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COMPILATION

ON VENICE COMMISSION'S OPINIONS AND REPORTS
ON SOCIAL AND ECONOMIC RIGHTS (*)

(*) *This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 114th Plenary Session (March 2018)*

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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 first of all, social and economic rights, as well some other second- and third-generation rights. 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 social rights, 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. The nature of the constitutional guarantee

“Which economic and social rights should be incorporated in constitutions?”

[...] [S]uch rights are rarely included in the body of a constitution, but rather in a preamble, and that there is no relationship between the fact that they have constitutional status and the recognition they receive. Indeed, experience shows that there is no real correlation between the inclusion of these rights in a constitution and the level of protection or benefits actually provided.

It should not be concluded from this that their inclusion in a constitution is valueless, but it is necessary to proceed with caution.

The Commission is of the opinion that only a few economic and social rights should be referred to in a constitution, and then not in too much detail or in the same form as traditional rights and freedoms. One good example to follow may be that of the German Basic Law, which lays down that the German Federal Republic is a "social state", without going into further detail about what this concept entails.

Only really fundamental economic and social rights should be included. The result otherwise is likely to be a reduction in parliaments' room for maneuver and an undue increase in the power of the courts. Moreover, the experience of countries which have attempted to list such rights in detail is that they do not lend themselves to clear legal definition.

It is also preferable to include only those rights for which there is already an appropriate legal framework, so that giving them constitutional status represents a form of consecration.

The next step is to identify the principles and the methods to be adopted.

What is required [in the Constitution] is an affirmation of the principle that economic and social rights as a whole are recognised, and possibly a statement of how the principle applies to individual rights, but only in the form of minimum standards or a negative wording of the type "no-one shall be deprived except ...".

It would then be left to legislation to determine the nature, content and form of these rights, provide for their protection and regulate their exercise, as well as to adapt them to changes in society.”

[CDL\(1994\)009](#), Report on the legal foundations of the economic system during a period of transition from a planned to a market economy, Part III

[...] [E]ven though most Articles of the Section are formulated as true subjective rights (has the right to...), these rights have a different structure and content as some of them correspond to traditional fundamental rights and liberties, whereas others have the character of social rights where the active intervention of the State is indispensable to fully realise the right (eg. the right to housing in Article 42) [...].

[...]

[...] [F]or different categories of rights the same wording “every person has the right...” is used, but for many of these rights it will be impossible for a court to apply them directly. This concerns for instance Article 43 (“everyone has the right to a standard of living sufficient for himself or herself and his or her family, including sufficient nutrition, clothing and housing”) or Article 45,

paragraph 1 ("everyone has the right to an environment which is safe for life and health, and to the recovery of damages inflicted through violation of this right.")

[...]

Therefore, a specific mention of the rights the protection of which is ensured by the ordinary courts should be introduced into the Constitution.

[CDL-INF\(1996\)006](#), *Opinion on the draft Constitution of Ukraine (text approved by the Constitutional Commission on 11 March 1996)*, pp. 4 and 5

33. The second reason for the large number of rights is the inclusion of a large number of economic, social and cultural rights. In many cases it will be difficult for the courts to apply these rights directly as provided for in Article 18 of the Constitution and a more prudent wording as objectives of state action might have been preferable[...].

[CDL-AD\(2007\)004](#), *Opinion on the Constitution of Serbia*

19. The Venice Commission had expressed the view that it would have been preferable to avoid that the Constitution contain merely programmatic rules, so that certain individual rights should instead be formulated as state objectives [...].

[CDL-AD\(2007\)047](#), *Opinion on the Constitution of Montenegro*

7. Some provisions, such as the amendments to Articles 43 and 49, seem of a mainly programmatic nature. This is not the approach recommended by the Venice Commission² but similar provisions can also be found in other European countries. The provisions on remuneration for labour according to amount and quality, on access to health care, legal assistance at public cost, etc, are not so much reflecting the institutions of a welfare state but rather resemble the general wording of the respective provisions of socialist constitutions.

[CDL-AD\(2009\)008](#), *Opinion on the Draft Law amending the Constitution of Ukraine presented by People's Deputies Yanukovych, Lavrynovych, et al.*

29. The fact that the Constitutional Bill provides for several socio-economic rights as well as for (new) "third generation rights", is in principle welcomed. Nevertheless, several questions remain open, in particular as to the scope of these new constitutional guarantees.

[...]

32. [...] [T]he Venice Commission finds regrettable that most of the provisions concerned are worded in very general terms, not providing sufficient clarity on whether and which concrete rights and obligations can be derived from them, and sees a strong risk that the public takes them as promises to ensure high living conditions. The provisions mainly state a goal, but do not deal with the means to reach it, entailing the risk of disappointing public expectations. The fulfilment of the duty to "ensure" (see Article 5 of the Bill) the enjoyment of such rights depends on subsequent legal specifications whose implementation may be subject to legal and/or factual restrictions, such as financial, personal or resources which may not be available at present nor in the future.

33. Clarifications on the scope of socio-economic and "third generation rights" and related obligations are also of particular importance when it comes to relations between private parties, [...]. Since the Constitution provides for such rights and obligations and seems to protect them in an absolute manner, it is essential that their minimum core content be provided by the Bill itself. Mere guidelines dependent on subsequent concretisations of

guarantees by the lawmakers are by far insufficient. Some guidance can, however, be found in certain related legislative materials, and in particular in the Explanatory Notes.

[...]

41. There is no doubt, in addition to the specifications to be provided by the secondary legislation, several of the issues mentioned above [and related to the constitutional text] may be addressed via interpretation and the jurisprudence of courts. On the other hand, there are numerous new provisions in the Bill that lack specifications. This may lead to conflicts, as well as to the disappointment of the public, whose particular involvement in the design of the Constitutional Bill may have raised high expectations. In the light of the comments above, the Venice Commission recommends that the chapter on human rights of the Bill be reviewed to ensure that all necessary specifications are added where appropriate. [...]

[CDL-AD\(2013\)010](#), *Opinion on the Draft New Constitution of Iceland*

61. From the point of view of the Venice Commission in the framework of this Opinion, the most important issue is the level of regulation. Article XI.3 of the Fundamental Law is one of the provisions of the Fourth Amendment that contains detailed rules which are usually regulated by law and should not be part of a Constitution. Raising such provisions to the level of the Constitution has the effect of preventing review by the Constitutional Court.

[CDL-AD\(2013\)012](#), *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*

62. The idea of including non-directly justiciable rights in a separate Chapter [(Chapter 3. Legislative guarantee and main objectives of the State Policy in the Social, Economic and Cultural Spheres)] is to be welcomed.

63. The same goes for the distinction between rights which ordinary laws should define as justiciable subjective rights (Articles 82 to 85), and policy objectives whose promotion is an obligation for public authorities (Article 86) and whose realisation is monitored by the National Assembly through an annual report of the Government (Article 87).

