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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT *VADEMECUM*

ON CONSTITUTIONAL JUSTICE

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1 Introduction

This document intends to give an overview (called *vademecum*) of the opinions of the Venice Commission in the field of constitutional justice. As such, it should help the Commission's members in the preparation of their comments to be able to know the general line of the Venice Commission on various issues in the field of constitutional justice as expressed in earlier opinions. Of course, this *vademecum* should not prevent members to make a point to the opposite if there is good reason to do so in a specific case or even in general.

The present document is only a preliminary draft, which will have to be completed by the Secretariat. The meeting of the Sub-Commission on Constitutional Justice will be asked to instruct the Secretariat on how to proceed with this *vademecum*.

This document presumes that constitutional review by a specialised constitutional court has been chosen as a model by the drafters of a constitution. While specialised constitutional courts are common in many countries, they are not the only model of constitutional review. Consequently, this document should not be interpreted as advocating specialised constitutional courts as the single, preferred model of the Venice Commission.

2 Type of constitutional jurisdiction

"The separation between Constitutional Court and the ordinary judiciary probably represents the most widespread model in Europe. On the other hand, a court exercising a power of constitutional review might be considered a part of the judiciary even though it may have a power of review over other courts. However, this seems to be primarily a dogmatic question of classification rather than having a practical effect provided that the Constitutional Court receives the fundamental guarantees for its independence and respect for its authority which should be afforded to the highest judicial organ. In this respect it is to be welcomed that the revised draft speaks about judges rather than 'members' of the Constitutional Court as was the case in the previous draft. This could be further underlined by adding a clause to Article 88.2 referring to the "judicial function" of the Constitutional Court."

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

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

CDL-INF(1997)002 Opinion on the Constitution of Ukraine

"Especially if a state wishes to introduce constitutional jurisdiction to its legal system, for the first time, possibly in connection with a new constitution, it appears preferable to entrust the decision of constitutional issues to a special institution, raised (to that extent) above the ordinary courts. For in this situation the judges of the ordinary courts may be neither trained nor used to dealing with constitutional matters.

Such a system, it should be emphasized, does not imply that all other courts be excluded from passing upon issues of constitutional law although there must be some rules as to what extent the courts of ordinary jurisdiction shall be competent to scrutinize a case on its constitutional implications and to rule on issues of constitutional law.

If a constitution is to be immediately applicable law, it must be respected by all institutions exercising public power including the courts. The very character of some provisions of constitutional law leads to the conclusion that the courts have the duty to apply and respect these provisions, regarding, e.g., the constitutional rights of *habeas corpus* pertaining to criminal proceedings or to forensic matters in general, such as fundamental procedural rights, the violation of which must be sanctioned, best immediately by the higher appellate courts reviewing the case. But even more, as the constitution is binding on the administration, too, the courts of ordinary jurisdiction must be able to examine whether administrative acts violate constitutional rights and freedoms in order to enforce these rights.

One of the most effective instruments of constitutional jurisdiction is the procedure of concrete (or collateral) norm control. It by necessity presupposes that a court of ordinary jurisdiction has the power to interpret the constitution, to affirm the question of the compatibility of a norm with the constitution, or to deny it; under this instrument it is only the power to declare an act of legislation violating the Constitution that is monopolized with the Constitutional Court."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

3 Sources

"The legal basis of the activity of each constitutional court is usually formed by three kinds of legal regulations having different positions in the hierarchy of norms of the domestic legal order of the state. They play different roles in the process of the complete and coherent legal regulation of the constitutional body.
On the "top" of this triad is usually the constitution establishing the jurisdiction of the court, the parties entitled to appeal as well as the constitutional principles on which the activity of the constitutional court is to be based. Laws on constitutional courts usually transform these constitutional principles into more concrete norms. Finally, the rules of procedure constitute the next and last level of this triad. They fill in practical details of the everyday judicial activity. The Rules of Procedure should be drafted by the constitutional court itself."

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

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

CDL-AD(2004)023 Opinion on the Rules of Procedure of the constitutional court of Azerbaijan adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), para. 9.

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

CDL-AD(2005)015 Opinion on the amendments to the Constitution of Ukraine

4 Composition of the court

4.1 Balanced composition as a requirement for legitimacy

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

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

The pursuit of these balances is limited by the indispensable maintenance of the independence and impartiality of constitutional court judges. Collegiality, i.e. the fact that the members adjudicate as a group, whether or not they deliver separate opinions, constitutes a fundamental safeguard in this respect. Even though the rules on the composition of constitutional courts may reflect the coexistence of different currents within a given nation, the guarantees of independence and the high sense of responsibility attaching to the important function of constitutional judge effectively ensure that constitutional judges will act in such a way as to dismiss all grounds of suspicion that they may in fact represent particular interests or not act impartially."

