional rules have to be designed in such a way as to guarantee the selection of highly qualified and personally reliable judges and to define settings in which judges can work without being unduly subjected to external influence.

9. The problem of establishing a comprehensive set of standards of judicial independence has been addressed in a considerable number of documents of differing detail, aimed at establishing reference points. These documents whether or not issued by international organisations, official bodies or by independent groups, offer a comprehensive view of what the elements of judicial independence should be: the role and significance of judicial independence in ensuring the rule of law and the kind of challenges it may meet from the executive, the legislature or others.

10. As experience shows in many countries, however, the best institutional rules cannot work without the good will of those responsible for their application and implementation. The implementation of existing standards is therefore at least as important as the identification of new standards needed. Nonetheless, the present report endeavours not only to present an overview of existing standards, but to identify areas where further standards might be required in order to change practices which can be an obstacle to judicial independence.

11. It should be noted that some principles are applicable only to the ordinary judiciary at the national level but not to constitutional courts or international judges, which are outside the scope of the present report.

II. EXISTING STANDARDS

12. At the European and international level there exist a large number of texts on the independence of the judiciary. It would not be useful to start from scratch with a new attempt to define the standards of judicial independence and therefore the Venice Commission will base itself in this report on the existing texts.

13. At European level, the right to an independent and impartial tribunal is first of all guaranteed by Article 6 of the European Convention on Human Rights *("1. In*

the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...'). The case-law of the Court sheds light on a number of important aspects of judicial independence but, by its very nature, does not approach the issue in a systematic way.

14. Apart from the European Convention on Human Rights, the most authoritative text on the independence of the judiciary at the European level is Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges. This text is currently under review and the Venice Commission hopes that the present report will be useful in the context of this review.

15. Since this text does not go into much detail, a number of attempts were made for a more advanced text on the independence of the Judiciary. Probably, the most comprehensive text is Opinion No. 1 of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges. Other Opinions of the CCJE are also relevant in this context, e.g. CCJE Opinions no. 6 on Fair Trial within a Reasonable Time, no. 10 on the "Council for the Judiciary in the Service of Society" and no. 11 on the Quality of Judicial Decisions.

16. Another Council of Europe text is the European Charter on the Statute of Judges, which was approved at a multilateral meeting organised by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998.

17. The Venice Commission's Report on Judicial Appointments (CDL-AD(2007)028) covers issues of particular importance for judicial independence. Other aspects are dealt with in various Venice Commission opinions.

18. Based on Article 10 of the Universal Declaration of Human Rights *("Everyone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'),* there are also a number of UN standards on the independence of the judiciary., in particular the Basic Principles on the Independence of the Judiciary endorsed by the United Nations General Assembly in 1985 and the Bangalore Principles of Judicial Conduct of 2002. These standards often coincide with the Council of Europe standards but usually do not go beyond them.

19. The present report seeks to present the contents of the European standards in a coherent way. It largely follows the structure of Opinion No. 1 of the CCJE.

III. SPECIFIC ASPECTS OF JUDICIAL INDEPENDENCE

1. The level at which judicial independence is guaranteed

20. Recommendation (94)12 provides (Principle I.2.a): "The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law."

21. Opinion No. 1 of the CCJE recommends (at 16[1]), following the recommendation of the European Charter, to go further; "the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level."

[1] *Unless otherwise indicated references to the CCJE relate to its Opinion No. 1.*

22. The Venice Commission strongly supports this approach. The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts[2].

[2] *Examples for constitutional provisions are: Albania – Article 145 of the Constitution 1. Judges are independent and subject only to the Constitution and the laws. ... Andorra – Article 85 of the Constitution 1. In the name of the Andorran people, justice is solely administered by independent judges, with security of tenure, and while in the performance of their judicial functions, bound only to the Constitution and the laws. ... Austria – Article 87 of the Constitution (1) Judges are independent in the exercise of their judicial office. ... Czech Republic – Article 81 of the Constitution The judicial power shall be exercised in the name of the Republic by independent courts. Georgia – Article 84 of the Constitution 1. A judge shall be independent in his/her activity and shall be subject only to the Constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law. Germany – Article 97 of the Basic Law – Independence of judges (1) Judges shall be independent and subject only to the law. ... Greece – Article 87 of the Constitution 1. Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence. ... Iceland – Article 70 of the Constitution Everyone is entitled to obtain a determination of his rights and obligations or of any charge against him for criminal conduct by a fair trial within a reasonable time before an independent and impartial court of law. A court hearing shall be held in public unless the judge otherwise decides pursuant to law in order to protect morals, public order, national security or the interests of the parties. Italy – Article 101.2 of the Constitution "Judges are subject only to the law" and Article 104.1 of the Constitution "The judiciary is an order that is autonomous and independent of all other powers." Latvia – Article 83 of the Constitution Judges shall be independent and subject only to the law. Lithuania – Article 109 of the Constitution In the Republic of Lithuania, the courts shall have the exclusive right to administer justice. While administering justice, judges and courts shall be independent. While investigating cases, judges shall obey only the law. The court shall adopt decisions on behalf of the Republic of Lithuania. Portugal – Article 203 of the Constitution – Independence The courts are independent and subject only to the law. Article 216 of the Constitution – Guarantees and disqualifications*

1. Judges have security of tenure and may be transferred, suspended, retired or removed from office only as provided by law. 2. Judges may not be held liable for their decisions, except in the circumstances provided for by law. 3. Judges in office may not perform any other functions, whether public or private, other than in unpaid teaching or legal research, as provided by law. 4. Judges in office may not be assigned to perform other functions unrelated to the work of the courts unless authorised by the appropriate superior council. 5. The law may establish other circumstances that are incompatible with performance of the functions of a judge. Romania – Article 123 of the Constitution – Administration of Justice (1)Justice shall be rendered in the name of the law. (2)Judges shall be independent and subject only to the law. Russian Federation – Article 10 of the Constitution The state power in the Russian Federation shall be exercised through separation of the legislative, executive and judicial powers. The bodies of the legislative, executive and judicial powers shall be independent. Article 120 of the Constitution 1. Judges shall be independent and be responsible only to the Constitution of the Russian Federation and the federal law. ... Slovenia – Article 125 of the Constitution – The Independence of the Judges The Judges shall independently exercise their duties and functions in accordance with this Constitution and with the law. Turkey – Article 138 of the Constitution Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law, and their personal conviction conforming with the law. No organ, authority, office, or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, make recommendations or suggestions. No question shall be asked, debated held, or statement made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial. As an example on the level of law, in the United Kingdom, s. 3 of the Constitutional Reform Act 2005 provides that all government ministers with responsibility for matters relating to the judiciary or the administration of justice «must uphold the continued independence of the judiciary».

