Strasbourg, 8 October 2020 **CDL-PI(2020)012**

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

CONCERNING SEPARATION OF POWERS(*)

(*) This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 124th Plenary Session (8-9 October 2020).

Contents

I. Introduction

1. This document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission regarding separation of powers. The aim of this compilation is to give an overview of the doctrine of the Venice Commission in this field.

2. The present compilation is intended to serve as a source of references for drafters of constitutions and of legislation relating to separation of powers, researchers as well as the Venice Commission's members, who are requested to prepare comments and opinions on such texts. However, it should not prevent members from introducing new points of view or diverge from earlier ones, if there is good reason for doing so. The present document merely provides a frame of reference.

3. This document is structured in a thematic manner in order to facilitate access to the topics dealt with by the Venice Commission over the years.

4. Each opinion referred to in the present document relates to a specific country and any recommendation made has to be seen in the specific constitutional context of the country. This is not to say that such recommendation cannot be of relevance for other systems as well.

5. The Venice Commission's reports and studies quoted on this compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

6. Both the brief extracts from opinions and reports/studies presented here must be seen in the context of the original text adopted by the Venice Commission from which it has been taken. Each citation therefore has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the corresponding opinion or report/study. References should be made to the opinion or report/study and not to the compilation.

7. The present compilation does not deal with the aspects of the separation of powers concerning *courts and judges* (including the independence of the judiciary), *prosecutors* and *constitutional justice*. These are addressed in specific compilations (CDL-PI(2019)008, CDL-PI(2018)001 and CDL-PI(2020)004).

8. The Venice Commission's position on a given topic may change or develop over time as new opinions are prepared and new experiences acquired. Therefore, in order to have a full understanding of the Venice Commission's position, it would be important to read the entire compilation under a particular theme. Please kindly inform the Venice Commission's Secretariat if you think a quote is missing, superfluous or filed under an incorrect heading (venice@coe.int).

II. Definition and main features of the principle of separation of powers

A. Definition - the possible political systems

Separation and balance of powers

14. The principles of 'separation of powers' and 'balance of powers' demand that the three functions of the democratic state should not be concentrated in one branch, but should be distributed amongst different institutions.

15. The concept of the separation of powers is most clearly achieved with respect to the judiciary, which must be independent from the two other branches.

16. When it comes to the separation and balance between the executive and the legislative branches, their relationship is more complex. The extent of separation depends on the political system as determined by the Constitution. In general, there are three models. In presidential systems there is a clear separation, where directly elected presidents do not depend on the confidence of the legislature. In semi-presidential systems, government has to answer both to a directly elected president and to the legislature. In parliamentary systems, the separation is usually less marked because the executive (government) is appointed from a parliamentary majority. This implies that the executive is dependent on parliamentary approval.

CDL-AD(2013)018 - Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco

117. The effects of the principles of limitation of mandates and incompatibility of political functions in a given country widely depend not only on their constitutional and legal dimension but mainly on the model of separation of powers in that country. The separation of powers has also been endangered by technocratic powers claimed by governments over parliaments. Government policy is more shaped by practical requirements, lobbying and pressure groups than by electoral considerations.

118. Democracies are not all the same. It is true that some democratic systems foster representation better than others. Certainly, the quality of representation of the citizens' interests in the politics of a given country depends widely on many variables such as: geography, history, tradition, the way in which democracy has come about, political culture, electoral and party system, leadership, civil society, media.

CDL-AD(2012)027 - Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions

10. The core of the rule of law is separation of powers. In a country with a presidential system, power tends to be concentrated on the President, while that of the Legislature or the Judiciary is relatively weaker. Therefore, the regular change of regime through the process of election is the very method to prevent too strong a concentration of powers in the hands of the President.

CDL-AD(2009)010 - Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan

14. The choice between a presidential and a parliamentary system is a political one to be freely made by each single state. However, the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts. If a presidential system is chosen, certain minimum requirements of parliamentary influence and

control should be fulfilled. In a parliamentary system, in turn, basic requirements arising from the principle of separation of powers should be respected.

CDL-AD(2003)019 - Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine

B. Main features - checks and balances

14. In order to assess whether the proposed changes can achieve the two main objectives announced by the drafters – to bring the rules of procedure in line with the constitutional provisions and to enhance the efficiency of the Verkhovna Rada these amendments have to be considered in the light of two major issues:
a. the problem of separation of powers in the Ukrainian constitutional system;
b. the legal nature of the act that establishes the internal rules of procedure and the scope of regulation.

17. Despite numerous attempts to create a sound system of separation of powers, the problem of finding the best way to ease the constitutional tension existing between the President, the Parliament and the Cabinet of Ministers, as well as improving the efficiency of state powers through a better division of functions is still on the agenda.

18. The Venice Commission recognises a sovereign right of each country to regulate the relations between its President, the Parliament and the Government in the best proper way according to its constitutional and institutional traditions and to achieve a balance of powers while taking into account the main democratic principles. However, it has underlined on numerous occasions that the chosen system had to be as clear as possible. If there was a shift towards a presidential system, certain minimum requirements of parliamentary influence and control were to be fulfilled.

19. The problem of striking the right balance between different powers in the Ukrainian case has always been more complex than a pure shift of competencies and attributions from one branch to another. The amendments to the Rules of Procedure are part of the process of achieving the effective separation of powers through a clear set of rules regulating parliamentary procedures as foreseen in the Constitution. Past attempts (reforms in 2009, 2014) to change the semi-presidential system with large powers of the Head of State into a more parliamentary system have not succeeded. On the contrary, one can observe a contrary tendency towards the strengthening of a semi presidential system.

