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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
OF THE COUNCIL OF EUROPE
(VENICE COMMISSION)

AMICUS CURIAE BRIEF

FOR

**THE EUROPEAN COURT OF HUMAN RIGHTS
IN THE CASE OF KUIJT V. THE NETHERLANDS**

ON

**PARTICIPATION OF ADDITIONAL JUDGES
IN SUPREME COURT DELIBERATIONS**

**Adopted by the Venice Commission
at its 145th Plenary Session
(Venice, 12-13 December 2025)**

on the basis of comments by

**Ms Nina BETETTO (Member, Slovenia)
Mr Mārtiņš MITS (Substitute Member, Latvia)
Mr Timothy OTTY (Member, United Kingdom)**

I. Introduction

1. By letter of 17 October 2025, the European Court of Human Rights (ECtHR) invited the Venice Commission to submit written comments on the case of *Kuijt v. the Netherlands* (no. 19365/19) which is pending before the Grand Chamber of the Court.

2. The Court submitted the following questions:

(i) *Which mechanisms may be set up to ensure the uniform interpretation and application of the law by a superior court, while ensuring compliance with the rights of the parties to the proceedings under Article 6 § 1 of the Convention?*

(ii) *May judges who are not members of the judicial formation to which the case has been assigned participate in the deliberations in camera, where such involvement serves the interest of ensuring the uniform interpretation and application of the law? If so, to what degree should the conditions of such participation as well as the role of these judges in deliberations be clearly defined? Is it appropriate for the regulation of these matters be (entirely) left to the courts?*

(iii) *If such participation may be regarded as not inconsistent per se with the requirements of Article 6, what are the safeguards that should be in place to ensure the internal independence of the judges (see, for example, *Parlov-Tkalčić v. Croatia*, no. 24810/06, § 86, 22 December 2009) who are members of the formation to which the case has been assigned, with respect to the involvement in the deliberations of judges who are not members of that formation? Should the parties to the proceedings be informed beforehand and/or afterwards about the participation of such judges in the deliberations on their case?*

3. Ms Nina Betetto (Member, Slovenia), Mr Mārtiņš Mits (Substitute Member, Latvia), and Mr Timothy Otty (Member, United Kingdom) acted as rapporteurs for this *amicus curiae*.

4. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs. The draft *amicus curiae* was examined at the joint meeting of the Sub-Commissions on the Judiciary and on the Rule of Law on 11 December 2025. It was adopted by the Venice Commission at its 145th Plenary Session (Venice, 12-13 December 2025).

II. Preliminary remarks

5. The right to a fair trial constitutes a cornerstone not only of the European Convention on Human Rights (ECHR), but more generally of the Rule of Law.¹ Over time, this has turned Article 6 of the ECHR into a benchmark of considerable relevance for assessing the democratic character of the legal systems subject to the supervision of the ECtHR.² From this perspective, the Court's case-law has shown that this right is subject to a "complex" guarantee: the various stages that make up the *trial* to which Article 6 refers are distinct and, consequently, numerous and equally diverse are the risks that may lead to a violation of the right it enshrines.

6. The questions raised by the Court reflect this and concern different aspects of the right to a fair trial.

7. On the one hand, the need to ensure consistent case-law—and therefore to guarantee that the law is interpreted as uniformly as possible—must undoubtedly be traced back to the principles of legal certainty, foreseeability, equality before the law and the prohibition of discrimination

¹ Rule of Law Checklist, Venice Commission, [CDL-AD\(2016\)007](#), Section E.2.

² [Guide on Article 6 of the European Convention on Human Rights](#).

between comparable litigants.³ Ensuring coherent jurisprudence is thus aimed, first and foremost, at protecting the parties in the proceedings and, indirectly, at preserving the internal consistency of the legal system as a whole allowing those subject to the law to regulate their conduct accordingly.

8. On the other hand, from the standpoint of Article 6 ECHR and the right to a fair trial, these mechanisms may raise specific concerns, depending on the manner in which the adjudicating bench is composed, on how such composition may be supplemented, on the legal foreseeability of that composition, and on the functions exercised by all judges assigned to it. In this respect, one must certainly distinguish the case in which a decision is taken by the court sitting in plenary formation from that in which the decision is materially adopted by a panel—whether larger or smaller—with the assistance of other individuals who do not hold voting rights; in other words, persons whose sole function is to assist the judges in ensuring a uniform interpretation and application of the law.

