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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# OPINION

# ON DRAFT AMENDMENTS AND ADDITIONS

# TO THE LAW ON THE CONSTITUTIONAL COURT

# OF SERBIA

**Adopted by the Venice Commission**
**at its 89th plenary session**
**(Venice, 16-17 December 2011)**

**on the basis of comments by**

**Mr Christoph GRABENWARTER (Member, Austria)**
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## I. Introduction

1. By letter dated 4 October 2011, the Minister for Justice of Serbia, Ms Snežana Malović, asked the Venice Commission to provide an Opinion on Draft Amendments (hereinafter, the "Amendments") to the Law on the Constitutional Court of Serbia (hereinafter, "CCL", CDL-REF(2011)060).

2. The Commission invited Messrs Grabenwarter, Hoffmann-Riem and Velaers to act as rapporteurs on this issue.

3. On 29 November 2011, a Delegation of the Commission, composed of Mr Hoffmann-Riem and Mr Velaers, accompanied by Mr Dürr from the Secretariat, visited Belgrade and met with the President of the Constitutional Court of Serbia, Mr Slijepčević, Justice Draškić and with the Minister for Justice, Ms Malović, the Assistant Minister for Justice, Mr Bošković, as well as with representatives of the OSCE Mission to Serbia. The present opinion takes into account the results of this visit.

*4.* The present opinion was adopted by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011).

## II. Preliminary remarks

5. The present opinion is based on an English translation of the Draft Law on Amendments and Additions to the Law on the Constitutional Court of the Republic of Serbia. The translation may not accurately reflect the original version on all points and, consequently, there is a risk that certain comments do not give the solution the draft meant to provide.

6. This opinion is restricted to some proposals of the draft. It does not constitute a full and comprehensive review of the entire legislation governing the organisation of and procedures before the Constitutional Court of Serbia.

7. The amendments provide for numerous changes of the Law on the Constitutional Court. While they are very important for the smooth functioning of the Court, they remain in principle "technical" and are not aimed at the foundation of Serbia's constitutional justice system. An analysis with respect to the principles of democracy and the rule of law is therefore difficult. Instead, these types of amendments call for an examination of their reasonableness, with a particular focus on the question of whether the changes are capable of solving the problems they address. This is not easy to evaluate, since the Venice Commission has not received a detailed explanatory memorandum. The Commission was informed that the main purpose of these amendments was to accelerate the individual complaints procedures in order to deal with the huge backlog. However, only a few of the proposed amendments directly deal with the individual complaints procedure.

8. Moreover, in many cases the amendments refer to the Rules of Procedure of the Constitutional Court, which are not covered by the present opinion and should also be amended. These circumstances greatly narrow the scope of the present opinion.

## III. Overburdening the Constitutional Court

9. The Venice Commission's Delegation was informed that there currently are some 9000 cases are pending before the Constitutional Court. The main purpose of the draft amendments is to help the Court in reducing this backlog. The main tools for this are the introduction of additional filters for individual complaints (e.g. the "manifestly unfounded" criterion) and to introduce smaller decision-making bodies (the Small and Grand Councils). These measures will

be discussed below. During the visit, other means to reduce the Court's backlog were also discussed.

10. It seems that a large part of the backlog (some 40 per cent were mentioned) is due to cases of excessive length of proceedings. One means to overcome this problem would be to **give the Court of Cassation jurisdiction to deal with cases of excessive length of procedures**, at least for on-going cases - as an acceleratory measure[1]. The Commission supports this idea, which would be implemented in the general Law on Judges and not through the Law on the Constitutional Court. Constitutional complaints concerning the length of procedure would be inadmissible unless an appeal to the Court of Cassation had been exhausted.