CDL-AD(2017)026 - Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine

44. The Venice Commission has emphasised in the past that the fundamental choice between a presidential, a semi-presidential and a parliamentary regime is a political choice to be made by the country in question and that, in principle, all these regimes can be brought into harmony with democratic standards, provided *inter alia* that parliament have sufficient controlling powers with regard to the executive branch. The Venice Commission has however repeatedly welcomed and supported constitutional reforms that aimed at decreasing the powers of the President and at increasing those of the parliament. The fundamental principles of the rule of law, the separation of powers and the independence of the judiciary create the framework which legitimates various political systems and forms of government, as long as they remain democratic. Negligence of these fundamental rules could lead to the transformation (or, better, the degeneration) of the whole system into an authoritarian one. This danger is stronger in the case of introduction of a presidential system instead of a parliamentary one. In legal literature, presidentialism is often considered to be generally less conducive to democracy, especially in countries with deep political cleavages, in which more than two political parties compete for power and which do not

have a long tradition of political compromises. A presidential regime requires very strong checks and balances. In particular, a strong, independent judiciary is essential because the controversies which in a parliamentary regime are normally settled through political debate and negotiations, in a presidential regime often end up before the courts.

61. Amended Article 104 stipulates that the President "*appoints and dismisses Vice-presidents and ministers*". The President has the exclusive power to decide (Article 106) whether and how many Vice presidents and ministers will be established (although there must be at least one Vice-president, given that the Constitution attributes some powers to him/her). The distinction between Vice-presidents and ministers is unclear. Parliament cannot express its approval for the appointment, which is the case in democratic presidential systems. The only criterion fixed in the Constitution is that Vice-presidents and ministers shall be appointed from among those eligible to be elected as deputies (Article 106(4)). According to the explanations provided by the Turkish authorities, "*as a rule, it is not compulsory for Vice-presidents and ministers to be appointed from among deputies. Since a strict separation of powers is envisaged in the government system brought, it is accepted that, in that case deputies are appointed as Vice-presidents or ministers, their membership of the Assembly will terminate*."

62. This solution is problematic from two points of views. First, as stated above, the fact that the President may select his Vice-Presidents and ministers from among members of parliament gives the President an effective form of patronage over the legislature, thus putting the separation of powers between the legislative and the executive into jeopardy.

84. In purely presidential republics, the power to dissolve the legislature is quite rare, as it would undermine the principle of the separation of powers as classically understood.

98. The elections of deputies of the TGNA and of the President are to be held on the same day (amended Article 77). This will mean in practice that usually the President will also control the parliamentary majority. This is motivated by the need to avoid conflicts between President and parliament, which are a characteristic feature of presidential systems. But this goes against the very logic of a presidential system which is based on the separation of powers and therefore on the possibility of conflicts among these powers. To be meaningful, separation of powers requires that the different powers are constituted in a way which prevents a uniformity of approach of the various powers. Holding elections simultaneously makes it unlikely that there will be a meaningful separation of powers. If the draft is based on the systematic holding of simultaneous elections to the presidency and parliament, this shows that it does not follow the model of democratic presidential systems based on separation of powers. It rather follows a concept of unity of power which is characteristic for not so democratic systems.

124. Every State has the right to choose its own political system, be it presidential or parliamentary, or a mixed system. This right is not unconditional, however. The principles of the separation of powers and of the rule of law must be respected, and this requires that sufficient checks and balances be inbuilt in the designed political system. Each constitution is a complex array of checks and balances and each provision, including those that already exist in the constitution of another country, needs to be examined in view of its merits for the balance of powers as a whole.

125. When a presidential system is chosen, as is the case in Turkey under the proposed constitutional amendments adopted by the Turkish Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, particular caution is called for, as presidentialism carries an intrinsic danger of degenerating into an authoritarian rule. In a presidential system, the executive and the legislative powers both derive their powers and legitimacy from the people, through elections held at fixed intervals. The two powers are rigidly separate, so that conflicts between the two inevitably arise. Governing requires mediation of

these conflicts. To be meaningful, separation of powers requires therefore that the different powers should be constituted in a way which also allows for divergent approaches and political emphases.

126. The proposed constitutional amendments […] are not based on the logic of separation of powers, which is characteristic for democratic presidential systems. Presidential and parliamentary elections would be systematically held together to avoid possible conflicts between the executive and the legislative powers. Their formal separation therefore risks being meaningless in practice and the role of the weaker power, parliament, risks becoming marginal. The political accountability of the President would be limited to elections, which would take place only every five years.

CDL-AD(2017)005 - Turkey - Opinion on the amendments to the Constitution

17. In general, while accepting that it may be justifiable to clarify certain parts of the 2010 Constitution, the OSCE/ODIHR and the Venice Commission note that the proposed amendments to the Constitution would negatively impact the balance of powers by strengthening the powers of the executive, while weakening both the parliament and, to a greater extent, the judiciary. In particular, although the Constitutional Chamber is retained as such, the Draft Amendments would seriously affect its institutional status and role as an effective organ of judicial constitutional review. Overall, some of the proposed amendments raise concerns with regard to key democratic principles, in particular the rule of law, the separation of powers and the independence of the judiciary, and have the potential to encroach on certain human rights and fundamental freedoms.

CDL-AD(2016)025 - Kyrgyz Republic - Joint opinion on the draft law "on Introduction of amendments and changes to the Constitution"

39. The distribution of powers among the different State institutions may also impact the context in which this checklist is considered. It should be well-adjusted through a system of checks and balances. The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well-functioning judiciary, whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law.

49. Unlimited powers of the executive are, *de jure* or *de facto*, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature.

