



Strasbourg, 10 December 2020

CDL-PI(2020)019

Opinion No. 1012/2020

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

URGENT OPINION

**ON THE REFORM
OF THE CONSTITUTIONAL COURT**

**Issued pursuant to Article 14a
of the Venice Commission's Rules of Procedure**

on the basis of comments by

**Mr Paolo CAROZZA (Member, United States)
Ms Marta CARTABIA (Substitute Member, Italy)
Mr Srdjan DARMANOVIC (Member, Montenegro)
Mr Christoph GRABENWARTER (Member, Austria)**

Contents

I.	Introduction	3
II.	Background	3
III.	Decision 13-r/2020 of the Constitutional Court of Ukraine	5
A.	Reasoning of the decision	5
B.	Conflicts of interest – recusals / withdrawals	6
C.	Scope of the decision – limitation to provisions challenged in the request	6
D.	Absence of postponement of the entry into force of the annulment of provisions found unconstitutional.	8
IV.	Method of reform	8
V.	Possible avenues for a reform of the Constitutional Court	10
A.	Quality of the reasoning	10
B.	Conflicts of interest	11
1.	Comparative perspective	11
2.	Situation in Ukraine	12
C.	Disciplinary sanctions	13
D.	Procedure of appointment of judges to the Constitutional Court	14
E.	Improving the procedural legitimacy of the decision of the Constitutional Court	16
F.	Possibility for re-opening of cases	16
G.	Recourse to international assistance	18
VI.	Constitutional culture - loyal co-operation between State Powers as a precondition for effective constitutional justice	18
VII.	Conclusion	19

I. Introduction

1. On 25 November 2020, the President of Ukraine, Mr Volodymyr Zelenskyy, requested an urgent opinion of the Venice Commission on the constitutional situation created by Decision 13-r/2020 of 27 October 2020 of the Constitutional Court. In his request, The President requested the Commission *“to assess the constitutional situation created by the Constitutional Court of Ukraine Judgment No. 13-r/2020 of 27 October 2020 and issue an opinion on the state of anti-corruption legislation after this judgment; the judges of the Constitutional Court of Ukraine issuing a judgment while possibly being in a conflict of interest situation; the Constitutional Court of Ukraine’s compliance with the due process of law in hearing the case and resolving the matter, including with regard to its reasonableness and respect for the limits of the constitutional petition”*.

2. On 25 November 2020, the Bureau of the Venice Commission accepted dealing with this request in an urgent manner. The Commission decided to prepare two urgent opinions, one on the situation if the anti-corruption mechanism following Decision 13-r/2020 (addressing the first question raised by the President, CDL-PI(2020)018) and the present urgent opinion on the reform of the Constitutional Court (addressing the second and third questions).

3. Mr Carozza, Ms Cartabia, Mr Darmanović and Mr Grabenwarter acted as rapporteurs for this urgent opinion.

4. On 3 December 2020, the rapporteurs, assisted by Ms Granata-Menghini, Mr Dürr and Mr Dikov had virtual meetings with (in chronological order) the Deputy Head of the President’s Office of Ukraine and Chairperson of the Working Group on Judiciary Reform under the President’s Commission on Legal Reform, some Judges of the Constitutional Court, the *Verkhovna Rada’s* (Parliament) Committee on Legal Policy, the President’s Commission on Legal Reform as well as with representatives of the international community and civil society. The Commission is grateful to the Council of Europe Office in Kyiv for the excellent organisation of these meetings.

5. This opinion was prepared in reliance on English translations of the Ukrainian Constitution¹, the Law on the Constitutional Court², its Rules of Procedure³ and other documents. The translations may not accurately reflect the original versions on all points. The Venice Commission emphasises that in the present urgent Opinion it will not examine legislative proposals made by various political actors in response to decision no. 13-r/2000, or draft laws which are now in the process of adoption.

6. This urgent opinion was issued pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions (CDL-AD(2018)019) and will be presented to the Venice Commission for endorsement at its 125th online Plenary Session on 11-12 December 2020.

II. Background

7. On 27 October 2020, on a motion filed by 47 MPs, the Constitutional Court of Ukraine (sitting as a Grand Chamber, composed of 15 judges – 3 positions are vacant) adopted Decision 13-r/2020 ([CDL-REF\(2020\)078](#) and [CDL-REF\(2020\)078add](#)) that invalidated large parts of the anti-corruption legislation in force ([CDL-REF\(2020\)079](#)).

¹ http://www.ccu.gov.ua/sites/default/files/constitution_2019_eng.pdf.

