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ON CONSTITUTIONAL JUSTICE

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1 Introduction

This document is a compilation of extracts taken from opinions adopted by the Venice Commission on issues concerning constitutional justice. The aim of this compilation, known as a *vademecum*, is to give an overview of past opinions of the Venice Commission. As such, it is intended to serve as a source of reference for drafters of constitutions and of legislations on constitutional courts, researchers as well as the Venice Commission's members, who are requested to prepare comments or expertises. It is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. This *vademecum* should not, however, prevent members from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. They should consider the *vademecum* as merely a frame of reference. The report by Mr Steinberger to the Venice Commission on Models of Constitutional Jurisdiction provides an excellent overview of the issues discussed in the present paper (Science and Technique of Democracy, no. 20, CDL-STD(1993)002).

The *vademecum* is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission.

The *vademecum* makes the assumption that constitutional review by a specialised constitutional court has been chosen as a model by the drafters of constitutions. While specialised constitutional courts are common in many countries, they are not the only existing model of constitutional review.

2 Type of constitutional jurisdiction

"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.

"...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.

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.

"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.

"..., 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.

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).

"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.

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.

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).

"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.

"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.

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.*

4.2 Incompatibilities

"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).*

"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).*

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).*

"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.*

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).

4.3.2 Procedure

"The simplification of the taking of an oath by providing for a written form of taking the oath or the introduction of an internal mechanism for swearing in."

CDL-AD(2006)016 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine.

"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.

4.4 Term of office

4.4.1 The judges' term of office and that of parliament

"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).

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).

4.4.3 Continuity of the 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).

"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).

"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..

"Creation of a safeguard in the case of the failure of a constitutionally empowered authority to appoint (or elect) new judges of the Constitutional Court by devolving the power of appointment from the original constitutional body to the remaining ones..."

CDL-AD(2006)016 Opinion on possible constitutional and legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine.

"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; see also CDL-AD(2006)017 Opinion on amendments to the law on the Constitutional Court of Armenia.

4.5 Termination / suspension of office

4.5.1 Impeachment of a judge

"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.

4.6 Disciplinary measures

"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).

"The legislation that regulates the basis for a judge's disciplinary responsibility and the disciplinary body that makes the decision need to be clearly defined. Countries often encounter difficulties when the grounds for disciplinary action are not sufficiently detailed. This lack of clearly defined rules creates the risk for arbitrary prosecution of judges for disciplinary offences. For this reason, the Consultative Council of European Judges (CCJE) of the Council of Europe, in its Opinion No. 1 of 2001 on the Independence of the Judiciary, recommended to set standards that define not just the conduct which may lead to removal from office of a judge, but also all conduct which may lead to any disciplinary steps or change in status. (para 6)

Although grounds for disciplinary action vary from one country to the next, there are common grounds that can be identified. For instance, laws on judicial conduct or codes of ethics generally require the judge to refrain from conduct that is likely to compromise the integrity and independence of the judiciary; to avoid undue delays in the performance of their duties; to behave in such a manner as not to damage nor discredit the reputation of the judiciary; not to commit offences nor omissions in the discharge of their official duties or grave disregard of deadlines for delivering judgments. (para 7)

...

The basis for disciplinary proceedings brought against judges based on the rule of law require the following:

- Violation of a duty expressly defined by law;
- Decision of a body composed at least to one half of elected judges;
- Fair trial with full hearing of the parties and representation of the judge;
- Definition of the scale of sanctions by law;

- Imposition of the sanction subject to the principle of proportionality;
- Right to appeal to a higher judicial authority. (para 9)"

CDL-AD(2007)009 Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Court of Georgia.

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.

4.8 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.

5 The right to appeal to the court

5.1 Appeal by a public body

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.

"According to Article 44.1.b-c the notification (appeal) to the Constitutional Court may be submitted by „parliamentary fraction and parliamentary group comprising at least 5 deputies" and according to letter j by the „citizens of the republic of Moldova". The question who may be 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.

5.1.2 Ombudsman

"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.

"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.

5.1.3 Courts (preliminary request)

"[...] 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.

5.2 Claims brought by individuals

5.2.1 Exhaustion of remedies

"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.

5.2.2 Rejection

"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).

"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.

"An appeal against the 'return' [reject] 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.

5.2.3 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.

6 Jurisdiction

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.

6.2 *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 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.

6.3 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.

6.4 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.

7 Procedure

7.1 Challenging of a judge

"... 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.

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.

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.

7.4 Oral / written procedure

"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".

"[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.

7.5 Interlocutory decisions

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

- ...
- the Constitutional Court can take interim measures to safeguard the position of an applicant and
- ..."

CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan.

7.6 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.

8 Effects of decisions

8.1 *Ex tunc* vs. *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.

8.2 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.

8.3 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.

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.

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