9. It should be noted that there exists a different situation in which the presence of additional judges is nonetheless permitted during the deliberations: the case of so-called “reserve” judges or “alternate” judges, both in international⁴ and national tribunals.⁵ In most instances, these are judges who attend the entire proceedings—including the deliberations—without being entitled to speak,⁶ for the sole purpose of replacing a member of the panel should the latter be unable to continue performing his or her duties. This mechanism thus functions as an instrument of procedural economy, intended to prevent the entire proceedings from having to recommence should such a situation arise, in order to brief a new judge on what has already occurred. The presence of the reserve judge therefore avoids such an extension of the trial’s duration and respects the importance of proceedings being completed within a reasonable time as expressly recognised in Article 6.

10. This mechanism of substitute judges is, however, directed towards a purpose that is clearly distinct from that underlying the situation to which the Court’s request refers. Generally, the presence of an alternate judge does not raise specific concerns regarding defence rights or judicial independence, owing to a set of safeguards that make his or her role a passive one. In particular, in most cases, the alternate judge cannot take the floor, and is a silent presence allowed solely to safeguard the proper conduct of the proceedings and, indirectly, to protect the parties. By contrast, in the scenario described by the Court, the presence of judges not assigned to the case is intended precisely to enable their active participation.

³ Rule of Law Checklist, Venice Commission, [CDL-AD\(2016\)007](#), Section D.

⁴ On this point, see International Criminal Court, Article 74(1) Rome Statute; Extraordinary Chambers in the Courts of Cambodia, Internal rules, Rule 79; Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 27; Extraordinary African Chambers, Article 232 Code of Criminal Procedure, where the exception is that the alternate judge cannot join the deliberations; Kosovo Specialist Chambers, Rule 18.1, Rules of procedure. In literature, see M. Fairlie, *Alternate judge: International Criminal Courts and tribunal*, in *Max Planck Encyclopedias of International Law*: Oxford Public International Law: Alternate Judge: International Criminal Courts and Tribunals.

⁵ See the role of active judges in UK under Sections 38 and 39 of the Constitutional Reform Act 2005; the additional or acting judge in India, Articles 217 and 224 of the Constitution.

⁶ Exceptions are International Residual Mechanism for Criminal Tribunals, Article 20B of the Rules of procedure, where the reserve judge may pose questions; Special Court for Sierra Leone, Article 16bis of the Statute, where the alternate judge may pose questions through the presiding judge; Special Tribunal for Lebanon, Rule 27 of the Rules of Procedures, where the alternate judge may pose questions; Kosovo Specialist Chambers, Rule 18.1 of the Rules of Procedure, where the reserve judge may pose questions during the hearings.

III. Analysis

A. First question concerning the mechanisms aimed at ensuring the consistency of case-law

11. The first question put by the ECtHR is the following:

Which mechanisms may be set up to ensure the uniform interpretation and application of the law by a superior court, while ensuring compliance with the rights of the parties to the proceedings under Article 6 § 1 of the Convention?

12. From a comparative-law perspective, it emerges that the function of guaranteeing uniform interpretation and application of the law—typically entrusted to superior courts—may be discharged through different mechanisms. The Consultative Council of European Judges has adopted an Opinion directly addressing this issue.⁷

13. Although the Venice Commission has not to date elaborated specific standards concerning such mechanisms, in answering the first question, it must be stressed that any mechanism set up to ensure the uniform interpretation and application of the law by a superior court has to comply with the Rule of Law as more broadly understood.⁸

14. The Venice Commission recalls that the uniform interpretation and application of the law is a pivotal instrument implementing the principle of legal certainty. Indeed, legal certainty enshrines several corollaries, such as, but not limited to, the accessibility and foreseeability of the law, the stability and consistency of law, and the protection of the legitimate expectations of those acting in good faith on the basis of law.⁹ This not only applies to the legislator, but also to court decisions, which should therefore be consistent with the case-law on the relevant matter, in order to comply with the principle of legal certainty.