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

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

…

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

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

4.1.1 Fair representation of ethnic minorities

"Another general issue of importance is the protection of minorities by the Constitutional Court. The Constitutional Law of the Republic of Croatia of 4 December 1991 on human rights and fundamental freedoms and on national or ethnic minorities establishes that minorities that represent more than 8 % of the population must be represented in high jurisdictions. The latter should include, in principle, the Constitutional Court. This provision is not reflected in the Law on the Constitutional Court."

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

4.1.2 Training

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

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), section 2.3.

"The draft amended Article 5.5 would require 12 years of practice as a judge or a prosecutor for candidates as judges of the Constitutional Court. The intention of this provision is probably to increase the level of qualification of constitutional court judges and their impartiality.
However, as a consequence, probably only career judges or prosecutors would be able to become constitutional court judges. Again, this would go contrary to the logic of a specialised constitutional court, the composition of which is different from that of the ordinary judiciary."

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

"The great proportion of Constitutional Court members recruited from the judiciary can serve well the independence of the Court. Nevertheless, this proportion is unusually high compared to other European constitutional courts. This might influence the interpretative methods used by the court as constitutional and statutory interpretation may differ in some aspects. It would be advisable to increase the representation of law professors. "

CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paras. 18-19

4.1.3 Age

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

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

4.2 Incompatibilities

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

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

"…, in a pluralistic society, based on individual constitutional (human) rights such as the freedom of speech, of conscience and of association including the right to found and become

a member of a political party, it appears only appropriate to let every person enjoy these fundamental liberties and therefore not to exclude the constitutional judges. Nonetheless, this does not mean that a certain degree of self-restraint in making use of these rights cannot or should not be demanded of a judge in order to secure his impartiality and the respect of the people in him and in his office.

- Membership in other supreme organs of the state should be incompatible with the status of a judge to avoid conflicts of interest.
- Judges shall not be allowed to exercise any other professions during their terms of office (teaching at a university might not be considered to be such an incompatible profession). This will allow them to concentrate their energy on their judicial tasks and make them more independent of personal professional or economic ambitions."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

"Constitutional judges are usually not allowed to hold another office concurrently. This general rule serves the purpose of protecting judges from influences potentially arising from their participation in activities in addition to those of the court. At times an incompatibility between the office of constitutional judge and another activity may not be apparent, even to the judge in question. Such conflicts of interests can be prevented from the outset by way of strict incompatibility provisions.
…
One criticism of strict incompatibility requirements was that they tend to produce a court composition of *retiring* members of society …."

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

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CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

4.3 Methods of appointment / election

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

CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paras. 18-19.

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

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), section 1.3.

4.3.1 Qualified majority for election

"Wide powers of the Constitutional Court require strong democratic legitimisation which is guaranteed by electing the members of the court by the Riigikogu. The two-thirds majority vote requirement and periodic rotation of the members of the court prevent the polarisation of the Court according to political parties. Upon appointing a member of the Court to office, The President of the Republic shall exercise constitutional supervision; for practical reasons the President cannot refuse to appoint a member to office. The fact that the members of the Court are appointed to office by the President emphasises their impartiality and independence. A fixed term of office and periodic change of membership avoid the "petrifaction" of the court and secure continued renewal of legitimisation. The prohibition of re-election strengthens the independence of the members of the Court."

CDL(1998)065 Amendments to the Constitution of the Republic of Estonia concerning the system of Constitutional Jurisdiction proposed by the Expert Committee on the Analysis of the Constitution

"The changing of the composition of a Constitutional Court and the procedure for appointing judges to the Constitutional Court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the Constitutional Court *and* to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force. This is the reason why, for example, the German Law on the Constitutional Court (the *Bundesverfassungsgerichtsgesetz*) provides for a procedure of electing the judges by a two-third majority in Parliament. This requirement is designed to ensure the agreement of the opposition party to any candidate for the position of a judge at the Constitutional Court. The German experience with this rule is very satisfactory. Much of the general respect which the German Constitutional Court enjoys is due to the broad-based appointment procedure for judges.
It would be advisable if the draft would provide for the inclusion of a broad political spectrum in the nominating procedure. So far, neither the Constitution nor the Law on the Constitutional Court provide for a qualified majority for the appointment of the two judges elected by Parliament."

CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court) adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), paras. 18-19.

4.4 Term of office

4.4.1 Life tenure

"Life tenure or fixed period of office ? As life tenure (like in the US Supreme Court) bears the danger of the Constitutional Court's over aging, the judges should be appointed for a fixed number of years. If re-election will be excluded (in order to strengthen independence) the term should not be too short, because this might affect the continuity of the Court's jurisprudence which is of great importance.."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

"As to the term of office of the judges, the draft law foresees two variants. Under the first variant judges shall be appointed for the period of 15 years and may not be re-appointed. Under the second, they shall be irremovable during their term of office and automatically retire at the age of 75. Although both variants are acceptable in terms of ensuring the independence of the judges, I personally prefer the first since it allows for a circulation of the membership and infusion of new blood into the court."

CDL(1996)078 Comments on the draft law on the Constitutional Court of the Republic of Azerbaijan (E. Özbudun, M. Russell & Lesage)

4.4.2 The judges' term of office and that of parliament :

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

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

4.4.3 Re-election of judges:

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

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), section 4.4.

4.4.4 Rotation of judges

"If a Constitutional Court shall be established for the first time, for the same reason the tenure of the first "set" of judges should not be equal in length; the first judges should rather be divided into several groups, one group serving the full term, another f.i. two thirds, and the last one third of the term in order to have the court partially renewed after certain periods successively."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

"All judges of the Constitutional Court of Georgia are appointed on the same term of office. One of the main tasks of the constitution is to guarantee the continuity of state power exercised by various kinds of organs. The system of complying with this task (as regards the continuity of the Constitutional Court) is lacking in Chapter 6 of the Draft. It would be appropriate to fix time limit (for example 3, 6 months) before the expiration of nine year term of office of constitutional judges to appoint new members of the Constitutional Court. The judges appointed by such a manner will start activity immediately after the expiration of nine year term of office of former judges."

CDL(1995)008 Comments on the draft Constitution of the Republic of Georgia

4.4.5 Continuity of the membership

"Where no appointment has been made, default mechanisms should be put in place in the interest of the court's institutional stability. It is true that not every possible failure requires a special remedial provision and that it may normally be resolved by a constitutional system capable of assimilating conflicts of power. Nevertheless, default mechanisms already exist in certain elective (Germany, Portugal, Spain) or semi-elective (Bulgaria) appointment systems, in which the importance of the stability of the court is such that a possible political failure to appoint a constitutional judge would be prevented from affecting this stability. This contingency should be seen as an exception, so as to prevent it from becoming an institution."

CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), section 4.4.

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

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

"Another issue of great importance, ..., is the procedure of election of a new judge by the Parliament. There should be either a procedure allowing the incumbent judge to pursue

his/her work until the formal nomination of his/her successor or a provision specifying that a procedure of nomination of a new judge could start some time before the expiration of the mandate of the incumbent one."

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

4.5 Termination / suspension of office

4.5.1 Impeachment of a judge

"While sentence 2 of art.89 sec.6 Draft provides that impeachment of a member of the Constitutional Court shall be the only way to release him/her from this judicial function, the Draft is silent on who is to decide on an impeachment, who is capable to initiate an impeachment procedure, and on the substantive criteria for impeachment of a member of the Constitutional Court.

It would appear to be appropriate to let this question to be regulated by the organic law provided for in art. 93 Draft but include in the Constitution.

Only the Constitutional Court itself (deliberating of course without the participation of the member impeached) should decide upon an application of an impeachment. The procedure envisaged by Draft for initiating of and deciding upon an impeachment of the President of a Republic in arts. 62, 77 sec. 2 Draft to apply to members of the Constitutional Court would be highly inadequate, because it cannot be excluded that political motives will prevail with such kind of procedure.

Nor should it be provided to have the Board of Justice (arts. 103 et seq. Draft) deciding on the charge.

The capacity to initiate impeachment procedure against a member of the Constitutional Court should be detached as far as possible from state organs involved in day-to-day political business, such as parliamentary bodies or the Cabinet of Ministers. It might be considered to accord the right to initiate an impeachment procedure to the President of the Republic, either exclusively or in consensus with the chairmen of both chambers of parliament.

A decision by the Constitutional Court to discharge the member charged, should require a sufficiently high quorum of members deliberating and a majority of at least five votes.
In connection with this problem it might also be considered to confer upon the Constitutional Court the exclusive jurisdiction to decide on application for discharging judges under art. 100 sec. 3 Draft."

