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**COMPILATION**  
**OF VENICE COMMISSION OPINIONS, REPORTS AND STUDIES**  
**ON CONSTITUTIONAL JUSTICE**  
**(UPDATED)**

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## 1 Introduction

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

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

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

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

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

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

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

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

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

## 2 Type of constitutional court

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

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

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

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

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

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

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

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

“Since World War II, constitutional courts were typically established in Europe in the course of a transformation to democracy; first in Germany and Italy, then in Spain and Portugal and finally in Central and Eastern Europe. The purpose of these courts was to overcome the legacy of the previous regimes and to protect human rights violated by these regimes. Instead of the principle of the unity of power, which excluded any control over Parliament, the system of the separation of powers was introduced. In place of the supreme role of Parliament (being under complete control of the communist party), the new system was based on the principle of checks and balances between different state organs. As a consequence, even Parliament has to respect the supremacy of the Constitution and it can be controlled by other organs, especially by the Constitutional Court. Constitutional justice is a key component of checks and balances in a constitutional democracy. Its importance is further enhanced where the ruling coalition can rely

on a large majority and is able to appoint to practically all state institutions officials favourable to its political views.”

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

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

[CDL-AD\(2014\)027](#) Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia, paragraph 75.

“... In this context, it is noted that a majority of countries have established separate constitutional jurisdictions for constitutional reviews. Constitutional justice is generally considered to be a key component of a constitutional democracy. The Venice Commission has noted that while there is no general requirement to establish a constitutional court, the establishment of such an organ as a separate institution is generally recommended and has often proved to be a motor in implementing the rule of law in a given country.

Where such courts exist, the respective constitution generally establishes their overall jurisdiction, the parties entitled to appeal to such courts, as well as the constitutional principles on which the activity of the constitutional court shall be based; more concrete norms on procedural matters are then set out in laws and rules of procedure, with the latter usually being drafted by the constitutional court itself. At the same time, the institutional independence of such body should generally be guaranteed in the constitution. The fact that “[t]he organization and procedures” of the Constitutional Chamber would be defined by ordinary legislation (new Article 93 par 4) would jeopardize the institutional status of the Constitutional Chamber, which, as the main body responsible for interpreting the Constitution, should be fully independent from the executive and the legislative branches. It is noted however that certain aspects regarding the composition of the Constitutional Chamber and its role are still laid down in the revised Article 97, which would support the view that it retains a special status within the Kyrgyz judicial system.”

[CDL-AD\(2016\)025](#), Joint Opinion on the Draft Law “On Introduction of Amendments and Changes to the Constitution” of the Kyrgyz Republic, paragraphs 47–48.

“While there are various models of constitutional review across the OSCE and the Council of Europe regions, such review should, as a general rule, take place outside the legislative and executive branches of power. Moreover, democratic systems are built on the separation of three equal branches of power, including, next to the executive and the legislative, also the judiciary, with the two latter exercising special oversight functions. Turning the Constitutional Chamber into a body that is secondary to the executive and legislative powers would thus constitute a worrying development, all the more given the importance of a constitutional court for the overall functioning of democratic institutions, the protection of human rights and the rule of law in a country.”

[CDL-AD\(2016\)025](#), Joint Opinion on the Draft Law “On Introduction of Amendments and Changes to the Constitution” of Kyrgyz Republic, paragraph 56.

“Full judicial review of constitutionality is indeed the most effective means to ensure respect for the Constitution, and includes a number of aspects which are set out in detail above. First, the question of *locus standi* is very important: leaving the possibility to ask for a review of constitutionality only to the legislative or executive branch of government may severely limit the number of cases and therefore the scope of the review. Individual access to constitutional jurisdiction has therefore been developed in a vast majority of countries, at least in Europe. Such access may be direct or indirect (by way of an objection raised before an ordinary court, which

refers the issue to the constitutional court). Second, there should be no limitation as to the kinds of acts which can be submitted to constitutional review: it must be possible to do so for (general) normative as well as for individual (administrative or judicial) acts. However, an individual interest may be required on the part of a private applicant.(...)

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". A qualified majority implies a political compromise and is a way to ensure a balanced composition when no party or coalition has such a majority."

[CDL-AD\(2016\)007](#), Rule of Law Checklist, paragraphs 109, 112.

### **3 Sources**

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

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

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

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

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

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

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

"In most European countries constitutional provisions on constitutional courts are further developed in separate laws or constitutional laws. On the contrary, in the Republic there is no special law on the CC. Article 113 of the Constitution stipulates that "the working methods and the procedures before the Constitutional Court are regulated by an act of the Court". The only legal act regulating activities and powers of the CC is currently the Rules of Procedure of 1992. The Venice Commission finds this situation quite irregular. In the opinion of the Commission, it would be useful to adopt a separate law on the CC that would regulate issues relating to the status of its judges, basic conditions for the institution of proceedings before the CC, legal effects of the CC's judgments, etc. Reference to such law should be inserted in the Constitution, which means that a new paragraph should be added to Article 113 correspondingly. It is understood,

however, that the adoption of any such law must not affect the power of the CC to regulate its own working methods and to develop the rules of procedure in the Rules of Court.”

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

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

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

“Article 15 of the draft Law refers to time limits “prescribed by the Constitutional Law of the Republic of Armenia ‘Rules of Procedure of the National Assembly” and to the manner “prescribed by the Constitution and law”. The “Rules of Procedure of the National Assembly of 20 February 2002,” which are currently in force (with the amendments of 16 March 2016), do not contain any time limits or any other procedural regulations. Due to the Constitutional Court’s special status and for reasons of legal certainty, the rules in question should be incorporated into the draft Law directly rather than be referred to as the “Rules of Procedure of the National Assembly.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 22.

“One pervasive issue in this draft Law is the very detailed nature of some of its provisions. A number of them could be considered to be too detailed for a constitutional law such as this draft Law and might find their place in the Rules of Procedure, which are easier to amend.

In light of the above, the Venice Commission strongly suggests that the Armenian authorities reconsider the demarcation between what should appear in this draft Law and what should appear in the Rules of Procedure”.

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraphs 100-101.

“Admittedly, including the Constitutional Court in the chapter on justice is appropriate, especially as it is made up of judges from other courts (Article 103(3)). However, as it is an independent body with separate functions, namely to rule on the compliance of laws with the Constitution, it could also be the subject of a separate chapter.”

[CDL-AD\(2019\)003](#) Opinion on the Proposed revision of the Constitution of Luxembourg, para. 110.

## **4 Composition of the court**

### **4.1 Balanced composition**

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



ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions.

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

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

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

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

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

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

“The proposed amendments provide for a balanced composition of the Constitutional Court, with its 18 members being appointed by the President, the Verkhovna Rada and the Congress of Judges, after a selection on the basis of a competition among candidates whose high qualifications are listed in the Constitution. As was expressed in the Preliminary Opinion, this proposed composition deserves to be supported.”

[CDL-AD\(2015\)027](#) Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, paragraph 24.

“The Venice Commission indeed regularly recommends establishing mechanisms which help to ensure a balanced composition of constitutional courts. In its 1997 Report, the Commission explained what it means by pluralism: “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. Here, the emphasis is on the independence of the judges and their respect for pluralism, not their “representation” of party interests.”

[...]

“While Members of Parliament legitimately represent the ideas of political parties, this is very different from the role of constitutional court judges. Constitutional judges have a “duty of ingratitude” towards the authority that elected or appointed them. They may well be nominated by a party and elected by the MPs of that same party, but they can never represent that party. As judges, they are independent, their loyalty is to the Constitution, not to those who have elected them.”

[CDL-AD\(2016\)001](#), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, paragraph 116, 119.

“[...] Thus, it is planned to introduce a model existing in many Eastern European States where the President, the legislator and the judiciary participate in the composition of the CC. The President and the Assembly must choose from a list provided by the Justice Appointments Council (JAC), where judges play a decisive role. In principles this is a positive change as it limits the scope for political manipulations and thus should be welcomed.”

[CDL-AD\(2015\)045](#), Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, paragraph 23.

“The Constitutional Court is still made up of the President of the Superior Court of Justice, the President of the Administrative Court, two judges at the Court of Cassation and five judges appointed by the Government – which now officially replaces the Grand Duke in this role – on the joint advice of the Superior Court of Justice and the Administrative Court (Article 103(3)). The inclusion of judges from other jurisdictions is justified by the limited number of inhabitants, of judges as well as of cases to deal with.”

[CDL-AD\(2019\)003](#) Opinion on the proposed revision of the Constitution of Luxembourg, paragraph 111

#### **4.1.1 Fair representation of ethnic minorities**

“Another general issue of importance is the protection of minorities by the Constitutional Court. The Constitutional Law of the Republic of Croatia of 4 December 1991 on human rights and fundamental freedoms and on national or ethnic minorities establishes that minorities that represent more than 8 % of the population must be represented in high jurisdictions. The latter should include, in principle, the Constitutional Court. “

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

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

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

#### **4.1.2 Judges’ qualifications**

“The qualities required of a constitutional judge reflect in most cases the necessity of legal qualifications in order to ensure a competent court composition. On the other hand, an excessive legal specialisation could undermine the diversity of the composition of some constitutional jurisdictions. Nevertheless, a distinction should be made between the desire for a certain diversity

and the creation of quotas in order to allow certain professions or minority groups to be represented on the court. The search for a balanced representation in order to redress inequality or discrimination may usually be formal in federal or multilingual societies, since these are particularly conscious of the issue of their different constituent groups' equal representation and access to the law.”

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

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

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

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

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

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

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

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

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

[CDL-AD\(2011\)040](#) Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, paragraph 21.

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

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

“However, the criterion whereby candidates must not have been a member of a political party for at least ten years seems too strict, given that political involvement, including as a member of a political party, is an important component of democracy. A constitutional court has a specific constitutional legitimacy enabling it to repeal legislation passed by parliament, the representative of the sovereign people. In order to enjoy this legitimacy, a specialist constitutional court is often

composed in a balanced way, reflecting the composition of society. In this context, requiring candidates for the post of judge in the Constitutional Court not to have been a member of a party for ten years before their appointment seems excessive. “

[CDL-AD\(2015\)024](#), Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, paragraph 17.

“The Venice Commission’s study on the Composition of Constitutional Courts of 1997 showed a wide range of eligibility requirements for constitutional judges:

“As expected, several answers differ according to whether the court in question is a constitutional court proper or a supreme court exercising, *inter alia*, constitutional jurisdiction. This applies in particular to the appointment requirements, whereby supreme courts are, in most cases, entirely made up of lawyers (Argentina, Canada, Denmark, Estonia, Greece, Iceland, Ireland, Malta, Norway). Finland forms a qualified exception: its Supreme Court and Supreme Administrative Court alter their composition in certain cases. In court-martial cases before the Supreme Court, two generals participate in the decision; where water rights and patent cases come before the Supreme Administrative Court, specialists in engineering take part in the decision. The supreme jurisdictions of Sweden also differ slightly: all members of the Supreme Court must be lawyers, whereas only two thirds of judges on the Supreme Administrative Court must have legal qualifications. Another exception is Switzerland's Federal Court (being also the final stage of appeal for ordinary jurisdiction), which does not require its judges to have had a legal education. In practice, however, the judges of the Federal Court are all lawyers. Up to five out of fifteen judges need not have professional legal qualifications on the Japanese Supreme Court.

The general preference for lawyers may be observed in many constitutional courts as well (Albania, Austria, Bulgaria, Germany, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Russia, the Slovak Republic, "the former Yugoslav Republic of Macedonia"). At least some constitutional courts, however, expressly allow for non-lawyers to become members of the court in order to bring together the widest possible span of human experiences and to avoid an excessive specialisation of the court (Armenia, France, Liechtenstein, Turkey). In practice, however, these courts are largely made up of lawyers. In Belgium half of the judges must be former members of parliament, though the overwhelming majority of them are lawyers.

Where legal qualifications are required, the kind of experience expected varies from longstanding service in the judiciary (Albania, Estonia) to experience in any kind of legal profession (Argentina, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Georgia, Hungary, Latvia, Lithuania, Norway, Romania, Russia, the Slovak Republic, Slovenia, Spain, “the former Yugoslav Republic of Macedonia”, Ukraine). In Belgium those judges who are not former members of parliament must be judges from the highest jurisdictions of the State, legal academics or auxiliary judges (assistants) of the Court. Some countries have a quota of recruitment from the judiciary (Germany, Portugal), or a requirement that the candidate have either judicial experience or legal professional experience, whereby the years of experience required are generally fewer for judges than for other lawyers (Canada, Ireland, Italy, 18 Japan). Similarly in Finland the experience in the judiciary required for appointment to the supreme jurisdictions need not be long if it is supplemented by experience as a law professor or prominent advocate. In Austria, the president, the vice-president, three effective and three substitute members of the Court (nominated by the Federal Government) must be selected from among judges, high officials and university law professors.”

In some countries, the composition of constitutional courts thus can include even non-lawyers in order to bring together the widest possible span of human experiences and to avoid an excessive specialisation of the court. However, in practice these courts are largely made up of lawyers.

Article 134.3 of the Slovak Constitution places the Slovak Republic firmly in the group of states which require legal experience, but do not require specific judicial experience.

While in practice many European constitutional court judges are professors of constitutional law, European constitutions, including the Slovak Constitution, do not require such specialisation.

A second typical origin of members of constitutional courts are the judges of the other courts who by the nature of their work in the ordinary courts do not specialise in constitutional law. In fact, constitutional courts often value a diverse composition, which brings into the Court experience from various fields of law, e.g. criminal law, which is one of the main fields where human rights come into play.”

[CDL-AD\(2017\)001](#), Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, paragraphs 52-56.

“The draft Law sets out an additional requirement that is not in the Constitution, notably that the candidate must have high professional and moral qualities. This is positive. Furthermore, the candidate must give documentary evidence with respect to his or her command of Armenian.

The criterion of “high professional qualities,” as set out in the Constitution, and not further explained by the draft Law, might be difficult to ascertain with precision in practice, but is adequate. The aim of this formula is to ensure that the judges of the Constitutional Court have a special, “higher” legal knowledge. These types of provisions also exist in other countries”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 12-13.

#### **4.1.3 Age**

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

[CDL-AD\(2004\)024](#) Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paragraph 25.

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

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

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

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

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

[CDL-AD\(2013\)014](#) Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, paragraph 26.

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

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

“The Preliminary Opinion expressed some doubts as to the increase of the minimum age requirement for Constitutional Court judges from 40 to 45. The revised amendments get back to a minimum age of 40, a solution which the Venice Commission welcomes. The Venice Commission reiterates its doubts as to the desirability of the 20-year residence requirement, which would exclude scholars and judges who have carried out academic or professional work abroad.”

[CDL-AD\(2015\)027](#) Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, paragraph 26.

“A judge of the Constitutional Court may be a citizen of Georgia “from the age of 35 years” (Draft art. 60(2)) which is a rather a young age for an important post in the highest court. A longer legal experience would be preferable”.

[CDL-AD\(2017\)013](#), Opinion on the draft revised Constitution of Georgia, paragraph 77.

## **4.2 Incompatibilities**

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

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

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

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

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

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

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

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

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

“However, Article 11.3 of the draft Law extends the requirement of political abstention to activities two years before becoming a constitutional judge and excludes as a judge any person (a) who was a member or held a position in a political party or similar organisation, (b) was a candidate or was elected to a government or local government office or (c) participated in managing or financing a political campaign or other political activities.

While the Venice Commission welcomes the approach to ensure that the judges of the Constitutional Court are not influenced by political motivations, political activities of citizens belong to the core of a pluralistic democracy and, thus, should be promoted. This includes political activities within political parties, even for persons who may be qualified to become a constitutional judge in the future.

The two important principles – the protection of judicial impartiality as a judge and the value of political commitment in a democracy – must be reconciled. In the view of the Venice Commission, notably simple party membership should not disqualify, but even the obligation to refrain from qualified political activities for a time-period of three years is too strict to balance these principles. The removal of this limitation should be considered.”

[CDL-AD\(2016\)034](#), Opinion on the Draft Law on the Constitutional Court of Ukraine, paragraphs 30-32.

“The Constitutional Court judge may also not engage in political activities (Article 164.7 of the Constitution). What is understood by “political activities” should be clearly spelled out in this draft Law.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 17.

### 4.3 Methods of appointment / election

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

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

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

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

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

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

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

[CDL-AD\(2009\)024](#) Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, paragraph 97.

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

[CDL-AD\(2011\)010](#) Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on Courts, the law on State’s Prosecutor Office and the law on the Judicial Council of Montenegro, paragraph 27.



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

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

“The Amendment deletes from Article 85 the provision empowering Parliament to elect the judges for permanent terms. Instead, the power of Parliament will be to determine the network, establishment, reorganisation and abolition of the courts of general jurisdiction upon the motion of the President of Ukraine.

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

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

(...)