64. The explicit entrustment to the legislator of the task of defining the rights provided under Articles 82 to 85 raises the issue of the content of these rights pending the adoption of the implementing legislation. It might be argued that upon its adoption the Constitution will immediately guarantee at least the right to the legislative implementation of these provisions; will there be the possibility of judicial protection of these virtual guarantees? Will it be possible to apply to the Constitutional Court if the legislator fails to adopt the implementing legislation?

[CDL-AD\(2015\)037](#), *First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia*

III. Social and economic rights – a general overview

[...] [T]wo types of fundamental right need to be distinguished:

- traditional rights and freedoms, that is essentially negative freedoms which impose on the state a duty to refrain from action;
- fundamental economic and social rights, also referred to as positive freedoms in that they require the community to act in a very specific fashion.

[...] [T]raditional rights and freedoms (which include economic freedom) require governments to refrain from imposing restrictions on them. On the other hand, they do not grant citizens any entitlement to benefits or advantages from the authorities.

Economic and social rights are different in nature; they are relative and contingent and are often much more clearly policy oriented. They require the state to take positive action and give citizens a right to call on the authorities to act. They are intended to achieve a transition from de jure or formal to de facto or real equality. [...]

However, the demands placed on governments must be reasonable; governments cannot do everything at the same time or immediately. They have to exercise choice and set priorities. Economic and social rights have to be introduced gradually as public resources permit and they imply a wide power of discretion on the part of the authorities.

It is therefore difficult to treat the two types of rights and freedoms in an identical fashion.

[CDL\(1994\)009](#), *Report on the legal foundations of the economic system during a period of transition from a planned to a market economy, Part III*

The Concept distinguishes between first and second generation rights, the former being subject to the jurisdiction of the courts, whereas the latter are not. Although this is a perfectly valid distinction, it nonetheless needs to be qualified and revitalised to some extent. Some rights referred to as second category rights (economic and social rights) can be regarded as subject to the jurisdiction of the courts and can be directly invoked before the courts. A distinction could therefore be made within social rights between simple social objectives, programmes to be carried out and mandates given to the State (right to housing, education, etc), on the one hand, and genuine social rights which confer subjective rights on individuals (the right to minimum subsistence, the right to decent housing etc), on the other. Unlike the former, the latter would be subject to the jurisdiction of the courts, in the same way as first category rights, ie rights and freedoms.

[CDL-INF\(1996\)002](#), *Opinion on the regulatory concept of the Constitution of the Republic of Hungary, p. 6*; see also [CDL-INF\(2001\)017](#), *Report of the Venice Commission on the Revised Constitution of the Republic of Armenia*

17. The Section on the rights and duties of citizens, in line with several other post-communist constitutions, gives fairly far-reaching constitutional protection to social rights. There is a danger that those constitutional promises will not be fulfilled. The result could be that the normative force of the Constitution is weakened. On the other hand, a comprehensive protection of social rights could be interpreted as at least primarily addressed to the legislative power and aimed at increasing the legitimacy of the Constitution.

[CDL-AD\(2005\)022](#), *Interim Opinion on Constitutional Reform in the Kyrgyz Republic*

23. [...] [I]mplementation [of the second and third generation rights] will be dependent upon resources being provided by the legislature and will be subject to review by the courts. There is little experience in this respect at European level. The Venice Commission has on other occasions expressed the concern that positive social and economic rights might create unrealistic expectations and advocated drafting them as aspirations rather than rights that can be directly implemented through court decisions. To include such rights as fundamental rights in the Constitutions risks involving the courts in the evaluation of scarce resources and in infecting the whole section on fundamental rights with the character of a list of aspirations rather than enforceable rights. At the least these socioeconomic rights should be qualified as 'subject to available resources'.

[CDL-AD\(2007\)004](#), *Opinion on the Constitution of Serbia*; see also *CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg, § 67*; *CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine (prepared by a working group headed by Mr V.M. Shapoval), § 19*; *CDL(1994)011, Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, p. 4*

57. Nonetheless, the Commission remains of the opinion that the equivalent of “citizen” [(in the Constitutional text speaking of human rights)] should be replaced with the equivalent of “everyone” during a future constitutional revision. This would make the wording of the Constitution unambiguous. It would also make the wording more consistent. The provisions where the wording should be changed are as follows: [...]

- Article 48 (right to work), [...]
- Articles 51-53 and 55 (right to social security and welfare aid, right to medical insurance, right to found schools and the to a healthy environment) [...]

[CDL-AD\(2008\)009](#), *Opinion on the Constitution of Bulgaria*

28. New challenges in modern societies have driven the Constitutional Council’s approach to human rights. The scope of protection has especially been widened by adding new socio-economic rights (Articles 22-25 Constitutional Bill), as well as more or less "collective rights" (Articles 32-36 Constitutional Bill), called by the Explanatory Notes "third generation rights". While the attempt to give answers to the most recent challenges is to be welcomed, specific answers should be given in the Constitutional Bill to different types of rights. It is of the utmost importance that the fundamental differences between (1) traditional (liberal) human rights, (2) socio-economic rights and (3) obligations and guarantees, especially directed at the society as a whole ("third generation rights") be adequately taken into account.

[...]

38. Since Articles 22-25 and 32-36 [on socio-economic and third general rights] are part of Chapter II, one might think that limitations to socio-economic and "third generation" rights and any pre-requirements to their effective enjoyment may be based on Article 9.2. However, since a provision like Article 9.2 is traditionally designed with a view to restricting governmental intrusion into individual freedom, this interpretation seems to be inappropriate. Designing the concrete conditions for ensuring socio-economic rights or protecting the nature and environment etc., as well as possible limitations to those rights, cannot be dealt with as an intrusion by the government in a person’s individual freedom. The inclusion of "third generation rights" in the Constitutional Bill raises new issues, which are not covered by traditional restriction clauses. Therefore, the Venice Commission sees the risk that, under these circumstances, the general restriction formula be too open and inconclusive from the perspective of such rights.

[...]

40. The choice made by the Bill’s drafters for one single restriction clause appears problematic from the perspective of the human rights’ “horizontal effect” introduced by the Bill. A restriction clause such as that of Article 9.2 is usually related to a model where the government restricts the rights of a person. This is a kind of a bilateral conflict. In modern life, there are increasing possibilities of clashes between different rights of different persons with different interests which may be protected by different provisions of the Constitution. Since the Constitutional Bill (rightly) expands the protection to the field of violations by others than bodies exercising public authority, conflicts of human rights in multipersonal-multilateral conflicts of private parties may arise. The field of “protection of privacy” is only one example of possible conflicts of this type

[...]. The Commission is not in a position to conclude whether the Explanatory Notes give sufficient guidelines to deal with such cases.