CDL(1995)008 Comments on the draft Constitution of the Republic of Georgia

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

CDL-AD(2005)015 Opinion on the amendments to the Constitution of Ukraine

4.6 Immunities

4.6.1 Purpose

"Rules on immunity serve the main purpose of protecting the judge against pressure exerted through unfounded accusations raised in order to influence his or her judgment. On the other hand the judge is required to observe a very high standard of professional but also private behaviour."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

4.6.2 Functional immunity

"The rapporteurs pointed out that there should be a functional immunity for acts performed in exercising as a judge and not a full immunity. Therefore, Paragraphs 1 and 3 of Article 14 should be merged. Furthermore, there should be a clause on the suspension of a judge when he/she is accused. Which majority would be applied? Was the judge allowed to take part in the vote?
[…] the Court should be obliged to give reasons when it does not lift the immunity."

CDL(1999)077 Meeting between the Constitutional Court of Albania and Messrs Bartole and Lopez Guerra on the draft Law on the Organisation and Functioning of the Constitutional Court of the Republic of Albania

4.7 Disciplinary measures

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

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

4.8 President of the Court

4.8.1 Court's power to elect its President

"With regards to the method of choosing the President of the court, four variants were foreseen. My own preference is for variant 4, under which the president and the vice-president are elected by the members of the court. This is the option most suitable to preserving the independence and the prestige of the court."

CDL(1996)078 Comments on the draft law on the Constitutional Court of the Republic of Azerbaijan (E. Özbudun, M. Russell & Lesage)

4.8.2 Powers of the President

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

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

4.9 Internal structure of the court – chambers

"However, we can see the dangers of splitting the Court into two chambers. The possible problems are: development of diverging interpretations and lines of jurisprudence, the distribution of the docket between the chambers, and the resolution of conflict of competences between the two benches. It was thought by the drafters that the possible inconsistencies between the case-law of the chambers can be settled by the plenary session of the Court. The detailed procedural rules should pay attention to the just distribution of files. The supervising role of the plenum can similarly resolve the conflict between the chambers on the question which bench is competent in the concrete case."

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

4.10 Financial independence of the constitutional court

"It might be considered to provide in the Constitution for an own budget of the Constitutional Court, to be administered by the Court itself (and not by any executive department); Art. 105 sec. 2 Draft might be modified by such provision and provide an own competence of the Constitutional Court directly submit an annual budget proposal to the Parliament of Georgia. Budgetary curtails might be improperly used by the executive to influence or to react on the Constitutional Court's jurisprudence."

CDL(1995)008 Comments on the draft Constitution of the Republic of Georgia

"There should be as little influence on the court as possible by the parliament's budgetary power and even less by the Executive, such as by the Minister of Justice or Finance. Therefore, the Constitutional Court itself should set up its budget plan, with the parliament formally deciding on it but under a general duty to comply with the Court's estimate of expenditure. It is very important in practice that the Court may itself administer its budget, independent of any interventions by the Executive."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

4.11 Relations of the constitutional court with the media

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

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

5 The right to appeal to the court

5.1 Appeal by a public body

5.1.1 Supreme organs

"The right to initiate a proceedings might be accorded to … a supreme organ or entity (to be defined) of the state, such as the Head of State, the central government, a legislative body (such as a second chamber, house, or federal council claiming that its powers to participate in the legislation at stake have been violated by the other legislative body to the effect that the enacted law at issue is unconstitutional), to a certain number of members of parliamentary bodies, the Prime Minister, the General Attorney, the Ombudsman, to a federal/regional entity … "

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

"[l]imiting the initiation of norm control proceedings to an organ of the public power would presumably confer upon it some kind of discretion whereby the individual constitutional right might be weakened."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

5.1.2 Parliamentary minorities

"Of particular importance is whether a minority of members of parliamentary assemblies may have the right (legal capacity) to initiate a proceedings (like in Portugal - one tenth of the members of the Assembly of the Republic; in Turkey, art. 150 Const.; art. 162 sec. 1 lit. a Span. Const.; Austria - one third of the members of the National Council; Fed. Rep. of Germany - one third of the members of the Federal Diet) because this means that, as a rule, the parliamentary opposition, too, has access to the Const. Court for norm control proceedings."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

"It is not provided in the Constitution that a minority in the Parliament can refer a case to the Constitutional Court. Article 130.III of the Constitution provides that a case can be referred to the Court by the Parliament as a whole, i.e. by a decision taken by the majority of its members. However, the Constitutional Court can play an important role in the establishment of the rule of law and the reinforcement of law through the protection of the rights of a minoritarian group in the Parliament. When the case is brought before the Constitutional Court by a group of members of Parliament, the Court's decision may result in avoiding political conflict on the passing of a bill (see, for example, the Constitutional revision of 1974 in France which granted to groups of 60 members of the Parliament or 60 members of the Sénat the right to refer a case to the Conseil constitutionnel; see also the Constitution of the Russian Federation of 12 December 1993 which gives to groups representing one fifth of the members of the Federation Council or one fifth of the members of the State Duma the right to refer a case to the Constitutional Court).."