2. Basis of appointment or promotion

23. *Recommendation (94)12 provides that* "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency."

24. *Opinion No. 1 of the CCJE recommends in addition (at 25)* "that the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency'. *Merit is not solely a matter of legal knowledge analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgements, etc.*

25. It is essential that a judge have a sense of justice and a sense of fairness. However, in practice, it can be difficult to assess these criteria. Transparent procedures and a coherent practice are required when they are applied.

26. Finally, merit being the primary criterion, diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society[3].

27. The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is indisputable.

3. The appointing and consultative bodies

28. Recommendation (94)12 reflects a preference for a judicial council but accepts other systems:

"The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority itself decides on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above".

29. The CCJE also argues in favour of the involvement of an independent body (at 45): *"The CCJE considered that the European Charter – in so far as it advocated the intervention (in a sense wide enough to include an opinion, recommendation or proposal as well as an actual decision) of an independent authority with substantial judicial representation chosen democratically by other judges – pointed in a general direction which the CCJE wished to commend. This is particularly important for countries which do not have other long- entrenched and democratically proved systems."*

[3] *See also a similar conclusion relating to judges of constitutional courts, Report on the Composition of Constitutional Courts, Science and Technique of Democracy no. 20, p. 30.*

30. Opinion No. 10 of the CCJE on "the Council of the Judiciary in the service of society" further develops the position of the CCJE. It provides (at 16): "the Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided." *and (at 19)* "In the CCjE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice".

31. The position of the Venice Commission (CDL-AD(2007)028) is more nuanced:

"44. In Europe, a variety of different systems for judicial appointments exist and that there is not a single model that would apply to all countries.

45. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time.

46. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse, and therefore, at least in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges.

47. Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.

48. An appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy.

49. Such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.

50. A substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications."

32. To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that **an independent judicial council have decisive influence on decisions on** the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. **While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent** judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.

4. Tenure – period of appointment

33. *Principle I.3 of Recommendation (94)12 provides:* "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of the term of office."

34. *Opinion No. 1 of the CCJE adds (at 48):* "European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence." *and (at 53)* "The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance."

35. This corresponds to the position of the Venice Commission which has, apart from special cases such as constitutional court judges, always favoured tenure until retirement.

36. A special problem in this context are probationary periods for judges. This issue is explicitly addressed in the European Charter at 3.3:

"3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period."

37. The Venice Commission has dealt extensively with this issue in its Report on Judicial Appointments (CDL-AD(2007)028):

"40. The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. [...]

41. This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office".

42. The main idea is to exclude the factors that could challenge the impartiality of judges: "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value."

43. In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they can not yet take judicial decisions which are reserved to permanent judges."

38. To sum up, **the Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence.**

5. Tenure – irremovability and discipline – transfers

39. The principle of irremovability is implicitly guaranteed by Principle I.3 of the Committee of Minister's Recommendation (94)12 (see above).

40. The CCJE concludes (at 60):

"The CCJE considered

that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (see paragraph 16 above);

that the intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline; and

that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area."

41. The issue of transfers is more specifically addressed in the European Charter at 3.4:

"3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof."

42. This corresponds to the approach of the Venice Commission when examining national constitutions.

43. The Venice Commission has consistently supported the principle of irremovability in constitutions**.** Transfers against the will of the judge may be permissible only in exceptional cases**. As regards disciplinary proceedings, the Commission's Report on Judicial**

Appointments[4] favours the power of judicial councils or disciplinary courts to carry out disciplinary proceedings**. In addition, the Commission has consistently argued that** there should be the possibility of an appeal to a court against decisions of disciplinary bodies.

6. Remuneration of judges

44. Recommendation (94) 12 provides that judges' remuneration should be guaranteed by law (Principle I.2b.ii) and "commensurate with the dignity of their profession and burden of responsibilities" (Principle III.1.b). The Charter, supported by the CCJE, extends this principle to guaranteed sickness pay and retirement pension.

[4] *CDL-AD(2007)028, para. 49.*

45. The CCJE adds in Opinion No. 1:

"62. While some systems (e.g. in the Nordic countries) cater for the situation by traditional mechanisms without formal legal provisions, the CCJE considered that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction and to ensure at least de facto provision for salary increases in line with the cost of living."

46. The Venice Commission shares the opinion that the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference. The example of the Polish Constitution, which guarantees to judges remuneration consistent with the dignity of their office and the scope of their duties is a commendable approach. The level of remuneration should be determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Bonuses which include an element of discretion should be excluded.

47. In a number of mainly post-socialist countries judges receive also non-financial benefits such as apartments, cars, etc. Such non-monetary remuneration of judges has two main origins: the first lies in the previous socialist system of distribution of goods, which depended on central planning. Some groups, including judges, were privileged in obtaining specific goods, including dwellings. This was a considerable advantage of being a judge.

48. The second origin of this practice lies in the post-socialist period of transition to a market economy. The prices for real property increased exponentially and this made it impossible for State officials, including judges, to purchase adequate housing. Again, one of the advantages of being a judge was the attribution of apartments. Young judges in particular may not easily be able to purchase real estate and, consequently, the system of allocation of housing persists.