11. The Venice Commission's Delegation learned that another reason for the overburdening of the Constitutional Court is the **unusually wide jurisdiction of the Constitutional Court** provided for by Article 167 of the Constitution, which even includes the compliance of general acts of political parties, trade unions, civic associations (sic!) and collective agreements with the Constitution and the law. In addition, the competence of conflicts of jurisdiction of the Constitutional Courts even covers conflicts between provincial bodies and local self-government units. The Commission strongly recommends **that these powers of the Constitutional Court be reduced by amending Article 167 of the Constitution.**

## IV. Consideration of the Draft

### A. Publicity

12. 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.**

### B. Access to case-files

13. While the current Article 4 CCL – by referring to the Law governing free access to information - provides vast access rights to the case files, Article 2 Amendments **restricts public access to the parties of the proceedings (only)** with regard to "constitutional appeals and appeals of judges, public prosecutors and deputy public prosecutors". Whereas the term constitutional appeals refers to the individual complaints procedure under Articles 82 *et seq.* CCL, the clause "appeals of judges, public prosecutors and deputy public prosecutors" is aimed at appeals of judges etc. against decisions on termination of office under Articles 99 *et seq.* CCL. The explanatory memorandum received refers to the "particularity of these procedures" in justifying this exception to the right of access to information. One reason could be that in these cases sensitive personal data might be revealed and such information should be protected.[2] But, there may also be other kinds of appeals with confidential information. In view of the high

[1] See CDL-AD(2006)036rev, Report on the effectiveness of national remedies in respect of excessive length of proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006).

[2] In his comments on the draft Law on the constitutional court, endorsed by the Venice Commission, G. Jowell wrote: "While it is right that hearings of the Court should be open to the public, and that parties should have access to the proceedings of the other parties, it is rare that all of a court's documentation, records and indeed deliberations should be open to the public. In addition, confidential information should be protected. CDL-AD(2007)039, Opinion 445/2007, Comments on the draft law on the constitutional court of the Republic of Serbia, para. 32.

sensitivity of the cases brought by judges and prosecutors and the need not only to uphold the judge's independence, but also to convince the public of their independence, the Commission recommends that **access to files in cases brought by judges and prosecutors should be restricted only in specific cases, by decision of the Constitutional Court in each case**. Even when personal data need to be protected, it may be sufficient to restrict access to specific parts of the file only.

### C. Rules of Procedure

14. Article 3 Amendments provides a procedure for adopting the Rules of Procedure of the Constitutional Court. It shall comprise details of the "organization, manner of work and conduct of the Constitutional Court", complementing the CCL. In this context, the term "conduct" without further specification (e.g. conduct of cases) seems misleading, since it is as such often used to describe the behaviour of an individual. If there were indeed sanctioned rules of conduct for the judges at the Constitutional Court, they should be regulated by law and not left to lower-level regulations. This issue might however be due to a simple translation problem.

### D. Salaries

15. Article 6 Amendments regulates the salary of the President and the judges of the Constitutional Court. In the event that not all judicial positions within the Court are filled, the salary of the President and the judges may be increased by up to 30% by a majority vote of all judges, for the period of time until the positions are filled. The appropriateness of this provision is doubtful. An increase of salary can certainly be justified by the additional workload, which the remaining judges face. Nevertheless, the salary increase should not be seen as a means of putting pressure on the appointing authorities. **Leaving the decision on salaries – even in exceptional circumstances – to the discretion of the Constitution Court may harm its reputation.** The Delegation was informed that such a system also exists for the ordinary courts. However, only an automatic increase (e.g. by one fifteenths for each missing judge) might be appropriate. Provisions which prevent situations of vacancies are preferable to a right to increase the salary (see below paragraphs 15 and 16).

16. In addition, Article 6 Amendments could have a perverse effect, as it suggests that the National Assembly could choose not to fill in the vacancies and to have the work done by the remaining judges, provided that an additional salary of a maximum of 30% is paid. This would not be in compliance with Article 172.2 of the Constitution and Article 11 CCL, which provide that the Constitutional Court consists of 15 judges, and implies that there is an obligation to nominate a new judge as soon as possible in case a position is not filled. Therefore the legislator has to ensure that after the end of office of a judge, the position does not remain vacant for a prolonged period.[3]

17. On several occasions, the Venice Commission has already expressed that **in case of inaction by the nominating authority following the retirement of a judge, "the possibility should be provided for an extension of the term of office of a judge until the appointment of his/her successor"**.[4] This may, however, require an amendment of Article 174.1 of the Constitution.