CDL-AD(2013)010, *Opinion on the Draft New Constitution of Iceland*

22. The distinction between social rights that require positive action by the state or other public authorities and liberty rights the effect of which are negative, is not sufficient in order to structure the Chapter on Human Rights. This is due to the fact that the distinction is not watertight: social rights may include elements of liberty rights and the constitutional safeguards for realising liberty rights may include positive measures too.

23. What is important is to make a clear distinction between directly justiciable rights and other rights. This distinction does not necessarily coincide with that between social and liberty rights, since it may be warranted to guarantee some social rights as justiciable individual rights. This goes for, above all, the right to basic subsistence and care.

24. Finally, establishing a justiciable individual right is only one of the possible legal effects of fundamental rights. Provisions on social rights can also be formulated as obligations for the legislature, and here again several alternatives exist. Constitutional provisions can, for instance, presuppose that through ordinary law an individual and justiciable right to specific social benefits is created and leave the manner in which the constitutional obligation is realised to the discretion of the ordinary legislature.

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

IV. Specific social and economic rights

A. Education

1. Right to education in general

79. It is not clear to what extent these rights [(enshrined in Article 39: The right to education)] are intended to be justiciable. The State is obliged to ensure each person's right to education, to fully develop his or her personality and gain critical thinking, problem solving, "education usage", further education and effective communication skills as well as to learn his or her native and foreign languages, and even to equal opportunities to success in private and public life. Singling out education in foreign languages as an element of the fundamental right to education any more than any other subject such as mathematics, may be questioned.

80. The State is to protect freedom of educational choice and ensure diversity of forms of professional education. Universal access to obligatory free elementary, basic and secondary education are to be ensured. Paragraph 4 provides that each person is to have equal access to higher continuous education. The Article does not however say that the education is to be free and it is not clear whether the Article simply means that in principle every person has access even though in practice they may not have the means to secure such access.

81. Parents are given the right to provide their children with education according to their religious, ethical, cultural and language requirements and to freely choose an educational institution but this freedom is not to be construed as evading obligatory education or obtaining an education that would prevent them from speaking or reading the State language, acquiring national and universal values and culture, or involving any education that would encourage intolerance and conflict. The parents' freedom is effectively a freedom to choose between different institutions rather than a freedom to opt out of the education system altogether. It is not clear from the wording of the second and fifth paragraphs whether free choice of an educational

institution includes the right to ensure education in conformity with the parents' religious and philosophical conviction, as guaranteed by Article 2 of the First Protocol to the ECHR.

[CDL-AD\(2005\)003](#), *Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia*

65. This provision [(on the right to education)] seems to regulate public education only. It does not address the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions, as laid down in Article 2 of the First Protocol to the European Convention on Human Rights.

66. Although there is no international legal obligation for States to finance private education and teaching, in some member States of the Council of Europe some form of financial support is laid down in the Constitution, sometimes on an equal footing with public education and teaching. If there is any regulation under Luxembourg law or in Luxembourg practice, it could be enshrined in the Constitution, but this is not mandatory.

[CDL-AD\(2009\)057](#), *Interim Opinion on the Draft Constitutional Amendments of Luxembourg*

58. Article 7 of the Fourth Amendment amends Article XI of the Fundamental Law, paragraph 3 of which reads as follows: "By virtue of an Act of Parliament, financial support of higher education studies may be bound to participation for a definite period in employment or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law."

59. In its decision 32/2012, the Constitutional Court had annulled the Government decree, albeit on formal grounds, stating that student grants have to be regulated on the level of law (an act of parliament). However, the reasoning of the decision shows that there were also serious doubts about substantive constitutionality. The Court found that the obligation for students having obtained state scholarships to work in Hungary after graduation for a period equal to double their period of study within 20 years directly affected the right to freely choose a job or profession of Article XII.1 of the Fundamental Law, also taking into account Article 45 of the EU Treaty on the free movement of workers and the relevant case law of the European Court of Justice.

[CDL-AD\(2013\)012](#), *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*

66. Article 38 guarantees the general and unconditional right (and obligation) to free public education up to the age of 16. This right, together with the educational establishments' obligation of neutrality, is to be welcomed. The second paragraph could appear in the general principles.

[CDL-AD\(2013\)032](#), *Opinion on the Final Draft Constitution of the Republic of Tunisia*

20. [...] The new place of the reference to competition in paragraph 2 may now give rise to doubts: it is assumed that there should be competition in the admission procedure. The new wording guarantees education "on the basis of competition". This is something different or leads – at least – to a misunderstanding.

[CDL-AD\(2015\)038](#), *Second Opinion on the Draft Amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16) of the Republic of Armenia*

2. The need to respect legitimate expectations

78. The abrupt change of the [legislative] framework [governing operation of long-established educational institutions] not only raises issues of arbitrariness and proportionality, but by

radically altering it also interferes with the right of already established institutions to rely on the existing set of rules and organise their continued operation, and thus fails to satisfy the principles of foreseeability and legitimate expectations, as part of the general principle of legal certainty. [...]

[...]

89. While a prior international agreement may legitimately be required for a new university wishing to open branches in Hungary, it seems difficult to justify its necessity and usefulness for already operating universities. This is even more difficult in the specific case of the CEU NY, in view of the clear support already been given to it by the two governments concerned in the first years of its operation, more than twenty years ago [...]. Since none of the irregularities found in 2016 appear to require an international agreement in order to be remedied, the restriction, in addition to being unjustified, also seems disproportionate.

90. Moreover, for universities currently operating in Hungary, based on rules which have been in place and accepted for more than twenty years, this requirement raises clear issues with regard to legal certainty, notably in the light of the principle of legitimate expectations [...].

[CDL-AD\(2017\)022](#), Hungary - Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education

3. Education in minority languages

105. [...] [T]he obligation imposed on the state in Article 12 (1) (b), to create governmental education institutions with teaching *in* Bulgarian, goes beyond the state's obligation under Article 14.2 of the Framework Convention, which leaves Parties a wide measure of discretion: "*the Parties should endeavour to ensure, as far as possible [...]*". Of course, as indicated by the Explanatory Report to the Framework Convention, it belongs to each state Party to decide, taking account of their own particular circumstances and available resources, the extent of their commitment to provide such teaching.

106. The position of the Moldovan authorities on this particular point results clearly from Article 6 (1) of the Law on national minorities, according to which the state *guarantees* the realization of the right to access to education in state language and in Russian, and *creates conditions* for the implementation of the right to education in minority languages. The same Article 6 provides in turn that persons belonging to national minorities and their associations are entitled to establish themselves private educational institutions of all level. It belongs to the Moldovan legislator to decide whether to add (or not) new obligations for the Moldovan state in this field.