49. While the allocation of property is a source of concern, it is not easy to resolve the problem of providing the judiciary with an appropriate living standard, including housing. An argument advanced in favour of such non-financial allocations is that they can be attributed according to individual need whereas salaries are set at the same level for all judges in a given category without the possibility of supporting those in special need. However, this assessment of social need and the differentiation between judges could too easily permit abuse and the application of subjective criteria.

50. Even if such benefits are defined by law, there will always be scope for discretion when distributing them. They are therefore a potential threat to judicial independence. While it may be difficult immediately abolish such non-financial benefits in some countries since they correspond to a perceived need to achieve social justice, the Venice Commission recommends the phasing out of such benefits and replacing them by an adequate level of financial remuneration.

51. **To sum up,** the Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the scope of their duties. Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out.

7. Budget of the Judiciary

52. In order to maintain the independence of the court system in the long and short run, it will be necessary to provide the courts with resources appropriate to enable the courts and judges to live up to the standards laid down in Article 6 of the European Convention on Human Rights and in national constitutions and perform their duties with the integrity and efficiency which are essential to the fostering of public confidence in justice and the rule of law. The adequacy of the financing accordingly should be considered in the broad context of all resources of which the judicial system should be possessed in order to meet these requirements and merit recognition as a separate state power.

53. It is the duty of the state to provide adequate financial resources for the judicial system. Even in times of crisis, the proper functioning and the independence of the Judiciary must not be endangered. Courts should not be financed on the basis of discretionary decisions of official bodies but in a stable way on the basis of objective and transparent criteria.

54. International texts do not provide for a budgetary autonomy of the judiciary but there is a strong case in favour of taking views of the judiciary into account when preparing the budget. Opinion No. 2 of the CCJE on the funding and management of courts provides:

"5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.

10. Although the CCJE cannot ignore the economic disparities between countries, the development of appropriate funding for courts requires greater involvement by the courts themselves in the process of drawing up the budget. The CCJE agreed that it was therefore important that the arrangements for parliamentary adoption of the judicial budget include a procedure that takes into account judicial views.

11. One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists – a co-ordinating role in preparing requests for court funding, and to make this body Parliament's direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees."

55. Decisions on the allocation of funds to courts must be taken with the strictest respect for the principle of judicial independence and the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council**.**

8. Freedom from undue external influence

56. Two aspects of judicial independence complement each other. External independence shields the judge from influence by other state powers and is an essential element of the rule of law. Internal independence (see below, chapter 10) ensures that

a judges takes decisions only on the basis of the Constitution and laws and not on the basis of instructions given by higher ranking judges.

57. Recommendation (94)12 provides (Principle I.2.d):

"In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary."

58. The CCJE comments in its Opinion No. 1 (at 63):

"..The difficulty lies rather in deciding what constitutes undue influence, and in striking an appropriate balance between for example the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press. Judges must accept that they are public figures and must not be too susceptible or of too fragile a constitution. The CCJE agreed that no alteration of the existing principle seems required, but that judges in different States could benefit from discussing together and exchanging information about particular situations."

59. The issue of criminal and civil liability and immunity of judges should be addressed in this context. In its Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, the CCJE concludes:

"75. As regards criminal liability, the CCJE considers that:

i) judges should be criminally liable in ordinary law for offences committed outside their judicial office;

ii) criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions.

76. As regards civil liability, the CCJE considers that, bearing in mind the principle of independence:

i) the remedy for judicial errors (whether in respect of jurisdiction, substance or procedure) should lie in an appropriate system of appeals (whether with or without permission of the court);

ii) any remedy for other failings in the administration of justice (including for example excessive delay) lies only against the state;

iii) it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of wilful default."

60. The Venice Commission has argued in favour of a limited functional immunity of judges:

"Magistrates (...)should not benefit from a general immunity as set out in the Bulgarian Constitution. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against

prosecution for criminal acts committed by them for which they should be answerable before the courts." *(CDL-AD(2003)12, para. 15.a).*

61. It is indisputable that **judges** have to be protected against undue external influence. To this end they **should enjoy functional – but only functional – immunity** (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes).

62. Moreover, **judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.**

63. Impartiality is also a requirement of Article 6 ECHR and has a similar but distinct connotation from independence. Judges have to recuse themselves when their participation in a case raises a reasonable perception of bias or conflict of interest, irrespective of whether the judge is in practice biased.

64. In order to shield the judicial process from undue pressure, one should consider the application of the principle of *"sub judice",* which should be carefully defined, so that an appropriate balance is struck between the need to protect, the judicial process on the one hand and freedom of the press and open discussion of matters of public interest on the other.

9. Final character of judicial decisions

65. Recommendation (94) 12, Principle I(2)(a)(i) provides that *"decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law".* It should be understood that this principle does not preclude the re-opening of procedures in exceptional cases on the basis of new facts or on other grounds as provided for by law.

66. While the CCJE concludes in its Opinion No. 1 (at 65), on the basis of the replies to its questionnaire, that this principle seems to be generally observed, the experience of the Venice Commission and the case law of the ECHR indicate that the supervisory powers of the Prokuratura in post-Soviet states often extend to being able to protest judicial decisions no longer subject to an appeal.

67. The Venice Commission underlines the principle that **judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal**.

10. Independence within the judiciary

68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that "judges are subject only to the law". This principle protects judges first of all against undue *external* influence. It is, however, also applicable *within* the judiciary. A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle.

69. The basic considerations are clearly set forth by the CCJE:

"64. The fundamental point is that a judge is in the performance of his functions no-one's employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.

66. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law" (Recommendation No. R (94) 12, Principle I (2)(d). This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case)."

70. The practice of guidelines adopted by the Supreme Court or another highest court and binding on lower courts which exists in certain post-Soviet countries is problematic in this respect.