15. Additionally, the Venice Commission underlines that, from the point of view of the parties to a proceeding under Article 6 § 1 of the Convention, the uniform interpretation and application of the law also serves as a safeguard to ensure that the law is equally applied and consistently implemented,¹⁰ thereby protecting the principle of equality before the law and avoiding discrimination. However, this should not be understood as a limitation preventing either clarification or departures from previous case-law, as the interpretation and application of the law should also be capable of adaptation to reflect changing circumstances or correction of previous errors. In other words, stability and consistency of the law are not an end in themselves; therefore, the stability and the consistency of the law should not preclude developments in case law when they are justified in light of these objectives and in compliance with the guarantees of the Rule of Law.¹¹

⁷ Consultative Council of European Judges (CCJE), Opinion n° 20 (2017) on the role of courts with respect to the uniform application of the law. The Venice Commission is aware of the fact that the ECtHR has asked the CCJE for an *amicus curiae* and decides to leave the interpretation and explanation of such opinion to the CCJE.

⁸ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.

⁹ Ibid, Section II.B..

¹⁰ Ibid, para. 73.

¹¹ See [CDL-AD\(2022\)024](#), Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on the Supreme Court of Justice, § 14: “the uniform application of the law should neither lead to rigidity and unduly restrict the proper development of law, nor should it jeopardise the principle of judicial independence.”

16. In light of the above, the Venice Commission is of the view that any mechanism set up to ensure the uniform interpretation and application of the law by a superior court should:

- First and foremost, comply with the principle of legality. This means that the rules governing such mechanisms have to comply with the constitution and the fundamental rules of a given legal framework.
- Second, it should comply with the principle of legal certainty. Therefore, it should be accessible and foreseeable, as further elaborated in the answer to the second question (see below Section **B.2**).
- Third, it should not compromise the right to a fair hearing of the parties in a proceeding. This means that the mechanism should not undermine the right to an independent and impartial judge, the right to seek the recusal of a judge, the right to access a tribunal established by law, and the prohibition of discrimination in a proceeding.

17. The Venice Commission recalls that judicial independence is a prerequisite of the Rule of Law.¹² Therefore, mechanisms set up to ensure the uniform interpretation and application of the law by a superior court should avoid imposing any pressure on the judges deciding a case¹³ and should preserve the substance and appearance of impartiality and independence of a court.¹⁴ As further elaborated in the answer to the third question, while elaborating those mechanisms, special attention should be given to ensuring the internal judicial independence of judges, the confidentiality of the deliberation, and the possibility of the parties to seek the recusal of a judge (see Section **C**).

18. The right to access a tribunal established by law requires the rules related to these mechanisms to be harmonized with the rules pertaining to the lawful composition of the court and appointments of judges.¹⁵ The mechanisms should also not interfere with the criteria for the allocation of cases, so that the allocation remains objective, transparent and established in advance.¹⁶

19. Finally, the importance of upholding the prohibition of discrimination requires the mechanisms to comply with the principle of equality before the law. Therefore, in a society governed by the Rule of Law, the mechanism should ensure that the law is equally applied and consistently implemented without arbitrariness.

20. In conclusion to the first question, the Venice Commission considers that in order to comply with Article 6 ECHR a mechanism set up to ensure the uniform interpretation and application of the law by a superior court should meet the above-mentioned criteria and be accompanied by the safeguards identified.

¹² Venice Commission, [CDL-AD\(2017\)002](#), Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges, paras.14–15.

¹³ Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, para. 74.

¹⁴ Venice Commission, [CDL-AD\(2023\)029](#), Joint opinion of the Venice Commission and Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the legal safeguards of the independence of the judiciary from the executive power para. 12; Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, para. 75.

¹⁵ On the rules pertaining to the lawful composition of the court and appointments of judges, see ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, 1 December 2020, Application no. 26374/18, §§ 211–214.

¹⁶ Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, Section E.1.b; Venice Commission, [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 62 and para. 81.