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

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

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

“Article 6 puts into effect the new constitutional rules dealing with the selection and election of constitutional judges. The President of Montenegro and the “responsible working body of the Parliament” (together referred to as “the proposers”) issue a public call for the selection of

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

candidates. According to Article 153 of the Constitution they must be “reputable lawyers” who have turned at least 40 years of age and have 15 years of service in the legal profession. The list of candidates is published by the proposers on their websites and shall be available to the public at least for ten days. The candidates who meet the requirements for the selection will be interviewed by the proposers, who on the basis of the (written) evidence and the interviews prepare a reasoned proposal for the Parliament. The proposal must take into account “the proportional representation of minorities and other minority ethnic groups and gender-balanced representation”. An individual candidate may apply to public calls for candidates by both proposers. In such a case, proposers have to co-ordinate their proposals.

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

This mechanism guarantees good transparency and enhances public trust in the Constitutional Court but it could be further improved. The objective of the 2013 constitutional amendments was to ensure a balanced composition of the Constitutional Court. Therefore it is recommended that the Law on the Constitutional Court explicitly regulate the composition of the “competent working body of the Parliament” such that the representatives of all political parties are represented therein.

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

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

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

“Surprisingly, there are no requirements dealing with the total number of members of the committees and there are no criteria laid down for the selection of the other half of the members. There is a risk that people may be chosen who are guided by considerations other than the professional competence of a judge. There are also no rules on whether these committees are permanent or established ad hoc for each open vacancy at the Court. The draft Law should include clear rules on the qualification of the second half of the members and on how the committees are set up in order to avoid any abuse.”

[CDL-AD\(2016\)034](#), Opinion on the Draft Law on the Constitutional Court of Ukraine, paragraph 14.

“In principle, all decisions concerning the appointment and the professional career of judges, which should include the appointment to the highest posts within the judiciary, should be based on merit, following pre-determined objective criteria set out in law, and open and transparent procedures. The involvement and decisive influence in appointment procedures and promotion of ordinary judges, including constitutional judges in the Kyrgyz Republic, of independent judicial councils or similar independent self-regulation bodies is generally considered to be an appropriate method to guarantee judicial independence. As recommended in OSCE/ODIHR’s Kyiv Recommendations (2010), in cases where the final appointment of a judge lies with the president, his/her discretion to appoint should be limited to those candidates nominated by an

independent selection body; any refusal to appoint such a candidate should be based on procedural grounds only and would need to be reasoned. Another possible option is to give the selection body the power to overrule a presidential veto by a qualified majority vote. The proposed system of appointment of judges of the Constitutional Chamber which gives a wide discretion to the President is highly problematic from the viewpoint of the separation of powers and for ensuring effective checks and balances. Similar comments apply with regard to the appointment of Supreme Court judges (see Sub-Section 4.2. infra). It is strongly recommended to amend the procedures for appointing Supreme Court and Constitutional Chamber judges to ensure greater openness and transparency, which may include a greater role for the Council of Judges.”

[CDL-AD\(2016\)025](#), Joint Opinion on the Draft Law “On Introduction of Amendments and Changes to the Constitution” of Kyrgyz Republic, paragraph 52.

“Article 12 provides that members of the Constitutional Court are appointed by decision of the President. Even if this is a mandatory power, this rule entails the risk that the President could prevent the candidates elected by the two other organs from fulfilling their term of office (for example by challenging their merit). Consequently, the election of candidates by the two other organs should be followed directly by the taking of the oath, without the need for a decision of the President.”

[...]

Article 14 provides that the members of the Constitutional Court take an oath before the President of the Republic. This also provides the President with the opportunity to prevent or delay the members of the Court taking up their office. Alternatively, candidates could take an oath before the organ which elected them.”

[CDL-AD\(2015\)024](#), Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, paragraphs 25, 27.

“The changes regarding the manner of appointment of the members of the CJP will have repercussions on the Constitutional Court. The CJP (Council of Judges and Prosecutors) is responsible for the elections of the members of the Court of Cassation and the Council of State. Both courts are entitled to choose two members of the Constitutional Court by sending three nominees for each position to the President, who makes the appointments. The influence of the Executive over the Constitutional Court is therefore increased.”

[CDL-AD\(2017\)005](#), Opinion on the Amendments to the Constitution of Turkey, adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, paragraph 121.

“Taking into account the very detailed nature of some of the provisions of this draft Law, it is perhaps surprising that no provisions complementing the constitutional provisions on the appointment of the judges of the Constitutional Court (requested by Article 166.9 of the Constitution) were considered necessary. For instance, there is no reference to the election of judges of the Constitutional Court by the National Assembly; that the Court is composed of nine judges, three of whom shall be elected upon nomination by the President of the Republic, three upon nomination by the Government, and three upon nomination by the General Assembly of Judges (Article 166.1 of the Constitution). To the extent that the procedure for these appointments is not defined in the Constitution, it should be set out in the law on the Constitutional Court.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 14.

### 4.3.1 Qualified majority for election

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

It would be advisable if the draft would provide for the inclusion of a broad political spectrum in the nominating procedure. So far, neither the Constitution nor the Law on the Constitutional Court provide for a qualified majority for the appointment of the two judges elected by Parliament.”

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

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

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

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

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

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

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

Qualified majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary function of the anti-deadlock mechanism is precisely that of making the original procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority.

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

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

“Under the present Constitution, the judges of the Constitutional Court are elected and dismissed by parliament on the proposal of the President of the Republic, without any qualified majority, for a renewable term. In this respect, the Venice Commission had previously stated that this manner of election seriously undermined the independence of the constitutional court in that it did not secure a balanced composition of the court, and was not in line with international standards. The Venice Commission had therefore recommended that, if constitutional judges were to be elected by parliament, their election should be made by a two-third majority with a mechanism against deadlocks, and that the mandate of the constitutional judges should be non-renewable (CDL-AD(2007)047, §§ 122,123; CDL-AD(2012)024, § 35). The Commission had also stated that while the “parliament-only” model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors (CDL-AD(2012)009, § 8).

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

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

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

“Article 148 does not provide that the 6 members appointed by the Verkhovna Rada are elected with a qualified majority. This possibility should be taken into consideration by the Ukrainian Constitutional Commission<sup>15</sup>, as in Ukraine the President is not a politically neutral institution, and there could therefore arise a situation in which twelve judges are chosen by the same political majority, with no say of the opposition. The Venice Commission is nonetheless conscious of the difficulty of obtaining a qualified majority in the current political context in Ukraine.”

[CDL-AD\(2015\)027](#) Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, paragraph 25.

“Another issue in comparative terms is the majority required for the election of the judges. While in the Slovak Republic and some other countries the judges are elected by a simple majority in Parliament, an election of constitutional judges by qualified majority allows depoliticisation of the

process of the judges' election, because it requires that the opposition also has a significant position in the selection process. It is true that a qualified majority can lead to a stalemate between majority and opposition but this can be overcome through specific anti-deadlock mechanisms.

From a comparative perspective, the Venice Commission recommends considering the introduction of a qualified majority for the election of the candidates for the position of Constitutional Court judges in the Slovak Republic together with appropriate anti-deadlock mechanisms.”

[CDL-AD \(2017\)001](#), Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, paragraphs 58-59.

“..., the election of three constitutional judges by the Parliament with the ordinary majority (compare Article 125 with Article 78 p. 1 of the Constitution) deserves attention. In the European constitutional experience, the election by parliament of constitutional judges is often supported by the requirement of a qualified majority in view of ensuring a choice shared by a pluralistic support of political parties, and not by the majority only. This is particularly important when the President and the Parliament are of the same political color and may appoint 2/3rds of judges synchronically. In normal circumstances this risk is not very high, given the transitional provisions on the gradual replacement of the sitting CC judges (see Article 179 p. 1)...”

[CDL-AD\(2016\)009](#), Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, paragraph 37.

“Admittedly, it can be difficult to reach a qualified two-thirds majority and this may on occasion lead to deadlock, particularly where there is no culture of sufficient democratic compromise among the political forces. In order to avoid such situations, “anti-deadlock mechanisms”, should be introduced, such as, for example, a lowering of the required majority to three-fifths following the third unsuccessful vote, and/or the nomination of candidates by other neutral bodies after several unsuccessful votes.”

[CDL-AD\(2015\)024](#), Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, paragraph 21.

“Three judges of the Constitutional Court (9 judges in total) shall be elected by a majority of the total members of Parliament. It would be advisable if the draft would provide for the inclusion of a broad political spectrum in the nominating procedure. It is recommended to provide for a qualified majority for the appointment of the three judges elected by Parliament. A suitable dead-lock breaking mechanism could also be introduced in the appointment procedure of constitutional judges by the Parliament. The procedure before the election has to be as transparent as possible in order to ensure a high professional level of the constitutional judges”

[CDL-AD\(2017\)013](#), Opinion on the draft revised Constitution of Georgia, paragraph 74.

“Draft 60(2), following the previous recommendation, introduces the requirement of a qualified majority in the election of three constitutional judges by Parliament: “three judges shall be elected by the Parliament with three-fifths majority of its full composition (...). This is welcome.”

[CDL-AD\(2017\)023](#), Opinion on the draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017, paragraph. 43.

#### 4.3.2 Procedure

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

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

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

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

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

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

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

“The Commission notes that the President is not involved in the procedure of selecting candidates in the National Assembly and notably that the President is not represented during the hearings of the candidates. Instead, President Kiska established his own advisory panel that interviewed the candidates already elected by the National Assembly.

In order to enable the President to voice possible issues relating to the candidates at an early stage, the President or his representatives should participate actively in the hearings before the National Assembly and ask questions to the candidates. Of course, the election would remain a competence of the National Assembly which would continue to elect the candidates by secret vote. This could avoid misunderstandings between the President and the National Assembly at an early stage. Such cooperation could be seen as a good example for a loyal co-operation between State organs as recommended by the Venice Commission on several occasions.”

[CDL-AD \(2017\)001](#) Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, paragraphs 49-50.

In the context of the appointment of constitutional judges, the Constitutional Court can only find an unconstitutionality, but it cannot substitute itself as the appointing authority. The appointment remains of course a competence of the President of the Republic.”

[CDL-AD \(2017\)001](#) Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, paragraphs 70).

“Regarding the lack of detailed constitutional provisions, the Venice Commission stated that “[u]nder Venice Commission standards, there is no requirement as such that the procedure for appointments to the judiciary be described in detail in the Constitution itself.” However, the Venice Commission also stated – with regard to the Constitution of Finland – that “[s]ince the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment in more detail in the Constitution.”

[CDL-AD\(2016\)034](#), Opinion on the Draft Law on the Constitutional Court of Ukraine, paragraph 10.

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

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

#### **4.4 Term of office**

##### **4.4.1 The judges’ term of office**

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

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

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

[CDL-AD\(2014\)017](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Tajikistan, paragraph 14.

##### **4.4.2 Re-election of judges**

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

[CDL-STD\(1997\)020](#) The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p. 14.



“It follows neither from the Constitution nor from the Draft Law whether one and the same person may be re-elected as Constitutional Court judge. The lack of the prohibition of re-election may undermine the independence of a judge.”

[CDL-AD\(2008\)030](#) Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 20.

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

[CDL-AD\(2009\)042](#) Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, paragraph 14.

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

[CDL-AD\(2011\)016](#) Opinion on the new Constitution of Hungary, p. 95.

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

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

#### **4.4.3 Continuity of membership**

“(…) Where no appointment has been made, default mechanisms should be put in place in the interest of the court’s institutional stability. It is true that not every possible failure requires a special remedial provision and that it may normally be resolved by a constitutional system capable of assimilating conflicts of power. Nevertheless, default mechanisms already exist in certain 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), p. 15.

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

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

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

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

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

[CDL-AD\(2006\)016](#) Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, paragraph 21(b).

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

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

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

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

[CDL-AD\(2007\)036](#) Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, paragraph 16.

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

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

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

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

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

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

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

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

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

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

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

“Extending the term of a judge in order to enable him or her to finish participation in pending cases serves the purpose of securing the effectiveness of constitutional justice. It need not necessarily mean that the new judge cannot take office. The extension of the term may be limited to cases where deliberation has started in the plenary.”

On the other hand, experience shows that in a system with a strict end of the mandate of constitutional judges the succession between judges can be in danger. In a number of countries the appointment / election of new judges was delayed, sometimes for long periods. In some cases the number of remaining judges fell below the quorum and the courts were unable to sit. Therefore, the Venice Commission recommends in principle that judges leave office only when a new judge takes office...”

[CDL-AD\(2016\)017](#), Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, paragraphs 19–20.

“... , the Commission recommended that there should be a default mechanism for taking the oath. The Commission warmly welcomes that this problem is now settled by the acceptance of the oath before the Court itself. 9 The same opinion also recommended that retiring judges should stay in office until their successor takes office. The latter recommendation remains fully valid. The solution of Article 16.2 of the draft Law is too limited. It only applies when the number of remaining judges already equals the quorum. If now another judge were to be too ill to work as a judge or were to die, the Court would no longer be able to sit. Judges should remain in office until their successor takes office, even if the threemonth period has expired. This solution might require a constitutional amendment.”

[CDL-AD\(2016\)034](#), Opinion on the Draft Law on the Constitutional Court of Ukraine, paragraph 14.

“In addition, default mechanisms should be put into place, in the interest of the Constitutional Court's institutional stability, and to avoid any institutional blockage. It is of the utmost importance to ensure that the position does not remain vacant for a prolonged period of time after the end of office of a judge. Rules of procedure on filling a vacant judge's position at the Constitutional Court should foresee the possibility of inaction by the nominating authority. There should either be a procedure that allows the incumbent judge to pursue his or her work until the formal nomination of his or her successor – this solution might require amendments to the Constitution – or a provision which specifies that a procedure of nomination of a new judge could start at least three months before the expiration of the mandate of the incumbent judge”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 23.

#### **4.5 Termination / suspension of office**

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

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

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

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

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

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

“Article 10 provides that judges can tender their resignation and that Parliament adopts a decision on the termination of office within 30 days as of the date of request. After that period, the term of office of Constitutional Court Judges shall expire. Parliament should have no role in the

resignation of a judge. Judges cannot be forced to remain in office against their will. The mandate should automatically terminate after the 30 days period.

Pursuant to Article 10.3 of the draft Law, the Constitutional Court shall notify the proposer that nominated a judge for election six months before the expiry of the term of office of the judge or before the fulfilment of the conditions for receiving an old-age pension. In accordance with Article 154 of the Constitution, the draft Law regulates the reasons and procedure for the termination of judicial office (Articles 10-12), however, it does not regulate what the consequences are if a nominated candidate is not elected even in a repeated vote. In order to avoid a situation in which judicial positions are vacant due to the fact that new judges have not been elected, the law should explicitly provide that upon the expiry of the term for which a Constitutional Court judge has been elected, s/he continues to perform his/her office until the new judge takes up office.

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

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

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

“Following the end of the mandate of a judge, the draft Law provides for an obligation to appoint a successor within three months (Articles 13.2, 14.3 and 15.3). In the light of the experience of 2005, this narrow time frame probably should ensure that there will be no vacancies for a longer period. This is to be welcomed since it aims at preventing the possibility that appointments of new judges will be delayed for tactical reasons, for instance in order to influence the majority in the Grand Chamber, the Senates or the boards.

However, there is no rule on what happens after these three months. One solution would be to provide that the person with the highest ranking by the selection committee could take the oath at the Court. An alternative might be that the – political organs – the President and the Rada lose the right to appoint a new judge once the three-month period has expired. Then the Congress of Judges of Ukraine – as a non-political body – could be entitled to elect a judge instead of the President or the Rada. Admittedly, this solution cannot work if it is the Congress of Judges that did not elect a judge, but this might be less likely. These solutions might require a constitutional amendment.”

[CDL-AD\(2016\)034](#), Opinion on the Draft Law on the Constitutional Court of Ukraine, paragraphs 22–23.

“(…) it might be considered that the Constitutional Court inform any of the following in writing about the end of the judge’s term of office or his or her reaching retirement age: the President of the Republic, the Government or the General Assembly of Judges (see Article 13.5 of the draft Law) at least three months before the end of office of a judge.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 22.

“(…) the principle of legality requires that the conditions for a very serious sanction, such as the termination of the powers of a judge, be set out in a very detailed and precise manner. The description of these conditions by the terms “physical impairment” or “illness” which render the judge “unable to exercise his or her powers” should be sufficient in this respect. “Temporary disability,” however, must be strictly reduced to disability due to health reasons.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 29.

“In the Venice Commission’s opinion, Article 62.4 of the draft Law, which requires at least a 2/3rd majority of the votes of the total number of judges for decisions on the termination of the office of a constitutional court judge, could be interpreted as also applying to decisions that may lead to termination of office, such as giving consent to initiating criminal proceedings against a judge. It would be advisable, however, to provide for this explicitly in the text of Article 62.4.”

(…)

“A criminal judgment of conviction rendered against a judge will automatically terminate his or her powers as a judge (Article 13.1(7) of the draft Law), no matter how serious the offence. Again, the provision repeats the general constitutional provision on judges (Article 164.8 of the Constitution). In this case, it can also be argued that the threshold for criminal liability in the exercise of judicial functions should be high, which means that it should require malice or, arguably, gross negligence, and that the Constitution cannot be considered to prevent such an enhancement of their independence. Criminal liability in the exercise of judicial functions should therefore be narrowed down to serious cases (malice and gross negligence).”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 39 and 41.