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

[4] Highlighting added; CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997). See also -CDL-INF(2001)002 Opinion on the Constitutional Law on the Constitutional Court of the Republic of Croatia, para. 17. "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-AD(2006)016 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, para. 21(b); -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, para. 16.; -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, para. 12; CDL-AD(2009)042 Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, para. 15; CDLAD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia.;

18. Furthermore, the amended Article 20a.3 CCL links the salaries of the President and the judges to those of the President and judges of the Supreme Court of Cassation by applying a coefficient. The salaries of these judges seem to be defined in the annual Law on the Budget. **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 Parliament on the budget. The coefficient applied should be fixed in the Constitutional Court Law itself.**

### E. Seat of the Court

19. Article 8 Amendments relocates the seat of the Constitutional Court from Belgrade to Sremski Karlovci in the province of Vojvodina. This seems to be part of a governmental decentralisation strategy, which includes *inter alia* further autonomy to the province of Vojvodina and the establishment of further regions. The decision on the seat of the highest organs is in principle at the discretion of the State, governed by different aims of state policy against the background of the particular history of that State. Whereas most countries would prefer their Constitutional Court to have its seat in their capitals, "decentralised" Constitutional Courts can be found as well, e.g. in the Czech Republic, Georgia, Germany, Russia and Slovakia. In Switzerland, the Federal Court is located in *Lausanne*, and not in the capital city of *Bern*.

20. However, these Courts have their seat in larger towns that are at least regional centres with other higher or even supreme courts, higher administrative authorities, universities and a rich cultural life. In Germany, for instance, the Constitutional Court is not located in Berlin, but not in a small provincial town either. Karlsruhe is a city of around 300 000 inhabitants with a rich cultural life, including universities, theatres, an opera house etc. Karlsruhe is often called the "Capital of Law", since several other courts including the Supreme Court have their seat there.

21. Serious doubts may be raised on whether it is appropriate to locate a Constitutional Court in a small city like Sremski Karlovci (about 10 000 inhabitants). This might be seen as a sign of the low significance of the Constitutional Court. The Commission's Delegation was informed that in practice, the Court would only partially move to Sremski Karlovci. Some of the offices would remain in Belgrade. Even with the newly established IT case-flow system, this would lead to a difficult situation where personal contacts between judges and staff would be limited.

22. There is also a risk that judges living in Belgrade (80 km) today will not move to Sremski Karlovci and come to the Court only for the Court sessions. The situation for the Court's staff is much more serious, because they would have to move from Belgrade to Sremski Karlovci. As a consequence, highly qualified staff might quit the Court when it moves to Sremski Karlovci and the Court might have difficulty in recruiting qualified staff in the future.

23. The meetings of the Commission's Delegation in Belgrade took place in the building shared by the Ministry of Justice and the Constitutional Court. Not least in order to provide a visible sign of separation of powers and independence, the Constitutional Court's premises should be separated from the Ministry. The solution would be however not to move (only part of) the Constitutional Court to Sremski Karlovci, but to provide it with an appropriate building in Belgrade.

### F. Budget

24. Articles 11 and 12 Amendments deal with the Constitutional Court's budget. They are designed to strengthen the independence of the Court. The draft Article 28a CCL provides for the procedure of drafting the budget proposal. Among the actors one can find "the competent working body of the Constitutional Court". Neither the participants of this body nor its competences are defined in the CCL and the Amendments. The Delegation was informed that this body already exists and was established as a "permanent working body" under Article 43 CCL. **Since the "competent working body" will play a strongly increased role in preparing the budget, both its participants and competences should be set out in the Law itself.**

25. The procedure outlined in draft Article 28a CCL **allows the Court to overcome objections from the Treasury; these objections shall be introduced to Parliament along with the proposal. This is a welcome provision**, safeguarding judicial independence and taking into account financial considerations at the same time.

26. There seems to be an error in the paragraph numbers in draft Article 28a.7. The reference to paragraph 5 should rather point to paragraph 6.