B. The second question concerning the participation of judges in deliberations *in camera* and its regulation

21. The second question put by the ECtHR is the following:

May judges who are not members of the judicial formation to which the case has been assigned participate in the deliberations in camera, where such involvement serves the interest of ensuring the uniform interpretation and application of the law? If so, to what degree should the conditions of such participation as well as the role of these judges in deliberations be clearly defined? Is it appropriate for the regulation of these matters be (entirely) left to the courts?

1. Involvement of judges who are not members of the judicial formation

22. Ensuring a uniform interpretation and application of the law corresponds to the primary purpose of the superior courts. Such an objective is generally pursued through the establishment of plenary sessions or, in any event, through the creation of “expanded” panels.¹⁷ This approach appears to be the most suitable for adopting decisions that are consistent with the case-law, insofar as it allows the decision to draw upon the collective experience of all members of the court.

23. From this perspective, allowing judges who have not been assigned to the case – but who belong to the same court – to take part in the deliberations may, under certain conditions, serve the legitimate aim of promoting the coherent interpretation and application of the law. Their role, however, must remain strictly consultative and non-binding, limited to providing general insights on the existing case-law and not to influencing the concrete outcome of the case. This mechanism therefore constitutes an intermediate solution between a plenary session and decision-making by a restricted panel, provided that it does not affect the freedom of opinion of the judges who are called upon to decide the case and is accompanied by appropriate safeguards of internal independence (see below, paras 37–42).

24. Given its “intermediate” nature, the considerations regarding the admissibility of such a mechanism within the framework of the Rule of Law cannot be expressed in absolute terms. The participation of judges who are not members of the judicial formation to which the case has been assigned in the deliberations *in camera* may be considered to serve the interest of ensuring the uniform interpretation and application of the law. However, in the Venice Commission’s view specific safeguards should be put in place to ensure legal certainty, foreseeability and accessibility, as well as to protect the core right of parties to be heard by the tribunal determining their particular case.

2. Degree of regulation of the conditions of participation

25. The Commission is of the view that the participation of additional judges should be expressly provided for in a legal norm that is clear and accessible to the parties. The legal basis of the mechanism should not only determine the aim of the participation of non-assigned judges – e.g. ensuring coherence of the jurisprudence – but should also define the criteria and modalities governing their participation in the deliberations.

26. First, it should specify whether such participation is always permitted or is contingent, case by case, upon the relevance or complexity of the decision. In this latter scenario, the adjudicating panel itself could be entrusted with indicating the need to open the deliberations to colleagues not assigned to the case. It should also be clear whether such participation is mandatory – meaning that all judges of appropriate level are always called upon to participate in deliberations – or discretionary in the sense that all are given the opportunity to do so but not required to do

¹⁷ Consultative Council of European Judges, Opinion n. 20, CCJE(2017)4, para. 12.

so. In the latter case, the legal provision should also set out the manner and, in particular, the timeframe within which each judge must express his or her intention to participate in the deliberations. Such communication should not be confined to the court's internal organisation but should be notified to the parties with a prescribed notice period, in order to safeguard the proper exercise of their defence rights.

27. With regard to the modalities of participation, the participation of an additional judge should be of an active nature: *in camera*, the additional judge should be authorised to speak and to contribute to ensuring the coherence of the jurisprudence. To enable this function to be properly fulfilled, the legal basis should confer upon the additional judges the right to access the case file so that their intervention is informed by a substantive understanding of the case.¹⁸

28. Moreover, the legal basis for such a mechanism should expressly indicate whether "deliberations *in camera*" refer to a single, unified stage of the proceedings or whether the vote and the final adoption of the decision take place in a separate phase. In this regard, it should be clearly established whether the intervening judges participate only in a preliminary discussion or whether they also take part in the vote (on this point, see the following paragraph 40).

3. Level of regulation

29. It is not uncommon for legal systems to grant individual courts a certain margin of autonomy in regulating their own internal functioning. In the present case, however, the question raised by the ECtHR touches upon a particularly sensitive aspect: although the intervening judges do not hold voting rights and therefore do not formally adopt the decision, they nonetheless play an active role in the debate leading to it.