CDL-AD(2016)007 - Rule of Law Checklist

139. In constitutional law, perhaps even more than in other legal fields, it is necessary to take into account not only the face value of a provision, but also to examine its constitutional context. The mere fact that a provision also exists in the constitution of another country does not mean that it also 'fits' into any other constitution. Each constitution is the result of balancing various powers. If a power is given to one state body, other powers need to be able to effectively control the exercise of this power. The more power an institution has, the tighter control mechanisms need to be constructed. Comparative constitutional law cannot be reduced to identifying the existence of a provision in the constitution of another country to justify its democratic credentials in the constitution of one's own country. Each constitution is a complex array of checks and balances and each provision needs to be examined in view of its merits for the balance of powers as a whole.

CDL-AD(2013)012 - Opinion on the Fourth Amendment to the Fundamental Law of Hungary

20. Modern democracy can only function with or through limitations that it had set itself as legitimate and reasonable. Of course, the limitation of mandate and the right to (re)-election of the holders of political functions, as well as the issue of political and economic incompatibility, and the issue of non-electoral status are the key principles that "limit" democracy, but at the same time make it possible.

21. On the other hand, the effects of these principles on the democratic institutions in a given country will widely depend not only on their constitutional and legal dimension and practical realisation, but mainly on the model of separation of powers in that country, i.e. on whether the political system is dominantly parliamentarian, presidential or organised in the form of a mixed system. The separation of powers has also been endangered by technocratic powers claimed by governments over parliaments. In the modern era, parliaments can be classified into three categories: first, policy-making parliaments, with significant autonomy and active impact on policy (US Congress, for example); second, policy–influencing parliaments, which by reacting to executive initiatives can transform policy and third, executive dominated parliaments, with marginal influence on policy. Parliaments must defend their right to control governments and to have an active role in decision-making.

CDL-AD(2012)027 - Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions

47. As for the substantial side of the envisaged constitutional reform process, the Venice Commission reiterates its recommendation that a constitutional reform should result in an "effective strengthening of the stability, independence and efficiency of state institutions through a clear division of competencies and effective checks and balances" and "should also introduce additional mechanisms and procedures of parliamentary control over the actions and intentions of the executive". In addition, it "should also include changes in the provisions on the judiciary aiming at "laying down a solid foundation for a modern and efficient judiciary in full compliance with European standards".

CDL-AD(2011)002 - Opinion on the concept paper on the establishment and functioning of a constitutional assembly of Ukraine

70. The Commission reiterates its position that even a good constitutional text cannot ensure stability and democratic development of society without there also being the relevant political will of different political forces, further legislation in line with democratic standards and a sound system of checks and balances that sets the basis for its implementation.

CDL-AD(2010)015 - Opinion on the Draft Constitution of the Kyrgyz Republic

C. The re-election of the President

96. In conclusion, the right to be elected is not an absolute right. Objective and reasonable limits may be placed on the right to be elected. Term limits which most representative democracies put on the right of the incumbent president are a reasonable limit to the right to be elected because they prevent an unlimited exercise of power in the hands of the President and protect other constitutional principles such as checks and balances and the separation of powers. […]

CDL-AD(2018)010 - Report on Term Limits - Part I – Presidents

52. In the concluding paragraphs of the 2009 Opinion on Azerbaijan, the Venice Commission emphasised that the removal of the two-term limit reinforced the President's already strong position and represented a "very negative development in terms of democratic practice, given the context prevailing in Azerbaijan". Unfortunately, since 2009 the "prevailing context" has not improved, at least not in this sphere. As noted in Resolution 2062 of the Parliamentary

Assembly the Azerbaijani institutional structure grants particularly strong powers to the President of the Republic and the executive. PACE also noted the limited competence of Parliament (Milli Mejlis) under the Constitution, the weakness of the opposition forces and the vulnerability of NGOs and of independent media. Moreover, other proposals contained in the draft under examination give to the President of Azerbaijan supplementary powers (for more details on this point see below).

53. In such circumstances, the modification to Article 101 which extends the Presidential mandate for longer than is the European practice, coupled with the previous removal of the two-term limitation, concentrates power in the hands of a single person in a manner not compatible with the separation of powers.

CDL-AD(2016)029 - Azerbaijan - Opinion on the draft modifications to the Constitution

III. Relationship between the Legislature and the Executive

A. In general

30. Constitutional amendments are particularly sensitive since they may affect the balance of powers between the executive and the legislature. Linking constitutional amendments to a question of confidence could give to a President the possibility of exercising pressure on the Congress to alter the balance of powers in his or her favour. In its decision on the vote of confidence the Constitutional Tribunal referred to the principle of the balance of powers when interpreting the scope of the vote of confidence. There seem to exist certain substantive limitations to constitutional reform in Peru. For the Constitutional Tribunal and most legal scholars, the presidential form of government in itself is one of such limits. It is not a rare case in comparative law. As has been recognised by the Venice Commission, this is a common limitation in cases where an entrenched clause does exist. But the concrete scope of these substantive limitations does not seem clearly defined. Even if the principle of the separation of powers is an unamendable provision in some countries, “it is true that the principle of “division of powers” is not immovable; exact limits of the presidential power vis-à-vis parliament cannot be defined once and for all.”

42. It should also be mentioned that normally in presidential systems the term of the legislative power is fixed, and Presidents do not have powers to dissolve a Congress. The Venice Commission noted that “in purely presidential republics, the power to dissolve the legislature is quite rare, as it would undermine the principle of the separation of powers as classically understood”. Ecuador is an exception (Art. 148 of the Constitution), as is Peru.