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

"According to Article 44.1.b-c the notification (appeal) to the Constitutional Court may be submitted by „parliamentary fraction and parliamentary group comprising at least 5 deputies" and according to letter j by the „citizens of the republic of Moldova". The question who may be standing to challenge normative acts before constitutional court is sensitive since it concerns the mutual relationship of constitutional court and legislator. Continental legal orders usually restrict this possibility to the relevant central state bodies or significant percentage thereof (a parliamentary minority opposition should have access to the Constitutional Court). The purpose of this limitation is to restrict the procedure before the Court only for serious cases in which supremacy of the constitution is actually at stake. Taking into consideration the number of the deputies of the Parliament of Moldova (According to Article 60.2 of the Constitution the Parliament consists of 101 members) the number 5 deputies seems too low. Such a low threshold can lead to an overburdening of the Constitutional Court."

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

5.1.3 Regions and other subdivisions of the central state

"The right to initiate repressive norm control may also rest with subdivisions of the central State, like federal states, cantons, autonomous regions (e.g., Belgian) communities, provinces, etc."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

5.1.4 Ombudsman

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

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

"Provision is made in paragraph 1 for the possibility for the Defender (after modification of the Constitution on this point: see Article 27) to apply to the Constitutional Court in respect of violations of human rights and freedoms. This new prerogative of the Defender is in line with the recommendation of the Commission and the European standards. ...."

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

5.1.5 Courts

"According to art. 90 para 1. letter e private persons have the right to bring constitutional complaint before the Constitutional Court in case human rights were violated. Private persons have, however, no right to ask for constitutionality of normative acts before the Constitutional Court. Art. 90 para 1. provides, for the same kind of persons and when they are in the position of "the sides of legal action before ordinary court" , the right to propose to the Court to stop legal procedure and to ask the Constitutional Court about the constitutionality of normative acts serving as a legal basis of its judgement. It would be convenient to confine the right to ask for constitutionality to the court itself, by its own independent decision without any proposal from disputing parties."

CDL(1995)008 Comments on the draft Constitution of the Republic of Georgia

"The question was raised whether it would be more appropriate for a court of general jurisdiction to be able to request a preliminary decision from the Constitutional Court only when it is convinced of the unconstitutionality of a norm which it has to apply in a concrete case and has to hand down a corresponding decision or whether serious doubts by this court should be sufficient. In this respect it was pointed out that ordinary judges are sometimes reluctant to come to the conclusion that a general norm is unconstitutional. Allowing them to address the Constitutional Court already upon doubts, even if serious, would allow them to come forward with applications more easily. On the other hand, the quality of the request will be better if the ordinary court has come to the conclusion of unconstitutionality and is obliged to provide its motivation for this decision."

CDL(2000)020 Draft amendments to the Law on the Constitutional Court of Latvia Results of the Seminar - Secretariat memorandum

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

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

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

"[f]orcing ordinary courts to take a definite position on the unconstitutionality rather than to let suffice a serious doubt might set the threshold too high and could result on a very low number of findings of unconstitutionality by ordinary courts."

CDL-INF(2001)28 Interim Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan

5.2 Claims brought by individuals

"The right to initiate norm control might moreover be accorded to private persons and entities by entering a complaint of unconstitutionality against laws (and other norms) with the Const. Court on the assertion that a norm violates their constitutionally guaranteed rights or liberties (e.g., arts. 161 sec. 1 lit. b, 162 sec. 1 lit. b, 53 sec. 2 Span. Const.; arts. 140 sec. 1 sentence 4 Austrian Const.; art. 93 sec. 1 no. 4a German Basic Law). As laws may

infringe upon the rights of individuals - whether only enabling an infringement by the administration or by their self-executing character - the individual should be granted this legal remedy, which can well be conceived as a special form of constitutional complaint.