### G. Participants in the proceedings

27. Participation in the proceedings before the Constitutional Court is further restricted in Article 13 Amendments. While Article 30.2 CCL allowed for participants in these proceedings to invite further persons to participate, this power seems to have been shifted to the participants' attorney. However, the formulation of Article 13 Amendment is unclear on this point, but should arguably read "Persons duly authorised by the attorney of participants in the proceeding…".

### H. Judge Rapporteur

28. A Judge Rapporteur is introduced in Article 35 CCL by Article 14 Amendment. The procedure on how cases are assigned to the rapporteur seems to be outlined in the Constitutional Court's Rules of Procedure. The Delegation was informed that the Court uses an automatic electronic case-assignment system. It should be noted that the assignment should be based on objective criteria in a previously established procedure. If this precondition is fulfilled, the fact that Article 14.2 Amendments gives the President the power to appoint additional rapporteurs in exceptional cases, does not raise concerns, since the exception ("when the complexity of the constitutional issue dictates") is formulated in narrow terms. The inclusion of one or several co-rapporteurs into the proceedings is known from other countries. In Austria for example, there is a possibility of involving a co-rapporteur in the proceedings right from the beginning. This is also possible when the rapporteur does not obtain a majority for his or her draft.

29. The amended Article 35.5 CCL provides that "in preliminary proceedings other procedural actions relevant for the decision-making of the Constitutional Court are also being undertaken". Given that the previous paragraph already provides for wide powers to collect opinions, necessary data, information and evidence, the additional powers of paragraph 5 seem to be too wide and too general.

### I. Admissibility / dismissal

30. Article 15 Amendments adds three new reasons for inadmissibility to Article 36 CCL: "3) If the submission is anonymous; 5) When it determines that the submission is **manifestly unfounded**; and 6) If it determines that the submission abuses the rights".

31. While an anonymous submission foreseen in Article 36.1.3 CCL should be rather the exception and thus of minor importance, attention should be drawn to both "manifestly unfounded submissions" in Article 36.1.5 and abusive submissions in Article 36.1.6. Admissibility criteria play a major role in preventing the overburdening of courts. The Venice Commission is of the opinion that constitutional courts must be given the tools to prevent vexatious, abusive or repetitive complaints.[5] Thus, the **introduction of these filters can be seen as a step forward**. Nevertheless, they must be applied in a proportionate manner and as long as there is reasonable doubt regarding the requirements of admissibility, the complaint should be examined in substance.

32. These admissibility criteria are also applied by the European Court of Human Rights (Article 35.2.a ECHR (anonymous application) and Article 35.3 ECHR (manifestly ill-founded, abuse of the right of petition). "Manifestly ill-founded complaints can be divided into four categories: 'fourth-instance' complaints, complaints where there has clearly or apparently been no violation, unsubstantiated complaints and, finally, confused or far-fetched complaints."[6]

33. In the German and Austrian systems, a **further distinction is made between inadmissibility in the strict sense and the alternative of declining to deal with a case** („*Nichtannahme*" in Germany, „*Ablehnung der Behandlung*" in Austria). The Commission recommends introducing such a distinction for reasons of clarity and of efficiency of Court proceedings – the Austrian Constitutional Court, for instance, has a number of cases where admissibility is doubtful and would need inquiry, but as it denies jurisdiction it may leave the question open; in such cases no „decision" on the case is taken, consequently there is no need for publication of these cases and the reasoning can be shortened to standard formulas.

34. Finally, according to the draft Article 36.1.7 CCL, a submission is dismissed "when there are no other requirements for the conduct of the proceedings and decision making stipulated by law". This seems to be only a different translation of the formulation "when other legally defined preconditions for conducting a procedure and determination do not exist" of the present Article 36.1.4 CCL. Both formulations are unclear. Taking into account that each of them is the last in an enumerative list of reasons for dismissal, one should expect some kind of a residual clause comprising all other grounds for dismissal, just like "when other statutory requirements are not met". A more intelligible and appropriate formulation should however be found.