[CDL-AD\(2016\)035](#), Republic of Moldova - Opinion on the Draft Law on the Ethno-Cultural Status of the District of Taraclia

78. Article 7 of the Law on Education strengthens the education in the state language. It provides that the language of education is the state language (Article 7.1.1), and that the state guarantees to each citizen of Ukraine the right to obtain formal education at all levels (from pre-school to higher education), as well as out-of-school and postgraduate education in the state language (7.1.2). Finally, Article 7.2 provides for mandatory study of the state language in vocational education and higher education, to the extent required to perform the chosen professional activity using the state language. Appropriate conditions for study of the state language are created for individuals belonging to indigenous people, national minorities of Ukraine, foreigners and stateless persons.

79. The adequacy of these measures has to be assessed in the light of the problems the Ukrainian authorities have already been faced with in the past and are still faced with at

present, due to a lack of qualified teachers, and adequate schoolbooks and pedagogical methodology for the teaching of the Ukrainian language. The Ukrainian authorities acknowledge the existence of this situation, which most likely will become even more problematic with the entry into force of Article 7 of the new Law on Education.

80. According to Article 3, paragraph 18 of the Concluding and Transitional Provisions, for persons belonging to national minorities or indigenous peoples having entered into general secondary education before 1 September 2018, Article 7 of the new Law on Education will only enter into force on 1 September 2020, although “a gradual increase”²⁵ of the number of subjects taught in Ukrainian is foreseen for these persons too. This leaves the Ukrainian authorities less than three years to find sufficiently qualified teachers to take over the courses in numerous secondary schools,²⁶ which had hitherto a “national minority” character and in which almost all subjects will have to be taught in Ukrainian. The transition period will certainly be particularly short for those minority languages where the situation will change from full schooling in the minority language through all secondary levels to an abrupt - instead of “gradual” - change to schooling in the minority language only at pre-school and primary levels.

81. The transitional provisions also imply that, for persons entering primary education on 1 September 2018, the schools will already have to apply the new system, namely to create separate classes or groups for education “*in the language of the respective national minority group along with the official language of the State.*” To translate the new framework into practice, the authorities will have to rely, taking due account of the principles contained in Article 7, on criteria, rules and procedures to be locked in legislation (the planned Law on Secondary Education), between now and 1 September 2018.

82. The Venice Commission has serious doubts as to whether the Ukrainian authorities will be able to adopt implementing legislation and to solve, in such a short time, the important problem of the lack of qualified teachers in the Ukrainian language, which will become even more acute under the new framework. In the Commission’s view, the provisions of Article 7 of the Law on Education can only be deemed to contain appropriate measures to realise the legitimate aim of strengthening the state language in education, when additional measures (of a legislative and practical nature) are taken to create the required conditions to implement these provisions in practice. It recommends, therefore, to amend the transitional provision and to determine, in consultation with the representatives of the minorities, a more realistic transitional period.

[CDL-AD\(2017\)030](#), *Ukraine - Opinion on the provisions of the Law on Education of 5 September 2017, which concern the use of the State Language and Minority and other Languages in Education*

NOTE: on the linguistic rights of national minorities see also **[CDL-PI\(2018\)002](#), *Compilation concerning the protection of national minorities***

4. Operation of educational institutions

61. [...] [A]cademic freedom and related requirements and principles are to be protected by states under their domestic legislation, in accordance with international standards, while at the same time taking due account of the specificity of the national education system and of the national constitution and the legislative practice, and - not least - of national policies and priorities in the field. In principle therefore, a large discretion is left to the national authorities as to the specific rules or frameworks for recognition/accreditation of foreign qualifications, quality assurance, information on higher education provision, co-operation in the field etc.

62. [...] [N]ational rules and practice are highly diverse in this field. Some states have adopted stricter conditions and rules than others on foreign universities wishing to operate on their territory, and there are even examples of countries where it is simply not possible for foreign universities to settle.

63. From this perspective, the regulatory framework proposed by the Law, as far as it applies to the establishment of new foreign universities (or their branches) which are not yet active in Hungary, and provided that the application of this framework takes into account the aforementioned guarantees for the effective enjoyment of academic freedom and institutional autonomy, does not appear to contradict applicable international standards and norms. [...]

[...]

74. Yet, the intended goals [...] have little connection as far as existing universities are concerned, [...]. In view of the considerations of a more political and ideological nature that have been invoked to justify the Law and taking into account the wider socio-political context surrounding its adoption, it is doubtful whether the Law responds to a genuine need in respect of universities which are already active in Hungary. [...]

75. The deadlines for compliance with the new requirements are unrealistic. Within six months after the entry into force of the Law [...] a preliminary agreement with the central authorities of a federal state has to be reached. And within eight and a half months after the entry into force [...] an international agreement must be concluded and corresponding teaching/academic activities in the country of seat must have been launched. The severe legal consequences for failing to comply are further aspects of relevance for the proportionality test. In particular, it is of special concern that, as stipulated by the Law, such failure *must* lead to license withdrawal and closure of educational institutions.

[...]

77. It would seem necessary [...] to make a clear distinction between already established institutions, with long-time operations [...], and foreign universities seeking in the future to open a branch or develop educational programs in Hungary. While new regulations may legitimately be imposed to future subjects, applying more stringent rules, without solid grounds, to those having lawfully operated for many years within the existing system appears problematic.

[...]

88. [...] It is questionable however, in the light of the principle of university autonomy, whether such [international] co-operation [in the educational sphere] should go so far as to making the operation of private education institutions, as well as the termination of their operation, entirely dependent on political decisions which may sometimes be influenced by considerations that are unrelated to academic interests. One may question also the added value of the required agreement in terms of quality assurance, taking into account the additional conditions related to the accreditation and state-recognition, in its country of seat, of the university and its educational programmes.

[...]

101. [...] [t]here appears to be no objective reason to impose an obligation on a foreign university having its programs already being operated in Hungary to have a "campus" in its state of seat. The accreditation in the state of origin [...] should in principle suffice to assure the Hungarian authorities of the quality of the teaching provided. [...]. For a university which provides for 25 years quality education in Hungary, the requirement that it should provide

education also in its country of origin cannot be justified by the need to ensure the quality of its education.

[CDL-AD\(2017\)022](#), Hungary - Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education

B. Employment and trade-unions

1. Employment rights in general; collective actions

The limitation of the right to strike by adding the words "including the right to strike with the use of methods of settlement established by the law" seems to be confusing and might be misinterpreted. Probably the intention of this provision is to establish the right to strike "after the exhaustion of the procedures/means provided for the settlement of disputes". In any case the present language needs a reformulation which would not put the right to strike into question.

[CDL\(1994\)011](#), Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, p. 5

69. Article 35 protects the right to form trade unions, which corresponds to the right of everyone to "join trade unions for the protection of his interests" guaranteed in Article 22 ICCPR.