In order to exclude an *actio quivis ex populo* it is usually required for admissibility that the complainant is directly and presently affected in his (or her) fundamental rights or liberties provided in the constitution (see also below C.; an actio popularis is admissible in Hungary: see paragraph 21 secs. 2 and 4 of Act No. XXXII of 1989 on the Constitutional Court))."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

"Individual constitutional rights to be effective require some means of enforcement. This may be achieved by entrusting the civil and criminal courts and the administrative tribunals with the protection of these rights; and in some countries, e.g. in France, the Conseil d'Etat, the administrative courts have a long and excellent record of protecting the libertés publiques. Vesting a special constitutional court with the power to deal with constitutional complaints of the violation of individual constitutional rights might intensify the protection of these rights and emphasize their constitutional rank. As a result, constitutional jurisdiction in matters of individual rights, if effective, will contribute to strengthening the respect of fundamental rights and liberties of the individual as a person, its dignity and freedom.."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

"As far as their right to challenge the constitutionality of a law does not exclude other possible applicants, this institution may effect the speedy control of norms. It seems preferable to leave the decision whether or not to challenge laws on the allegation of the violation of individual constitutional rights to the individual affected by the law, because he (she) will be the one who will best feel the impact of the law. Limiting the initiation of norm control proceedings to an organ of the public power would presumably confer upon it some kind of discretion whereby the individual constitutional right might be weakened."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

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

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

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

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

5.2.1 Individual complaint as a subsidiary remedy

"In case the Constitutional Court is established, this amendment provides for the possibility of fundamental rights action or individual constitutional complaint. The right of petition given to everyone and a court specialised in the protection of fundamental rights ensure better protection of fundamental rights than the present system. In order to avoid overloading the Constitutional Court it has been prescribed that the fundamental rights action shall be a subsidiary remedy. Similarly to the European Court of Human Rights, recourse to the Constitutional Court requires that other remedies be exhausted. The Court's right not to apply unconstitutional legislation is dealt with in the amendment to § 152 (see also § 150 and 152)"

CDL(1998)065 Amendments to the Constitution of the Republic of Estonia concerning the system of Constitutional Jurisdiction proposed by the Expert Committee on the Analysis of the Constitution

5.2.2 'Full' individual complaint

"To be distinguished from this principal kind of complaint (directed against the norm as such) are those kinds of complaints which are directed against executive decisions or decisions of courts on the assertion that these decisions are based on an unconstitutional norm or illegal regulation (e.g. art. 280 Port. Const., art. 144 Austrian Const.)."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

5.2.3 Overburdening of the court / filters

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

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

"…, a procedure of constitutional complaint of private persons should not be a regular, merely additional remedy lest the Constitutional Court might well be overburdened by the number of cases it will have to deal with. Therefore, the rules governing the admissibility of constitutional complaints of private persons should be diligently conceived."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

"Since the constitutional complaint procedure can be initiated by individuals, it is possible that the Court will have to deal with a large number of such complaints. According to Article 37 of the draft, which applies to all types of procedures, the Court can refuse to accept manifestly ill-founded cases. This provision might serve as a filter in order to avoid an excessive case-load."

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

"In case the Constitutional Court is established, this amendment provides for the possibility of fundamental rights action or individual constitutional complaint. The right of petition given to everyone and a court specialised in the protection of fundamental rights ensure better protection of fundamental rights than the present system. In order to avoid overloading the Constitutional Court it has been prescribed that the fundamental rights action shall be a subsidiary remedy. Similarly to the European Court of Human Rights, recourse to the Constitutional Court requires that other remedies be exhausted. The Court's right not to apply unconstitutional legislation is dealt with in the amendment to § 152."

CDL(1998)065 Amendments to the Constitution of the Republic of Estonia concerning the system of Constitutional Jurisdiction proposed by the Expert Committee on the Analysis of the Constitution

"The rapporteurs insisted that the necessary exhaustion of remedies before a constitutional complaint should refer only to ordinary remedies. The use of extraordinary remedies should not prevent the individual to appeal to the Constitutional Court. The members of the Court agreed."

CDL(2000)020 Draft amendments to the Law on the Constitutional Court of Latvia Results of the Seminar - Secretariat memorandum

"[I]t might be advisable, on the other hand, to grant the Constitutional Court a discretionary power to decide on a complaint before the exhaustion of other judicial remedies if the subject-matter of the complaint is of general importance or if recourse to other courts would entail a serious and unavoidable detriment to the complainant."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

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

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

…"

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

5.2.4 Relations with ordinary courts

"A constitutional complaint will be successful if the Court finds that an individual constitutional right of the complainant has been violated. A Constitutional Court should,

nevertheless, not be conceived to perform as an additional ultimate appellate tribunal; its scope of review should be restricted to scrutinizing the challenged act as to the violation of constitutional rights and not as to its lawfulness in general. (This requirement may lead to difficulties in discerning violations of constitutional rights from other aspects of illegality, especially if the right to the free development of one's personality is understood to protect against any unconstitutional infringement, and every act inconsistent with the sub-constitutional legal order is regarded as unconstitutional.)