71. The Venice Commission has always upheld the principle of the independence of each individual judge:

"Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgments of lower courts, it should not supervise them." *(CDL-INF(1997)6 at 6).*

"Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art. 50.1) the possibility to address to the lower courts "recommendations/explanations" on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium." *(CDL-INF(2000)5 under the heading "Establishment of a strictly hierarchical system of courts")*

"Judicial independence is not only independence of the judiciary as a whole vis-a-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-a-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior)

courts. There is in fact more and more discussion on the "internal" independence of the judiciary. The best protection for judicial independence, both "internal" and "external", can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence." *(CDL(2007)003 at 61)*

72. To sum up, **the Venice Commission underlines that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity.**

11. The allocation of cases and the right to a lawful judge

73. As already noted, the issue of internal independence arises not only between judges of the lower and of the higher courts but also between the president or presidium of a court and the other judges of the same court as well as among its judges.

74. In many countries court presidents exercise a strong influence by allocating cases to individual judges. As regards the distribution of cases, Recommendation (94)12 contains principles (Principle I.2.e and f), which may be seen as essential to the notion of judicial independence:

"The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order of some similar system."

"A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interests. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges."

75. In similar vein, the Venice Commission has stated that "the procedure of distribution of cases between judges should follow objective criteria" (CDL-AD(2002)026 at 70.7).

76. The European Convention on Human Rights provides that "everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law" (Article 6 ECHR). According to the Court's case-law, the object of the term "established by law" in Article 6 is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament"[5]. Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation[6].

77. The main point to be noted, however, is that according to the express words of Article 6, the medium through which access to justice under fair hearing should

[5] *See Zand v. Austria, application no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.*

[6] *See Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII.*

be ensured must not only be a tribunal established by law, but also one which is both "independent" and "impartial" in general and specific terms. And in its evaluation of these requirements for a fair hearing, the Strasbourg Court has applied the maxim that "justice must not only be done, but also be seen to be done." All of this implies that the judges or judicial panels entrusted with specific cases should not be selected *ad hoc* and/or *ad personam,* but according to objective and transparent criteria.

78. Many European constitutions contain a subjective right to a lawful judge (in doctrine often referred to as "natural judge pre-established by law"). Most frequently, the guarantee to this effect is worded in a negative way, such as in the Constitution of Belgium: *"No one can be separated, unwillingly, from the judge that the law has assigned to him." (Article 13) or Italy "No one may be removed from the natural judge predetermined by law"*[7] *Other constitutions state the "right to the lawful judge" in a positive way such as the Constitution of Slovenia: "Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual.*[8]*"*

79. The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. In terms of principle, it is clear that both aspects of the "right to the lawful judge" should be promoted. It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles**,** is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed**.** In national legislation, it is sometimes provided that the court presidents should have the power to assign cases among the individual judges. However, this power involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases.

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[7] *Article 25.1 of the Constitution. See also § 24 of the Constitution of Estonia: "No one shall be transferred, against his or her free will, from the jurisdiction of the court specified by law to the jurisdiction of another court."; Article 8 of the Constitution of Greece: "No person shall be deprived of the judge assigned to him by law against his will."; Article 33 of the Constitution of Liechtenstein: "Nobody may be deprived of his proper judge; special tribunals may not be instituted."; Article 13 of the Constitution of Luxemburg: "No one may be deprived, against his will, of the Judge assigned to him by the law."; Article 17 of the Constitution of the Netherlands: "No one my be prevented against his will form being heard by the courts to which he is entitled to apply under the law.", Article 83 of the Constitution of Austria: "No one may be deprived of his lawful judge."; Article 32 para. 9 of the Constitution of Portugal: "No case shall be withdrawn from a court that already had jurisdiction under an earlier law.", Article 48 of the Constitution of Slovakia: "No one must be removed from the jurisdiction of his law-assigned judge. The jurisdiction of the court is established by law.", Article 101 of the German Grundgesetz: "No one may be removed from the jurisdiction of his lawful judge."*

[8] *See also Article 30 of the Constitution of Switzerland: ,, Every person whose case is to be judged in judicial proceedings has the right to a court established by law, with jurisdiction, independence, and impartiality."; Article 24 of the Constitution of Spain "Likewise, all have the right to the ordinary judge predetermined by law …".*

It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be a very effective way of influencing the outcome of the process.

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

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

IV. Conclusions

82. The following standards should be respected by states in order to ensure internal and external judicial independence:

1. The basic principles relevant to the independence of the judiciary should be set out in the Constitution or equivalent texts. These principles include the judiciary's independence from other state powers, that judges are subject only to the law, that they are distinguished only by their different functions, as well as the principles of the natural or lawful judge pre-established by law and that of his or her irremovability.

2. All decisions concerning appointment and the professional career of judges should be based on merit applying objective criteria within the framework of the law.

3. Rules of incompatibility and for the challenging of judges are an essential element of judicial independence.

4. It is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. While respecting the variety of legal systems existing, the Venice Commission recommends that states not yet having done so consider the establishment of an independent judicial council. In all cases the council should have a pluralistic composition, with a substantial part if not the majority of the members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.

5. Ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence.

6. Judicial councils, or disciplinary courts, should have a decisive influence in disciplinary proceedings. The possibility of an appeal to a court against decisions of disciplinary bodies should be provided for.

7. A level of remuneration should be guaranteed to judges which corresponds to the dignity of their office and the scope of their duties.

8. Bonuses and non-financial benefits for judges, the distribution of which involves a discretionary element, should be phased out.

9. As regards the budget of the judiciary, decisions on the allocation of funds to courts should be taken with the strictest respect for the principle of judicial independence. The judiciary should have the opportunity to express its views about the proposed budget to Parliament, possibly through the judicial council.

10. Judges should enjoy functional – but only functional – immunity.

11. Judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.

12. States may provide for the incompatibility of the judicial office with other functions. Judges shall not exercise executive functions. Political activity that could interfere with impartiality of judicial powers shall not be authorised.

13. Judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal.

14. In order to shield the judicial process from undue pressure, one should consider the application of the principle of *"sub judice",* which should be carefully defined, so that an appropriate balance is struck between the need to protect the judicial process on the one hand and freedom of the press and open discussion of matters of public interest on the other.