43. The Peruvian Constitution does not set forth any explicit limitations with respect to the issues which may be linked to a question of confidence. It will be up to the Constitutional Tribunal to decide whether proposals for constitutional amendments may be linked to a question of confidence. In comparative law, linking constitutional amendments to a question of confidence is unusual.

44. Any constitutional amendment process should preserve the principle of the separation of powers and the requirement of checks and balances between the President and the Congress. The power of the President to link a question of confidence to constitutional amendments may create a risk of being used to alter this balance. The threat of dissolution after a second vote on a question of confidence may make it difficult for Congress to resist attempts to alter it in favour of the President. In Peru some substantive limitations to constitutional amendments seem to

exist, such as the principle of separation of powers or the republican form of government, which might provide a safeguard, but their scope is not clearly defined.

CDL-AD(2019)022 - Peru - Opinion on linking constitutional amendments to the question of confidence

30. […] the President's direct call for a NCA [National Constituent Assembly] assumes that only one of the Public Powers (i.e. the Executive Branch) has enough attributions to impose a renegotiation of the social contract, ignoring the other State organs through which the People of Venezuela exert their sovereignty (e.g. the National Assembly); this raises an issue in terms of democratic and egalitarian principles, and of the separation of powers, as stated in articles 1, 2, 5, 19, 21 and 136 of the Constitution. The Venezuelan President, as only one of the constituted powers, should not be entitled to call for a National Constituent Assembly without calling a referendum.

CDL-AD(2017)024 - Venezuela - Opinion on the legal issues raised by Decree 2878 of 23 May 2017 of the President of the Republic on calling elections to a national constituent Assembly

189. Thus, for a government lacking the necessary qualified majority in parliament, it might be tempting instead to put the issue directly to the electorate. On several occasions the Venice Commission has emphasized the danger that this may have the effect of circumventing the correct constitutional amendment procedures. It has insisted on the fact that it is expedient in a democratic system upholding the separation of powers that the legislature should always retain power to review the executive's legislative output and to decide on the extent of its powers in that respect.

CDL-AD(2010)001 - Report on Constitutional Amendment

B. Legislative powers of the executive

1. In general

14. As the 1789 French Declaration of Human and Civic Rights proclaims, "[a]ny society in which no provision is made… for the separation of powers, has no Constitution". Traditionally, powers are separated into legislative, executive and judicial branches. From this principle emerges a main line between law-making (legislation) and implementation of laws. Both law-making and implementation of laws are expressions of sovereignty, of the will of the state (if it sounds better: of the nation): the difference depends on their addressees. Laws – in the material sense – or normative acts - are addressed to everybody (or at least to a large and indefinite group of addressees): they are general and abstract; decisions implementing laws always have one or more, but definite, specific, or named addressees: they are individual and concrete.

15. In a democratic state respecting the principle of separation of powers, the power to adopt laws in the material sense belongs primarily to the legislator (directly elected in a democratic way). In almost every state this power is not reserved in its entirety to parliaments, more or less topics are delegated to the executive. In theory, delegation could be unconditional (the executive may make laws concerning every issue not regulated by the legislation) or conditional (the executive needs a formal and case-by-case authorisation to create primary regulation and/or to complete regulation of an issue by secondary laws, coherent with the primary legislation). However, unconditional delegation would go against the principles of legality and separation of powers: those imply not only the supremacy of the legislature over the executive, but that general and abstract rules should be included in an Act of Parliament or a regulation based on that Act, save for limited exceptions provided for in the Constitution; when legislative power is delegated by Parliament to the executive, the objectives, contents, and scope of the delegation of powers

have to be explicitly defined in a legislative act. General and abstract acts can in exceptional cases be included in an act of the executive power not based on an Act of Parliament (but directly on the Constitution).

17. Implementation of laws is the task of the executive and judicial branches of government. The power of the executive to adopt normative acts is limited to legislative delegation as defined above and implementation of (formal) laws. It is more generally competent for adopting decisions (legal acts of an individual and concrete nature). Usually the executive (through its administrative institutions and bodies) acts for the future (pro futuro, ex nunc), while the judiciary decides on the legality of the previous behaviour of the state and of individuals, it implements laws with retrospective effect (ex tunc). 18. […], the excessive use of the law-making powers by the Government under the pretext of an "emergency" is arguably at odds with the principles of democracy and separation of powers, which are proclaimed in Article 1 (3) and (4) of the Romanian Constitution. In the 2014 opinion on Romania, the Venice Commission noted that the practice of issuing over a hundred of emergency ordinances every year "involves risks for democracy and the rule of law in Romania" (§ 173). In 2018 the Government issued 114 emergency ordinances in different fields, which demonstrates that the notion of "emergency" is interpreted in the Romanian legal order very generously. This runs counter the exceptional character of such legislation (see Article 115 § (4)), and leads to the routine exercise of the legislative function by the Government.

22. Clarity and foreseeability of legal acts are important not only to enable individuals to regulate their conduct, but for separation of powers reasons: as the Memorandum summarising the conference on "The European legal standards of the rule of law and the scope of discretion of powers in the member States of the Council of Europe" states: "legislative provisions should be clear and understandable to enable the executive power to exert discretion only in areas where this is intended and not simply because the law is uncertain or ambiguous."

47. The draft law does not refer to the case law of the European Court of Human Rights, other international courts, or the Courts of Kosovo, including the Constitutional Court. This is in conformity with international standards. Case law (or rather: precedents) are important sources of law, but not as legal acts (products of legislation), and, at least in the continental system, may not contain new legal rules (unless provided for by the Constitution or a statute in exceptional cases). Separation of powers means that the power of adoption of new rules belongs to the legislative branch of government, except in case of delegation to the executive.35 The role of courts is to implement legal acts. It is fulfilled by interpretation, and this interpretation is binding for the parties, but only under the limits of (primary or delegated) legislation, under the force of legal acts that were interpreted by the courts. Once a law is changed, the former interpretation – and the precedent – loses its binding force.