² http://www.ccu.gov.ua/sites/default/files/law_on_ccu_amended_2017_eng.pdf.

³ http://www.ccu.gov.ua/sites/default/files/rules_2018_0.pdf

8. Four of the judges of the Constitutional Court, including the judge-rapporteur, were challenged by the President of Ukraine in his capacity as a party to the proceedings on the ground of conflict of interest, having been found by the National Agency for Corruption Prevention (NACP) to have failed to make due declarations of their financial situations, with referral to the National Anti-Corruption Bureau (NABU) for possible criminal investigations in two cases. They were therefore potentially directly concerned by the legislation at issue.

9. Following a first open hearing during which these allegations of conflicts of interest and the request of recusal were made, the Court withdrew and changed the type of proceedings thereafter from open hearings to a written procedure, stating that the change was due to the coronavirus crisis. The judges concerned did not withdraw from the case and participated in the judgment.

10. Decision 13-r/2020 of 27 October 2020, which was handed down in a hasty way,⁴ is somewhat hard to understand (see the section on reasoning below). The decision annulled Article 366-1 of the Criminal Code, which provides for criminal liability for a knowingly false asset declaration by government officials. Moreover, it declared some important powers of the NACP void. In this context, it declared unconstitutional the provisions of law on the verification of officials' e-declarations and deprived the NACP of the authority to check asset declarations and identify conflicts of interest (on issues of the anti-corruption mechanism, see parallel urgent opinion CDL-PI(2020)018).

11. In reaction to Decision 13-r/2020 President Zelenskyy presented draft law No. 4288 in Parliament. Draft law No. 4288 would:

1. declare null and void Decision 13-r/2020, as it had been adopted in the private interests of judges of the Constitutional Court and was arbitrary and ungrounded, contradicting the principle of rule of law and denying the European and Euro-Atlantic choice of the Ukrainian people;
2. ensure the continuity of the annulled provisions of the Criminal Code and the Law on the Prevention of Corruption;
3. terminate the powers of the judges of the Constitutional Court; and
4. ensure the selection and appointment of new judges of the Court.

12. Several other bills have been introduced, or proposals to introduce such legislation were made, aimed at resolving the constitutional crisis/breaking the resistance of the Constitutional Court. These aim, among other things, at:

- adopting not identical but similar provisions to the invalidated provisions;
- depriving the Constitutional Court of funding;
- increasing the quorum for decisions of the Court, thus probably blocking its work; and
- re-appointing new judges based on new criteria/procedures.

13. On 31 October 2020, the President of the Venice Commission and the President of the Group of States against Corruption (GRECO) sent a joint letter to the Speaker of the Parliament insisting that "[t]erminating the mandate of the judges is in blatant breach of the Constitution and of the fundamental principle of separation of powers. Violating the Constitution, even if for an arguably good cause, cannot lead to a culture of constitutionalism and respect for the rule of law, which the fight against corruption pursues."⁵

14. On 16 November 2020 the Speaker of Parliament, Mr Razumkov established a working group in the Parliament to prepare legislative amendments to overcome the crisis. In addition, on 16 November 2020, the Parliament launched the procedure for the selection of candidates

⁴ On this point see the accounts in the dissenting opinions.

⁵ <https://www.venice.coe.int/webforms/events/?id=3023>.

for a vacant position at the Constitutional Court (two more vacancies are to be filled by the Congress of Judges).

15. By letter of 25 November 2020, following exchanges with the President of the Venice Commission⁶, President Zelenskyy requested an urgent opinion of the Venice Commission on the constitutional situation created by Decision No. 13-r/2020 of 27 October 2020 of the Constitutional Court.

III. Decision 13-r/2020 of the Constitutional Court of Ukraine

16. Decision 13-r/2020 contains a number of peculiarities, as concerns its reasoning, possible conflicts of interest, the extension of the scope of the legal provisions that were found unconstitutional, and the absence of a period of time for the parliamentary implementation of the decision.

A. Reasoning of the decision

17. The reasoning of Decision 13-r/2020 is incomplete and not persuasive.⁷ This opinion will not enter into a detailed discussion of Ukrainian national law but it should be pointed out that an important part of the decision refers to international standards which are not presented in a coherent manner:

- the analysis of international standards seems one-sided, omitting important references on judicial accountability; for instance when it refers CCJE Opinion N° 21 (2018) on preventing corruption among judges, it fails to mention paragraph 37 of that Opinion which points out that GRECO recommends having a specific body inside *or outside the judiciary (emphasis added)* charged with the scrutiny of the timeliness and accuracy of such declarations;
- references to international standards are immediately followed by conclusions of the Court itself without developing specific arguments leading to these conclusions;
- Decision 13-r/2020 states that any form of control by a non-judicial organ of the financial disclosures and reporting by judges is *per se* contrary to general principles of judicial independence. This is not the case, as evidenced also by the practices in a variety of other countries.⁸ Judges are properly subject to various other forms of supervision and control by the other branches of government, such as basic criminal laws, taxation, etc. The Court's language is so categorical and unreasoned that it would appear to apply even to these.