15. The principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision making activity.

16. As an expression of the principle of the natural or lawful judge pre-established by law, the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated.

Legal basis for cooperation

Decree of the President of the Republic of Kazakhstan of 13 March, 2012 № 283 «On the membership of the Republic of Kazakhstan in the European Commission for Democracy through Law»

DECREE:

1. The Republic of Kazakhstan shall accede to the attached Statute of the European Commission for Democracy through Law (hereinafter – the Venice Commission).

2. Appoint:

The Chairman of the Constitutional Council of the Republic of Kazakhstan Igor Rogov member of the Venice Commission from the Republic of Kazakhstan;

Deputy Head of the Administration of the President of the Republic of Kazakhstan Talgat Donakov substitute member of the Venice Commission from the Republic of Kazakhstan.

3. The Ministry of foreign affairs of the Republic of Kazakhstan shall take the necessary measures under this Decree.

4. This Decree shall enter into force from the date of signature.

President
of the Republic of Kazakhstan **N. Nazarbayev**

Decree of the President of the Republic of Kazakhstan of 28 March, 2016 № 221 «On the membership of the Republic of Kazakhstan in the European Commission for Democracy through Law»

DECREE:

1. Appoint:

The Chairman of the Constitutional Council of the Republic of Kazakhstan Igor Rogov member of the Venice Commission (hereinafter – the Venice Commission) from the Republic of Kazakhstan;

member of the Constitutional Council of the Republic of Kazakhstan Unzila Shapak substitute member of the Venice Commission from the Republic of Kazakhstan.

2. To make the following amendment to the Decree of the President of the Republic of Kazakhstan dated 13 March, 2012 № 283 «On the membership of the Republic of Kazakhstan in the European Commission for Democracy through Law» (SAPP of the Republic of Kazakhstan, 2012, № 36, Art. 475):

paragraph 2 should be excluded.

3. The Ministry of foreign affairs of the Republic of Kazakhstan shall take the necessary measures under this Decree.

4. This Decree shall enter into force from the date of signature.

President
of the Republic of Kazakhstan **N. Nazarbayev**

Statute of the European Commission for Democracy through Law

Resolution Res(2002)3 adopting the revised Statute of the European Commission for Democracy through Law (Adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies)

The Representatives on the Committee of Ministers of the state's members of the Partial Agreement establishing the European Commission for Democracy through Law1, Recalling Resolution (90) 6 on a Partial Agreement establishing the European Commission for Democracy through Law;

Having regard to the decision taken at the 484bis meeting of the Ministers Deputies in December 1992 to maintain for the future the structure of the Commission as a Partial Agreement of the Council of Europe;

Having regard to Statutory Resolution (93) 28 on Partial and Enlarged Agreements;

Welcoming the interest expressed by many non member states of the Council of Europe in the work of the Commission and wishing to give to these states the possibility to take part in the work of the Commission on an equal footing;

Convinced that the independent character of the Commission and its flexible working methods are the key to its success and have to be safeguarded;

Desirous to further develop the Statute of the Commission in the light of the experience acquired, Decide that the European Commission for Democracy through Law shall henceforth be an Enlarged Agreement governed by the provisions of the appended revised Statute which shall enter into force upon adoption of this Resolution.

Revised Statute of the European Commission for Democracy through Law

Article 1

1. The European Commission for Democracy through Law shall be an independent consultative body which co-operates with the member states of the Council of Europe, as well as with interested non-member states and interested international organisations and bodies. Its own specific field of action shall be the guarantees offered by law in the service of democracy. It shall fulfil the following objectives:

- strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer;
- promoting the rule of law and democracy ;
- examining the problems raised by the working of democratic institutions and their reinforcement and development.

2. The Commission shall give priority to work concerning:

a. the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law;

b. fundamental rights and freedoms, notably those that involve the participation of citizens in public life;

c. the contribution of local and regional self-government to the enhancement of democracy.

3. With a view to spreading the fundamental values of the rule of law, human rights and democracy, the Commission encourages the setting up of similar bodies in other

regions of the world and may establish links with them and run joint programmes within its field of activity.

Article 2

1. The Commission shall be composed of independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science. The members of the Commission shall serve in their individual capacity and shall not receive or accept any instructions.

2. There shall be one member and one substitute in respect of each member state of the Enlarged Agreement. The member and substitute shall be appointed by the member state concerned and shall have the qualifications required by the first paragraph of this article as well as the capacity and availability to serve on the Commission.

3. Members shall hold office for a four-year term and may be reappointed. During their term of office members may only be replaced if they have tendered their resignation or if the Commission notes that the member concerned is no longer able or qualified to exercise his or her functions.

4. Representatives of the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe and the Giunta of the Regione Veneto may attend the sessions of the Commission.

5. The Committee of Ministers may by the majority stipulated in Article 20.d of the Statute of the Council of Europe invite any non-member state of the Council of Europe to join the Enlarged Agreement. Members appointed by non-member states of the Council of Europe shall not be entitled to vote on questions raised by the statutory bodies of the Council of Europe.

6. The European Community shall be entitled to participate in the work of the Commission. It may become a member of the Commission according to modalities agreed with the Committee of Ministers.

7. The Committee of Ministers may, by the majority stipulated in Article 20.d of the Statute of the Council of Europe, authorise the Commission to invite international organisations or bodies to participate in its work.

8. Any state authorised in the past to participate in the work of the Commission in the capacity of associate member or observer may continue to do so unless it joins the Commission as a member. Observers are invited to the sessions of the Commission depending on the items on the agenda. The rules governing members shall apply mutatis mutandis to associate members and observers.

Article 3

1. Without prejudice to the competence of the organs of the Council of Europe, the Commission may carry out research on its own initiative and, where appropriate, may prepare studies and draft guidelines, laws and international agreements. Any proposal of the Commission can be discussed and adopted by the statutory organs of the Council of Europe.