CDL-AD(2019)025 - Kosovo - Opinion on the draft law on legal acts

36. The checks and balance system is not established only within the executive. The relationship of executive, legislative and judicial powers to one another should be regulated according to this understanding. Presidential or semi-presidential models require more rigid and precise lines separating executive and legislative powers. The set of amendments affecting the powers of the President (Par. 2, Article 45) goes in this sense and contains a proposal that the laws are the prerogative of the legislature alone. The President will have no longer the power to issue decrees having the force of law. This change is in line with Par. 4, Article 3 of the Constitution of the Republic of Kazakhstan and the principle of functional separation of powers into legislative, executive and judicial branches and their balanced interaction in accordance with the principle of checks and balances.

CDL-AD(2017)010 - Kazakhstan - Opinion on the amendments to the Constitution of Kazakhstan

13. There is no codified standard as concerns the level of regulation of disqualification from holding an elective office (see Code of good practice in electoral matters, II.2.a). However, as the universal right to vote is one of the main cornerstones of democratic government, the Commission is of the view that disqualification should preferably be laid out in the constitution or – possibly organic - legislation adopted by parliament. The question arises whether a legislative decree adopted by the Executive upon detailed mandate of Parliament in a specific law is an appropriate level of regulation. Shielding the Parliament and the individual MPs from interference by the Executive is an important requirement of the separation of powers. In the Commission's view, therefore, even when the delegation is sufficiently precise, regulation through a law adopted by the parliament itself is preferable.

CDL-AD(2017)025 - Amicus curiae brief for the European Court of Human Rights in the case of Berlusconi v. Italy

71. As for the constitutional changes in Central and Eastern Europe in recent years, the Venice Commission notes that they have to a large extent been such as to reduce executive power (and strengthen parliament), improve human rights, and support integration into European and international bodies. This is a very positive trend, which is due partly to a fairly broad domestic political consensus in many countries to promote and improve liberal constitutional democracy, and partly to international and European advice and inspiration (including the work of the Venice Commission). However, the Venice Commission notes that there have also been examples of less positive constitutional reforms processes, including several, and sometimes successful, attempts to strengthen presidential powers in a way detrimental to democratic development.

142. The most important proposals for amending constitutional rules on the state machinery are often those that seek to alter the balance of power between the legislative and executive branches of government, one way or the other. These should also be subject to particular care and consideration. In general, amendments strengthening parliament are normally meant to make the system more democratic, while amendments strengthening the executive are meant to make it more efficient and effective. But there may also be hidden or more personal motivations, which are less legitimate.

143. Since new constitutions were first adopted in most of Eastern and Central Europe in the mid-1990s, there have been later amendments in several countries further strengthening the national parliaments. In this regard, the Commission has repeatedly stated that the choice between a presidential and a parliamentary system is a political one to be freely made by each single state. However, the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts. In a parliamentary system, fundamental requirements arising from the principle of the separation of powers should be respected. If a presidential system is chosen, in turn, certain minimum requirements of parliamentary influence and control should be fulfilled."

CDL-AD(2010)001 - Report on Constitutional Amendment

2. Emergency powers/acts

18. […] the excessive use of the law-making powers by the Government under the pretext of an "emergency" is arguably at odds with the principles of democracy and separation of powers, which are proclaimed in Article 1 (3) and (4) of the Romanian Constitution. In the 2014 opinion on Romania, the Venice Commission noted that the practice of issuing over a hundred of emergency ordinances every year "involves risks for democracy and the rule of law in Romania" (§ 173). In 2018 the Government issued emergency ordinances in different fields, which demonstrates that the notion of "emergency" is interpreted in the Romanian legal order very

generously. This runs counter the exceptional character of such legislation (see Article 115 § (4)) and leads to the routine exercise of the legislative function by the Government.

19. The Venice Commission is aware that in many legal orders the Government has the power to issue emergency decrees. But it is questionable, in general, whether Article 115 of the Romanian Constitution was intended to be used for the purposes for which it is currently used by the Government. "Sometimes legislation has to be adopted speedily in order to avert serious risks to the country. [However, in the Romanian context], the nearly constant use of government emergency ordinances is […] not the appropriate way to do so. […] If […] it was not possible to adopt a high number of laws within a short time, Parliament should rather use the instrument of legislative delegation and empower – through special laws – the Government to adopt urgent legislation (paragraphs 1 to 3 of Article 115 of the Constitution). […]".

20. Finally, the emergency ordinances issued by the Romanian Government contain provisions establishing rules of indefinite duration, and not only temporary or transitional solutions. The Venice Commission criticised such use of the emergency powers in cases of a serious nation-wide crisis; it is even more true in the Romanian context where the Government regularly legislates by "emergency ordinances", simply because there is an urgent need to change the law. The legal regime of Article 115, as currently interpreted in Romania, is by itself problematic: there is no declaration of a state of emergency, with the accompanying international and national controls, nor is there any mandatory parliamentary *ex post* control which is usually attached to emergency decrees issued in a state of emergency. In addition, the validity of the ordinances is not tied to the duration of the emergency situation.

21. In sum, the routine use of emergency powers is objectionable at many levels. It affects the quality of the legislation, disturbs legal certainty, weakens external checks on the Government, and disregards the principle of the separation of powers. The Venice Commission calls on the Romanian Government to drastically reduce the use of GEOs in all fields of law. Article 115 of the Constitution seems to be interpreted in Romania in an overly broad manner, so its revision may be envisaged in order to define more narrowly the situations in which the Government may legislate by emergency ordinances, and to introduce checks on the Government's legislative power. As to the future of the judicial reform under consideration, the Venice Commission urges the Romanian authorities to adopt necessary future amendments in a normal parliamentary procedure, which should ensure proper (i.e. inclusive, informed, transparent etc.) deliberations.