30. From this perspective, the Venice Commission considers that the principle that the court must be established in accordance with the law should also apply to the intervening judges. Indeed, it is well established case-law that a body which has not been established in accordance with the will of the legislature will lack the legitimacy required in a democratic society and that this principle applies not only to the "court" as such but also to the panel of judges in each case.¹⁹ It would seem that, viewed from a perspective of the separation of powers, the rules regulating the establishment of the court, including the panels examining cases (but not the individual composition of panels), normally should be adopted by the legislature or on the basis of delegated powers by the legislature.²⁰ Only in this latter case could it be considered admissible to regulate the role of the intervening judges by rules adopted directly by the court, provided that such rules are public, accessible and comply with the parameters already examined.²¹ Moreover, the admissibility of rules adopted by the court itself is subject to the condition that, on the one hand,

¹⁸ On this point, see footnote 7. In the case of a reserve or alternate judge, their presence throughout the entire proceedings is generally provided for. This, however, reflects the very purpose of such a figure, namely, to enable them, should the relevant conditions arise, to assume adjudicatory functions already fully informed of all that has occurred or been submitted up to the moment of their joining the panel. In the situation envisaged by the ECtHR, however, the intervening judges are understood to participate exclusively in the deliberations. If this were not the case, the considerations of procedural economy which, as noted above (Section A), appear to justify the mechanism under examination would be undermined.

¹⁹ See *Lavents v. Latvia*, no [58442/00](#), ECtHR 28 November 2002, §114.

²⁰ Rule of Law Checklist, Venice Commission, [CDL-AD\(2016\)007](#), pp. 15-17.

²¹ Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, para.62, 81, where the Venice Commission has emphasised that, irrespective of the level of regulation, what must be assessed is the objectivity and transparency of the criteria that are established.

appropriate mechanisms are in place to ensure that the court complies with its own rules,²² and, on the other hand, that the parties are able to challenge those rules and contest their legality.

C. The third question concerning the internal independence of judges and the rights of the parties of the proceeding

31. The third question is the following:

*If such participation may be regarded as not inconsistent per se with the requirements of Article 6, what are the safeguards that should be in place to ensure the internal independence of the judges (see, for example, *Parlov-Tkalčić v. Croatia*, no. 24810/06, § 86, 22 December 2009) who are members of the formation to which the case has been assigned, with respect to the involvement in the deliberations of judges who are not members of that formation? Should the parties to the proceedings be informed beforehand and/or afterwards about the participation of such judges in the deliberations on their case?*

32. Having found that such participation may be regarded as not inconsistent *per se* with the requirements of Article 6, it is possible to address the third and last question raised by the Court. The question is twofold. On one hand, the Court asks about the safeguards that should be in place to ensure the internal independence of the judges who are members of the formation to which the case has been assigned, with respect to the involvement in the deliberations of judges who are not members of that formation. On the other hand, the Court asks whether the parties to the proceedings should be informed beforehand and/or afterwards about the participation of such judges in the deliberations on their case.

1. Safeguards to ensure internal independence

33. The Venice Commission recalls that judicial independence relates to both the court as a whole and the judicial panel deciding on a case.²³ As indicated by the ECtHR²⁴ and reiterated by the Venice Commission,²⁵ judicial independence requires judges to be protected from undue influence both from outside the judiciary and from within. Indeed, the Venice Commission has consistently emphasized the principle of the independence of each individual judge.²⁶

34. Protecting judges from undue influence from within the judiciary means that individual judges shall be free from directives or pressures from their peers, especially from those having administrative responsibilities in the court.²⁷ Thus, the notion of internal independence applies only when examining the relationship between one judge and another. In such an assessment,

²² *Mutatis mutandis*, see Opinion on the Constitutional situation with particular reference to the possibility of dissolving Parliament, Republic of Moldova, [CDL-AD\(2019\)012](#), para. 52, where the Venice Commission affirms that “A constitutional court, like any other state institution and court, on the one hand deserves institutional respect but, on the other hand, must respect its own procedures when they provide for adversarial proceedings which guarantee the principle of equality of the parties”.

²³ Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, para. 88.

²⁴ *Parlov-Tkalčić v. Croatia*, no. 24810/06, ECtHR 22 December 2009, §86.

²⁵ Venice Commission, CDL-AD(2024)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, para. 15.

²⁶ Venice Commission, CDL(2022)034, Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on the Supreme Court of Justice, para. 15.