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

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

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

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

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

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

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

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

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

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

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

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

“The Preliminary Opinion recommended clarifying that only serious disciplinary offences may entail the dismissal of a Constitutional Court judge. The revised amendments replace the vague formula “commission of actions incompatible with the status of judges of the Constitutional Court of Ukraine” with a more qualified one: “commission of a disciplinary offence, flagrant or permanent disregard of his or her duties to be incompatible with the status of judge of the Court or apparent non-conformity with being in the office”. This formula is clearly preferable; nevertheless, it is recommended to further qualify the disciplinary offence as “serious”.

The Venice Commission welcomes the choice, recommended in the Preliminary Opinion, to provide for termination or dismissal of the judges by a two-thirds vote of the Court.”

[CDL-AD\(2015\)027](#) Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, paragraph 28 and 29.

“The Venice Commission welcomes the new provision that the President, the Parliament and the Congress of Judges respectively have no right to dismiss judges of the Constitutional Court. This removes a danger of pressure on the judge. A judge can be dismissed only by a decision of at least two-thirds of the total number of judges of the Constitutional Court itself.”

[CDL-AD\(2016\)034](#), Opinion on the Draft Law on the Constitutional Court of Ukraine, paragraph 26.

“In the past, the Venice Commission has expressed its strong concern that the possibility of an early dismissal could undermine the powers of the judiciary in the long term. The current Draft Amendment lowers the number of votes required for adopting a decision on such judges’ early dismissal from two-thirds to the majority of the total number of deputies. This makes it easier to dismiss the judges of the Supreme Court and the Constitutional Chamber and may therefore negatively affect the independence of the judiciary.”

[CDL-AD\(2016\)025](#), Joint Opinion on the Draft Law “On Introduction of Amendments and Changes to the Constitution” of Kyrgyz Republic, paragraph 54.

## **4.6 Liability**

### **4.6.1 Disciplinary liability**

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

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

“Article 16 makes complex provision for enabling other members of the Court to deal with allegations against one or more members that may have disciplinary consequences. It is rather difficult to see how in all cases, particularly if more than one judge is affected, a proper decision could be given by other members of the Court. Instead of transferring the case to the small provisional committee (see above under Article 11), there may be a need for a wider body taking disciplinary measures.”

[CDL-AD\(2009\)014](#) Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 20.

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

[CDL-AD\(2012\)009](#) Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, paragraph 54(2).

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

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

Unless there are manifest indications of a false accusation levelled against a judge by the prosecutor, the acts of a judge should not be removed from the scrutiny of an independent court (see below). Where there are reasonable grounds for believing that a judge is guilty of having



committed a criminal offence s/he should not be entitled to immunity and the HCJ should lift immunity, notably also in cases of corruption. It is reasonable that the HCJ should have the function of deciding whether to lift a judge's immunity, but the criteria when to do this should be spelt out."

(...)

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

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

"While the current Article 97 par 5 does not mention the circumstances for the early dismissal of judges, this is now specified in the new Article 95 pars 2 and 3. This is generally welcome. At the same time, Article 95 par 2 refers to the violation of "the requirement of irreproachability" as a ground for dismissal. While the term "irreproachability" is defined in the Constitutional Law on the Status of Judges of the Kyrgyz Republic as the absence of a violation of a number of requirements and prohibitions applying to serving judges listed in the Constitutional Law, some of these are rather vaguely framed (see also par 74 infra). In general, the OSCE/ODIHR and the Venice Commission reiterate that early dismissal should always be based on clear and objective criteria as well as open and transparent procedures. Hence, unless grounds for early dismissal are clearly and strictly defined in other legislation, the respective provisions may jeopardize judges' security of tenure, and the independence of the judiciary in general."

[CDL-AD\(2016\)025](#), Joint Opinion on the Draft Law "On Introduction of Amendments and Changes to the Constitution" of Kyrgyz Republic, paragraph 55.

"In its Interim Opinion the Commission recommended a clarification on who should decide on disciplinary measures against the CC judges. The revised Draft makes it clear that this is to be a function of the CC itself and this clarification is to be welcomed (Article 128); evidently, the constitutional court judge concerned by the procedure should not sit on the bench which takes such a decision."

[CDL-AD\(2016\)009](#), Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania, paragraph 40.

"The Commission notes that it is consistent with the recommendations of Opinion CDL-AD(2016)001 that the Act does not provide for the initiation of disciplinary proceedings by the President of Poland and the Minister of Justice. The Opinion had insisted that disciplinary proceedings against judges should not be initiated by the President and the Government: "It is not clear what the justification is for introducing such a provision into the Polish Act. The Act does not grant the power to initiate such proceedings to any other external actor and the President and the Minister of Justice have no special role in the criminal proceedings that might be brought against constitutional judges under the conditions set out in Articles 24-27 of the Act." (par 93)."

[CDL-AD\(2016\)026](#), Opinion on the Act on the Constitutional Tribunal of Poland, paragraph 23.

"Article 13.3 of the draft Law provides that the non-attendance by a judge of the sessions of the Constitutional Court without providing a valid reason having occurred five or more times during the course of a year shall amount to a "major disciplinary violation". It may be assumed that this is not the only type of disciplinary violation. The draft Law should therefore either set out explicitly

that this is the only type of disciplinary violation there is or, if there are others, provide explicitly what constitutes a “major” disciplinary violation.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 30.

“Considering the severity of the sanction provided under Article 13.2 of the draft Law for a “*major disciplinary violation*” and in order to safeguard the independence of the Constitutional Court judges, major disciplinary violations should be established in the draft Law”.

(...)

“the personal characteristics of a judge should have no bearing on establishing disciplinary liability. This criterion should be removed from Article 81.9 of the draft Law.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 49 – 51.

#### **4.6.2 Immunity**

“As the judiciary, including a Constitutional Court, has the task of deciding matters before it impartially, on the basis of facts and in accordance with the law, the judiciary must not be subject to any improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The principle of the independence of the judiciary entitles, and requires, the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.

An efficient, independent and impartial judiciary is undoubtedly one of the cornerstones for ensuring the rule of law and the democratic principles of society. As reiterated in previous opinions and reports of the Venice Commission, the independence of the judiciary is an issue that affects all countries, whatever their systems, and is essential for any democratic system and the respect for the separation of powers. It is a fundamental guarantee of the rule of law, democracy and the respect for human rights. It ensures that justice can be done and seen to be done without undue interference by any other branch of power, other bodies inside the judiciary, other judges or by any other actors.

An independent judiciary also means that judges are accountable for their work. In this sense, when the key tasks of judges that have been specified in Opinion No. 17 (2014) of the CCJE are examined, it is clear that they carry out essential duties in every democratic society that respects the rule of law. Namely, judges must protect the rights and freedoms of all persons equally. Judges must take steps to provide efficient and affordable dispute resolution and decide cases in a timely manner, independently and must be bound only by the law. They must give cogent reasons for their decisions and must write in a clear and comprehensible manner.

If judicial power is abused and misused, it cannot serve its purpose. Judges who, in the exercise of their functions, commit a crime such as accepting a bribe, cannot claim immunity from criminal proceedings. Furthermore, functional immunity does not exclude criminal prosecution in cases not related to adjudication, because criminal offences may be committed by anyone, including Constitutional Court judges. Judges – like any other person – should be punished for the crimes they have committed, for instance causing a traffic accident due to drink driving.”

[CDL-AD\(2019\)028](#) Republic of Moldova – Amicus Curiae Brief on the criminal liability of the Constitutional Court judges, paras. 20-24.

“As concerns liability for adjudication itself, as consistently stated in the amicus curiae Brief for the Constitutional Court of the Republic of Moldova on the criminal liability of judges (2017) and

other Venice Commission opinions on the issue,<sup>27</sup> where judges are subject to criminal liability for the interpretation of a law, the ascertainment of facts or the assessment of evidence, such liability should only be possible in cases of malice and, arguably, gross negligence; judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law. This also means that only failures performed intentionally, with deliberate abuse or, arguably, with repeated, serious or gross negligence should give rise to disciplinary actions and penalties, criminal responsibility or civil liability.<sup>28</sup> Therefore, the mere interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability, even in cases of ordinary negligence.

Nevertheless, it should also be noted that, although European standards allow for judges to be held criminally liable in the exercise of their judicial functions, the threshold is very high as explained above, and this is reiterated in the explanatory memorandum to Recommendation CM/Rec(2010/12): “When exercising judicial functions, judges should be held criminally liable only if the fault committed was clearly intentional.”

The above has been formulated for ordinary judges, however, there is no reason why this should not apply to Constitutional Court judges, taking into account the general principles of the law, the principles specified in international documents and the overriding principles emerging from previous Venice Commission opinions, CCJE opinions and established European standards.”

CDL-AD(2019)028 Republic of Moldova – Amicus Curiae Brief on the criminal liability of the Constitutional Court judges, paras. 25-27.

“In conclusion, Constitutional Court judges should be protected by functional immunity, which does not cover ordinary crimes (e.g. bribery; causing a traffic accident by drink driving etc.). Constitutional Court judges should not be held liable for judicial mistakes that do not involve bad faith and for differences in the interpretation of the law. However, failures performed intentionally by Constitutional Court judges in the exercise of their functions, with deliberate abuse may give rise to disciplinary actions and should only give rise to penalties, criminal responsibility or civil liability in exceptional cases of extreme deviation from principles and standards of the rule of law and constitutionality. Although ordinary crimes should be dealt with by the relevant competent court, only the Constitutional Court should decide on the disciplinary liability of its judges in the exercise of their duties. Procedurally, the Constitutional Court judges are protected by inviolability, i.e. prosecution must seek the agreement of the Constitutional Court before it can institute criminal proceedings, but the Constitutional Court is obliged to lift this inviolability unless the case is related to the expression of the legal opinion or there is an obvious abuse on the side of the prosecution.”

[CDL-AD\(2019\)028](#) Republic of Moldova – Amicus Curiae Brief on the criminal liability of the Constitutional Court judges, para. 33.

“In conclusion, functional immunity for activities carried out by Constitutional Court judges in the exercise of their judicial functions during their term of office continues to apply after their term of office has ended. As for the period during the exercise of the mandate, this does not apply to ordinary crimes that were committed during the term of office of a Constitutional Court judge, which are not covered by functional immunity in the first place.”

[CDL-AD\(2019\)028](#) Republic of Moldova – Amicus Curiae Brief on the criminal liability of the Constitutional Court judges, para. 38.

#### 4.7 President of the Court

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

[CDL-AD\(2002\)005](#) Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, p. 8.

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

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

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

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

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

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

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

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

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

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

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

“Article 16.3 provides that the President of the Constitutional Court has the right to participate in sessions of the Government, Parliament, the supreme courts and other state organs. The Commission’s delegation was informed that this provision helps to ensure a sufficient respect for

the Court in protocol issues. In many countries the Constitutional Court President indeed ranks between third and fifth position in State protocol, which shows the importance of the Constitutional Court among state powers. If Article 16.3 were retained for protocol reasons, the President should use this right sparingly and participate mostly in ceremonial sessions of other state powers in order to avoid giving the impression of being close to the executive or the legislative powers.

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

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

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

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

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

“... the Venice Commission has recommended the election of the President of the Constitutional Court by the judges as good practice, but a comparative survey shows that there is no definitive European standard on this.

(...)

In such a system, when there is a very small number of voters (twelve in the current situation, 15 once the issue of the appointments is settled) have to elect a relatively high number – three – candidates (25 per cent or 20 per cent respectively), restricting each judge to a single vote is likely to lead to severe distortions of the result compared to the intentions of the General Assembly. It could easily happen that the third and maybe even the second candidate will be proposed by very few or even a single judge - potentially only by him- or herself. Such a situation should be avoided, preferably by attributing to each judge a number of votes equal to the number of candidates required to be presented to the President of Poland. Only such a system can ensure that the proposals will represent the preferences of the General Assembly rather than an arbitrary result reflecting the will of a small minority of judges, which seems to contradict the goal of the Article 194 of the Constitution.”

[CDL-AD\(2016\)026](#), Opinion on the Act on the Constitutional Tribunal of Poland, paragraphs 27, 29.

“The Chairperson of the Court is granted too strong a position. A notable example is issuing normative acts, such as the Rules of Procedure (Article 17.4(7)), which should be reserved for the plenary of the Constitutional Court.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 52.

#### 4.8 Independence of the judiciary

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

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

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

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

[CDL-AD\(2008\)030](#) Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 50.

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

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

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

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

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

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

“In the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges’ salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether

remuneration continues to be commensurate with the dignity of a judge's profession and his or her burden of responsibility.”

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

“In order to protect their independence, the salaries of the president and the judges of the Constitutional Court (and the ordinary judges) should be determined by law and not be submitted to an annual vote in the parliament on the budget. The coefficient applied should be fixed in the Constitutional Court Law itself.”

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

“The independence of the Constitutional Court and its judges is covered by Articles 1.2 and 8 of the draft Law. Article 1.2 repeats the constitutional provision on the independence of the Constitutional Court and restricts the requirement of independence only to the administration of constitutional justice. However, it is important to remember that the independence of the judiciary also possesses an administrative and financial aspect. Although Article 5.6 provides that the Constitutional Court shall form its staff and manage its resources independently, this does not cover all aspects of administrative and financial independence.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 8.

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

(...)

“A. General

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

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

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

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

#### B. Institutional independence

The judiciary must be independent and impartial. Institutional judicial independence focuses on the independence of the judiciary from the other branches of state power (external institutional independence). The relationship between courts within the same judicial system should also be taken into account (internal institutional independence).

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

#### C. Individual independence

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

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



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

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

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

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

“It is important that a balance be struck between immunity as a means of protecting a judge against undue pressure and abuse from state powers or individuals (immunity), on the one hand, and the fact that a judge is not above the law (accountability), on the other. The Venice Commission has consistently pointed out that judges should not be granted *general immunity*, but *functional immunity* only. This is because, in principle, a judge should only benefit from immunity in the exercise of his or her lawful functions. Article 10.1 of the draft Law should therefore be revised.

In any event, this provision should be reformulated so as to ensure that non-liability is expressly prescribed as a rule, complemented by the possibility of lifting immunity through a decision taken by the Constitutional Court. In addition, the conditions for lifting immunity (see below, under criminal liability) should be stricter and more precise than a mere existence of “*elements of crime or disciplinary violation*”.

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 36-37.

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

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

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

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

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

“According to Article 10.6 of the draft Law, for the purpose of search, inspection, seizure of documents or items, the building of the Constitutional Court may be entered once the Chairperson of the Constitutional Court has been notified. Mere notification of the Chairperson should not be considered enough. Taking into account the independence of judges, the reasons for which these measures may be taken should be set out as well as who may enter the premises of the Constitutional Court and who decides which documents or items may be searched, inspected or seized. It is not clear whether general provisions on criminal procedure are sufficient or whether special provisions are needed here.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 44.

“Considering the severity of the sanction provided under Article 13.2 of the draft Law for a “*major disciplinary violation*” and in order to safeguard the independence of the Constitutional Court judges, major disciplinary violations should be established in the draft Law”.

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 49.

#### **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, paragraph 13.

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

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

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

“The composition of the Constitutional Court’s Chambers should be clearly regulated, taking into account the mixed composition of the Court by providing for members from different branches in each Chamber. The composition should be predetermined in advance for a certain period of time in order to exclude the possibility to influence a case through an ad hoc composition.”

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

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

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

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

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

“A requirement that the Tribunal sit as a full bench, if applied frequently, is quite burdensome to the functioning of the Tribunal. What makes Article 26.1.1.g questionable is that the other judges cannot reject such a request. In systems where such a referral to the plenary of the Court exists (such as Austria) there is either no such restriction on the ability of the plenary to reject a referral, or the plenary can decide in fast track or summary proceedings if it finds that the case does not raise a serious issue under the Constitution. The adoption of a similar approach in Poland could have avoided these problems.

(...)

.... In the absence of a possibility for the other judges to reject a transfer request, there is a danger of politicisation and obstruction to the effective functioning of the Tribunal.”

[CDL-AD\(2016\)026](#), Opinion on the Act on the Constitutional Tribunal of Poland, paragraphs 34, 36.

“Other additions to Chapter 4 on the organisation of the operation of the Constitutional Court, might be considered: for instance, a provision on the Rules of Procedure – explaining that the structure and work procedures of the Constitutional Court shall be set out in the Rules of Procedure of the Constitutional Court, which shall be adopted by an absolute majority vote by the total number of judges.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 57.

#### **4.10 Secretary General / staff / experts**

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

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

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

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

“The draft law grants the government supervisory powers over the Constitutional Court, which could threaten its independence. The government’s powers to appoint (even if on the proposal of the President of the Court) the Secretary General (Article 28), to specify the rules governing the organisation of the Secretariat (Article 27.2) and the appointment, by the Finance Minister of a public auditor (Article 32) carry the risk of placing the Court under the supervision of the government:11 the Secretary General and the public auditor should be directly appointed by the Court or its President, without any government interference...”

[CDL-AD\(2015\)024](#), Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, paragraph 36.