70. It also protects the right to strike; this right is an independent right guaranteed by Article 8 of the International Covenant on Economic, Social and Cultural Rights, provided that it is exercised in conformity with the law. There should therefore be a provision relating specifically to the right to strike.

[...]

73. Article 39 stipulates the right of every citizen to work and the obligation placed on the state to take the necessary measures to guarantee this right in fair and decent conditions. This article could be supplemented by the right to freely choose one's profession or occupation, as is the case in certain European constitutions such as the Constitutions of Germany, Poland, the Czech Republic and Croatia.

[CDL-AD\(2013\)032](#), Opinion on the Final Draft Constitution of the Republic of Tunisia

39. New Section IV of Article 36 prohibits lockouts, except in cases provided by law. This provision appears to give additional protection to the workers; however, the legislator retains a wide discretion in regulating situations where lockouts should be possible. The Venice Commission draws the authorities' attention to the interpretation given by the European Committee of Social Rights to the revised European Social Charter, ratified by Azerbaijan in 2004. A comment to Article 6 § 4 of the Charter (which guarantees the right of workers and employers to collective actions) stipulates that "a general prohibition of lock-out is not in conformity with Article 6 § 4".

[CDL-AD\(2016\)029](#), Azerbaijan - Opinion on the draft modifications to the Constitution submitted to the Referendum of 26 September 2016

2. Employment of foreign workers

114. [...] [T]hird country (non-EEA) academic personnel were entitled to conduct educational, scientific research and artistic activities in a higher education institution maintained by a Hungarian foundation without a work permit. [...]

115. The 2017 Law repeals this exemption. In fact, this means that, if work permits will not be granted, the operation and academic freedom (including the freedom to select appropriate academic staff) of foreign institutions of higher education which employ non-EEA nationals will seriously be affected.

116. It is important to recall, on the one hand, that the requirement for work permits for non-EEA citizens is a common feature of European immigration and labour laws. [...] [I]t was confirmed that publicly-funded universities must obtain work visas for non-EEA citizens.

117. On the other hand, one cannot fail to observe here, too, that the amendment will have a major impact on the [university at issue], which reportedly is the only higher education institution with a high percentage of international, non-EEA, staff. The input from distinguished international professors contributes significantly to the international standing of this academic community. While it does not appear to respond to an objective need, the amendment will enable the Hungarian authorities to have a decisive role to play in the selection of [...] academic staff in as far as they are non-EEA nationals.

118. Should the amendment be maintained, it would be essential [...] to ensure that all applications would be treated fairly on an individual basis, and not be selected on any discriminatory or arbitrary ground [...]. Furthermore, the new rule should not be applied in a manner which would jeopardise the quality and international character of the education provided by [the university].

[CDL-AD\(2017\)022](#), Hungary - Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education

3. Working rights of public servants

86. The blanket prohibition for public employees to strike appears excessive; what needs to be guaranteed, either in the constitution or in the law, is the maintenance of a minimum service in key sectors of the public service.

[CDL-AD\(2007\)017](#), Interim Opinion on the Draft Constitution of Montenegro

25. A newly democratic state might have good reasons to remove from the public life, on a temporary basis, individuals who occupied high-level positions under the previous, non-democratic regime or who engaged in serious human rights violations. Doing so limits the risk that the new regime be overturned or tarnished from the beginning by non-democratic practices. It strengthens public trust in the new government and enables the society to have a new, fresh start. At the same time, it is important to keep in mind that lustration is not, and is not meant to be, a form of criminal proceedings. It must never be used as a substitute for a criminal sanction, when such a sanction would be warranted, or as a measure of revenge and retaliation.

26. Anti-corruption measures also play an important role in building up a democratic society. In addition to undermining the national economy, corruption might constitute a security threat. It also has a negative impact on the trust in the public institutions and on social cohesion within the society. [...]

[...]

30. The Law on Government Cleansing bans certain categories of individuals from occupying certain public offices. The Venice Commission stresses that in line with the concept of the “democracy capable of defending itself”, the state has the right to exclude from the access to public positions those individuals who might pose a threat to the democratic system and/or

have shown themselves unworthy of serving the society. [...] The legal regulation imposing limits on the access to public positions thus has to be clear and non-arbitrary in nature and has to respect the principle of proportionality.

[...]

32. The 1996 Guidelines on Lustration stipulate that:

- Lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy;
- Lustration shall not apply to elective offices; and
- Lustration shall not apply to positions in private or semi-private organisations.

33. The list under Article 2 of the Law contains a rather extensive number of positions in all the spheres of the public administration [...]. [T]he Venice Commission warns that an overbroad personal scope of application of the Law would be very problematic. Not only would it risk violating individual fundamental rights: it would also affect the functioning of the whole Ukrainian civil service and social peace, giving rise to serious antagonisms and stimulating the rancour of those working under the former regime being disqualified from public functions in a disproportionate manner. A large scale lustration process would result in enormous bureaucratic burdens and might lead to an atmosphere of general fear and distrust.

[...]

54. Article 3(8) relates to the fight against corruption. It disqualifies persons whose verification [...] showed “unreliability of data about their possession of property indicated in property, assets, expenses and financial declarations, or their family members’, and/or discrepancy value of the property” submitted to the fiscal authorities. [...].

55. The Venice Commission does not contest that Article 3(8) pursues a legitimate purpose, that of protecting the Ukrainian society from the scourge of corruption. It notes however that the provision is drafted in a somewhat problematic manner. An automatic disqualification from access to public positions for a period of 10 years of all individuals whose verification shows some irregularities, regardless of the nature and extent of these irregularities, is a radical measure. It is questionable whether it could meet the principle of proportionality [...].

[CDL-AD\(2015\)012](#), *Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015; see also [CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, §§ 119 - 140*

107. [...] [T]he policy regulating public service is based on the idea of loyalty, and that gives the States a larger margin of appreciation in deciding whom to employ/dismiss, at least when the posts “wielding a portion of the State’s sovereign power” are concerned. Judges, prosecutors, police officers and military personnel belong par excellence to the category of public servants “wielding a portion of the State’s sovereign power”. This logic is *a fortiori* applicable in times of a major crisis where the State has to combat a secret organisation which deeply penetrated into its administrative mechanism.

108. Therefore, as a starting point the Venice Commission acknowledges that following the coup it might have been necessary to introduce a simplified system of provisional removal of public servants from office, based on the relatively loose criterion of loyalty and following an expedient procedure. This does not imply, however, that mass dismissals of public servants are not a human rights issue, for which the principles of proportionality and necessity must be respected. [...]

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016

4. Trade-unions

75. The right to form and to join trade unions should be added [(to Article 51 guaranteeing the freedom of association)]. [...]