Furthermore, as the constitutional complaint stands in the context of the realization of individual rights the objective unconstitutionality of a challenged act (for constitutional reasons other than those affecting the complainant's individual constitutional rights) should not suffice to have the court decide in favour of the complainant."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

6 Jurisdiction

6.1 Scope

"… certain matters should be reserved to the jurisdiction of the Constitutional Court simultaneously withdrawing them from the ordinary courts' scope of jurisdiction. Among these can be counted:

- jurisdiction on controversies between the supreme organs of the state concerning their respective powers;
- jurisdiction on controversies between the federal power and the constituent states of a federation or between the central state and autonomous regions or provinces over their respective competences, rights or duties;
- constitutional control of acts of legislation.
- constitutional control of admissibility of referendum;
- control of the constitutionality of the formation of supreme organs of the state by control of elections;
- the protection of the constitution by impeachment of the bearers of high offices, decisions on the unconstitutionality of political parties and on the forfeiture of individual rights."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

6.2 Preventive and repressive norm control

"Preventive control

1) a. The advantages of a system of preventive norm control would appear to consist *(exist)*

- if combined with the requirement for the Const. Court to decide within a specified short time limit in an early clarification of the constitutional issue, thereby of fortifying reliability and security of the sub-constitutional legal order (*Rechtssicherheit*) while repressive (ex-post) norm control quite often leaves the constitutional question pending for years;
- of avoiding the difficulties arising if an enacted law, administered and enforced over years, is declared unconstitutional, even more so if this declaration should have effects *ex tunc*, (these specific difficulties of repressive norm control, however, being solvable);
- of possibly saving the prestige of the legislator somewhat more than in a system of *ex-post* norm control if the Const. Court arrives at a finding of unconstitutionality;
- of enabling a final and authoritative judgment on the constitutionality of a law consenting to an international treaty before the treaty is ratified with its provisions thus becoming binding on the international level as well as on controversies over competences, f.i., in a federal system.

b. The main disadvantages of a system of preventive norm control (as compared to repressive norm control) would appear to be the following:

- Whoever is or was in a position to review the compatibility of a norm with the constitution will know the frequent and serious difficulties, in particular in respect to economic and social legislation in highly complex societies, to judge a freshly enacted norm, even more so if this judgment has to be rendered within a very short time. Quite frequently the actual and potential consequences of a norm, of the "law in action", at this early stage cannot possibly be ascertained in a reliable way, lacking the empirical experience from the practice of administration and enforcement of the law at stake. A law constitutional on its face in its practical effects may very well turn out to be unconstitutional when concrete cases and controversies are at stake.
- While under a system of repressive norm control the procedure of "abstract" norm control might face the same problems of judging a "fresh" law, lacking the experience from its application in practice, there is usually not the pressure of time to decide (quite often on hundreds of articles of a law) within one or a few weeks. Judicial cognition of the constitutionality of laws needs a certain distance to the actual, day-to-day arguments surrounding the political process of legislation. The quality of decisions takes time.
- Social and economic conditions to which the law originally had been addressed in our affluent societies may change so that the law in action with this change may lead to unconstitutional results no longer justifying to find it constitutional. While this problem also arises in a system of (ex-post) repressive norm control (and there can be solved by allowing a renewed proceedings of norm control), in a system of exclusively preventive norm control this problem remains without a judicial solution. (Whether and when the legislature will react cannot be foreseen).
- Preventive control of legislative norms may also impede the legislature in quickly and immediately reacting to acute situations in need of a normative regulation especially if the initiation of proceedings automatically bars the promulgation of the law until the decision of the court. (This effect, however, can be minimized by fixing

short deadlines for the initiation of proceedings as well as for the decision of the Const. Court.)

Thus especially practical reasons drawn from judicial experience with norm control generally would appear to speak more in favour of repressive norm control with the exception of the control of laws consenting to international treaties and controversies over competences, f.i., in a federal system.

c. A solution of the problems listed above might be sought by combining preventive and repressive norm control, f.i., by allowing lower courts which find a law (after its enactment) unconstitutional to refer the issue of unconstitutionality to the Constitutional Court, or by providing for a complaint of unconstitutionality to the Const. Court against court decisions applying a norm which in the opinion of the complainant is unconstitutional, or by proceedings of abstract (*ex-post*) norm control.

