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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE INTRODUCTION OF A WRITTEN PROCEDURE
AT THE CONSTITUTIONAL COURT**

OF THE RUSSIAN FEDERATION

by

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Introduction

1. The Russian Constitutional Court has asked the Venice Commission to give an opinion on the Draft Federal Constitutional Law “on modifications and amendments to the Federal Constitutional Law on the Constitutional Court for the Russian Federation”

The draft would amend seven articles of the presently valid law (adopted in 1994). The aim of the amendments is to introduce the possibility of the written procedure. The main question to be answered is whether the introduction of the written procedure in the proposed way to the Russian system of judicial review of constitutionality would violate constitutional principles or European standards.

Oral and written procedures

2. The Russian regulation of the procedure of the Constitutional Court in 1994 opted definitely and exclusively for the oral hearings (Article 32.). The provisions of the Constitution (dated from 1993) regulating the guarantees of judicial procedures (Articles 46-51) do not prescribe oral hearings as a constitutional requirement. Therefore, the legislature is free to decide whether in constitutional cases it prefers written or oral procedures. The primacy or even the exclusivity of oral hearings can be justified by several considerations. It makes possible the direct involvement and litigation of the parties, direct contact with the judges, thus it can accelerate the procedure. Public oral hearings make the litigation procedure more open and transparent. 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.

3. However, oral hearings do not serve in all cases the quickness of the procedure. Therefore, especially in public law and in constitutional court procedures it became quite widespread the use of written procedure (though I would not go as far as to state that the written procedure is typical in constitutional justice). Certain European countries opt for oral hearings (Italy), others for written procedures (Hungary), others combine the two procedures (Austria, Germany). Without entering into detailed examination of the different solutions, one can state that the use of written procedure in litigations before Constitutional Courts is widespread, and it is in conformity with European standards.

Examination of the draft

4. The proposed legislation would abolish the current requirement of having an oral hearing in every admissible case brought before the Court. In exceptional cases, the Court can deliver a decision without oral hearings, within a written procedure. This exceptional procedure can take place if the constitutional procedure regards an “analogous normative provision” compared to a provision examined previously by the Constitutional Court (Article 42). Thus the possibility of the written procedure is limited to cases analogous to

previously adjudicated cases in which the Constitutional Court has already declared a provision constitutional or unconstitutional. In these cases, under article 68, the Constitutional Court can also discontinue the proceedings.

5. The definition “analogous normative provision” is not fully clear, it is vague to a certain extent but the substance of the provision and its scope is understandable. However, if the proposed text would be adopted, the Constitutional Court itself will be responsible to interpret the meaning of “analogous provision”.

6. The written procedure generally can be justified but in this limited scope outlined by the draft especially does not raise any concerns. Furthermore, the proposed amendment to Article 53 contains a guarantee that the parties shall enjoy equal rights even in written procedures when oral hearings do not take place.

Conclusion

7. The proposed draft by introducing the written procedure as exceptional proceedings is in conformity with European standards and does not violate Russian constitutional provisions, either. Its scope and application is limited, several European Constitutional Courts, and even European Courts make use of the written procedure in definitely wider way. The introduction of the written procedure does not limit or withdraw rights from the parties, because the substantial element is that an analogous provision has been already adjudicated.