[CDL-AD\(2007\)017](#), Interim Opinion on the Draft Constitution of Montenegro

26. The next issue to address is whether the removal of current Article 42 (which guarantees the rights of trade-unions) and replacement of it with a general provision [which guarantees the freedom of association], where trade-unions are only mentioned as bearers of the freedom of association, affects the legal protection provided by the Constitution to the trade-unions in the constitutional order.

27. The mode of regulation of the right to form and join trade-unions at the constitutional level differs in various countries. It depends on the tradition and the role that trade-unions play. In some countries regulations are more detailed, for example in Poland, where the Polish Constitution in Articles 58 and 59 states that the freedom of association shall be guaranteed to everyone and deals specifically with the trade-unions and industrial actions. This solution is rooted in the Polish tradition of *Solidarity* as a trade union and, at the same time, as a strong political movement. That being said, this is just one possible solution, and it is also possible to have no separate article on trade-unions but simply mention them in the general provision on the freedom of association, as in the new Article 42.

28. It is important to ensure, however, that the removal of the current article 42 is not interpreted as a calculated move aimed at lowering the protection given to the trade-unions at the constitutional level. The rapporteurs understood that it was not the intention of the Government, [...]. [T]his is something which could be made clear during debates in Parliament, on condition that those debates make part of the legislative history and may be used by the courts in their interpretation of the Constitution.

29. In contrast to the scope of protection under the current Constitution, the new provision not only refers to trade unions, but also to employers' associations ("patronages"). The inclusion of patronages next to the trade unions in the scope of application stresses that trade unions and employers' associations are social partners, and is not unusual among the Council of Europe member states (see for instance Article 28 para 1 of the Swiss Constitution, Article 7 of the Spanish Constitution, or Article 9 of the Romanian Constitution).

[CDL-AD\(2018\)007](#), Republic of Moldova - Opinion on the Draft Law on the modification of Article 42 of the Constitution of the Republic of Moldova regarding the Freedom of Association

C. Other socio-economic rights: rights of the child, right to medical assistance, cultural rights, environment and good administration

1. Rights of the child

78. It would be helpful if the Article made it clear that the rights referred to are in addition to the other rights provided for in the Constitution. The Article makes no reference to the right of children to express views freely in all matters guaranteed by Article 12 of the UN Convention of the Rights of the Child, or the rights to freedom of expression or of thought, conscience and religion guaranteed in Article 13 and 14 of the same instrument. The unqualified reference in

Article 37 to the raising of children according to the parents convictions seems somewhat at odds with these provisions of the UN Convention.

[CDL-AD\(2005\)003](#), *Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia*

91. This provision should better correspond to Article 32 of the 1989 Convention on the Rights of the Child which sets out “the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”

[CDL-AD\(2007\)017](#), *Interim Opinion on the Draft Constitution of Montenegro*

NOTE: on the rights of the children see, more generally, **[CDL-AD\(2014\)005](#), *Report on the Protection of Children's Rights: International Standards and Domestic Institutions***

2. Right to social security and medical assistance

The inclusion of the upbringing of children as an entitlement to social insurance is much better suited to constitutional regulation than the previous version (it is much more specific and less programmatic).

[CDL\(1994\)011](#), *Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, p. 5*

31. Article 36 in fine provides for an obligation of individuals “to take care of their needy and incapable parents”. The Commission, although it fully subscribes to this principle, stresses the fact that this obligation should not diminish in any way whatsoever the social obligations of the State towards needy and incapable individuals, as set forth in other provisions of the Constitution.

32. The Commission notes with approval that the right to social security in Article 37 is granted to everyone and not only to citizens.

[CDL-INF\(2001\)017](#), *Report of the Venice Commission on the Revised Constitution of the Republic of Armenia*

83. In the event of pregnancy, motherhood, illness, work related trauma, old age, job loss, or other events, there is a right of access to social services. There is also a right of access to preventive medicine. It is not clear what is meant by this or to what extent this right is intended to be justiciable. The concept should be brought to reasonable proportions, for instance by specifying it as immunisation against dangerous diseases. The rights of the elderly to live in dignity and independently and to be involved in social and cultural life are recognised. The State is required to ensure free development and equal opportunity for the handicapped. The scope of this latter provision appears unclear, in particular regarding how it is to be enforced.

[CDL-AD\(2005\)003](#), *Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia*

10. The “inalienable right to life” is one of the most fundamental rights enshrined in all human rights codifications (cf. Article 2 ECHR). It should never be confused with the controversial social “right to health”. Adding the term “health” in Article 27 is therefore counterproductive.

[CDL-AD\(2009\)008](#), *Opinion on the Draft Law amending the Constitution of Ukraine presented by People's Deputies Yanukovych, Lavrynovych, et al.*

3. Right to a housing

62. Article 8 of the Fourth Amendment replaces Article XXII of the Fundamental Law which now provides:

“(1) Hungary shall strive to provide every person with decent housing and access to public services.

(2) The State and local governments shall also contribute to creating the conditions of decent housing by striving to provide accommodation to all homeless people.

(3) In order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area.”

63. The Venice Commission welcomes that paragraphs 1 and 2 of Article XXII introduce an obligation of the State and local governments to strive for the protection of homeless persons. As concerns Article XXII.3, the Venice Commission notes that, [...] the Hungarian Constitutional Court [...] stated that the punishment of unavoidable living in a public area fails to meet the requirement of the protection of human dignity [...], and can neither be justified by the removal of homeless people from public areas nor by providing an incentive for such persons to avail themselves of the social care system. In the Court’s view, homelessness is a social problem which the State must handle in the framework of social administration and social care instead of punishment. Introducing the new Article XXII.3 on the constitutional level is a reaction to this decision.

[CDL-AD\(2013\)012](#), *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*

4. Cultural rights

34. The Commission welcomes the new wording [...] guaranteeing to persons belonging to minorities the right “to freely express, preserve and develop their ethnic, linguistic, cultural and religious identity”.

[CDL-INF\(2001\)017](#), *Report of the Venice Commission on the Revised Constitution of the Republic of Armenia*

86. [Article 44: Right to free development] includes the right to preserve and develop cultural, ethnic and language diversity and heritage, traditions and distinctiveness. The State is obliged to support cultural development and to protect cultural heritage through the law. It is not clear why the right of participation in cultural life, mentioned in the second paragraph, and the obligation to protect and preserve cultural heritage, referred to in the third paragraph, are restricted to “citizens”. It should be recalled, that international law confers human (including minority) rights to every person within the jurisdiction of the State. A restriction to citizens only is only allowed when it concerns those fundamental human rights that are commonly reserved for citizens, notably political rights. Even if the purpose were to make a distinction in relation to Article 45, which deals with the rights of minorities, the restriction would not be justified since there are non-citizens who do not belong to a national minority. Consequently, there should be specific reference to the right of persons belonging to national minorities to develop their cultural, linguistic or religious identity.