49. […]

- most alarmingly, the Government continues to make legislative amendments by emergency ordinances. While the Constitution clearly indicates that this should be an exceptional measure, legislation by the GEOs became a routine. Fundamental rules of the functioning of key State institutions are changed too quickly and too often, without preparation and consultations, which raises legitimate questions about the soundness of the outcomes and of the real motives behind some of those changes. The resulting legal texts are not clear. This practice weakens external checks on the Government, it is contrary to the principle of separation of powers and disturbs legal certainty. The Venice Commission calls on the Romanian authorities to drastically limit the use of the GEOs. As to the further amendments to the three laws in the field of justice, they should be made through a normal legislative procedure.

CDL-AD(2019)014 - Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice

59. In addition, as required by the general principle of the rule of law, the measures have to be *proportionate*. As stated by the Commission in its Opinion on the Emergency Decree Laws, "*[t]he Constitution may give to the Government very large emergency powers. However, those*

powers cannot be limitless - otherwise the Constitution would contain a mechanism of self-destruction, and the regime of the separation of powers would be replaced with the unfettered rule of the executive." (§29) In the same vein, the Parliamentary Assembly in its Resolution 2090(2016) warned against the risk that "*counter-terrorism measures may introduce disproportionate restrictions or sap democratic control and thus violate fundamental freedoms and the rule of law, in the name of safeguarding State security*".

CDL-AD(2017)021 - Turkey - Opinion on the Provisions of the Emergency Decree-Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy

29. The Turkish Constitution does not expressly say that those irrevocable principles [as defined in Article 4 of the Turkish Constitution] are also non-derogable under the *state of emergency*, [emphasis added] but this is self-evident. "During the state of emergency, state institutions function normally, although the distribution of powers is modified in favour of the executive". The Constitution may give to the Government very large emergency powers. However, those powers cannot be limitless - otherwise the Constitution would contain a mechanism of self-destruction, and the regime of the separation of powers would be replaced with the unfettered rule of the executive. Any re-distribution of powers during the emergency regime should be limited to what is provided explicitly by the constitutional and legal provisions on the state of emergency and what is necessitated by the "exigencies of the situation". "In fact, most modern constitutions explicitly state that the *basic structural features of government* remain intact even in an emergency" (italics added). New permanent powers of the Government, or new regulations permanently altering the competencies, composition or principles of the functioning of other constituent bodies should not emanate from the decree laws: they should be expressly authorised by the Constitution.

CDL-AD(2016)037 - Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016

93. The amended paragraph 2 of Article 72 introduces certain incompatibilities between the parliamentary mandate and posts such as those "in the civil and municipal service", "entrepreneurial activity" or "member[ship] of the governing body or supervisory council of a commercial organization". Deputies may, however, continue to exercise "scientific, teaching or other creative activities" – as is already the case. Generally, the primary purpose of incompatibility provisions is to ensure the separation of powers, enhance transparency and guarantee that parliamentarians' public or private occupations do not influence their role as representatives of the nation to avoid or limit conflicts of interest.

96. In some countries, such a combination of ministerial and parliamentary functions is considered to violate the principle of separation of powers, as this may create a conflict of interest which *de facto* prevents such parliamentarians from exercising their parliamentary oversight functions over the executive. On the other hand, in some parliamentary regimes, which are based on close collaboration between the legislative and the executive, the combination of ministerial and parliamentary duties is even encouraged. At the same time, in many parliamentary systems, members of the executive remove themselves from the day-to-day work of the legislative in order to strengthen the ability of the legislative to hold the executive to account. In that case, it is often considered helpful to have them replaced by members of the same party. Indeed, and as noted in the 2015 Joint Opinion, the suspension of the parliamentary mandate of the Prime Minister and other members of Government would deprive the majority of valuable votes in this Parliament with a total of 120 seats, which could result in a distortion of the relative forces of political parties in Parliament. **It may be useful for the respective legal drafters and stakeholders to debate this point in detail, and reiterate the positive and negative sides of all options in order to find a good solution that is most beneficial for the smooth and independent functioning of the *Jogorku Kenesh***.

CDL-AD(2016)025 - Kyrgyz Republic - Endorsed joint opinion on the draft law "on Introduction of amendments and changes to the Constitution"

C. Incompatibilities

83. Incompatibility is different form the ineligibility principle, although the basis of both these legal principles lies in the principle of the separation of powers. Incompatibility is a much broader concept than ineligibility, while the first is viewed as part of parliamentary law, the second is viewed as part of electoral law.

94. In Belgium, it is up to the Members themselves to verify whether they comply with these rules and if not, to determine which office they will abandon. Certain offices are ended automatically when taking the oath as Member of Parliament. Article 233 of the Electoral Code provides, for instance, that Members of a Regional Parliament who become Senator or Representative automatically lose their office in the Regional Parliament (with the exception of Community Senators). The same rule applies the other way round. One of the most important incompatibilities is based on the separation of powers. Article 50 of the Constitution provides that a Member of Parliament who becomes a federal Minister ceases to sit in Parliament. If that individual resigns as Minister, however, he or she will get his or her parliamentary seat back. A Member of the federal Parliament cannot be a civil servant and cannot hold judicial office. A civil servant elected to the federal Parliament is, however, entitled to political leave and is not obliged to resign as a civil servant. Federal parliamentarians may not sit in Regional or Community assemblies, except for the 21 Community Senators, who are appointed by and from the Community Parliaments. They may also not be members of a Regional or Community Government. There is also an incompatibility between the office of Member of the federal Parliament and of Member of the European Parliament.