### J. Introduction of the Grand Council and the Small Council

35. Among the measures for prevention of further overburdening the Constitutional Court, one can find the introduction of the so called "Grand Council" and the "Small Council" in Article 16 Amendments. As such, **the establishment of smaller decision-making bodies is very much welcomed.**

36. In this endeavour, the legislator is, however, limited by Article 175.1 of the Constitution, which provides that the Constitutional Court shall take decisions by a majority of the votes cast by all judges of the Court. The Amendments provide for the introduction of Grand Councils, which consist of the President and seven judges, i.e. 8 judges together. This is a majority of the 15 judges. The Grand Council can only decide unanimously, otherwise the case must be referred to the plenary. The Delegation was informed that two Grand Councils with 7 judges each should be established. The President of the Court should sit in both of them. The composition of these Councils would be established on a permanent basis through the Rules of Procedure. Judges who are not members of the Grand Council, which deals with a specific

[5] CDL-AD(2010)039 rev., Study on individual access to constitutional justice, para. 221.
[6] Research Division of the European Court of Human Rights, Practical Guide on Admissibility Criteria, Council of Europe, December 2010, para. 344.

case, would be able to participate in it, however it was not yet clear whether they were also able to vote and thus to block the unanimity of the 8 judges of the Grand Council.

37. The Commission welcomes that the composition of the two Grand Councils will be stable, but recommends, in view of the importance of this issue, **to regulate the establishment of the Grand Councils by Law**[7], rather than by Rules of Procedure only. The actual decision which judges sit in which Council can of course be taken through a decision of the plenary. In the light of Article 175.1 of the Constitution, the Commission also recommends that **judges who are not members of a Grand Council be given the right to request that a case be presented to the plenary** rather than dealt with by the Grand Council. This means that the case-files destined to a Grand Council would be sent to all 15 judges, thus allowing them to request their transfer to the plenary, ahead of the session of the Grand Council.

38. The Small Council, which is made up of only three judges, is *inter alia* competent for taking decisions under Article 46.9 CCL regarding the dismissal of constitutional complaints "if the procedural preconditions are not satisfied". As the Venice Commission found, "very often a smaller body of judges is selected to examine applications and to deny review if the application has no prospect of success (e.g. Austria, Germany, Slovenia). This leads to an immediate reduction in the constitutional court's workload".[8] In particular, questions of admissibility are usually delegated to smaller chambers in order to relieve the plenum. Hence, **establishing "Small Councils" competent for decisions on the admissibility of submissions is a commendable step.**

39. The three Judges of the Small Council may take a decision unanimously only. Even though, the legislator is again limited by Article 175.1 of the Constitution, which according to the original text in Serb language seems to provide that 'decisions' may be taken only by a majority of all judges. The Delegation was informed that the drafters of the Amendments consider that admissibility issues are of procedural nature only (called *reshenia*) and would not be 'decisions' (*odluka*) on the merits in the sense of Article 175.1. The Venice Commission cannot express itself on this issue on the basis of the English translations of the Constitution and the draft Amendments. However, the Commission recommends **that Article 175.1 of the Constitution be amended to provide an explicit basis for the establishment of smaller decision-making bodies within the Constitutional Court.**

40. In Article 16 Amendments (Article 42.2.2 CCL) and in Article 18 Amendments the references to items 14 and 15 should be checked. The current Article 45 CCL only has 13 items.

### K. Request to withdraw

41. According to Article 20 Amendments (Article 47.1.10 and 47.1.11 CCL) proceedings before the Constitutional Court will be terminated **upon withdrawal of the submission**. While there is no conflicting European standard, such a rigorous provision could bring about a serious disadvantage with respect to the review of acts other than individual ones. Since the normative act still exists, the problem will often be forwarded to the court again, thus unnecessarily prolonging the final decision making. Therefore, the Venice Commission underlined that, as an expression of their autonomy and their function as guardians of the Constitution, Constitutional Courts **"should be able to continue to examine the case if this is in the public interest**".[9] Article 54 CCL provides that the Court may continue "the procedure of assessing the constitutionality or legality if it finds grounds for doing so." However, Article 54 CCL only relates

[7] As a consequence, Article 16 Amendments could enter into force together with the Law itself, not only after the adoption of the Rules of Procedure, as provided for by Article 40 Amendments.
[8] CDL-AD(2010)039 rev., Study on individual access to constitutional justice, para. 223.
[9] CDL-AD(2010)039 rev., Study on individual access to constitutional justice, paras. 144 and152.

to the procedure for assessing the constitutionality or legality of general acts and should be extended to other procedures.