## 5 The right to appeal to the court

### 5.1 Appeal by a public body

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

“Public legal persons should be able to invoke applicable rights under the Constitution before the Constitutional Court (...)”

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

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

[CDL-AD\(2014\)027](#) Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia, paragraph 73.

#### 5.1.1 Parliamentary minority

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

[CDL-INF\(1996\)010](#) Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan, p. 3.

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

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

### 5.1.2 Ombudsman

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

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

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

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

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

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

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

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

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

“An advantage of indirect individual access is that the bodies filing complaints are usually well-informed and have the required legal skills to formulate a valid request. They can also serve as filters to avoid overburdening constitutional courts, selecting applications in order to leave aside abusive or repetitive requests. Finally, indirect access plays a vital role in the prevention of

unnecessarily prolonging rather obvious unconstitutional situations. However, indirect access has a clear disadvantage, as its effectiveness is heavily reliant on the capacity of these bodies to identify potentially unconstitutional normative acts and their willingness to submit applications before the constitutional court or equivalent bodies. Therefore, the Venice Commission sees an advantage in combining indirect access with a form of direct access, balancing the different existing mechanisms.”

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

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

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

“Section 26 ACC also empowers the Prosecutor General to request the Constitutional Court to examine the conformity of regulations with the Fundamental Law, if a person concerned is unable to defend his or her rights personally or if the violation of rights affects a larger group of people. It is incoherent to give the power to defend individual interests to the Prosecutor General who is called upon to defend the public interest. The Prosecutor General could easily come into a situation where these interests conflict and he or she cannot pursue both of them with the same vigour which they may merit. Admittedly this is mitigated by the fact that the Prosecutor General may bring a complaint to the Constitutional Court only if he or she participated in the court proceedings on which the case is based. While such powers do not contradict European standards, the Hungarian authorities should consider vesting them in the Commissioner for Fundamental Rights.”

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

### **5.1.3 Courts (preliminary request)**

“In ordinary legal proceedings, the judge (and the parties) may be confronted with a legal provision which seems to be unconstitutional, but that the judge would be obliged to apply in this case. In order not to force the adoption of a judgment on the basis of this possibly unconstitutional provision, the ordinary judge (judge a quo) can stay the proceedings in the case at hand and refer the question of the unconstitutionality of that provision to the constitutional court (judge ad quem).

Such referrals to the constitutional court are called preliminary requests or, in some countries, exception of unconstitutionality or concrete review. Depending on the system, the doubt as to the constitutionality can originate with the ordinary court judge or can be based a request by the parties. Again depending on the system, the judge may be obliged to make the request or s/he does so only if s/he is convinced of the seriousness of the doubt. The case pending with the judge a quo is stayed until the constitutional court renders its decision and it is resumed and decided on the basis of the decision of the constitutional court.

In most cases, the ordinary court addresses the constitutional court (judge ad quem) directly, but in some countries the request must first be sent to a supreme court, which acts as a filter by deciding whether the doubt as to the constitutionality of the provision is serious enough.

The very nature of such a preliminary request requires that when the constitutional court finds that the challenged provision is unconstitutional, this provision cannot be applied in the case at hand. This does not mean that the provision will necessarily lose its force erga omnes. The further effects depend on the system in place.”

[CDL-AD\(2018\)012](#), Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paragraphs 34,35,36 and 37

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

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

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

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

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

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

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

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

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

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



serious doubts should be sufficient for a preliminary control procedure before the constitutional court.”

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

“Article 25.9 of the draft Code, which states that “*No action for unconstitutionality shall be allowed in constitutional defence actions*”, seems to preclude the possibility of adjudication of constitutionality of norms by the ordinary judge. However, in most of the situations concerned by the defence actions, it is precisely the application of a norm which is unconstitutional that creates the unconstitutional situation against which a remedy is sought. The ordinary judge should be allowed not to apply the norm deemed unconstitutional in the specific case and such cases should be referred to the Constitutional Court for final decision.”

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

## 5.2 Claims brought by individuals

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

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

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

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

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

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

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

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

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

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

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

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

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

“The Venice Commission’s report on individual access to constitutional justice found a combination of a full constitutional complaint with preliminary requests to the constitutional court as the most complete from the viewpoint of human rights protection”

[CDL-AD\(2018\)012](#), Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paragraph 24

### 5.2.1 Full constitutional complaint

“Typically, full individual constitutional complaints can be used to challenge:

- final judgments of ordinary courts and
- decisions of public authorities, the latter provided that they cannot be reviewed by administrative courts;
- measures, i.e. legal acts or other acts issued by the relevant authorities, which do not fulfil the formal criteria of a decision, but which directly affect or may affect the rights, legally protected interests or duties of individual persons and legal entities; as well as
- in some systems, acts designated as laws that are not general norms but that specifically address only one person or set of facts (“individual law”).”

[CDL-AD\(2018\)012](#), Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paragraph 25.

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

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

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

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

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

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

[CDL-AD\(2014\)027](#) Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia, paragraph 74.

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

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

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

“The Venice Commission’s report on individual access to constitutional justice found a combination of a full constitutional complaint with preliminary requests to the constitutional court as the most complete from the viewpoint of human rights protection.

Typically, full individual constitutional complaints can be used to challenge: final judgments of ordinary courts and decisions of public authorities, the latter provided that they cannot be reviewed by administrative courts; measures, i.e. legal acts or other acts issued by the relevant authorities, which do not fulfil the formal criteria of a decision, but which directly affect or may affect the rights, legally protected interests or duties of individual persons and legal entities; as well as in some systems, acts designated as laws that are not general norms but that specifically address only one person or set of facts (“individual law”).

The individual can bring full individual constitutional complaint proceedings only after having exhausted all other legal remedies. The powers of the constitutional court are thus limited by the principle of subsidiarity, i.e. the constitutional court may decide on challenged acts only after all instances of the ordinary courts have pronounced themselves or when no appeal to an ordinary court is possible.

The advantage of the full constitutional complaint is that when the constitutional court comes to the conclusion that there was a violation of human rights, it may directly annul the final judgment or last instance act, no matter whether the unconstitutionality resides in the norm or its application. Depending on the system, the constitutional court can either directly settle the case or, typically, refer the case back to the ordinary court or the authority for further proceedings.

Depending on the system and the specific circumstances, the constitutional court can also prohibit the continued violation of the human rights concerned; or, if possible, order that the authority which has violated that right reverts to the state of affairs before the violation occurred.

The drawback of full constitutional complaints is that they quickly make up the majority of the case-load of the constitutional court, sometimes representing more than 90 per cent of the

case-load. As a result, the constitutional court may be overburdened by cases which lack any constitutional dimension, only because the parties are dissatisfied with the judgment of the ordinary court. In order to deal with the heavy case-load, in countries with a full constitutional complaint to the constitutional court, there usually are a number of filters in place, for instance time limits, mandatory legal representation, simplified decisions on manifestly unfounded cases, etc. In addition, the organisation of the constitutional court must be streamlined, the judges render decisions in smaller chambers, and the judges need to be supported by a sufficient number of legal assistants.”

CDL-AD(2018)012 Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paras. 24, 25, 26, 27, 28, 29.

### **5.2.2. Normative constitutional complaint**

“Several countries allow direct individual access to the constitutional court, but only for complaints against allegedly unconstitutional normative provisions (“normative constitutional complaint”). Through this type of complaint, an individual has the right to appeal to the constitutional court against the violation of his or her human rights through an individual act that is based on a normative act, the constitutionality of which is contested.”

“In systems that provide for a normative constitutional complaint, the individual act applying the normative act cannot be attacked as such before the constitutional court. The control by the constitutional court does not concern the implementation of the normative act. As a consequence, a normative constitutional complaint is not an effective remedy if the unconstitutionality resides in the application of the norm, but not in the norm itself.”

“Normative constitutional complaints exist in a number of Eastern European countries. An interesting case is Ukraine, where the recent constitutional amendments introduced a normative constitutional complaint. The Law on the Constitutional Court extends the effects of this complaint by allowing the Constitutional Court to refer a final judgment of an ordinary court back to that court if the Constitutional Court discovers that the challenged norm is constitutional, but its application by the ordinary court was unconstitutional.”

The Ukrainian constitutional complaint thus shows some similarities with a full constitutional complaint, but there are limits. First, the applicant cannot appeal against the application by the ordinary court; the appeal must be directed against the norm applied. The applicant can only hope that during the norm control, the unconstitutional application is discovered by the Constitutional Court. In addition, once the Constitutional Court has found a legal provision to be constitutional, future complaints against the same provision might be inadmissible. This means that the similarity between the new Ukrainian constitutional complaint and a full constitutional complaint would fade over time as legal provisions increasingly become ‘cleared’ as constitutional.

[CDL-AD\(2018\)012](#), Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paragraphs 30, 31, 32 and 33.

### **5.2.3 Exhaustion of remedies**

“The individual can bring full individual constitutional complaint proceedings only after having exhausted all other legal remedies. The powers of the constitutional court are thus limited by the principle of subsidiarity, i.e. the constitutional court may decide on challenged acts only after all instances of the ordinary courts have pronounced themselves or when no appeal to an ordinary court is possible.”

[CDL-AD\(2018\)012](#), Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paragraph 26.

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

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

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

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

[CDL-AD\(2008\)03](#) Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 60.

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

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

“The Preliminary Opinion recommended to clarify that a constitutional complaint may only be lodged “after exhaustion of the domestic remedies”. This is now done in the revised amendments, and is to be welcomed.”

[CDL-AD\(2015\)027](#) Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, paragraph 32.

#### **5.2.4 Free legal aid**

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

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

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

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

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

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

### 5.2.5 Determination of admissibility

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

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

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

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

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

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

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

[CDL-AD\(2010\)039rev](#) Study on individual access to constitutional justice, paragraph 112.

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

[CDL-AD\(2010\)039rev](#) Study on individual access to constitutional justice, paragraph 124.

“Appeals [*against inadmissibility decisions*] may be beneficial for establishing a common approach with regard to the admissibility criteria. However, it is also true that such appeals could lead to an overburdening of the Chamber. The explanatory note contains no information on the number of appeals, if and to what extent the Chamber was burdened by the appeals against inadmissibility decisions and whether this was the real reason for the amendment.

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

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

“The Constitutional Court should be required, when either accepting or rejecting an application, to provide a well-reasoned decision.

An addition should be made to the last part of Article 29.3 to the effect that the Staff of the Constitutional Court shall return the application within five days *following a resolution of the Chairperson of the Constitutional Court*. It should be further noted that the refusal by the staff of the Constitutional Court should always contain information regarding the possibility of filing a complaint to the Chairperson against the decision rendered.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 61- 62.

## 5.2.6 Relations with ordinary courts

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

[CDL-AD\(2004\)024](#) Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, paragraph 44.

“(…) The Venice Commission is in favour of German and Spanish provisions, according to which in cases where the constitutional complaint is directed against a court decision, the court should give the party in whose favour the decision was taken an opportunity to make a statement (…)

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

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

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

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

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

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

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

### 5.2.7 *Actio popularis*

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

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

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

“According to part 1, para 1 of Article 20 which is currently in force a private person or a legal entity are entitled to appeal to the Constitutional Chamber in case they believe that the laws or other normative regulatory acts violate their rights and freedoms recognized in the Constitution”. The Draft Law (the English version of it) proposes to delete the word “his” in this legal provision. However, there is no word “his” in the English text of the law, which seems to be an editorial or translation error. In this regard, Russian texts of the law and the Draft Law are more coherent as they contain the word “his” (“ero” in Russian) followed by “rights and freedoms”.

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

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<sup>3</sup> H. Kelsen, cit.in: R. Ben Achour, “Le contrôle de la Constitutionnalité des lois: quelle procédure?”, Actes du colloque international “L’effectivité des droits fondamentaux dans les pays de la communauté francophone”, Port-Louis (Île Maurice), 29-30 septembre, 1<sup>er</sup> octobre 1993, p.401.



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

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

[CDL-AD\(2014\)026](#) Opinion on the Seven Amendments to the Constitution of “The former Yugoslav Republic of Macedonia” concerning, in particular, the Judicial Council, the Competence of the Constitutional Court and Special Financial Zones, paragraph 87.

### **5.3 Effective remedy**

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

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

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

#### **5.3.1 Procedural length**

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

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

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

[CDL-AD\(2010\)039rev](#) Study on individual access to constitutional justice, paragraphs 94, 109, 149.

“Even without such a further complication, a 30-day period for the examination of the constitutionality of a legal provision appears to be extremely difficult to meet, especially in the context of the introduction of individual appeals to the Constitutional Court, which results in a substantial additional work-load. While it is understandable that the Hungarian authorities wish to

provide for speedy proceedings before the ordinary courts, this should not be done in a way that renders ineffective constitutional review as an essential element of checks and balances.

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

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

“A time limit of at least three months may have no major negative consequences for a number of cases. There is no doubt that a time limit of three months would enable the parties to prepare their case thoroughly. For this reason, it is the practice of many constitutional courts to announce a hearing one or two months in advance, but without a strict minimum rule requiring it. The courts are guided instead by the general principles of a fair hearing and the equality of arms when they decide on time limits. A factor which could lead to a longer time limit may be the particular complexity of the case, as was the case in the ESM/OMT proceedings before various courts. The Austrian Constitutional Court, for instance, gives notice to the parties as a rule only two weeks before the hearing, in urgent cases only one week before.”

[CDL-AD\(2016\)001](#), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, paragraph 85

“In principle, the Venice Commission welcomes that the draft Law addresses “the serious problem of dilatory or vexatious proceedings and thus protects the right to a fair trial”, notably because with the introduction of the normative individual complaint, the rights of individuals are directly concerned. With regard to Articles 6 and 13 ECHR, “the Contracting States have great freedom to choose how they fulfil their commitments in this regard”. However, a predefined limited term of judicial proceedings comprises the danger of a loss of legal quality of those cases which are complicated and need time to be considered carefully, or in situations of many pending proceedings before the Constitutional Court of Ukraine. Six months respectively one month may in many cases not be sufficient to ensure the required examination of (difficult) legal questions. The Commission recommends that the Grand Chamber should be able to extend these deadlines in exceptional cases.”

[CDL-AD\(2016\)034](#), Opinion on the Draft Law on the Constitutional Court of Ukraine, paragraph 48.

## **6 Jurisdiction**

“In the Venice Commission’s opinion, the jurisprudence of a Constitutional Court has to be consistent and based on convincing arguments in order to be accepted by the people. Changes in the case-law have to be well-founded and explained in order not to undermine legal certainty. The principle of legal certainty, being one of the key elements of the rule of law, also requires that when declaring a constitutional amendment unconstitutional the time elapsed since its adoption is taken into account. Moreover, when a court’s decision is based on formal or procedural grounds only, the substantive effect of such a decision should also be taken into account. In other words, the final decision should be based on a proportionality test where the requirement of constitutionality should be balanced against the negative consequences of the annulment of the constitutional amendment in question.

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

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

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

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

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

[CDL-AD\(2011\)030](#) *Amicus Curiae* Brief for the Constitutional Court of Bosnia and Herzegovina on the law of the Republika Srpska on the status of state property located on the territory of the Republika Srpska and under the disposal ban, paragraph 21.

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

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

“This provision means that procedures already pending before the Constitutional Court are transferred from the Court to the HJC by law. This raises serious doubts with respect to the principle of the separation of powers and the rule of law. 6 The legislator should refrain from intervening into already commenced judicial proceedings and it will be up to the constitutional Court to decide whether or not legislative changes may cause termination of appeals lodged with the Court. In its opinions on the Constitution of Serbia (CDL-AD(2007)004) and on the draft laws on judges and on the organisation of courts of the Republic of Serbia (CDLAD(2008)007), the Venice Commission insisted that decisions concerning termination should be appealable to a court of law.

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

“The legislator should refrain from intervening into already commenced judicial proceedings and it will be up to the Constitutional Court to decide whether or not legislative changes may cause termination of appeals lodged with the Court. With respect to the latter, instead of terminating the already commenced proceedings, the proceedings should simply be

suspended pending the new examination by the HJC and the SPC, but enable the appeals to continue in the event of an unfavourable decision in relation to an individual judge or prosecutor.”

[CDL-AD\(2011\)015](#) Interim opinion on the draft decisions of the high judicial council and of the state prosecutorial council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia, paragraphs 18-19, 42.

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

(...)

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

In the discussions in Budapest, representatives of the governmental majority agreed that in some cases Parliament had reacted to decisions of the Constitutional Court by amending the Fundamental Law, but pointed out that this also had happened for example in Austria, where Parliament had resorted to constitutional amendments in order to overcome decisions of the Constitutional Court. In the opinion of the Venice Commission, however, while this example is indeed correct, it has to be pointed out that in 1988 the Austrian Constitutional Court stated that a repeated constitutionalisation of unconstitutional law could be seen by the Court as a total revision of the Constitution, which could not be adopted as a simple constitutional amendment with a two-thirds majority under Article 33.4 of the Austrian Constitution. Indeed, later the Constitutional Court annulled a constitutional amendment. Thus the Austrian Constitutional Court finally retained control over whether constitutional amendments violate fundamental principles.

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

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

(...)