CDL-AD(2005)003, *Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia*

14. [...] [T]he current draft article 7 should provide for the rights of persons belonging to national minorities not only to express, preserve and openly manifest, but also to “develop” their national and religious, but also “cultural, ethnic and linguistic” identity.

CDL-AD(2007)017, *Interim Opinion on the Draft Constitution of Montenegro*

77. Culture seems to be defined [in Article 33 of the Constitution (Access to culture)] in a very broad sense since it apparently includes spirituality:

(3): “*The State shall ensure the preservation of spiritual identity, the support of national culture, the stimulation of arts, the protection and conservation of cultural heritage, the development of contemporary creativity, the promotion of cultural and artistic values of Romania worldwide*”.

(3¹) “*The State promotes the diversity of cultural expressions nationwide and encourages the intercultural dialogue*”.

78. However, the proposed provisions lack clarity and may raise issues of interpretation. In particular, the notion of “spiritual identity” is too vague, as is the duty of the state to ensure “the preservation of spiritual identity”. The interrelation between these provisions and the constitutional guarantees for freedom of conscience might be problematic: could article 33 be used to make proselytising or even criticism of religious ideas unlawful? Also, it is difficult to see how the duty to “ensure the preservation of spiritual identity” in §3 relates to that of promoting “the diversity of cultural expression” in new § (3¹). Such vague and sensitive notions should be avoided in a constitutional text or adequately specified.

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

108. [...] [W]hile the ethno-cultural district of Taraclia will be entitled to exercise powers [...], the authorities of the Republic of Moldova will have obligations in relation to the maintenance and the development of the “national culture” [...].

109. In concrete terms, *the ethno-cultural district will be entitled to*: establish non-governmental cultural institutions and ensure the functioning thereof; establish cultural unions, professional and amateur art groups, groups for the study of the ethno-cultural heritage of Bulgarians; carry out cultural events, [etc.].

110. *The state authorities will in turn be under the obligation to*: take into consideration the proposals of the ethno-cultural district when implementing regional cultural development programmes; consider the district’s proposals for introducing the study of the history, language and traditions of Bulgarians in the educational programmes in Bulgarian language; direct the work of the state and municipal cultural institutions to meet the ethno-cultural needs; organise sections on minorities’ culture, history and social life within state and municipal archives; [etc.].

111. Here again, it is not sufficiently clear to the Venice Commission whether these provisions only confirm rights and obligations that are already protected by the national legislation or whether they further enlarge these rights.

112. To the extent that they only confirm these rights, the above mentioned provisions of the draft are superfluous and might even create confusion as they could be interpreted as implying a limitation of the rights of the Bulgarian national minority in the ethno-cultural district of Taraclia, to the rights mentioned in these provisions. To the extent that they enlarge the rights of the Bulgarian national minority in the ethno-cultural district of Taraclia, the question arises, in

the light of the principle of fair and equal treatment of all minorities, as to whether similar rights should not be granted to the national minorities, including Bulgarians, in other districts.

113. Here once more, it is noted that [...] Article 13 of the draft does not explicitly state that the ethno-cultural district may exercise the rights mentioned in this article "in compliance with the legislation of the Republic of Moldova." Does this mean that, in exercising those rights, the ethno-cultural district of Taraclia can infringe the relevant Moldovan legislation? Or does this mean that the state legislator can no longer enact legislation applicable to Taraclia on the issues mentioned in Article 13?

[CDL-AD\(2016\)035](#), *Republic of Moldova - Opinion on the Draft Law on the Ethno-Cultural Status of the District of Taraclia*

NOTE: on the cultural rights of national minorities see also <u>CDL-PI(2018)002</u>, <i>Compilation concerning the protection of national minorities</i>
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5. Environmental protection

The introduction of the right to "reliable information about the state of the environment" seems to be a proper step in order to make the right to a favourable environment more specific.

[CDL\(1994\)011](#), *Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993, p. 5*

84. [Article 42: The right to a healthy environment] imposes on the State a duty to ensure the rational use of natural resources, protection of the environment and sustainable development for the purposes of guaranteeing a safe environment for human health. Persons have rights to obtain information regarding the work and home environment and factors affecting their health. Again, it is not clear to what extent such rights might be capable of being justiciable.

[CDL-AD\(2005\)003](#), *Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia*

31. In order to avoid that the Constitution contain merely programmatic rules, the right to a sound environment should not be formulated as an individual right, but rather as a state objective. A good example of this kind is Section 20 of the Finnish Constitution, which provides: "Section 20 - Responsibility for the environment. Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment."

[CDL-AD\(2007\)017](#), *Interim Opinion on the Draft Constitution of Montenegro*

79. It is difficult to see that the ill-treatment of animals is an issue concerning the right to a healthy environment. It should be addressed by a separate provision or deleted.

[CDL-AD\(2014\)010](#), *Opinion on the Draft Law on the Review of the Constitution of Romania*

31. The mention of the State's duty to take care of environmental protection and rational use of natural resources under the new draft Article 5(5) and of the principle of the autonomy of higher educational institutions under the new draft Article 27(3) are welcome.

[CDL-AD\(2018\)005](#), *Georgia - Constitutional amendments as adopted at the second and third hearings in December 2017*

6. Other socio-economic rights

56. Articles 49 Right to Proper Administration, Article 50 Right of Access to Information and Article 51 Right to Apply to the Human Rights Defender are indispensable components of good governance and should therefore be welcomed.

[CDL-AD\(2015\)037](#), *First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia*

90. The obligation for the State to create conditions to stimulate childbirth is very vague and should be removed.

[CDL-AD\(2007\)017](#), *Interim Opinion on the Draft Constitution of Montenegro*

D. Duty to promote equality

It should also be stressed that the principle of equality and non-discrimination - identified earlier as one of the constitutionally protected traditional rights and freedoms - probably is the best safeguard of social values. The judicious application of this principle can be markedly more effective than the enumeration of a long list of economic and social rights.

[CDL\(1994\)009](#), *Report on the legal foundations of the economic system during a period of transition from a planned to a market economy, Part III*

24. The special advantages and privileges for women mentioned in the current Constitution have been abolished. This is in conformity with the new approaches to gender equality abstaining from granting women special privileges, especially if they are based on a traditional conception of the different roles of men and women. On the other hand the paternalistic prohibition of hazardous work for women is upheld in Art. 47. This is in line with ILO Conventions, especially Convention No. 45 concerning the employment of women in underground work in mines of all kinds. The European Court of Justice considers such an approach as discriminatory [...]; but this need not be taken into consideration by Ukraine.

[CDL-AD\(2008\)015](#), *Opinion on the Draft Constitution of Ukraine (prepared by a working group headed by Mr V.M. Shapoval)*

44. Article 20 states that “all citizens, male and female alike, shall have equal rights and duties. They shall be equal before the law without any discrimination (...)”. The explicit recognition of the principle of equality and non-discrimination is important and deserves to be welcomed. It will however be noted that the principle allowing for positive action to eliminate any discrimination is not expressly provided for.