However, such combinations might turn out to have serious disadvantages: the effect of legal security (*Rechtssicherheit*) gained by preventive norm control may be diminished if, should the norm have been found constitutional by the Const. Court, its constitutionality later on can be questioned again. Moreover, it may lead to embarrass the Const. Court if, in such later proceedings, it will find the norm at stake unconstitutional.

A combination might best be feasible in the field of controversies over competences: preventive norm control on these subject-matters brings about an early clarification of the question. After decision of the Const. Court and enactment of the law at issue it should no longer be admissible to question the competence, while other asserted faults might well be subject to repressive norm control. What remains, nevertheless, is the short time limit usually (and, with regard to the impediments on the legislator, reasonably) requested of a procedure of preventive norm control. Questions of competence, in particular in a federal or quasi-federal system may have far-reaching prejudicial effects; to consider them within one or a few weeks might prove inadequate."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

6.3 *A priori* control for international treaties

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

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

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

6.4 National implementation of decisions of international jurisdictions

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

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

6.5 Conflicts of competence between state organs

"The Commission noted already in its opinion on the Constitution of Ukraine […] that several procedures which could play an important role for the consolidation of constitutionalism in Ukraine were not specifically mentioned in the text of the Constitution:
…
- a provision on conflicts of competence between State organs.

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

CDL(1997)018rev Opinion on the law on the Constitutional Court of Ukraine, adopted at the 31st plenary meeting of the Commission (S. Bartole & J. Klucka)

7 Procedure

7.1 Challenging of a judge

"… it must be ensured that the Constitutional Court as guarantor of the Constitution remains functioning as a democratic institution. The possibility of excluding judges must

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

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

7.2 Mandatory legal representation

"The rapporteurs suggested that due to complex legal-technical questions being dealt with before the Constitutional Court, legal representation of parties should always be required. Parties who could not afford representation should be given legal aid."

CDL(1999)077 Meeting between the Constitutional Court of Albania and Messrs Bartole and Lopez Guerra on the draft Law on the Organisation and Functioning of the Constitutional Court of the Republic of Albania

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

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

7.3 Rights of the parties

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

CDL(1997)018rev Opinion on the law on the Constitutional Court of Ukraine, adopted at the 31st plenary meeting of the Commission (S. Bartole & J. Klucka)

7.3.1 Right of access to the file

"To enable the participants in constitutional litigation to duly present their causes before the court, whether in an oral hearing or in writing, at least the parties (in the strict sense of the word) and the initiator of non-adversary proceedings should be granted access to all the documents presented to the Court and to the records of the case."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

7.3.2 Oral / written procedure

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

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

"Oral hearings should be obligatory in all the proceedings where it is important for the decision to gain a broad spectrum in view of the consequences of the ruling, in particular, in controversies between supreme organs of the States, in federal and quasi-federal controversies, in the procedures of abstract norm control on application by public applicants, in impeachment procedures, (possible) procedures on declaring political parties unconstitutional, and on the forfeiture of fundamental rights; in the other kinds of procedures an oral hearing might be provided facultatively, i.e. if the Court considers it useful to promote the proceedings."

CDL-STD(1993)002 Models of constitutional jurisdiction - Science and technique of democracy, no. 2 (1993) (H. Steinberger)

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

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

7.4 Interlocutory decisions

"…the organic law should provide for a power of the Constitutional Court in all kings of procedures to render interlocutory decisions in order to temporarily enjoin an act or norm under attack from being enforced and to do [so] not only upon application of the plaintiff but also *proprio motu*, i.e. on the Constitutional Court's own initiative and discretion."

CDL(1995)008 Comments on the draft Constitution of the Republic of Georgia

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

- …
- the Constitutional Court can take interim measures to safeguard the position of an applicant and
- …"

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

7.5 Dissenting opinions

"The rapporteurs suggested that dissenting opinions should be made public together with the decisions in the official journal and not only in the official digest of the Court but already, which is published annually. Dissenting opinions had the advantage to force the majority in the Court to give a convincing motivation for their opinion. In this way they even help to legitimise the decision taken by the majority."

CDL(2000)020 Draft amendments to the Law on the Constitutional Court of Latvia Results of the Seminar - Secretariat memorandum

8 Effects of decisions

8.1.1 Ex tunc vs. ex nunc effects

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

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

8.1.2 Obligation for ordinary courts to reopen case

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

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

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

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

8.1.3 Re-opening of case by the Constitutional Court

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

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