2. The Commission may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organisation or body participating in the work of the Commission. Where an opinion is

requested by a state on a matter regarding another state, the Commission shall inform the state concerned and, unless the two states are in agreement, submit the issue to the Committee of Ministers.

3. Any state which is not a member of the Enlarged Agreement may benefit from the activities of the Commission by making a request to the Committee of Ministers.

4. The Commission co-operates with constitutional courts and courts of equivalent jurisdiction bilaterally and through associations representing these courts. In order to promote this co-operation, the Commission may set up a Joint Council on Constitutional Justice composed of members of the Commission and representatives from co-operating courts and associations.

5. Furthermore, the Commission may establish links with documentation, study and research institutes and centres.

Article 4

1. The Commission shall elect from among its members a Bureau, composed of the President, three Vice-Presidents and four other members. The term of office of the President, the Vice-Presidents and the other members of the Bureau shall be two years. The President, the Vice-Presidents and the members of the Bureau may be re-elected.

2. The President shall preside over the work of the Commission and shall represent it. One of the Vice-Presidents shall replace the President whenever he or she is unable to take the Chair.

3. The Commission shall meet in plenary session as a rule four times a year. Its SubCommissions may meet whenever necessary.

4. The Commission shall establish its procedures and working methods in the Rules of Procedure and shall decide on the publicity to give to its activities. The working languages of the Commission shall be English and French.

Article 5

1. Whenever it considers it necessary, the Commission may be assisted by consultants.

2. The Commission may also hold hearings or invite to participate in its work, on a caseby-case basis, any qualified person or non-governmental organisation active in the fields of competence of the Commission and capable of helping the Commission in the fulfilment of its objectives.

Article 6

1. Expenditure relating to the implementation of the programme of activities and common secretariat expenditure shall be covered by an Enlarged Agreement budget funded by the member states of the Enlarged Agreement and governed by the financial rules as foreseen for Enlarged Agreement budgets of the Council of Europe, subject to the following modifications:

a) the rate of contribution of a non member state of the Council of Europe to the Enlarged Agreement Budget shall be one third of its contribution as calculated in accordance with the rules for Council of Europe member states; however, it shall not be higher than onethird of the contribution by the major contributors;

b) the Commission shall propose, after having consulted the member states of the Enlarged Agreement not members of the Council of Europe, its draft annual budget to the Committee of Ministers for adoption.

2. In addition, the Commission may accept voluntary contributions, which shall be paid into a special account opened under the terms of Article 4.2 of the Financial Regulations of the Council of Europe. Other voluntary contributions can be earmarked for specific research.

3. The Regione Veneto shall put a seat at the disposal of the Commission free of charge. Expenditure relating to the local secretariat and the operation of the seat of the Commission shall be borne by the Regione Veneto and the Italian Government, under terms to be agreed between these authorities.

4. Travel and subsistence expenses of each member of the Commission shall be borne by the State concerned. If the Commission entrusts members with specific missions, the expenses shall be borne by the budget of the Commission.

Article 7

Once a year, the Commission shall present to the Committee of Ministers a report on its activities containing also an outline of its future activities.

Article 8

1. The Commission shall be assisted by the Secretariat General of the Council of Europe, which shall also provide a liaison with the staff seconded by the Italian authorities at the seat of the Commission.

2. The staff seconded by the Italian authorities at the seat of the Commission shall not belong to the staff of the Council of Europe.

3. The seat of the Commission shall be based in Venice.

Article 9

1. The Committee of Ministers may adopt amendments to this Statute by the majority provided for under Article 20.d of the Statute of the Council of Europe, after consulting the Commission.

2. The Commission may propose amendments to this Statute to the Committee of Ministers, which shall decide by the above-mentioned majority.

Rules of procedure

adopted by the Venice Commission at its 50th Plenary Session
(Venice, 8-9 March 2002)
as amended
at its 53rd Plenary Session (Venice, 13-14 December 2002)
at its 61st Plenary Session (Venice, 2-3 December 2004)
at its 96th Plenary Session (Venice, 11-12 October 2013)
at its 101st Plenary Session (Venice, 12-13 December 2014)
at its 105th Plenary Session (Venice, 18-19 December 2015)
and at its 116th Plenary Session (Venice, 19-20 October 2018)

The European Commission for Democracy through Law, having regard to the Statute of the Commission, in particular to Article 4.4, adopts the following Rules of Procedure:

Article 1[1]

Appointment, Term

1. Any State which appoints a member or an associate member shall inform the Secretary of his or her name, address and working languages together with the name, address and working languages of the substitute. Not later than 8 weeks before the expiry of the term of office, the Secretary shall invite the State concerned to proceed with the appointments for the new term.

2. The term of office of a newly appointed member or associate member shall start on the day following the expiry of the term of the previous member or, if the State appoints a member for the first time, on the day of the accession of the State to the Enlarged Agreement.

3. The term of office of a member or associate member shall expire:

a. at the end of the regular term of four years, it being understood that he or she may continue to exercise his or her functions until the appointment of the new member;

b. on the day a letter of resignation signed by the member is received by the Secretariat;

c. the day the Commission notes, on the proposal of the Bureau, by a majority of two-thirds of its members that the member concerned is no longer able or qualified to exercise his or her functions.

Article 2

Associate members and observers

1. An associate member or an observer shall have no right to vote.

2. With the President's permission, an associate member or an observer may make oral or written statements on the subjects under discussion.

3. States authorized to appoint an observer shall inform the Secretariat of his or her name, address and working languages.

[1] *Article 1 was amended at the 96thPlenary Session of the Commission.*

Article 3

Substitutes

1. These Rules of Procedure shall apply mutatis mutandis to substitutes.

2. The term of office of a substitute shall coincide with the term of office of the member. If the term of office of the member ends for the reasons set forth in Article 1.2.b) or c), the substitute shall exercise the functions of the member until the appointment of the new member.

