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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS**

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

**OF THE RUSSIAN FEDERATION**

**by**

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## **Introduction**

The Russian Constitutional Court has asked the Venice Commission to give an opinion on the Draft Federal Constitutional Law “on modifications and amendments to the Federal Constitutional Law on the Constitutional Court for the Russian Federation”. The main purpose of this draft legislation is to introduce the exceptional possibility for a written procedure in cases in which norms are at issue which are “analogous” to those which have already been the object of a proceeding by the Constitutional Court. This proposal would therefore abolish the current requirement of having an oral hearing in every admissible case brought before the Court. The present opinion concerns the question whether this draft legislation is in conformity with European standards.

## **Evaluation**

The requirement to have an oral hearing in each and every admissible case brought before a Constitutional Court is unusual but not unique. Article 17 of the Italian Law on the Constitutional Court contains a similar rule. The introduction of such a rule in Russia can be explained by the transformation in the early 1990’s of the Soviet judicial system into a constitutional system based on the rule of law. 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.

These reasons speak powerfully in favour of oral hearings. At the same time, however, Constitutional Courts must remain capable of rendering meaningful decisions within a reasonable time. Oral hearings can take much time. If the rules on admissibility are generous and if a Constitutional Courts must decide many cases, as it is the case for the Constitutional Court of the Russian Federation, an overly broad requirement to conduct oral hearings can become counterproductive. The requirement to conduct oral hearings in each and every case can lead to serious delays. It is, of course, possible to shorten oral hearings as far as possible, as it seems to be done in Italy. Such a practice of shortening oral hearing risks to make them a mere formality which does not serve its original purpose. Therefore, it is widely recognised that oral hearings can be dispensed with by Constitutional Courts in proceedings where it is typically to be expected that an oral hearing either will not contribute much to the judicial decision-making or if no other relevant interests are at issue. It is, however, important that the decision not to conduct an oral hearing is taken by the judges of the Constitutional Court themselves and not merely by the Court administration.

This general assessment is confirmed, *inter alia*, by the rules of procedure for the German Constitutional Court. It is true that, according to the general rule of Article 25 (1) of the German Law on the Federal Constitutional Court, an oral hearing must take place in

every proceeding, except when all the “parties to the proceedings” (“Beteiligte”) renounce this right. However, although this general rule seems to impose a strict requirement to conduct an oral hearing in every case, other provisions in the same law and judicial interpretation have had the effect of reversing the relationship of the rule and the exception:

- The first and most important restriction of the general rule of Article 25 (1) results from the narrow interpretation which the German Federal Constitutional Court has given the term “party to the proceedings” (“Beteiligte”). According to the Court, there are no “parties to the proceedings” (“Beteiligte”) strictly speaking in proceedings which concern the (abstract and concrete) control of norms - except if “constitutional organs” (such as the Federal government, the Federal parliament, or the Federal Diet) expressly “accede” to such a proceedings (which is rarely the case). As far as there are no “parties to the proceedings” (Beteiligte) the German Constitutional Court exercises its discretion whether to hold an oral hearing or not.
- The second type of restriction results from more specific norms within the same Law on the Federal Constitutional Court according to which, in certain types of proceedings, the Court is free to decide whether to hold an oral hearing, even though there is a “party to the proceedings” (Beteiligte) in the strict sense. The most important of such rules concerns the procedure of constitutional complaint (Verfassungsbeschwerde, see Articles 93d (1)(1) and 94 (5)(2) of the Law on the Federal Constitutional Court. In the procedure of constitutional complaint the complainant/citizen himself or herself has no right to require an oral hearing, only “constitutional organs” if they expressly accede to the procedure. The procedure of constitutional complaint is the source of more than 97% of all proceedings before the German Constitutional Court.

The two rules combined have led to the result that oral hearings are exceptional in proceedings before the German Federal Constitutional Court. Compared to the German law and experience the suggested change in the Draft Russian Federal Constitutional Law is quite modest. While it may not always be absolutely clear what the term “analogous normative provision (“disposition normative analogue”) means, it is difficult to define the intention of the draftspersons more precisely without reducing the scope of the exception so much that it loses much of its substantial practical effect. This would be the case, for example, if only “identical” norms would give rise to the exception). The proposed exception guarantees that the legal question at issue has already been debated at least once in an oral hearing.

There is, however, one consideration from the German experience which the Russian authorities may wish to take into account: While the rule of transparency, including of obligatory oral hearing, has been developed to strengthen the relationship of trust and confidence between the individual citizen and the state, the principle of transparency is also important in the relationship between different state organs. If, for instance, the Russian Federal government would initiate proceedings against a subject of the Federation, or if one of the highest state organs would initiate proceedings against

another state organ (e.g. *President v. Duma*), there appears to be an important public interest that such a proceeding take place with an oral hearing – possibly even if the case would concern a normative provision which is analogous to one which has already been the object of another proceeding. This is, at least, the general rule in Germany, where “constitutional organs”, such as the Federal government, the Federal Parliament, the Federal Diet, or governments of one of the “Länder” (in Russian terminology: subjects of the Federation) can become “subjects of the proceedings”(Beteiligte des Verfahrens) by way of an express declaration of accession.

To give certain “constitutional organs” the right to request an oral hearing in all contentious proceedings would not undermine the purpose of the proposed amendment since the number of such contentious proceedings, and indeed of such a request, is likely to remain small. Moreover, it is unlikely that such organs would request an oral hearing when a normative provision is at issue which is “analogous” to one which has already once been the subject of a decision of the Constitutional Court. It is, however, possible, that a “constitutional organ” would want to publicly introduce certain considerations in order to persuade the Court to reconsider its previous decision.

### **Conclusion**

The suggested amendments of the Draft Federal Constitutional Law “on modifications and amendments to the Federal Constitutional Law on the Constitutional Court for the Russian Federation” serve a legitimate purpose and are a legitimate means to achieve this purpose. The draft amendment is in conformity with European standards. The Russian authorities may, however, want to consider introducing a counter-exception to the proposed new exception by giving certain important “constitutional organs” the right to request an oral hearing in any proceedings in which they are parties. Such a counter-exception, however, would not seem to be required by European standards.