[...]

47. Article 45 provides that “the State shall ensure equality of opportunity between women and men in assuming different responsibilities (...)”. This sentence is ambiguous and could be interpreted in a restrictive way, with equal opportunities being limited to certain responsibilities, whereas Article 20 provides for no limitation *ratione materiae* on the principle of equality. It would be preferable to delete the words “in assuming different responsibilities”.

[CDL-AD\(2013\)032](#), *Opinion on the Final Draft Constitution of the Republic of Tunisia*

108. The new Article 36 par 5 provides that “a family is created upon voluntary union of a man and a woman who reached the age of consent and entry into marriage [...], which] shall be

registered by the state". This could imply that only the union of a man and a woman would be recognized by the state/public authorities as a "family". Such a provision may de facto limit access to certain state/public benefits which are dependent upon "family status"/official marriage (e.g., certain social security benefits, economic protection benefits, access to social housing, child and health benefits). This would also indirectly discriminate against unmarried couples, those in a de facto relationship or same-sex partners. In principle, any difference in treatment on the basis of marital or family status must be justified on reasonable and objective criteria, and be proportionate. As regards same-sex partners, they would be subject to intersecting forms of discrimination on the basis of both, their sexual orientation and their family status. While same-sex marriages are debated in many OSCE participating States and the practice varies greatly across the OSCE and the Council of Europe regions, the new provision could be problematic under the right to freedom from discrimination based on one's sexual orientation. It is thus recommended to retain the current wording of Article 36 par 5, while at the same time ensuring, as recommended by UN human rights monitoring bodies, that legislative measures necessary to protect the rights especially of women upon dissolution of unregistered marriages are also guaranteed.

[CDL-AD\(2016\)025](#), *Kyrgyz Republic - Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution"*; 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, §§ 16-20***

E. Duty to provide reasonable accommodation to people with disabilities

24. In contrast with the regulation in other constitutions, the provision on disability has not been inserted [in the Constitution] in connection with the principle of equality. The draft stresses the State's obligation aiming at independence, social integration and full-fledged participation in social life. The practical application will prove the efficiency of this approach.

[CDL-AD\(2009\)024](#), *Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine*

90. Article 50 [of the Constitution (Protection of persons with disabilities)] contains guarantees for persons with disabilities, which is welcomed:

"Persons with disabilities enjoy all the fundamental human rights and freedoms, under the conditions of the equality of opportunities. The State ensures the implementation of a national policy based on the equality of opportunities and of inclusion, prevention and treatment with a view to the effective participation of persons with disabilities in the life of the community, with the respect of the rights and duties incumbent on parents and tutors."

91. The new terms of the first sentence of article 50 - proposing deletion of the "special protection" provided to persons with disabilities though replacing it by a reference to "the conditions of the equality of opportunities" - may be interpreted as diminishing the level of protection presently guaranteed to persons with disabilities. The Constitutional Court has declared this proposal unconstitutional.

[CDL-AD\(2014\)010](#), *Opinion on the Draft Law on the Review of the Constitution of Romania*

NOTE: on the promotion of equality see also <u>CDL-PI(2016)007</u>, <i>Compilation of Venice Commission opinions and reports concerning gender equality</i>

F. Specialised institution protecting social and economic rights

NOTE: on the operation and organisation of ombudsman institutions see [CDL-PI\(2016\)001](#), **Compilation of Venice Commission Opinions concerning the Ombudsman Institution.**

V. Sources

1. Reports and studies

- [CDL\(1994\)009](#), Report on the legal foundations of the economic system during a period of transition from a planned to a market economy
- [CDL-AD\(2014\)005](#), Report on the Protection of Children's Rights: International Standards and Domestic Institutions

2. Opinions

- [CDL\(1994\)011](#), Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993
- [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 (text approved by the Constitutional Commission on 11 March 1996), p. 5
- [CDL-INF\(2001\)017](#), Report of the Venice Commission on the Revised Constitution of the Republic of Armenia
- [CDL-AD\(2002\)002](#), Opinion on the Resolution on the Principles of the State Policy of Ukraine in the Sphere of Human Rights adopted by the Verkhovna Rada of Ukraine on 17 June 1999
- [CDL-AD\(2005\)003](#), Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia
- [CDL-AD\(2005\)022](#), Interim Opinion on Constitutional Reform in the Kyrgyz Republic
- [CDL-AD\(2005\)003](#), Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia
- [CDL-AD\(2007\)004](#), Opinion on the Constitution of Serbia
- [CDL-AD\(2007\)017](#), Interim Opinion on the Draft Constitution of Montenegro
- [CDL-AD\(2007\)045](#), Opinion on the Constitutional situation in the Kyrgyz Republic
- [CDL-AD\(2007\)047](#), Opinion on the Constitution of Montenegro
- [CDL-AD\(2008\)009](#), Opinion on the Constitution of Bulgaria
- [CDL-AD\(2009\)008](#), Opinion on the Draft Law amending the Constitution of Ukraine presented by People's Deputies Yanukovych, Lavrynovych, et al.
- [CDL-AD\(2009\)024](#), Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine
- [CDL-AD\(2009\)045](#), Opinion on the Draft Law on Prohibition of Discrimination of Montenegro
- [CDL-AD\(2009\)057](#), Interim Opinion on the Draft Constitutional Amendments of Luxembourg

- [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\(2013\)032](#), Opinion on the Final Draft Constitution of the Republic of Tunisia
- [CDL-AD\(2014\)010](#), Opinion on the Draft Law on the Review of the Constitution of Romania
- [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\(2014\)027](#), Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia
- [CDL-AD\(2015\)012](#), Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015
- [CDL-AD\(2016\)025](#), Kyrgyz Republic - Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution";
- [CDL-AD\(2015\)037](#), First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia
- [CDL-AD\(2015\)038](#), Second Opinion on the Draft Amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16) of the Republic of Armenia
- [CDL-AD\(2016\)029](#), Azerbaijan - Opinion on the draft modifications to the Constitution submitted to the Referendum of 26 September 2016
- [CDL-AD\(2016\)035](#), Republic of Moldova - Opinion on the Draft Law on the Ethno-Cultural Status of the District of Taraclia
- [CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016
- [CDL-AD\(2017\)022](#), Hungary - Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education
- [CDL-AD\(2017\)030](#), Ukraine - Opinion on the provisions of the Law on Education of 5 September 2017, which concern the use of the State Language and Minority and other Languages in Education
- [CDL-AD\(2018\)007](#), Republic of Moldova - Opinion on the Draft Law on the modification of Article 42 of the Constitution of the Republic of Moldova regarding the Freedom of Association