### L. Postponement of publication

42. The rule of law requires publicity of the legal order. It is a matter of legal clarity that every citizen be able to ascertain the law in force in order to adjust his or her behaviour accordingly[10]. In a democratic state under the rule of law, judgments of the Constitutional Court must be published as soon as possible in order to inform citizens about their rights, as established by the Court.

43. Article 168.3 of the Constitution provides that laws and other general acts, which are not in compliance with the Constitution or law, shall cease to be effective on the day of the publication of the Constitutional Court decision in the official journal. This rigid rule does not allow the Court to postpone the entry into force of the annulment of a law or general act. This can lead to a legislative gap and legal uncertainty. Other constitutional courts have the possibility to determine a delay during which the law or general act remains in force and during which the legislator may enact a new law or act in compliance with the Constitution.[11]

44. The Delegation was informed that the drafters of the Amendment try to overcome this problem by permitting Constitutional Court to postpone the publication of its decision in the official journal for up to six months through a "special resolution" of the Court (Article 25 Amendments). However, this does not mean that the decision remains secret. The Court will publish its decision immediately on its web-site (see also Article 1 Amendments).

45. The solution envisaged in Article 25 Amendments is certainly unusual but may be acceptable as a transitional measure in view of the limitations imposed by the Constitution. However, the Commission **recommends that Article 168.3 of the Constitution be amended in order to allow the Constitutional Court to postpone the date its decisions shall take effect.**

### M. Prohibition of secret or paramilitary associations

Article 29 Amendments introduces a new Article 81a CCL on the prohibition of secret or paramilitary associations. While it is certainly necessary to act against such associations, the **powers given to the Constitutional Court to "order taking of measures required to prevent the operation" of such associations seems to be too wide and would need to be specified.** What type of measures can be taken (e.g. confiscation of assets) and who should take these measures (e.g. the police)? It may not be possible to list all such measures, but there should be a reference to the legislation in force. The Constitutional Court should not be able to "invent" completely new repressive measures, which are not part of existing legislation.

### N. Effects of the judgments

46. Article 31 Amendments deals with the effects of a judgment. The Delegation was informed that the English translation contains an error by excluding the competence of the Constitutional Court to annul court decisions. The original text in the Serb language does not make such an exception from the powers of the Constitutional Court to annul individual acts.

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[10] Cf. ECtHR, Vogt v. Germany, Judgment of 2 September 1995, Series A 323, para. 48.

[11] E.g. Austria, Belgium, Azerbaijan, Hungary, Latvia, Liechtenstein, Lithuania, Poland, Slovenia, South Africa and Switzerland), see CDL-AD(2010)039rev., Study on individual access to constitutional justice, para. 198.

47. In general, in case of a violation of individual fundamental rights, redress should be accessible as quickly as possible.[12] In the Venice Commission's member states, there are not only different regulations with regard to the question whether or not the Constitutional Courts are competent to annul court decisions, but also with regard to the extent to which they are allowed to examine these decisions.

48. If the Constitutional Court is competent to examine court decisions, which is very positive from a human rights perspective, it must also be given the power to sanction them, if they are found to be unconstitutional. While constitutional courts sometimes may even rule on the substance in such cases[13], the usual way – even in these countries – is to send the case back and order it to be reopened.[14] However, if the prior judgment cannot be annulled, this undermines the powers of and the respect for the Constitutional Court.[15]

49. The establishment of the possibility of a full constitutional complaint before the Constitutional Court is highly recommended from a human right's perspective. If the Constitutional Court is not allowed to review judgments of the ordinary courts, there will be more applications to the European Court of Human Rights seeking human rights protection. States such as Turkey or Hungary, which have recently amended their systems of constitutional justice, tend to submit decisions of ordinary courts to the jurisdiction of the Constitutional Court. It is recommended that similar steps be taken by the Serbian legislator.