Article 3a[2]

Independence and impartiality of members

1. Members shall act in a manner that is, and is seen to be, independent, impartial and objective with respect to any issue examined by the Commission.

2. Members shall provide a curriculum vitae setting forth in particular all offices and functions exercised by them which may be deemed relevant for the work of the Commission. This curriculum vitae shall be made public.

3. Members shall notify the President through the Secretary of any potential conflict of interest, i.e. any circumstance which might appear to influence their impartial and objective consideration of any issue examined by the Commission, in particular but not limited to any task, remunerated or not, entrusted to them by a government.

4. When entering into a relevant agenda item the President shall, if he or she considers that there is a potential conflict of interest, announce to the Commission that the member shall not take part in the vote. The member concerned may take part in the debate but in doing so shall declare his or her interest in the matter being discussed.

5. Members shall be prudent when commenting in public on decisions of and texts adopted by the Commission.

Article 4

Sessions

1. As a general rule, the Commission shall hold four sessions per year. The dates of the sessions shall be fixed by the Commission at the last session of the previous year.

2. The dates of the meetings of the Sub-Commissions and working groups shall be fixed by the Secretary, upon instruction from the respective Chair.

Article 5

Convocation

1. Upon instruction of the President the Secretary shall convene the session by letter addressed to the members, associate members and observers.

2. A copy of the letter of convocation addressed to the members and associate members shall be sent to the substitutes. It will be for each member or associate member to decide whether he or she will attend the meeting in person or be replaced by his or her substitute.

3. Substitutes who prepared an opinion which will be discussed at a session shall also be invited to the session.

[2] *Article 3a was added at the 61st Plenary Session of the Commission.*

Article 6[3]

Bureau

1. The President, the Vice-Presidents and the other members of the Bureau shall be elected for a term of two years, by a majority of the votes cast. They shall be eligible for reelection.

1 bis[4] The elections will be prepared by a «Committee of wise persons" elected by the Commission, on the proposal of the Enlarged Bureau, at the Plenary Session preceding the one at which elections must take place. Every member may put forward his or her candidature for any vacant position to the wise persons. The lists of candidates for each vacant position shall be communicated by the Committee of Wise Persons to the Commission at the beginning of the Plenary Session at which the elections must take place.

2. The President shall direct the work of the Commission. Outside Plenary sessions, he or she shall take decisions on behalf of the Commission, where appropriate in consultation with the Bureau.

3. Whenever the President is absent or stands down, he or she shall be replaced by a Vice-President.

4. The Bureau may meet as an Enlarged Bureau together with the Presidents of the Sub-Commissions.

Article 7

Secretariat

The Commission shall have a Secretariat serving under the authority of the Commission. The Commission shall be invited to give an opinion on the appointment of the Secretary and Deputy Secretary.

Article 8[5]

Agenda

The agenda shall be adopted at the beginning of each session on the basis of a draft prepared by the Secretariat taking into account possible proposals by members and, where appropriate, in accordance with the instructions of the Bureau. The agenda shall be annexed to the letters of convocation.

2. If appropriate, the rapporteurs on an opinion being prepared will be given the opportunity to make effective representation to the Bureau, prior to the Secretariat finalising the draft agenda.

3. If no consensus is reached, the issue of the inclusion of the draft opinion in the agenda shall be put before the Plenary Session for decision.

Article 9

Documents

1. The Secretariat is in charge of preparing and circulating all the documents intended to be examined by the Commission. The documents should, as a general rule,

[3] *Article 6 was amended at the 96thPlenary Session of the Commission.*

[4] *Paragraph 1bis was added at the 101st Plenary Session of the Commission.*

[5] *Article 8 was amended at the 101st Plenary Session of the Commission*

be forwarded to the members, associate members, observers and substitutes at least two weeks before the opening of the session.

2. The opinions adopted by the Commission shall be public. Other documents issued by the Commission shall be public unless classified by the President "restricted" or "confidential". Documents classified "restricted" shall become public after one year, documents classified "confidential" after ten years, with effect from the first of January of the subsequent year, unless the Commission decides otherwise. The rules applicable to access to documents within the Council of Europe shall apply mutatis mutandis to the documents of the Commission.

Article 10

Languages

The working languages of the Commission shall be English and French.

2. Any member, associate member or observer may, however, use a language other than a working language, provided that he or she shall provide for interpretation into one of the working languages.

3. Any document to be considered by the Commission submitted in a language other than one of the working languages shall be addressed to the Secretariat together with a translation into one of the working languages.

4. The Commission may decide that interpretation shall be provided also in a language other than the working languages.

Article 11

Privacy of sessions

1. Sessions shall be held in private unless the Commission decides otherwise. Representatives of States or organisations co-operating with the Commission may, as appropriate, be invited to sessions. The President may invite guests to attend a session.

2. If the Commission is invited to adopt an opinion on the situation in a specific country which is a member of the Enlarged Agreement, a representative of the country concerned and/or representatives of interested institutions from that country may be invited to one of the sessions where the issue is discussed with the right to speak. The President may ask these representatives to leave the room before a vote is taken.

Article 12

Quorum

There shall be a quorum if a majority of the members are present.

Article 13

Voting

1. Subject to the provisions of Article 2.5 of the Statute each member shall have one vote. Members shall not take part in the vote on opinions specifically relating to the state having appointed them or of which they are citizens or if the President notes that there is a potential conflict in respect of a member's interest.

2. Subject to any provision of these Rules of Procedure requiring a different majority for a specific decision, the Commission shall adopt its decisions by a majority of its members.

3. Each member may request that his opinion be recorded in the session report.

Article 14[6]

Rapporteurs and working groups

1. Draft reports and draft opinions of the Commission are as a general rule prepared by one or more rapporteurs appointed by the President.

For specific issues working groups of members of the Commission may be established to which outside experts may be added as advisers. Representatives of other institutions or bodies may be invited to participate in such working groups.