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

*“49. [...] Belgium stands in the tradition of countries such as France which firmly reject judicial review of constitutional amendment. The Conseil Constitutionnel argued ‘that because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution.)’ Although in Austria and Germany there exists the possibility of review, these cases do not stand for a common European standard.*

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

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

(...)

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

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

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

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

So far, the very limited catalogue of constitutional rights listed in Article 110 § 3 of the Constitution together with the procedural rules established in Section IV of the 1992 Rules of Procedure

resulted in a negligible number of complaints about human rights' violations before the CC. Thus, in the course of 2013 it had a total of 22 such complaints. The Venice Commission observes that in the same period the European Court of Human Rights received over 500 complaints from the country. It shows that if the new remedy against human rights violations is introduced at the national level, there is a real risk of a strong growth in the number of cases the CC has to examine. The Commission considers that introduction of a new remedy of that kind requires careful preparation: adoption of procedural rules, development of new working methods, hiring and training law clerks and secretarial assistants, etc. In some other countries introduction of such remedy was preceded by a long preparatory period (up to two years, like in Turkey). The Venice Commission suggests that this welcome amendment should not have immediate effect, so that necessary preparations and amendments at the legislative level can be made.

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

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

## 6.1 Control of sub-legislative acts

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

[CDL-INF\(1996\)010](#) Opinion on the draft law on the Constitutional Court of the Republic of Azerbaijan, p. 3.

## 6.2 A priori control of legislation

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

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

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

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

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

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

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

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

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

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

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

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

### **6.3 A *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 *a priori* constitutional review of international treaties ‘subject to ratification’ and consequently ‘international treaty or some [of] its provisions declared non-constitutional may not be ratified or approved and may not enter into force in the Republic of Moldova’ (Article 117.2). It should be pointed out that ‘by means of the exception of non-constitutionality’ and according to Article 115.3 of Draft Law also international treaties entered in force may be subject to the constitutionality control. Declaring such treaty or a part of its non-constitutional ‘shall bring about its denunciation’. The ratified (valid) treaties obviously involve relations with other parties and if the Constitutional Court overturns such a treaty this could create international complications and result in the responsibility of the state in public international law. Article 27.of the Vienna Convention on the Law of Treaties provides clearly that: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. A denunciation of an already valid treaty due to its non-conformity with the Constitution does not represent the optimum approach of the state to the valid norms of international law and values enshrined thereof. The general tendency is to rather harmonize legal orders of states (including constitutions) with their international obligations. “

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

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

[CDL-AD\(2010\)039rev](#) Study on individual access to constitutional justice, paragraph 99.

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

[CDL-AD\(2011\)018](#) Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, paragraph 14.

#### **6.4 Control of sub-statutory acts**

“Constitutional Court should not have the interpretation of ordinary law as its competence; it should be limited to interpretation of the constitution. Usually, interpretations of ordinary laws are given by a Supreme (High) Court.”

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

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

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

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

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

#### **6.5 Constitutional Amendments**

“The power of the Constitutional Courts to review and invalidate part of the Constitution itself is a controversial and extremely complex issue, especially when the Constitution does not contain so-called “eternal clauses”. In its opinion on Ukraine the Venice Commission stated that there is no generally accepted standard in comparative constitutional law regarding the participation of constitutional courts in the constitutional amendment process. In its Report on Constitutional Amendment the Venice Commission noted that while some European countries explicitly provide for such a possibility, the posterior judicial review of adopted constitutional amendments is a relatively rare procedural mechanism. In some countries, judicial review of constitutional amendments is in theory possible, but has never been applied in practice. In others, it has been rejected on the basis that the courts as state organs cannot place themselves above the constitutional legislator acting as constitutional power. A system which has firmly rejected judicial



review of constitutional amendments is the French system, under which this is not considered within the competence of the Conseil Constitutionnel (or any other court), because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution). An alternative approach was taken by the Austrian Constitutional Court which regarded the fundamental principles of the Constitution as de facto un-amendable (or rather amendable only through the referendum).

That being said, it would be possible to give the CC at least the power to verify the procedure in which the constitutional amendments are adopted (as opposed to the substance of the amendments). After all, the Draft Amendments do not touch upon the power of the CC to examine the constitutionality of a referendum (see Article 131 (ë) of the current Constitution), including the referendum on changing the Constitution. In any event, when the Constitution is so detailed and encompasses issues which should normally be regulated at the legislative level, the role of the CC is already quite limited. In case if CC is empowered to evaluate the issue of procedure of constitutional amendments, there will be a need for more detailed regulations, for instance, such as time-limits for lodging such complaints, who is entitled to bring them etc.”

[CDL-AD\(2015\)045](#), Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, paragraphs 20–21.

“Paragraph 3 of article 91 of the draft gives the Constitutional Council the power to review all the Constitutional amendments before their adoption in regard to their compliance with requirement of Par. 2, Article 91 providing that the provisions on the unitary nature of the state, its territorial integrity, its form of governance and independence cannot be changed. This amendment is also a positive step; however, it would be advisable to complete this list with a reference to the democratic form of government and unalienable constitutional rights.”

[CDL-AD\(2017\)010](#) Opinion on the Amendments to the Constitution of Kazakhstan, para. 41.

## **6.6 Referendum questions**

“The revised amendments add the possibility for “no less than forty-five People’s Deputies” to seek an opinion of the Constitutional Court on the constitutionality of questions to be put to an all-Ukrainian referendum. This is to be welcomed.”

[CDL-AD\(2015\)027](#) Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, paragraph 31.

## **6.7 Exclusion of legislation from Constitutional control**

“The prohibition for the Constitutional Court to declare unconstitutional legal norms regulating elections during the election year, unless this norm has been adopted within one year before the respective election, is maintained in new draft Article 60(6). This complete exemption from the control of constitutionality of the electoral laws within the year of election -unless this norm has been adopted within one year before the respective election-was criticised in the previous opinion on the ground that, although the aim of preventing interference with the electoral process justifies a number of limited measures in the pre-electoral period, the proposed system, by excluding any control of constitutionality of the electoral laws within the reference period, appears to be disproportionate. The Georgian authorities explained that in view of the fact that the elections in Georgia take place in October, the Constitutional Court will be able to decide on electoral legislation –introduced prior to this one year period- in a time span of three months between October and December of the year preceding the election year. It seems legitimate to prevent decisions of the Constitutional Court to be taken in the period required for the preparation of the elections. However, it is recommended that the period during which the Constitutional Court is unable to decide on electoral legislation is reduced. In addition, new draft Article 60(6) introduces

two additional limitations by requiring full consensus of the plenum of the Constitutional Court, when delivering judgment on the unconstitutionality of conducted elections and the delivery of the judgment of the Constitutional Court no later than 7 days from the date of official publication of election results. The requirement of full consensus of the plenum of the Constitutional Court when deciding on constitutionality of the conducted elections is problematic and should be replaced by a requirement of ordinary majority.”

[CDL-AD\(2017\)023](#) Opinion on the draft revised Constitution adopted by the parliament of Georgia at the second reading, paragraph 44

“As legitimate as may be the aim of preventing manipulations of the electoral process, the Constitutional Court as a constitutional organ should be trusted to play its role in a correct manner. The need to safeguard the stability of electoral law may justify excluding that such judgments are taken in the pre-electoral period. But no rules should be completely exempt from the control of constitutionality. If this provision is to be maintained at all, regarding legislation it will have to be modified to ensure that the Constitutional Court be able to review legislation adopted just before the 12 months deadline. The exclusion of the control of normative acts issued by the Central Election Commission within 60 days prior to the election should be reconsidered.”

[CDL-AD\(2017\)013](#), Opinion on the draft revised Constitution of Georgia, paragraph 76.

“The Constitutional Court will instead lose the possibility of controlling, as it does now, laws empowering the Council of Ministers to issue decrees having force of law. The President under the amendments will not need an empowering law. While the amendments define limits to the Presidential legislative activity with a formal prevalence of laws over decrees, the Constitutional Court has not been given the express power to decide over the conflicts which will inevitably arise in this respect.”

[CDL-AD\(2017\)005](#), Opinion on the Amendments to the Constitution of Turkey, adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, paragraph 122.

## **6.8 National implementation of decisions of international jurisdictions**

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

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

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

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

“(…) The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court. If the Constitution has provisions contrary to the treaty which is already part of the domestic legal system – a situation which should have been addressed in the process of expressing consent to be bound by that treaty (through ratification, accession, approval or acceptance of that treaty) – it is the duty of all State bodies to find appropriate solutions for reconciling those provisions of the

treaty with the Constitution (for instance through interpretation or even the modification of the Constitution), otherwise the international responsibility of the State will be engaged, with all consequences deriving from it, including countermeasures and/or sanctions.”

“State bodies (including the Constitutional Court) have to ‘comply with the legal situation under the ECHR but also to remove all obstacles in their domestic legal system that might prevent an adequate redress of the applicant’s situation’ (Case *Maestri v. Italy*, Application 39748/98, 17 February 2004, paragraph 47).”

[CDL-AD\(2016\)005](#) Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of Russian Federation –, paragraph 41 and 53.

“In the multi-layered legal order that exists in Europe today, tensions between various layers of the European legal order are unavoidable. There are mechanisms to alleviate those tensions between ECtHR decisions and national (constitutional) law, including the interpretation given by national constitutional courts.”

[CDL-AD\(2016\)005](#) Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of Russian Federation –, paragraph 59.

“..., the Venice Commission is of the opinion that the Constitutional Court should not be tasked with the identification of all the means of execution of an international judgment. The choice of the best way of enforcing a decision by an international court is a political and administrative matter, not a constitutional one and it is primarily the responsibility of the government. If it were tasked with the whole question of enforcement, the Constitutional Court would risk becoming the political arbiter of all controversies surrounding international decisions. The Constitutional Court can usefully contribute to the execution of international decisions but it can only play the role of a “negative legislator”: it cannot actively create new normative acts (on the sub-statutory, statutory or constitutional level) which may be required in the process of execution. As a consequence, a finding of unconstitutionality of a particular modality of execution of a decision of an international court has to be the starting point for the work of other state powers/organs. The Constitutional Court may therefore be asked (only) to assess whether a specific form or modality (measure) of execution raises an issue of constitutionality (such cases should be rather exceptional)...”

As the Venice Commission has said in its interim opinion, the finding that a whole judgment is “non-executable” is problematic. “Non-executable” in the sense that there is no constitutional manner of execution inevitably points to the only solution that is compatible with the State’s international obligations: amending the Constitution (which is obviously not for the Constitutional Court to indicate as a means of execution). As a consequence, the discretionary power of the other State authorities ends up being significantly reduced...

In sum, the Venice Commission considers that the question of the execution of an international decision should not be delegated in its entirety to the Constitutional Court; the Commission therefore recommends that the wording of the revised Federal Law on the Constitutional Court be amended to provide that the Government Agent (or other State authority) may seek a decision of the Constitutional Court on the compatibility with the Russian constitution of a specific modality of execution which it intends to take, when it has doubts that such a modality may raise issues of constitutionality.”

[CDL-AD\(2016\)016](#), Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of Russian Federation, paragraphs 25–27.

## 6.9 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, paragraph 4.

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

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

“It is difficult to see where the benefit of assigning the task of repealing an unconstitutional act to another organ than the Constitutional Court lies. Furthermore, there is no provision for cases of conflict which could arise if the other state organ disobeys the order of the Constitutional Court. If it would be inadequate – for whatever reason – to repeal an unconstitutional act immediately, the Constitutional Court may, by recognising that act as unconstitutional, postpone the effect of its decision to a time when that act shall lose its legal force. In that case, the act shall remain in force until it loses its legal force.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 85.

## 7 Procedure

### 7.1 Conflicts of interest – recusal and exclusion of a judge from a case

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

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

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

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

“In case the Court is asked to rule on a matter in which some of its members may have, or be perceived to have, an interest, the Court is not absolved by the existence of such an interest from its duty to rule on the issue raised. The Constitutional Court is obliged to rule on the constitutionality of every law which is challenged before it. If it were to permit a situation to arise in which it was precluded from doing so by virtue of disqualifications arising from the possibility of any one or more of its members being the subject of an adverse finding under the legislation, that obligation on the Court to make a decision could not be fulfilled.

The Bangalore Principles of Judicial Conduct 2002 envisage that such a situation may arise and provide for such an eventuality. Under the heading “Value 2, Impartiality”, having stated the general principle that a judge who is not impartial or may be perceived by a reasonable observer not to be impartial should not take part in hearing a case, they go on to say that “disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case”. The Commentary on the Bangalore Principles by the UN Office of Drugs and Crime explains this provision as follows:

“Doctrine of necessity

100. Extraordinary circumstances may require departure from the principle discussed above. The doctrine of necessity enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice. This may arise where there is no other judge reasonably available who is not similarly disqualified, or if an adjournment or mistrial will cause extremely severe hardship, or if a court cannot be constituted to hear and determine the matter in issue if the judge in question does not sit. Such cases will, of course, be rare and special. However, they may arise from time to time in final courts that have few judges and important constitutional and appellate functions that cannot be delegated to another judge.”

This is certainly the case when there is only one court with constitutional jurisdiction and/or there are limited number of judges and when disqualification may actually result in denial of justice.”

(...)

Similar situation may arise if the constitutionality of legal norms regulating constitutional court proceedings, requirements for office holders of the constitutional court, grounds for resignation or disciplinary proceedings is challenged before the Constitutional Court. In such cases, constitutional judges are not precluded from hearing the case.

However, if there are grounds to believe that a judge considering the constitutionality of the Vetting Law would fail the requirements established by this very law and thus appears to be unfit for the office, not only the judge has a right but, in certain circumstances, may be under the obligation to resign, for instance, if the judge concerned foresees his/her failure to satisfy the background assessment due to inappropriate contacts with the members of the organized crime. However, since there is a presumption that judges of the court are acting in good faith, the judge should be allowed to evaluate constitutionality of the requirements established by law”

[CDL-AD\(2016\)036](#) Amicus Curiae Brief for the Albanian Constitutional Court on the Law on the Transitional Re-Evaluation of Judges and Prosecutors, paragraphs 20-22, 24-25.

“The Venice Commission has been confronted with the question of a possible *non liquet* in proceedings before a constitutional court in two cases. In 2006, in an opinion for Romania, the Venice Commission was asked to examine the question whether the constitutional court could be blocked because – due to recusals – the number of judges would fall below the required quorum. The Commission insisted that “(...) 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.

In an amicus curiae opinion for the Constitutional Court of Albania, the Venice Commission was asked to address the question whether or not the Court could examine the constitutionality of a law which affected the judges of the Court and where these judges would normally have recused themselves. However the recusal of several judges would have resulted in a lack of quorum and an inability for the Court to sit. In this situation, the Venice Commission found that ... “[t]he authorization of the Court derives from the necessity to make sure that no law is exempt from constitutional review, including laws that relate to the position of judges. ...”

[CDL-AD\(2016\)001](#), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, paragraphs 37-38.

## **7.2 Mandatory legal representation**

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

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

“The proposed new wording of part 2 of Article 32 guarantees the right of parties to conduct their affairs personally or through their representatives. This is welcome. However, the new wording seems to eliminate requirements that representatives should be lawyers and thus providing for a possibility for the party to appoint non-lawyers as representatives. The Venice Commission

advises to clarify the purpose of this provision. In addition, the Commission recommends that legal aid should be available also for proceedings before the Constitutional Chamber.”

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

### 7.3 Rights of the parties

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

[CDL\(1997\)018rev](#) Opinion on the law on the Constitutional Court of Ukraine, paragraph 11.

### 7.4 Case allocation

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

“The attribution of cases to rapporteur judges should be made via an automatic system of case-distribution. Justified exceptions from this system should be documented in the case-file.”

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

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

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

Already in its decision 166/2011 the Constitutional Court had found the transfer of cases by the Supreme Prosecutor to be contrary to the European Convention on Human Rights. In order to overcome that decision, this transfer had been ‘constitutionalised’ in Article 11.4 of the

Transitional Provisions. The Fourth Amendment includes into the Fundamental Law the transfers of cases by the PNJO, which had been introduced in Article 11.3 of the Transitional Provisions. The Commission welcomes that the Fourth Amendment does not provide for transfers by the Supreme Prosecutor him- or herself.

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

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

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

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

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

“Instead of a distribution of cases by the President of the Court, the amended Article 17.31 LCLP introduces an automatic system for assigning cases to speakers (rapporteurs). This is welcome as it increases the independence of the judges with a view to any discretion on the side of the President of the Court. The Minister of Justice informed the Commission that this system will not be a random system but it will take into account the case-load of each judge. It has to be ensured that the Court itself has full control over the programming and use of such software.”

[CDL-AD\(2016\)017](#), Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, paragraph 35.

[...] “The draft Law or the Rules of Procedure should also provide for an automatic allocation of cases to the judges.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 57.

“Another solution could be, instead of giving this power to the Chairperson, the draft Law should simply introduce an automatic allocation of the case to a judge or the Chairperson should at least be bound by pre-determined criteria e.g. a balanced caseload or by specialisation”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 66.