²⁷ *Parlov-Tkalčić v. Croatia*, no. 24810/06, ECtHR 22 December 2009, § 86.

it should be inquired whether a judge's colleague has any power regarding the handling of a case²⁸ or the change of the status of the judge assigned to the case.²⁹

35. It is important to note that the rules aiming at shielding judges from any undue influence should be conceived in such a way as to dispel any reasonable doubt in the minds of individuals regarding the independence and impartiality of the judge, and the neutrality of the panel with respect to the case that it is called to decide on.³⁰

36. In light of these considerations, to ensure the internal independence of the members of a bench in the case in which they are joined in the deliberation *in camera* by other judges to serve the interest of ensuring the uniform interpretation and application of the law, the Venice Commission advises to put in place the following safeguards.

37. First, functional equality among judges should be implemented. Thus, safeguards should aim at avoiding any hierarchical constraint or subordination of the judges that are called to decide the case. More specifically, the rules governing the participation of judges that are not members of the formation to which the case has been assigned and those relating to the status of judges and the performance of their duties should be designed to prevent not only direct influence during the deliberations *in camera*, but also more indirect forms of pressure that could affect the decisions of the judges involved.³¹

38. Second, confidentiality should be granted. In order not to expose any of the judges of the bench to any potential undue influence or repercussions, non-members of the panel should be bound by the same confidentiality of deliberations and disciplinary rules as the deciding judges.

39. Third, to enhance the trust in justice in a democratic society governed by the Rule of Law, attention should also be given to transparency. Therefore, the protocol or case record should note that such participation occurred.

40. Fourth, to safeguard the autonomous judicial function of the members of the bench, the rules governing the participation of other judges in the deliberation *in camera* should require them to leave the deliberation before the moment in which the judges that are called to decide the case express their vote. In this way, the bench would be able to assess the case independently and impartially. Furthermore, by doing so, if the case that the bench has to decide is materially different from previous cases, then it could freely distinguish it from interpretations previously adopted.³² This becomes even more relevant in contexts where the legal framework does not allow for the publication of dissenting opinions and where judges are not bound by *stare decisis*.

41. Lastly, excluding the judges that do not decide the case from the deliberation *in camera* before the decision is finally taken would further enhance compliance with the doctrine of appearance, as even the presence of a silent, non-participating observer might undermine the perception that the decision is taken by the judges formally assigned to the case.³³

42. In conclusion, when addressing the internal independence of the judges who are members of the formation to which the case has been assigned, with respect to the involvement in the

²⁸ *Daktaras v. Lithuania*, no. 42095/98, ECtHR 10 October 2000, § 36.

²⁹ *Parlov-Tkalčić v. Croatia*, no. 24810/06, ECtHR 22 December 2009, § 91.

³⁰ Court of Justice of the European Union (Grand Chamber), *Financijska agencija v. Hann-Invest d.o.o. and Others*, 2024, § 52.

³¹ *Ibid*, § 53.

³² Venice Commission, CDL(2021)038, Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020, para. 41.

³³ *Martinie v. France*, no. 58675/00, ECtHR 12 April 2006, §53.

deliberations of judges who are not members of that formation, the decisive question is whether the consultative role of the peers remains a collegial exchange within a culture of judicial equality, or whether it risks introducing hierarchical or persuasive pressure within the deliberative process. If the latter were shown, their participation in deliberations *in camera* could jeopardize the very essence of internal independence.

2. Information to the parties of the proceeding

43. Having answered the first part of the third question posed by the Court, the Venice Commission can now turn to the assessment of the last issue concerning the parties to the proceedings. More specifically, the question is whether they should be informed about the participation of such judges in the deliberations on their case.

44. In this regard, the Commission recalls that the rights of persons accused of or charged with a criminal offence require particular protection as compared with the rights of parties to civil proceedings but the institutional requirements of independence and impartiality and for there to be a tribunal established by law are common to both the civil and criminal spheres.³⁴

45. Against this background, for the parties to exercise their rights effectively, they should be informed about the identity of other judges participating in the deliberation *in camera*, and of any new point of law, should this be the case, arising out of the deliberations in a timely manner. The reasons behind this are mainly two.