### O. Procedure in cases on appeal brought by judges and prosecutors

50. Article 34 Amendments introduces a new Article 102a CCL, which provides that in cases on appeal brought by judges and prosecutors, the provisions governing the proceedings on constitutional appeal shall apply accordingly. It is probably useful to provide for an analogous application of procedural rules, but some specific characteristics of appeals by judges and prosecutors should be taken into account. In cases of individual complaints, the applicant must exhaust remedies. The ordinary courts therefore have already examined the case and evaluated the facts. In appeals from the judges and prosecutors, 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 this may be necessary in constitutional complaint proceedings. It seems that the analogous application of the constitutional complaint procedure allows for such an examination of facts, which is important given that this is the first appeal to a Court.

## V. Conclusion

51. While the draft Amendments are mostly technical, they are very important for the functioning of the Constitutional Court of Serbia. This especially concerns decisions on the admissibility of individual complaints, which currently overburden the Court. The draft is coherent and provides a good basis for the improvement of the work of the Court.

52. The Commission in particular welcomes:

1. the obligation to publish the judgments of the Constitutional Court on its Internet site;
2. the introduction of smaller decision-making bodies (Grand Council, Small Council), instead of having to take all decision in plenary;
3. the introduction of further filters for individual complaints, including the inadmissibility of "manifestly ill-founded" cases.

[12] CDL-AD(2010)039rev, Study on individual access to constitutional justice - Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), p. 54.
[13] E. g. in Armenia, Brazil, Canada, Cyprus, Estonia, Iceland, Ireland, Japan, Slovenia, Switzerland, South Africa, Spain and "The former Yugoslav Republic of Macedonia".
[14] *Cf.* CDL-AD(2010)039 rev., Study on individual access to constitutional justice, para 181 *et seq.*
[15] *Cf.* CDL-AD(2010)039 rev., Study on individual access to constitutional justice, para 184.

53. Nonetheless, the Venice Commission makes certain recommendations for the further improvement of the draft Amendments, in particular:

1. Access to files in cases brought by judges and prosecutors should be restricted only in specific cases, upon decision by the Constitutional Court.
2. The "competent working body", which has a strongly increased role in preparing the Court's budget should be established by the Law.
3. 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 Parliament on the budget. The coefficient applied should be fixed in the Constitutional Court Law itself.
4. An increase of the salaries of the judges when the Court is not in full composition should not be decided by the judges themselves.
5. The two Grand Councils should be established by the Law and not only by the Rules of Procedure.
6. Judges who are not members of the Grand Council, dealing with a specific case, should be able to request that a case be presented to the plenary rather than to that Grand Council.
7. The Serbian legislator should reconsider the possible disadvantages of a relocation of the Constitutional Court for its independence and the efficiency of its work.
8. The powers given to the Constitutional Court to "order taking of measures required to prevent the operation" of secret or para-military organisations should be specified.
9. As concerns admissibility of individual complaints, a further distinction could be made between inadmissibility in the strict sense and the alternative of declining to deal with a case.
10. 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.

54. A certain number of problems identified stem directly from the Constitution. The Commission therefore recommends that the following amendments be made:

1. The unusually wide jurisdiction of the Constitutional Court should be reduced (Article 167 of the Constitution).
2. Article 168.3 of the Constitution should be amended in order to allow the Constitutional Court to postpone the date its decisions take effect.
3. Article 175.1 of the Constitution should be amended in order to provide an explicit basis for the establishment of smaller decision-making bodies within the Constitutional Court.
4. Article 174.1 of the Constitution should be amended to allow for the extension of the mandate of a retiring judge until his or her successor takes office.

55. Finally, the Commission recommends that the Court of Cassation be given jurisdiction to deal with cases of excessive length of procedures. This would help to reduce the backlog of the Constitutional Court and provide an effective acceleratory remedy in these cases.

56. The Venice Commission remains at the disposal of the Serb authorities for any further assistance they may need.