Article 14a[7]

Urgent opinions

1. In urgent cases, with the authorisation of the Bureau in consultation with the rapporteurs, an urgent opinion may be issued and published prior to its consideration by the Commission at a Plenary session.

2. Prior to its issuing and publication, the urgent opinion shall be submitted to the Bureau and the Chairs and Vice-Chairs of the Sub-Commissions. On occasion, the Commission may at a Plenary session give specific directions for a planned urgent opinion.

3. Such urgent opinion shall be submitted to the Commission at its next session. The Commission may, depending on the circumstances,

- take note of the urgent opinion;
- endorse the urgent opinion;
- adopt an (ordinary) opinion based on the urgent opinion; or
- decide to postpone consideration of the opinion to a forthcoming session.

Article 15

Reconsideration of a decision

When a decision has been taken on any particular matter, such matter shall not be re-opened except at the request of a member approved by a two-thirds majority of the votes cast.

Article 16

Session Reports

A draft session report shall be considered adopted 30 days after its circulation, provided no objection is notified within that period.

Article 17

Meetings of Sub-Commissions

1. The Commission shall decide every two years upon the composition and the chair of the Sub-Commissions.

2. The provisions of these Rules of Procedure shall apply, *mutatis mutandis,* to the meetings of the Sub-Commissions.

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[6] *Article 14 was amended at the 53rd Plenary Session and again at the 96thPlenary Session of the Commission.*

[7] *Article 14a was added at the 53rd Plenary Session of the Commission and amended at the 116th Plenary Session.*

3. The Chair of the Sub-Commission or a person designated by him or her shall report at the subsequent plenary session on the activities of the Sub-Commission and present any proposed text for adoption.

Article 17a[8]

Scientific Council

1. The Scientific Council shall contribute to the high quality and the consistency of the Commission's studies and opinions.

2. The Commission shall decide every two years upon the composition of the Scientific Council. The First Vice-President may be elected as Chair of the Scientific Council.

3. The Chair of the Scientific Council or a person designated by him or her shall report at the subsequent Plenary Session on its activities.

Article 18

Joint Council on Constitutional Justice

1. The Joint Council on Constitutional Justice shall be composed of one representative (liaison officer) from each of the courts and associations of courts co-operating with the Commission and representatives whom the Commission shall appoint from among its members.

2. The Joint Council shall elect its Chair, two vice-chairs and two further members of its Bureau. The Chair shall be ex officio member of the Enlarged Bureau of the Commission.

Article 19

Amendments

1. Amendments to these Rules shall be adopted by a two-thirds majority of the members of the Commission.

[8] *Article 17a was added at the 96th Plenary Session and amended at the 105th Plenary Session of the Commission.*

Annexes

Members of the Venice Commission

Member states
Member (62)

- Albania
- Algeria
- Andorra
- Armenia
- Austria
- Azerbaijan
- Belgium
- Bosnia and Herzegovina
- Brazil
- Bulgaria
- Canada
- Chile
- Costa Rica
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Georgia
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Israel
- Italy
- Kazakhstan
- Korea, Republic
- Kosovo
- Kyrgyzstan
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Malta
- Mexico
- Republic of Moldova
- Monaco
- Montenegro
- Morocco
- Netherlands
- North Macedonia
- Norway
- Peru
- Poland
- Portugal
- Romania
- Russia
- San Marino
- Serbia
- Slovakia
- Slovenia
- Spain
- Sweden
- Switzerland
- Tunisia
- Turkey
- Ukraine
- United Kingdom
- United States of America

Associate Member (1)

- Belarus

Observer (4)

- Argentina
- Holy See

• Japan
• Uruguay

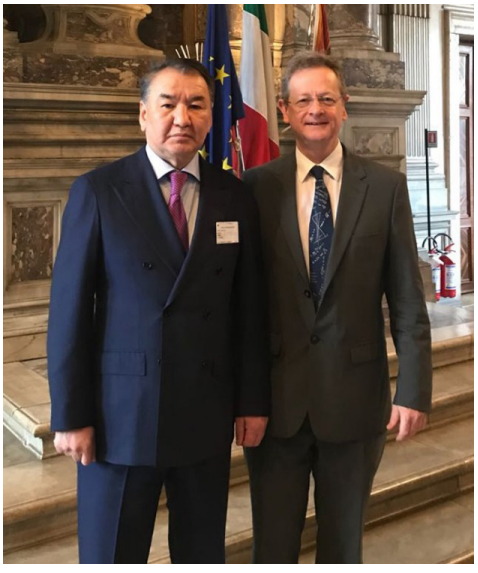
Special status (3)
• European Union
• Palestine* This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of Council of Europe member States on this issue.
• South Africa

Photos

International conference dedicated to the Constitution Day, Kazakhstan, 2012

Meeting of the Chairman of the Constitutional Council of Kazakhstan Mr Kairat Mami with President of the Venice Commission Mr Gianni Buquicchio, Venice, 2018

Member of the Venice Commission from Kazakhstan Mr Igor Rogov and
President of the Venice Commission Mr Gianni Buquicchio



Meeting of Kairat Mami with the Secretary
General of the World Conference on
Constitutional Justice Mr Schnutz DURR

Meeting of Kairat Mami
with the Secretary of the Venice Commission
Mr Thomas Markert

Kazakhstan delegation participating in plenary session
of the Commission on draft constitutional reform 2017

Chairman of the High Judicial Council Mr Talgat Donakov and Substitute member from Kazakhstan Ms Unzila Shapak on 117th plenary session

Member of the Commission Ms Taliya Khabrieva making comments on draft Administrative procedure and justice code of Kazakhstan

Delegation of the Venice Commission participates in conference, dedicated to Constitution Day of Kazakhstan, 2018

Meeting of the EACRB, Minsk, 2019

Visit of the working group on Concept paper on reform of the High Judicial Council, 2018

Meeting of the Joint Council on Constitutional Justice, Germany, 2018

KAZAKHSTAN AND VENICE COMMISSION:
FOR DEMOCRACY THROUGH LAW

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