97. Should any political reasons for parliamentary incompatibility arise the sanction by default is clear and legally formulated. The MPs' mandate stops due to the reasons that derive from the basic requirement related to the constitutional principle of the separation of powers.

CDL-AD(2012)027 - Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions

IV. Relationship of the Legislative with the Judiciary and other bodies

A. Judiciary

12. The retention of solutions under which parliaments themselves have the power to "verify credentials" is consistent with a particular approach to the role of parliaments and the separation of powers. It is based on the theory of the omnipotence of the legislature (or at least the pre-eminence of parliament) as a sovereign body under the parliamentary system with special rights that no judicial authority may impinge upon. Many jurists in continental Europe have defended this position. In France, it was set out in detail by the great legal thinker, Carré de Malberg, in the 1920s. Although the mechanism was much older, it had not been theorised so authoritatively until then. In France, it was employed both for the initial verification of credentials and for all decisions regarding the eligibility of the relevant members of parliament, up to and including the Fourth Republic. The same system still applies in Italy, where the Constitutional Court itself has ruled that the verification of parliamentarians' credentials is not covered by the system of judicial protection concerning elections. Conversely, some scholars have said that in following this approach parliaments are acting as courts, which is an intrusion into the powers of the judiciary.

13. While expanding the powers of parliament, 19th and 20th-century constitutionalism placed emphasis on the separation of powers, with scrutiny of parliamentary elections moving to the

judiciary. For instance, in the United Kingdom judicial review was introduced in 1868 and election courts were set up. In France, the Third and Fourth Republics retained the system of "verification of credentials" by parliament, but the Constitution of the Fifth Republic opted for a system under which the legislature has no part at all in resolving electoral disputes. In France, all electoral disputes are dealt with by the administrative courts (in the case of local elections) or the Constitutional Council (in the case of parliamentary elections). More generally, in the 20th century a need was felt to transfer electoral disputes from parliaments to independent and impartial bodies.

44. The first requirement is for the appeal body to be impartial and sufficiently independent of parliament and the executive for the impartiality of its decisions not to be questioned. The requirement for impartiality concerns both the composition of the appeal body and the procedural and institutional safeguards against interference by other public or private players. Electoral appeals cannot be examined effectively and electoral law cannot be implemented properly unless the appeal body is impartial and independent.

CDL-AD(2019)021 - Amicus curiae brief for the European Court of Human Rights in the case of Mugemangango v. Belgium on procedural safeguards which a State must ensure in procedures challenging the result of an election or the distribution of seats

105. Nevertheless, the Venice Commission has criticised this method, because it gives the Supreme Court of Cassation a general "rule-making" power, which can conflict with the separation of powers. The exchange of views between judges of different instances, which is provided for in the draft (the new paragraph 3 of Article 24) is as such good and could therefore be recommended. However, when it is combined with Article 31, it becomes less clear. The need to unify practice should in principle be solved by an appeals procedure that could be designed to also solve problems that usually, only or mostly, occur in different categories of small claims cases.

CDL-AD(2013)005 - Opinion on Draft amendments to Laws on the Judiciary of Serbia

B. Other bodies

168. In addition, having non-state actors and public actors sit in the same body may pose problems with regard to the prerogatives of Parliament, and the separation of powers in general. Political representation is a prerogative of Parliament. The Authority should not have political members or members of public institutions subject to political instructions, therefore.

CDL-AD(2019)013 - Tunisia - Opinion on the Draft Organic Law on the Authority for Sustainable Development and the Rights of Future Generations.

32. With respect to the fact that the prytanies may deal with any kind of subject matter, and regarding their small size and their members not being democratically elected, the competence to propose a vote of no confidence – which leads to the resignation of the Provincial Government and the dissolution of the Provincial Parliament – seems clearly out of proportion, undermining the principle of separation of powers.

36. However, consultation should be regulated in a way that does not endanger the principle of separation of powers and hinder good administration by imposing on the authorities the duty to submit each and every act to a consultation procedure. For instance, the Swiss consultation process is not applicable to all kinds of parliamentary or governmental acts, but only takes place when amendments to the Constitution, provisions of federal laws and international law agreements subject to referendum or affecting essential cantonal interests are drafted. For other projects, a consultation procedure is carried out only if the project is of

major political, financial, economic, ecological, social or cultural significance or if its enforcement will to a substantial extent be the responsibility of bodies outside the Federal Administration. Article 14 of the Bill should be redrafted so as to better define the scope of the obligation to promote consultation.

CDL-AD(2015)009 - Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy)

V. Relationship of the Executive with the Judiciary and the Prosecution Service

A. Independence of the judiciary

74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.

86. The independence of individual judges must be ensured, as also must the independence of the judiciary from the legislative and, especially, executive branches of government.

CDL-AD(2016)007 - Rule of Law Checklist

6. The independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people.

CDL-AD(2010)004 - Report on the Independence of the Judicial System Part I: The Independence of Judges

For more quotations on the independence of the judiciary, and in particular country-related opinions, see the Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, CDL-PI(2019)008.

B. Autonomy of the Prosecution Service

91. There is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. In conformity with the principle of legality, the public prosecution service must act only on the basis of, and in accordance with, the law.[98] This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle).

92. Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

CDL-AD(2016)007 - Rule of Law Checklist

28. […] there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court. The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.