## **7.5 Panels of judges and qualified assistants**

“To ensure an adequate balance between the interest of individual access to constitutional justice and the risk of being overburdening the constitutional court, the Venice Commission recommends



that the constitutional judges be supported by qualified assistants and that their number should be determined in accordance with the case-load of the court (...)"

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

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

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

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

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

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

## **7.6 Relationship between plenary and chambers**

"Another issue is that Article 131 of the Slovak Constitution clearly assigns cases either to the plenary session or to a senate of three judges, depending on the type of proceedings. Accordingly, (individual) complaints are always decided by senates of three judges. It seems that the legislator was aware of the problem of possible divergent interpretations of the Constitution by the senates. According to § 6 of the Act of the National Council of the Slovak Republic of 20 January 1993 on the Organisation of the Constitutional Court of the Slovak Republic, on the Proceedings before the Constitutional Court and the status of its Judges reads: "If a Senate in connection with its decision-making activity comes to a legal opinion, different from the legal opinion already expressed in the decision of one of the Senates, then this Senate shall submit the motion for unification of different legal opinions to the Plenary Session of the Constitutional Court for judgement. The Plenary Session of the Constitutional Court shall decide on unification of different legal opinions by the ruling. The Senate shall be bound in its further activity by the ruling of the Plenary Session of the Constitutional Court." However, this rule is not sufficient to overcome the problem.

When the Court had to decide on the complaints of three candidates against their non-appointment by the President of the Slovak Republic, these were (individual) complaints under Article 127 of the Constitution and had to be decided by a senate of three judges according to

Article 131.2 of the Constitution. Even though this case was of major constitutional significance, a senate of three judges had to decide on it.

The Venice Commission recommends that a senate be able to transfer a case to the plenary session if it relates to an issue of major constitutional significance. The plenary session should however be able to reject such a request from a senate.”

[CDL-AD \(2017\)001](#) Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, paragraphs 40-42.

## 7.7 Oral / written procedure

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

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

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

[CDL-AD\(2004\)035](#) Opinion on the Draft Federal Constitutional Law ‘on modifications and amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation’, paragraph 4.

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

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

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

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

[CDL-AD\(2010\)039rev](#) Study on individual access to constitutional justice, paragraphs 135, 138.

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

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

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

“In the light of the above, the Venice Commission does not find that the possibility for the Constitutional Court to decide a case under the 2015 amendments without holding a hearing jeopardises as such the respect for the original applicants’ right to submit arguments. However, in the light of the explanations provided by the Constitutional Court (see above paragraph 10), the Venice Commission recommends the inclusion of appropriate rules in the Rules of procedure of the Constitutional Court, to provide for the participation of the original applicants in the oral hearing, if there is one, or for their right to make written submissions, if no oral hearing is held.”

[CDL-AD\(2016\)016](#), Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of Russian Federation, paragraph 37.

“In conclusion, any imposition of an obligation to hold a hearing and to decide - in a strict chronological order risks not being in compliance with European standards. There must be room for the Constitutional Tribunal to continue and finish deliberations in certain types of cases earlier than in others. Such discretion on the side of the Constitutional Tribunal thus is in line with European standards such as Articles 6 ECHR and 47 TFEU.

If the aim is to avoid a backlog, more appropriate rules may be adopted. For example, in Belgium, the Constitutional Court must decide cases within six months of their registration. This deadline can be extended to a maximum of one year. In order to avoid any doubt regarding the sequence in which cases are considered, the current system of automatic allocation of cases to judges in alphabetical order and the state of advancement of all cases could be made fully transparent, e.g. on the web-site of the Tribunal.”

[CDL-AD\(2016\)001](#), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, paragraphs 65–66.

. “General provisions are needed to set out in which cases a) oral proceedings are obligatory, b) the Court can decide on oral proceedings and, c) proceedings are exclusively in writing (Article 38). It is important that this be clarified.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 75.

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

[CDL-AD\(2010\)039rev](#) Study on individual access to constitutional justice, paragraph 125.

“Reasons to restrict filming and broadcasting of sessions should be laid down (Article 23.2), to ensure proportionality and the inclusion of safeguards against arbitrariness.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 74.

## 7.8 Dissenting opinions

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

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

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

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

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

“It is also positive that Articles 43.13 and 47.2 OLCC provide that dissenting and concurring opinions are to be systematically published together with the act, and not only upon request of the judges formulating that opinion (Article 7.4 LCLP). Of course, the refusal to provide a dissenting or concurring opinion or a delay in providing such an opinion must not lead to a delay of the publication of the act on the web-site and the entry into force of that act.”

[CDL-AD\(2016\)017](#), Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, paragraph 61.

“The above reflects what may be referred to as the paradox of dissent, i.e. judicial dissent undermines the authority of a judgment, but simultaneously – precisely by doing so – plays a constructive role in strengthening the legitimacy of courts. According to the proponents of separate opinions, practical examples illustrate that a court's authority and acceptance does not depend on the unanimity of its decisions. In addition, separate opinions improve the quality of judgments, because those delivering a concurring or dissenting opinion must explain why they do not agree with the majority.”

[CDL-AD\(2018\)030](#) Report on Separate Opinions of Constitutional Courts, para. 20.

“The risks associated with separate opinions may be avoided if separate opinions are used only as a last resort (*ultima ratio*) and are prepared with respect to the majority opinion. The use (or abuse) of separate opinions is indeed a matter which should not be driven by selfish motives. A separate opinion should not be a defiant reaction to having been overruled. Their role should be to contribute to the development of the law by promoting certain alternative legal opinions.”

“ Even proponents of separate opinions admit that dissent for its own sake has no value and can be detrimental to the collegiality among judges and the credibility of a court. Yet, it is argued that where significant disagreement exists, members of the court have a responsibility and an obligation to articulate it. In this context, it could be debated whether or not anonymously drafted separate opinions should be permitted in order to guarantee the independence of judges. This shall be considered below.”

“The above shows the appeal of the arguments of the proponents of and of the opponents to separate opinions of constitutional courts or courts with equivalent jurisdiction. This report will now consider the rules that govern separate opinions in the Member States of the Venice Commission.”

[CDL-AD\(2018\)030](#) Report on Separate Opinions of Constitutional Courts, paras. 30, 31, 32.

“It is important that a disrespectful separate opinion that breaches the code of conduct or ethics (or other) be published regardless of whether or not a procedure has been launched against the dissenting or concurring judge. A solution, as had been adopted in Romania for instance by a decision of the Constitutional Court in June 2017 as explained above, allowing the President of this Court to prevent the publication of separate opinions that are considered to bring criticism to the Court, or are considered to be judgmental or ostentatious or political in nature – is problematic and should be avoided.”

[CDL-AD\(2018\)030](#) Report on Separate Opinions of Constitutional Courts, para. 46.

“It is important for the quality of judgments, and for the collegiality within the Court, for the majority to be able to react and respond to a written separate opinion and to amend the findings or the reasoning of the majority, if necessary. To the extent possible, the majority should not be surprised by the content of a separate opinion, once the majority opinion is finalised. Should the majority decide to change their reasoning in view of the separate opinion, the dissenting or concurring judge should then have the right to withdraw or change his or her dissenting or concurring opinion within a short period of time. This requires for the majority to obtain the dissent in writing before the final judgment is announced, sent to the participants or published (see § 26(1) of the Rules of Procedure of the German Federal Constitutional Court; Article 72 paragraph 3 of the Rules of Procedure of the Constitutional Court of Slovenia<sup>76</sup>). Ideally, both texts (the majority opinion and the separate opinion(s)) should be prepared at the same time (when the attempt to influence the majority opinion has finally failed), so that the separate opinion does not appear to be a type of “rebuke” to the majority or even to a particular judge rapporteur, because of an alleged mistake they have made. It should rather be a parallel interpretation of a particular legal problem, usually concerning a conflict of values, for example why a minority would give preference to one constitutional value rather than another, preferred by the majority.”

[CDL-AD\(2018\)030](#) Report on Separate Opinions of Constitutional Courts, para. 47.

54. The information about the number of votes is, among other things, an indication of the stability of the solution adopted in a decision, which is important not only for the parties to the proceedings, but it also allows others to estimate future developments in the case law on a given issue. It can also be an important mechanism of control provided to the public, which enables it to monitor the coherence in the decision-making of the court and individual judges. Finally, it might be argued that disclosing the number of votes could contribute to greater consistency in the case law.

55. Arguments against disclosing the number of votes are that the purpose of separate opinions is to present a different line of reasoning and not to predict future developments nor to reveal how strong the majority is in terms of numbers. What should matter is the strength of the arguments, not the number of votes.<sup>80</sup>

57. The Venice Commission has consistently stated that separate opinions form a part of the judgment and should therefore be published in every case together with the majority judgment and ex officio, not only upon request by the judges, who formulate these opinions. This requirement applies both to the publication medium and to the time of publication.

[CDL-AD\(2018\)030](#) Report on Separate Opinions of Constitutional Courts, para. 54, 55 and 57.

61. For its Members States, which have decided to allow separate opinions, the Commission makes the following general recommendations, which are based on a logic of coherence of this basic choice:

- a) The law should treat separate opinions as a right of judges, and not impose on them a duty to disclose their opinions in every case they were not able to join the majority.
- b) The legitimacy of judicial decision-making will only be ensured by separate opinions that remain loyal to the court and its institutional role. Therefore, separate opinions should focus on explaining that the matter could be dealt with differently, perhaps, in a better way, but not that the solution chosen by the majority was of poor quality.
- c) A separate opinion should be considered as an ultima ratio solution. Therefore, it is essential that judges debate and attempt to influence the majority opinion before envisaging a separate opinion.
- d) It is important for the quality of judgments and for the collegiality within the court for the majority to be able to react and respond to a written separate opinion and to amend the findings or the reasoning of the majority, if necessary. Should the majority decide to change their reasoning in view of the separate opinion, the dissenting or concurring judge should then have the right to withdraw or change his or her dissenting or concurring opinion within a short period of time. This requires for the majority to obtain the dissent in writing before the final judgment is announced, sent to the participants or published.
- e) The judges' code of conduct or ethics should deal with separate opinions – not to dictate the contents, but to set out which lines should not be crossed, without impeding on the independence of the individual judge or harming the institution. It is important that a disrespectful separate opinion that breaches the code of conduct or ethics (or other) be published regardless of whether or not a procedure has been launched against the dissenting or concurring judge.
- f) Separate opinions form a part of the judgment and should therefore be published in every case together with the majority judgment and ex officio, not only upon request by the judges, who formulate these opinions.

[CDL-AD\(2018\)030](#) Report on Separate Opinions of Constitutional Courts, para. 61.

## **7.9 Interlocutory decisions**

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

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

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

“Draft Article 78.2 attributes the competence to take interim measures in constitutional complaint cases to the Senate “concurrently with the initiation of constitutional proceedings”. These measures are by definition urgent. The decision to initiate proceedings is taken by the board. Therefore, the board should also be competent to issue the interim order. Conversely, draft Article

78.5 ends the interim measure when the judgment of the Court is approved. However, when the Constitutional Court finds an unconstitutionality, this will be too early because in a constitutional complaint case, the ordinary courts have to reopen the case and decide anew. The Court should be competent to prolong the interim measures in its judgment until the ordinary court has rendered a decision on the re-opened case.”

[CDL-AD\(2016\)034](#), Opinion on the Draft Law on the Constitutional Court of Ukraine, paragraph 62.

“It seems strange that a final decision of unconstitutionality of a legal provision can be made by the board whereas a mere interlocutory decision on the suspension of the same provision can only be taken by the plenary session. In addition, the judges of the plenary session who are not members of the board in charge will have to familiarise themselves with the case, which will necessarily take time and thus delay the decision.”

[CDL-AD\(2016\)017](#), Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, paragraph 33.

“It is important for the Constitutional Court to take into account the interests of other parties and the public interest before suspending legal acts or norms.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 70.

#### **7.10 Joinder of cases**

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

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

“Article 32.1(5) sets out that an application may be rejected because a similar case is already pending before the Constitutional Court. This seems to contradict Article 39.1, which states that cases on the same issue may be joined and examined at the same session of the Court. Article 39.1 is in line with European standards.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 64.

#### **7.11 Application withdrawal**

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

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

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

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

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

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

“Article 33.2 of the draft Law reads as follows: “*The Constitutional Court may reject the withdrawal of the application, where it finds that the examination of the case on the subject matter of the application derives from public interests.*” Having the Court examine a case even after the applicant has withdrawn his or her application is unusual, but seems to be a positive step. It enables the Constitutional Court to continue proceedings of public interest even against the will of the applicant.

The reason for having such a provision may be to avoid that the applicant withdraw the case under political pressure. But, one should bear in mind that it is quite unusual for a constitutional court to examine a legal act without a pending complaint or motion. On the other hand, in the present situation, an initial application is still required, which means that the Constitutional Court cannot be considered as initiating the case *ex officio*.

Nevertheless, it would be advisable to clarify what is meant by “*public interests*,” as it seems to be vague and the proceedings would then become of an inquisitorial nature.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraphs 67-69.

## 7.12 Adversarial proceedings

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

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

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

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



### 7.13 Evaluation of evidence

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

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

“Article 51.5, on explanations of the parties, of the draft Law reads as follows: “*The information presented in the explanations of the parties concerning the facts shall not have probative value. A party may disclose information of probative value relating to the facts only through the procedure provided for by Article 52 of this Law.*”

This provision is highly unusual for a Constitutional Court, as it contains strict rules on the evaluation of evidence. In particular, a constitutional court should have full discretionary power in the consideration of evidence. This provision should therefore be removed.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraphs 72-73.

### 7.14 Repetitive cases

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

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

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

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

### 7.15 Announcement of Judgments

“The Slovak Constitutional Court is not the only Constitutional Court that announces its conclusions before the full judgment is released. In some cases, weeks or even months (two months in this case) can separate the announcement of the conclusions from the publication of the full judgment. The Commission learned that in other countries, judges disagreed on how the

judgment should be drafted after the conclusion had been announced and that Court had great difficulty to prepare the judgment after the conclusion had already been announced.

However, the separation of announcement and full judgment is even more problematic for the parties, as it creates uncertainty as to how the conclusions were reached. The public expects the executive and legislative powers to implement the judgment right after the conclusion is known, but they cannot do so because the judgment's full reasoning is missing. In its Opinion on the draft Law on the Constitutional Court of Ukraine (CDL-AD(2016)034, Ukraine (Opinion on the draft Law on the Constitutional Court, para. 65), the Venice Commission welcomed the introduction by the Ukrainian law of an obligation to publish the full judgment right after its announcement. The Venice Commission recommends that §30.6 of the Act on the Constitutional Court be amended. The findings or rulings should be publicly announced only when the full text of the decision is available in writing."

[CDL-AD \(2017\)001](#) Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, paragraphs 38-39.

"The first step is to publish the decision, once court proceedings are finalised. It is important that the published decision precisely reflect the conclusions reached by the Court. The decision should only be pronounced once the written decision is ready and should be published at the same time"

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 77.

#### **7.16 Sequence of cases**

"Article 38.3 of the Act provides that hearings on admissible cases should be scheduled in the order in which cases are received by the Tribunal. The Article includes some exceptions, in particular for cases involving the a priori control of bills, control of the constitutionality of international treaties before their ratification, control of the Budget law, control of the Act on the Constitutional Tribunal, cases involving the obstacles to the exercise of the office of the President of Poland, cases involving competence disputes between state authorities and for the control and activity of the goals and acts of political parties<sup>30</sup> (Article 38.4). Article 38.5 provides that the President of the Tribunal may set the date of a hearing and bypass the sequence rule if this is justified by necessity to safeguard the rights or freedoms of citizens, national security or the constitutional order. Upon a motion by five judges, the President of the Tribunal may reconsider a decision about the date of a hearing.

(...)

The complete removal of the sequence rule by the Tribunal is positive because it ensures necessary flexibility in the work of the Tribunal which would be difficult to achieve even with the exceptions under Article 38.5. In addition, it solves the problem of the missing exception for preliminary requests to the Court of Justice of the European Union."

[CDL-AD\(2016\)026](#), Opinion on the Act on the Constitutional Tribunal of Poland, paragraphs 43-48.

#### **7.17 Postponement of cases**

It is a legitimate and valid aim to allow judges more time for preparing a particularly complex case. In this respect Article 68.4 of the Act already provides for postponement of the deliberation for two weeks. Article 68.5-7 also does not depend on the complexity of the case but only on the disagreement between the majority of judges and the four dissenters. The second three month

period in particular lacks any justification, because the four judges are not even required to prepare an alternative solution. In any case, it should be left to the Tribunal to develop solutions for addressing disagreements among the judges. Rigid rules adopted by the legislature should be avoided and these rules provide an incentive for judges to disagree instead of reaching consensus.

The rules allowing postponement of a case for a maximum of six months upon request by four judges thus lack justification. In any event, they do not reflect the necessary understanding for safeguarding an effective judiciary in the field of constitutional justice. They could easily be abused to slow down proceedings in delicate cases. Furthermore, strict delays of a considerable minimum length which are not requested by the parties (being of internal nature) delay the handling of cases. Moreover, rules of this nature proceed from the assumption that the Constitutional Tribunal and its President are not able to take appropriate measures to ensure speedy proceedings while respecting the time needed for judges to present opinions and, in addition, they provide an incentive for judges to stick to maximalist position instead of accepting to reach compromises. They thus risk further compromising its effective functioning and independence.