46. First, it is necessary that the parties be informed of the identity of all the judges involved in the deliberation *in camera*, so that they may, if necessary, seek their recusal.³⁵ Therefore, the Venice Commission advises against leaving the parties unaware of this information, as this would effectively require them to apply for the recusal of every potential judge of the same court, thereby running against the principle of procedural efficiency, and unnecessarily increasing the workload and costs of the defence.

47. Second, the parties should be informed about any new points of law before their final submissions to the court, thereby enabling them to exercise their rights in the most effective and comprehensive manner. In the view of the Commission this would be consistent with the principles identified by the case law of the European Court indicating, particularly in the context of criminal charges and adversarial proceedings, that a party should have the opportunity to address the court on all evidence and observations capable of influencing the court's decisions.³⁶ Such an approach is also consistent with considerable evolution in the court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice.³⁷

³⁴ *Moreira Ferreira v. Portugal* (no. 2), no. 19867/12, ECtHR 11 July 2017§ 67); *Gorou v. Greece* (no. 4), no. 12686/03, ECtHR 14 June 2007, §§ 26-27; *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/16, ECtHR 1 December 2020, §§ 211 et seq.

³⁵ For further considerations on the recusal, see Venice Commission, CDL-AD(2024)038, Amicus curiae brief for the European Court of Human Rights in the case of Shevchuk v. Ukraine on standards on the disciplinary rules concerning presidents and judges of constitutional courts, para. 20.

³⁶ *Brandstetter v. Austria*, no. 11170/84, 12876/87, 13468/87, ECtHR 18 August 1991, § 67.

³⁷ *Borgers v. Belgium*, no. 12005/86, ECtHR 30 October 1991, § 24.

IV. Conclusions

48. The Venice Commission has been invited by the European Court of Human Rights to submit an amicus curiae brief in the case of *Kuijt v. the Netherlands* on three questions, and has reached the following conclusions:

(i) Which mechanisms may be set up to ensure the uniform interpretation and application of the law by a superior court, while ensuring compliance with the rights of the parties to the proceedings under Article 6 § 1 of the Convention?

- Concerning the first question, the Venice Commission notes that any mechanism set up to ensure the uniform interpretation and application of the law by a superior court has to comply with the Rule of Law, in its components and corollaries: the principles of legality and legal certainty, and the right to a fair trial.

(ii) May judges who are not members of the judicial formation to which the case has been assigned participate in the deliberations in camera, where such involvement serves the interest of ensuring the uniform interpretation and application of the law? If so, to what degree should the conditions of such participation as well as the role of these judges in deliberations be clearly defined? Is it appropriate for the regulation of these matters be (entirely) left to the courts?

- The Venice Commission considers that the intervening judges may in principle participate in deliberations, with a view to ensuring the coherence of the case law, provided that such participation does not introduce any undue influence within the deliberative process. The intervening judges, however, should leave the deliberation before the moment in which the judges that are called to decide the case express their vote. The legal basis for the criteria and the modalities of their involvement should be clear, foreseeable and accessible. Such regulation may be established at the level of primary legislation or delegated by statute to the courts themselves, provided that such rules comply with the guarantees already identified.

*(iii) If such participation may be regarded as not inconsistent per se with the requirements of Article 6, what are the safeguards that should be in place to ensure the internal independence of the judges (see, for example, *Parlov-Tkalčić v. Croatia*, no. 24810/06, § 86, 22 December 2009) who are members of the formation to which the case has been assigned, with respect to the involvement in the deliberations of judges who are not members of that formation? Should the parties to the proceedings be informed beforehand and/or afterwards about the participation of such judges in the deliberations on their case?*

- A series of safeguards are necessary in order to ensure any such participation is consistent with Article 6 of the Convention. In particular the parties should be informed in a timely fashion of the fact of any such process being undertaken, of the identity of the individual judges concerned, and of any new points of law, should this be the case, arising out of the deliberations. All of this should occur sufficiently in advance of any final substantive determination of the proceedings by the judges assigned with responsibility for its determination.

49. The Venice Commission remains at the disposal of the European Court of Human Rights for further assistance in this matter.