30. Any 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.

CDL-AD(2010)040 - *Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service*

For more quotations on the autonomy of the prosecution service, and in particular country-related opinions, see the Compilation of Venice Commission Opinions and Reports concerning Prosecutors, CDL-PI(2015)009.

C. Competent jurisdiction for dealing with acts of the executive

98. Leaving it to the law to determine which court has jurisdiction to hear cases relating to the separation of powers (Article 90(3)) is a debatable approach. There are two main models in European constitutional law where it comes to the criminal responsibility of ministers, namely use of the ordinary courts or special impeachment procedures. In the absence of a definition of special impeachment procedures in the Constitution, the criminal responsibility of Government members is mostly incurred under the ordinary law, and hence before the ordinary courts, and criminal prosecution is reserved for the public prosecutor.

CDL-AD(2019)003 – Luxembourg - Opinion on the proposed revision of the Constitution

108. The Venice Commission recognises that there are two basic models in European constitutional law for holding government ministers criminally responsible. One is to leave this to the ordinary criminal system. The other is to have special impeachment procedures, which may be construed in a number of different ways. The Venice Commission considers that both alternatives should as such be considered legitimate, and that both form part of the European constitutional tradition. It is not for the Commission to advocate one before the other.

CDL-AD(2013)001 - Report on the relationship between political and criminal ministerial responsibility

VI. Constitutional Justice

A. Composition

94. Particularly worrying, from the viewpoint of the independence of the Tribunal and the separation of powers, is that new Article 31a(1) of the Act provides that *"[i]n particularly gross cases, the General Assembly shall apply to the Sejm to depose the judge of the Court."* This action of the General Assembly could be caused by an application by the President of the Republic or the Minister of Justice (Article 31a(2)), although the Constitutional Tribunal remains free to decide. Moreover, the final decision will be taken by the *Sejm*. These new provisions are highly questionable, because a judge's mandate can now be terminated by Parliament which by its very nature also decides on the basis of political considerations. In any case, such provisions cannot be introduced without an explicit constitutional basis.

CDL-AD(2016)001 - Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland

76. Since World War II, constitutional courts were typically established in Europe in the course of a transformation to democracy […]. The purpose of these courts was to overcome the legacy of the previous regimes and to protect human rights violated by these regimes. Instead of the principle of the unity of power, which excluded any control over Parliament, the system of the separation of powers was introduced. In place of the supreme role of Parliament, the new system was based on the principle of checks and balances between different state organs. As a consequence, even Parliament has to respect the supremacy of the Constitution and it can be controlled by other organs, especially by the Constitutional Court. Constitutional justice is a key component of checks and balances in a constitutional democracy. Its importance is further enhanced where the ruling coalition can rely on a large majority and is able to appoint to practically all state institutions officials favourable to its political views."

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

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

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

CDL-AD(2013)012 - Opinion on the Fourth Amendment to the Fundamental *Law of Hungary*

B. Powers

60. The Venice Commission and the Directorate strongly reiterate the need for this reform to comply fully with the Constitution in force. It is the Constitutional Court of the Republic of Moldova that has the final say on the binding interpretation of the Constitution and the compatibility of national laws with this text.

CDL-AD(2019)020 - Moldova, Republic of - Joint Interim Opinion of the Venice Commission and the Directorate of Human Rights (DHR) and Rule of Law (DGI) of the Council of Europe on the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office

77. The execution of judgments of the Constitutional Court is an essential requirement of the rule of law. Leaving the choice of whether or not to follow the judgments of the Constitutional Court to Parliament does not live up to this requirement.

78. The Venice Commission recommends amending the Constitution to ensure that a legal provision found unconstitutional as such by the Constitutional Court loses legal force with the publication of the judgment of the Court. In order to avoid legal gaps, the Constitutional Court could be empowered to postpone the entry into force of the repeal of the provision found to be incompatible with the Constitution by a specified period (typically up to one year). This allows Parliament to phase in new legislation before the unconstitutional provisions lose their force.

79. In conclusion, the Constitution should be amended to provide that judgments of the Constitutional Court finding a legal provision unconstitutional will result directly in the annulment of that provision without intervention by Parliament.

CDL-AD(2018)028 - Malta - Opinion on Constitutional arrangements and separation of powers

89. [...] Whether a constitutional court is part of the judiciary or has its own chapter in the constitution, the constitutional court's role is to be the main institutional safeguard for the constitution and for the principle of the separation of powers. The very purpose of a constitutional court is to limit the transgressions of the legislator and that of other state powers and parliament cannot refer to the 'separation of powers' to refuse the implementation of the constitutional court's decisions.

CDL-AD(2017)011 - Armenia – Opinion on the draft Constitutional Law on the Constitutional Court

11. Finally, the Venice Commission will not address specific facts of the present case. Whereas the Venice Commission is competent to evaluate the Georgian law on the freedom of speech in matters of international law and, in particular, European standards, the Constitutional Court has the final say as regards the binding interpretation of the Constitution and the compatibility of national legislation with it. The Venice Commission recalls that the interpretation of the Constitution by the Constitutional Court is binding on all national institutions from the administrative, judicial and legislative branches, which are obliged to respect it and adhere to it.

CDL-AD(2014)040 - Amicus Curiae Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased adopted by the Venice Commission at its 101st plenary session

18. This provision means that procedures already pending before the Constitutional Court are transferred from the Court to the HJC by law. This raises serious doubts with respect to the

principle of the separation of powers and the rule of law. The legislator should refrain from intervening into already commenced judicial proceedings and it will be up to the Constitutional Court to decide whether or not legislative changes may cause termination of appeals lodged with the Court. […]

CDL-AD(2011)015 - Interim opinion on the draft decisions of the high judicial council and of the state prosecutorial council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia

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

CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan.

4. 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