The decision of the Tribunal to annul the provision enabling four judges to obtain a postponement of a case for six months removes a danger of frustrating the work and independence of the Tribunal.”

[CDL-AD\(2016\)026](#), Opinion on the Act on the Constitutional Tribunal of Poland, paragraphs 57-58-61.

#### **7.18 Quorum and majority for adopting decisions**

“Finally, it should be pointed out that providing for a qualified majority in abstract cases, initiated by State bodies, and a simple majority in individual cases is incoherent. This means that a law could be challenged in abstract proceedings before the full bench and even if there is a simple majority of judges finding the law unconstitutional, the law might “survive” because no two-thirds majority can be achieved. The same law might be challenged through an individual complaint and, in such a case, a simple majority of four out of seven judges would be able to annul the law. It is true that abstract proceedings are considered to be more complex and that a higher level of scrutiny might apply. Nonetheless, the fact remains that the same provision could be subject to different standards of control and its annulment or not would depend on the type of proceedings that were brought to challenge that provision. This contradiction should be resolved by reducing the majority for full bench decisions to a simple majority.”

[CDL-AD\(2016\)001](#), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, paragraph 83.

“The Opinion insisted that the established constitutional practice of voting by simple majority “cannot be altered by the ordinary legislator, but only by a constitutional amendment requiring a qualified majority” (par 82) and “[s]uch a very strict requirement carries the risk of blocking the decision-making process of the Tribunal and of rendering the Constitutional Tribunal ineffective, making it impossible for the Tribunal to carry out its key task of ensuring the constitutionality of legislation.” (par 79)...”

[CDL-AD\(2016\)026](#), Opinion on the Act on the Constitutional Tribunal of Poland, paragraph 63.

“In its opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, the Commission had pointed out that a “comparative overview shows that, with regard to the decision quorum, in the vast majority of European legal systems, only a simple voting majority is required. There are a few – and limited – exceptions to this rule in Europe”<sup>11</sup> and “a

decision quorum of two-thirds is clearly not the general rule for plenary or chamber decisions in constitutional courts in Europe. Such a very strict requirement carries the risk of blocking the decision-making process of the Tribunal and of rendering the Constitutional Tribunal ineffective, making it impossible for the Tribunal to carry out its key task of ensuring the constitutionality of legislation.”

[CDL-AD\(2016\)017](#), Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, paragraph 48.

### 7.19 Signing decisions

“An alternative would be to replace the requirement of a signature of the Courts’ judgments by all judges with a signature of the President of the Court and the Secretary General only. An – incomplete – comparative overview shows that two major groups can be distinguished as concerns the modalities for signing decisions of the constitutional courts and equivalent bodies. In a first group, all judges who participated in the case sign. This group includes Albania, Algeria, Andorra, Brazil, Chile, Estonia, Germany, Kazakhstan, Kyrgyzstan, Lithuania, Peru, Poland, Republic of Korea, Romania, Russia, Turkey and Ukraine. In the second group, only the President / session chair, secretary general and/or the rapporteur judge sign. This group comprises Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, “the former Yugoslav Republic of Macedonia”, France, Italy, Kosovo, Latvia, Liechtenstein, Luxembourg, Mexico, Moldova, Monaco, Montenegro, Portugal, Serbia and Slovenia. It is clear that Georgia currently belongs to the first group.”

[CDL-AD\(2016\)017](#), Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, paragraph 158.

“An additional option could be that an adequate mechanism for solving conflicts be implemented in that respect. Since every mechanism takes time and therefore delays the release of the decision, the requirement that only the president of the constitutional court sign (and possibly the secretary general), could resolve such a deadlock. However, as is often the case, this solution requires a certain level of trust by the judges of the signing president, which cannot be established by law”.

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 82.

“The comparative overview outlined above shows that the requirement for the participation of at least 13 judges of the constitutional court when adjudicating as a Plenary Court of 15 judges goes considerably further than corresponding requirements in other European states. While, according to common European standards, the attendance quorum within a constitutional court should be higher than half of the judges of the court, 13 out of 15 judges is unusually high, especially if there is no system of substitute judges like in Austria or in the European Court of Human Rights. The reason that such a high quorum cannot be found in other European countries is obvious: this very strict requirement carries the risk of blocking the decision-making process of the Court and rendering it ineffective, making it impossible for the Court to carry out its key task of ensuring the constitutionality of legislation.”

“Against the background of the comparative overview above, a decision quorum of two-thirds is clearly not the general rule for plenary or chamber decisions in constitutional courts in Europe. Such a very strict requirement carries the risk of blocking the decision-making process of the Tribunal and of rendering the Constitutional Tribunal ineffective, making it impossible for the Tribunal to carry out its key task of ensuring the constitutionality of legislation.”

[CDL-AD\(2016\)001](#), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, paragraph 71-79.

## 8 Effects of decisions

“The execution of judgments of the Constitutional Court is an essential requirement of the rule of law. Leaving the choice of whether or not to follow the judgments of the Constitutional Court to Parliament does not live up to this requirement.

The Venice Commission recommends amending the Constitution to ensure that a legal provision found unconstitutional as such by the Constitutional Court loses legal force with the publication of the judgment of the Court. In order to avoid legal gaps, the Constitutional Court could be empowered to postpone the entry into force of the repeal of the provision found to be incompatible with the Constitution by a specified period (typically up to one year). This allows Parliament to phase in new legislation before the unconstitutional provisions lose their force.”

[CDL-AD\(2018\)028](#) Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, paras. 77, 78.

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

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

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

### 8.1 Publication of judgments

“According to Article 105.2 of the 2015 Act (and Article 79.3 of the 1997 Act), the President of the Tribunal shall “order” the publication of judgment. Article 80 of the new Act, however, only provides for an “application” to the Prime Minister. Given the problems regarding publication of the judgments of 9 March and 11 August 2016 (and the 21 judgments handed down since 9 March that were published only after a long delay and an act of the legislature), such a shift seems likely to exacerbate the risk that judgments will not be published in a timely manner, by giving the Prime Minister a potential basis for denying the publication of judgments, and the risk that Article 190.2 of the Constitution requiring the immediate publication of judgments will be violated.

The Opinion stated that “[a] refusal to publish judgment 47/15 of 9 March 2016 would not only be contrary to the rule of law, such an unprecedented move would further deepen the constitutional crisis triggered by the election of judges in autumn 2015 and the Amendments of 22 December 2015. Not only the Polish Constitution but also European and international standards require that the judgments of a Constitutional Court be respected. The publication of the judgment and its respect by the authorities are a precondition for finding a way out of this constitutional crisis.” (par. 143).

Under the rule of law and in particular the principle of the independence of the judiciary, the validity and force of judgments cannot depend on a decision of the executive or the legislature. In particular, refusal to publish the judgements of a Constitutional Tribunal without sanction constitutes a fundamental challenge to the court’s authority and independence as the final arbiter on constitutional issues.”

[CDL-AD\(2016\)026](#), Opinion on the Act on the Constitutional Tribunal of Poland, paragraphs 75–77.

“In Austria, a judgment by the Constitutional Court that declares a law unconstitutional obliges the Federal Chancellor or the competent Land Governor to publish the judgment without delay (Article 140.5 of the Federal Constitutional Law). Nevertheless, the judgment itself has the effect of repealing the unconstitutional provisions. Thus, in Austria, the annulment of a law is effective and binding for the parties as of the date on which the judgment is served on the parties, regardless the date of its publication in the official journal.

In the United States, all opinions of the U.S. Supreme Court are published in the United States Reports, by the Reporter of Decisions of the Supreme Court of the United States, a position created by Congress. No discretion is exercised by the Reporter over what opinions are published, and all opinions have legal force and may be cited as binding legal precedent as of the moment that they are issued by the Court.

The solution may be somewhat different in other countries. In Belgium, for example, a judgment annulling a law has legal authority only when published in the Official Gazette, but this publication is automatic and depends solely on the Court. Anyway, no valid system of constitutional justice can be conceived of where the validity of the judgments of the Court depends on the good will of political authorities.

The legal force of a court judgment cannot be dependent on whether or not that decision is published by some actor other than the Court. Such control over the legal force of a judgement would egregiously violate the independence of the court and the rule of law. When this concerns the Constitutional Tribunal this is a challenge to its authority as the final arbiter on constitutional issues.”

[CDL-AD\(2016\)026](#), Opinion on the Act on the Constitutional Tribunal of Poland, paragraphs 79–82.

“ Article 43.10 OLCC provides that the full text of an act of the Constitutional Court (judgment, ruling, recording notice or conclusion) is published on the website of the court within 15 days “from its receipt” (adoption) and sent to the “Legislative Herald of Georgia”, which shall publish it within the following two days. 60. The Commission welcomes that while introducing a publication of the acts of the Court in the Legislative Herald, Article 25.6 OLCC also makes it clear that “the Constitutional Court act is regarded as promulgated if its whole text is published on the webpage of the Constitutional Court”. 15 It must be ensured that the Court has full control over the publication of its acts on its own web-site. This avoids any interference by the Executive in the work of the Court by refusing to publish a judgment.”

[CDL-AD\(2016\)017](#), Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, paragraphs 59–60.

“It is a prerequisite for the effectiveness of constitutional justice that the decisions of a constitutional court be published. A comparative overview<sup>21</sup> shows that in some countries, the legal authority of decisions of a constitutional court depends on their publication; in other countries the decision released by the constitutional court has itself legal effect even without its publication”

“It should be emphasised that the legal authority of a decision of the Constitutional Court does not depend on its publication in the Official Journal of the Republic of Armenia, which seems to be the task of the executive branch. As in Georgia, it should be clarified that the issuance of a decision by the Constitutional Court on its website or in its journal, must be recognised as having legal value in itself and should then be followed by a publication in the official gazette.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraph 94 and 97.

## 8.2 Ex tunc v. ex nunc effects

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

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

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

Limiting the effects of a decision of the Constitutional Court to future cases and cases, which have not yet been decision in final instance has an advantage from the viewpoint of legal certainty.”

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

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

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

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

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

[CDL-AD\(2010\)039rev](#) Study on individual access to constitutional justice, paragraph 192.

“An *ex tunc* effect of the Chamber’s decisions should be applied with great caution, providing it in exceptional circumstances only. It is absolutely necessary to provide the courts with clear guidance with regard to the *ex tunc* effect of the Chamber’s decisions.”

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

“The draft law does not specify when the decisions and opinions of the Constitutional Court enter into force. (Only Article 57, on review of the constitutionality of laws, stipulates that the Court must specify the legal effects of its findings of unconstitutionality – on this point, see below). The Court should be able to defer the effect of its findings of unconstitutionality, so as to avoid a legal gap following the repeal of a law or of provisions within a law. By deferring such a repeal, the Court can ensure that the Assembly of the Representatives of the People has sufficient time to pass a new law which complies with the Constitution. If the law does not provide for it, the Court can develop itself the effects of its decisions in its case-law.”

[CDL-AD\(2015\)024](#), Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, paragraph 11.

“The new paragraph 6, which deals with the effects of Constitutional Court judgments, is a step in the right direction. There is no clarification on this point in the current text, or moreover any other text. The new text states that provisions declared to be unconstitutional “shall cease to have any legal effect” on the day after publication of the judgment. This is a real transformation in the functions of the Court, which it would be worth clarifying. According to information provided by the Luxembourg authorities, the law becomes impossible to apply, but this does not mean that it disappears completely from the body of law, as it is not an annulment. The Venice Commission recommends that, in order to guarantee the principle of legal certainty, provision should be made for provisions that are declared unconstitutional to be annulled.”

“The new paragraph also introduces the possibility of deferring the effect of a judgment of the Court for a period of no more than twelve months. Now that the Court’s judgments are considered to apply *erga omnes*, this possibility is welcome, not to say essential. Otherwise, and failing the formal repeal of the provision declared unconstitutional, it would have to be specified whether judgments of the Constitutional Court had an *ex nunc* or an *ex tunc* effect, together with a stipulation that the law should not be applied to the applicant.”

[CDL-AD\(2019\)003](#), Opinion on the proposed revision of the Constitution of Luxembourg, paragraph 115 and 116.

#### “E. Temporal effects

41. The core task of a constitutional court is to identify legal provisions that contradict the constitution and to remove these provisions from the body of laws (‘negative legislator’). Unconstitutional laws, or parts of it, should be removed or invalidated because they contradict the Constitution which has a higher rank. A number of questions arise as to the temporal effects of decisions of unconstitutionality.

42. (...) Many constitutional courts may decide that the invalidation of these unconstitutional provisions will only take place in the future, often up to one year or 18 months after the decision of the constitutional court enters into force. This means that during this period of time, the unconstitutional provision will continue to be applied, even though its unconstitutionality has already been established.



43. The only exception is the “rule for the instant case” (see below) where it exists. The application of a legal provision that is known to be unconstitutional may be justified by the need to maintain legal certainty, to provide for equality and to avoid a legal gap without any applicable provision. This period gives time to the legislator to adopt a new, constitutional provision that replaces the one that was found unconstitutional. The unconstitutional provision loses its effect by virtue of the decision of the constitutional court and the legal gap really opens only if the legislator remains inactive during this period.

44. As concerns the validity of the unconstitutional legal provisions, there are two schools of thought: If a law which is incompatible with the constitution is thought to be null and void, the decision of the constitutional court, which finds a law unconstitutional, has an *ex tunc* (as from then) effect. This is also called the doctrine of nullity. If a law which is incompatible with the constitution is thought to be effective until it is abolished, the decision of the constitutional court which finds a law unconstitutional has an *ex nunc* (as from now) effect.”

[CDL-AD\(2018\)012](#) Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paras. 41-44.

#### “1. Moderate *ex tunc* effects

46. Only relatively few countries provide for *ex tunc* effect of constitutional court decisions. The German legal system is widely regarded as a well-known example for an *ex tunc* effect of the decisions of a constitutional court. In this case, *ex tunc* means that the unconstitutional provisions are considered to be invalid as from their adoption. The decision of the constitutional court finding the unconstitutionality is not a constitutive act invalidating these provisions. It only identifies provisions which are unconstitutional and which are already invalid. The advantage of this concept is its abstract clarity. The supremacy of the Constitution is so important that unconstitutional provisions are invalid *per se*.

47. However, in practice, a rigorous application of this concept would lead to unforeseeable results in individual cases, which are based on the application of the unconstitutional provision. (...)”

[CDL-AD\(2018\)012](#) Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paras. 46-47.

#### “2. Strict *ex nunc* effects

49. The alternative doctrinal concept, *ex nunc* effects, means that the decision of the constitutional court not only identifies an unconstitutional provision that was invalid as from its adoption, but the decision is constitutive and repeals / invalidates the unconstitutional provision.

50. The invalidation of unconstitutional provisions *ex nunc* (in its variants below) is the most common system with regard to the effects of decisions of constitutional courts.

51. In its strict form, this means that the legal provision that was found unconstitutional remains even applicable to facts that arose before the invalidation entered into force. With the exception of the rule for the instant case (below), decisions of the constitutional court do not influence legal relationships that had been finalised before the publication of the decision. The logic justifying this solution is that legal certainty is given a high priority over individual remedy. (...)”

[CDL-AD\(2018\)012](#) Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paras. 49-51.

“3. Rule for the instant case

53. If the ex nunc effect is strictly applied, even though the provision is abrogated by the constitutional court, the rights of the applicant in a case of a (normative or full) constitutional complaint cannot be protected, because the invalidation of the unconstitutional provision only acts pro futuro. The unconstitutional provision still has to be applied to the facts of the instant case, the facts of which took place before the decision of the constitutional court.”

[CDL-AD\(2018\)012](#) Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 53.

“4. Moderate ex nunc effect

58. Some countries have a moderate version of the ex nunc effect. In this form, the ex nunc effect means that only final court judgments remain unaffected by the invalidation of a provision on which they are based. The decision of the constitutional court invalidates the unconstitutional provision as of the date of the pronouncement of the decision. In principle, this provision remains part of the legislation prior to the decision. However, on-going cases and any new cases will be based on the result of the decision of the constitutional court and the unconstitutional provision will no longer be applied, even in cases relating to facts that occurred before the decision. As a consequence, no special rule for the instant case is necessary, because the applicants’ final judgment by the ordinary court will be quashed and the new judgment will not be based on the invalidated legal provision.”

[CDL-AD\(2018\)012](#) Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para. 58.

“5. Ex nunc systems allowing the constitutional court to define retroactive effects of its decisions

62. In some countries, the constitutional court itself may decide on the effects of a decision finding a legal provision unconstitutional.

63. In the Czech Republic, there is extensive case law on the issue of legal aspects of abstract constitutionality review. Findings of the Constitutional Court are considered constitutive legal acts and have, in principle, ex nunc effects. (...)

64. However, this principle cannot be understood in an absolute and overly formalistic way. In exceptional cases, the Constitutional Court’s findings have retroactive effects. They are admissible if they are absolutely necessary as a last resort for the purposes of protection of constitutionality and if they do not lead to disproportionate interference in legal certainty, especially in vertical relations if the unconstitutional provision regulates the relationship between a public authority and an individual who would benefit from the invalidation.

65. The case-law of the Constitutional Court of the Czech Republic admits that when it comes to vertical relationships (between the state and individuals), a finding of unconstitutionality may have retroactive effects, because in vertical relationships it is necessary to give priority to the protection of fundamental rights over legal certainty and trust in the law. (...)

66. As a result, the rights of third parties could be seen as the limits of the retroactive application of the constitutional court decision when the constitutional court itself can decide on the effects of its own decisions.”

[CDL-AD\(2018\)012](#) Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paras. 62-66.

“6. Ex nunc systems with a limitation of retroactive effects in time

67. Armenia has a special position in this respect because Article 68, paragraph 14, of the Law on the Constitutional Court, provides that “The administrative and judicial acts that were adopted and implemented on the basis of the general acts that were annulled and found unconstitutional [...] within three years before the Constitutional Court decision entered into force shall be revised by the administrative and judicial bodies that adopted those in the procedure stipulated by the Law.” This means that the decisions of the Constitutional Court have a retrospective effect on all ordinary court judgments and administrative decisions taken during the last years before the entry into force of the decision of the Constitutional Court.

[CDL-AD\(2018\)012](#) Amicus Curiae Brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, para.67.

### **8.3 Obligation for ordinary courts to reopen a case**

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

(...)

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

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

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

“The fact that the legal provision on which that judgment was based is not constitutional cannot be held against that party. The re-opening of the case with the possible outcome that the other party might win the case therefore affects the rights of this party. This does not mean that such a case should in no way be re-opened, but whether and how the case can be reopened will depend on the applicable system. The rights resulting from the original judgment merit consideration in the concrete case. The invalidation of a law will of course potentially affect a high number of cases”

[CDL-AD\(2018\)012](#), Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paragraph 22.

“When a constitutional court refers a case back to an ordinary court (e.g. as the result of a full constitutional complaint), corresponding provisions in the respective procedure code should allow the ordinary court to act on this referral (and oblige it to do so).

Such provisions typically directly refer to decisions of the constitutional court but, depending on the interpretation of the relevant procedure code, they could also be intrinsic and result from general provisions. The general grounds for the reopening of civil proceedings applied in many European countries are that a final judgment may be reopened if there are certain, very specific facts, decisions or evidence relating to the original proceedings, which could not (yet) be presented in these proceedings without the fault of the applicant and these elements could lead to a more favourable judgment for the applicant. Depending on the interpretation of such a rule, even a decision of a constitutional court invalidating a legal provision on which the judgment was based could constitute grounds for reopening proceedings. In most countries, however, a direct link of the new judgment or decision to the concrete case is required.

The ordinary court would then examine whether the constitutional court’s decision could lead to a more favourable result for the applicant. This means that the reopening of proceedings must be examined and admitted by the ordinary court. In addition, not every human rights violation established by the constitutional court is a ground for the reopening of proceedings. The ordinary court would examine the possible effects of the constitutional court’s decision on the concrete case.”

[CDL-AD\(2018\)012](#), Amicus curiae brief for the constitutional court of Georgia on the effects of constitutional court decisions on final judgments in civil and administrative case, paras. 38, 39, 40.

#### **8.4 Functions of the constitutional court**

“The core task of a constitutional court is to identify legal provisions that contradict the constitution and to remove these provisions from the body of laws (‘negative legislator’)(...)”

[CDL-AD\(2018\)012](#), Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paragraph 41

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

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

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

“Even more than the possibility for the Court to initiate proceedings on its own motion, Article 110 brings the Constitutional Court in the political arena. The law should restrict the task to monitor

the implementation of constitutionality and legality from a general supervision to monitoring the execution of its own decisions.”

[CDL-AD\(2008\)030](#) Opinion on the Draft Law on the Constitutional Court of Montenegro, paragraph 80.

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

[CDL-AD\(2009\)014](#) Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, paragraph 27.

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

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

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

## **8.5 Execution of the Constitutional Court’s decision**

“The respective jurisdiction and institutional setting of the various constitutional courts in Europe vary widely. In particular, the rules on the execution of judgments, where such rules exist at all, differ for every constitutional court. As a consequence, there are no strict common standards on the execution of judgments of constitutional courts.”

“The comparative overview provided above shows that there is some diversity with respect to the execution of judgments. One part of the European legal order does not regulate the enforcement of Constitutional Court decisions and the other assigns this task to other state powers. Only in Moldova, the Constitutional Court may impose administrative fines. As a consequence, there are no European standards on who should be responsible for the execution of Constitutional Court decisions.”

“The attribution of the task to ensure the execution of its decisions in Article 92 is the heart of the Amendments. As the comparative overview has shown, this task is rather exceptional for European Constitutional Courts. While some Courts have the task of monitoring the execution of their judgments or may assign the task of execution to a specific organ or body, no other Court seems to have the overall responsibility of ensuring the execution of its judgments itself.”

[CDL-AD\(2017\)003](#), Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 15, 26 and 38.

“As regards the execution of the Constitutional Court’s decisions (…) it may be questionable whether Articles 66-67 will be efficient enough to guarantee it. Complementary means may be needed, notably the development of a constitutional culture respecting the Constitution and the decisions of the Constitutional Court.”

“More practical mechanisms for the supervision of the execution of decisions as well as legal consequences for non-compliance with their requirements seem to be necessary.”

“Another issue raised during the visit of the Venice Commission’s delegation to Yerevan concerned the question of which parts of the decisions of the Constitutional Court are binding. The argument put forward by some of our interlocutors was that only the conclusive part of the decision should be binding and not the reasoning of the Court leading to it. The counter argument

provided by the Constitutional Court was that the reasoning, which leads to the conclusive part of the decision, is included in the operative part of the decision and is therefore also binding. Article 61.5 of the draft Law leaves a bit of a grey area in this respect, by stating that “*The decisions rendered by the Constitutional Court on the merits of a case shall be binding [...].*” The following solution might be considered: in case of a declaration of unconstitutionality, only the conclusive part of the judgment should be binding. In case of a declaration of constitutionality, however, the conclusive part and the interpretation of the relevant norm, as referred to in the conclusive part of the judgment, should be binding.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraphs 86, 88 and 91.

“The power to notify the decisions to any public authority and employee is consistent with the final and binding character of the decisions of the Constitutional Court. The organs and persons which have an obligation to execute decisions of the Court need to be notified so that they are aware of their obligation and can fulfil this obligation in an efficient and speedy manner. Such notification can remove doubts as to which authority or person is responsible to execute a decision and thus avoid positive or negative conflicts of competence in the execution. Such notification should not only be optional, but be an obligation for the Constitutional Court.”

[CDL-AD\(2017\)003](#), Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 33.

“Article 92 para. 1 maintains the provision that the Court may determine within the judgment or decision, or in subsequent acts who shall be responsible for the execution. This provision serves the effectiveness of the Court’s case law and, therefore, is a useful instrument for securing implementation of decisions.

The competence to annul ‘any’ decision contradicting its own decisions already existed in Article 92 since 2007. In order to ensure that the Court is seen as a neutral arbiter, this competence should be exercised only upon request by a party (as provided for in Article 92.3). In any case, judgements of the ordinary courts should not be annulled in execution proceedings but only in specific proceedings on the merit.

This competence might also overburden the Court. The Amendment makes no distinction between contradicting decisions taken before the Constitutional Court gave its own decision and later ones, which will indeed knowingly contradict the Court’s decision. There could be many individual decisions which contradict a given Constitutional Court decision. The scope *ratione temporis* of the competence to annul any decision contradicting a decision of the Constitutional Court should be clarified.”

[CDL-AD\(2017\)003](#), Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 40-42.

“(...) the obligation to report to the Constitutional Court is not problematic, as long as the time limits set by the Court are reasonable.”

“(...) fair trial guarantees of Article 6 ECHR are required for penalty payments imposed on individuals. The application of the Law on Contentious-Administrative Jurisdiction and, notably, its provisions on hearings and on evidence may provide such guarantees. It is for the Constitutional Court to apply them appropriately in individual cases.”

[CDL-AD\(2017\)003](#), Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 45 and 50.

“Once the Constitutional Court has made a decision and there is a refusal to implement this decision, other bodies should step in, in order to defend the Constitution and the Constitutional Court. Giving the power of execution of its decisions to the Constitutional Court may seem as an increase of power at first sight. However, in a system of separation of powers, the division of competences of adjudicating on the one hand, and of executing its results, strengthens the system of checks and balances as a whole, and in the end, also the independence of the Constitutional Court as a decisive factor of the rule of law. The perpetrator should certainly be forced to obey the judgment of the Constitutional Court, but not by the Constitutional Court, which does not have the practical means to force the office holder to comply with its decision.”

“The comparative overview shows that the responsibility for the Constitutional Court to contribute to the execution of its own decisions is the exception. This task is usually attributed to other state powers. Attributing the overall and direct responsibility for the execution of the Constitutional Court’s decision to the Court itself should be reconsidered, in order to promote the perception that the Constitutional Court only acts as a neutral arbiter, as judge of the laws.”

[CDL-AD\(2017\)003](#), Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 53 and 71.

“(…) two measures raise questions: the repetitive, coercive penalty payments applied on individuals and the suspension from office of officials who refuse to execute the Courts’ decisions.

The personal scope of the suspension from office remains unclear and should be specified. It could be problematic if it were to include directly elected officials, who are not excluded by the wording of Article 92. The law or its application should provide for different treatment when penalty payments concern respectively public authorities, office holders and individuals.

In order to enhance the perception of the Constitutional Court as a neutral arbiter, the Court should not act on its own motion but only upon request by a party in exercising the execution powers under the Amendment.”

[CDL-AD\(2017\)003](#), Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 73-75.

“Another issue is the effect of the suspension. During the suspension, the suspended office holder cannot exercise his or her powers. In itself, the suspension does not result in the replacement of the person concerned with another office holder. According to the Preamble of the Amendments and the Position Paper, the suspension – like the penalty payments - should induce the suspended office holder to execute the decision of the Constitutional Court and the suspension should last only while the officeholder refuses to execute the decision of the Constitutional Court. However, if the office-holder can no longer exercise his or her powers, how is he or she expected to execute the Court’s decision? Judgment STC 215/2016 states that the measure will be lifted when the authority or public official is no longer “unwilling” to comply. In order to solve that problem, it would seem necessary that the office-holder first promise to execute the decision; the Court would then end the suspension in order to enable the execution by the office holder. The Amendments should address this practical question.”

“This issue may be moot if the rules governing the office of the suspended official provides for the official’s (his or her deputy) substitution and the substitute executes the Constitutional Court’s decision. Then the suspension of the office holder would end. If however the substitute in turn refuses to execute the decision, he or she should probably be suspended as well. This could be repeated until the decision is executed. Such repeated suspension could lead to an absurd situation.”

“Finally, the same problem arises as for the penalty payments. If the decision of the Constitutional Court is not executed, then it is possible that the office holder concerned would also ignore his or her suspension and remain in office. This would seriously undermine the authority of the Constitutional Court.”

[CDL-AD\(2017\)003](#), Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 59-61.

“The Venice Commission is of the opinion that substitute enforcement of decisions of the Constitutional Court is not problematic. The Constitutional Court is likely not to execute this measure itself, but to request the cooperation of the Spanish Government. Therefore, the Court is not itself burdened with performing the required acts.”

“The suspension of acts without hearing the parties could be an issue, notably if the case were to fall under the scope of Article 6 ECHR. However, a hearing is held already three days after this measure is taken and the parties concerned can express their views at that hearing. Often, Constitutional Courts or even their Presidents can adopt interim measures in urgent cases. Therefore, there is no objection against this measure, given that a hearing is held shortly after the measure is taken. However, the Court should not act on its own motion but only upon request.”

[CDL-AD\(2017\)003](#), Opinion on the amendments of the Organic Law of the Constitutional Court of Spain, paragraph 64 and 68.

## **8.6 Obligation to follow constitutional interpretation provided by the constitutional court**

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

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

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

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

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



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

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

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

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

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

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

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

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

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

(...)

“The Venice Commission therefore cannot support the Hungarian authorities’ argument that the Constitutional Court should be more free to decide. As shown, there was no justification to repeal the Constitutional Court’s former case-law in order to enable the Constitutional Court to renew its

jurisdiction in cases where it is necessary. It is inherent in a Constitutional Court's approach to interpret a constitution on the basis of its provisions and the principles contained in it. These principles transcend the constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. It is these principles which are reflected in the case-law of the Constitutional Court since its establishment.”

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

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

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

“The Constitutional Court must ensure the supremacy of the Constitution (Article 167.1 of the Constitution). Therefore the decisions rendered by the Constitutional Court on the merits of a case must be binding for all state and local self-government bodies, the officials thereof, as well as for natural and legal persons throughout the territory of the Republic of Armenia (Article 61.5 of the draft Law). It is essential that parliament not ignore the constitutional court's decisions when it adopts or amends laws. Whether a constitutional court is part of the judiciary or has its own chapter in the constitution, the constitutional court's role is to be the main institutional safeguard for the constitution and for the principle of the separation of powers. The very purpose of a constitutional court is to limit the transgressions of the legislator and that of other state powers and parliament cannot refer to the ‘separation of powers’ to refuse the implementation of the constitutional court's decisions.

This does not mean, however, that a constitutional court's jurisdiction is unlimited; its jurisdiction is limited by the constitution.”

[CDL-AD\(2017\)011](#) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraphs 89 and 90.

## **8.7 Re-opening of a case by the Constitutional Court**

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

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

“Since the decision of a Constitutional Court is regarded as final and respecting its decision is in conformity with the constitutional order and in the interest of legal certainty, reviewing a judgment by a Constitutional Court must be an exception. This is where a separation needs to be drawn

between the judge's criminal activity (e.g. there could be a video recording of the judge accepting a bribe and promising to take a decision in a given way) from the adopted court decision itself. The judge should be punished for the crime s/he has committed. Functional immunity does not cover ordinary crimes and hence the judge should face criminal responsibility.

The question then is what occurs with the judgment itself if a legal opinion or judgment of the Constitutional Court is tainted by a judge having accepted a bribe – can this legal opinion or judgment be revised? A distinction needs to be made between such revision of a judgment in a concrete case from a general change of the case-law, which is not relevant for this *amicus curiae* brief.

In general, a judgment enters into legal force and becomes binding on the court itself, which cannot start a new procedure. In some situations, a provision for the reopening of a judgment may be required. This requirement often exists, for instance, for member States of the Council of Europe in response to a judgment by the European Court of Human Rights, which finds that the member State has breached its obligations under the European Convention on Human Rights (ECHR) and the Constitutional Court has rendered a decision contributing to this breach.<sup>36</sup>

There are, generally, no legal provisions that allow for the reopening or reviewing of a judgment specifically on the basis of offences (e.g. bribery) committed by a Constitutional Court judge in his or her function leading to a tainted judgment. However, proof that a bribe has been accepted by a Constitutional Court judge (criminal conviction) could provide a new element to reopen a judgment under the applicable general procedural rules. Constitutional court laws often refer to general (mostly civil) procedural codes to be applicable in constitutional proceedings - subsidiarily.<sup>37</sup>

In summary, it is important that only the Constitutional Court itself be able to revise its judgments if there is proof of a criminal act in adopting it (criminal conviction of a judge). No other public authority can be authorised to do so. If a public authority were to be given the power to review the constitutionality or legality of an act of a Constitutional Court, especially regarding the investigation of Constitutional Court judges for offences carried out in their functions (not for ordinary crimes), the independence of the Constitutional Court would be compromised. International bodies may assess whether a decision of a Constitutional Court of a particular state is in line with the international obligations of that state, but their conclusions cannot directly alter the Constitutional Court's decision or lead to the criminalisation of judges who have taken that decision. Only if these international bodies impose the obligation on a state to compensate an individual for any harm caused to him or her by a decision of the Constitutional Court, should it be possible to infer the obligation of "regression damages" on judges.<sup>38</sup> However, such a procedure would only be possible if it has a legal basis in the country concerned, i.e. if there is legislation that clearly provides for this possibility. For this reason, an internal reexamination procedure of the Constitutional Court would be needed rather than a review procedure by other public authorities such as Parliament or the Supreme Court (which already deals with minor and administrative offences by Constitutional Court judges (Article 16(2) of Law No. 317-XIII)). When there is no such possibility, and if this is warranted in substance, a constitutional amendment may be necessary to overcome a Constitutional Court judgment that was adopted involving a criminal act of one of the court's judges.

In conclusion, it is for the Constitutional Court to decide whether Law No. 317-XIII on the Constitutional Court requires the Court's approval for the initiation of criminal proceedings against a judge and which conditions must be met to give its consent (see above). However, as concerns Constitutional Court decisions, they are final and reviewing them should be an exception and carried out by the Constitutional Court itself. To give this task to a public authority would compromise the independence of the Constitutional Court."

[CDL-AD\(2019\)028](#) Republic of Moldova – Amicus Curiae Brief on the criminal liability of the Constitutional court judges, paras. 45-50.

## **9 Relations of the constitutional court with the media**

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

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

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

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

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