18. Following a general presentation of the principle of judicial independence, the main part of the reasoning seems to be missing. Decision 13-r/2020 does not examine the very provisions that it invalidates. The Court only "concludes that certain provisions of the Law No.1700 concerning the powers of the National Agency for the Prevention of Corruption in terms of control functions of the executive over the judiciary" are unconstitutional but it does not analyse specific articles of that to come to this conclusion. This is particularly regrettable because the Court extended the scope of the challenged request by 47 Members of Parliament (see below) and invalidated also Articles 11, 13, 35, 48, 65, 131 of Law no. 1700 "On Preventing Corruption", without explaining why there is an intricate link between the challenged provisions and other provisions that were invalidated (see below). Furthermore, there is a reference to a "functional analysis" of the National Agency for the Prevention of Corruption but this very

⁶ <https://twitter.com/giannibuquicch1/status/1323664463501905922>;
<https://twitter.com/giannibuquicch1/status/1329804991067017218>.

⁷ See also dissenting opinion by Judge Lemak, referring on this point to Justice Scalia (CDL-REF(2020)078).

⁸ Asset declarations of judges are verified by bodies outside of the judiciary for instance in Albania, Armenia, Azerbaijan, Bulgaria, Czech Republic, Estonia, Georgia, Latvia, Lithuania, Moldova, Montenegro, North Macedonia, Romania, Serbia, Slovakia and Slovenia (see the Fourth Evaluation Round of GRECO)
<https://www.coe.int/en/web/greco/evaluations/round-4>.

analysis is not set out in Decision 13-r/2020, not even by reference to external studies or similar sources.

19. It is true that by Ruling no. 9-up/2020 of 27 October 2020⁹, the Constitutional Court split the request by 47 MPs - case no. 1-24/2020(393/20) – into two separate proceedings. More reasoning could be forthcoming in a second decision that is still to be rendered. However, each decision of the Constitutional Court should have its own reasoning and should be understandable on its own.

20. Finally, the decision does not explain why it annuls legal provisions that apply to all civil servants while its reasons refer to judges only. During the meetings with the rapporteurs, the Court mentioned that Decision 13-r/2020 related to judges only and would not cover the application of the invalidated provisions in respect of civil servants and a decision on civil servants would still need to be handed down but this could not yet be spelled out in Decision 13-r/2020. Such an explanation leaves the Commission somewhat perplexed. This would mean that the Court would have knowingly adopted a decision that leaves it unclear whether legal provisions remain applicable or not. Such a judicial drafting technique is a matter of concern: the scope and the effects of a Constitutional Court's decisions have to be clear and understandable, especially when the decision invalidates legal provisions.

21. To sum up, Decision 13-r/2020 demonstrates that the style of reasoning and decision drafting of the Constitutional Court has serious shortcomings, falls short of standards of a clear reasoning in constitutional court proceedings, and requires improvement.

B. Conflicts of interest – recusals / withdrawals

22. It is the object of criticism that some judges of the Constitutional Court were allowed to sit on the case leading to Decision 13-r/2020. Three of the judges had indeed been notified by the National Agency for Corruption Prevention that their asset declarations are incomplete.

23. Article 60 of the Law on the Constitutional Court provides strict rules on withdrawal of the judges of the Constitutional Court when they have a conflict of interest in a specific case. Article 60 (1) item 1, provides that recusal (withdrawal) shall be applied when the judge *“is interested in the outcome of the case either directly or indirectly”*. *A priori*, this would seem to be the case when a judge is under investigation on the basis of a legal provision that is the subject of the review by the Constitutional Court. This issue will be discussed below also from a comparative perspective.

24. Although recusal was formally requested by one of the parties, the Court and the individual judges in question have made no effort to justify their implicit denial of the recusal request – thus lacking transparency and explanation.

C. Scope of the decision – limitation to provisions challenged in the request

25. While in some jurisdictions, the constitutional court or equivalent body is strictly limited to the examination of the provisions specifically challenged in the petition to the court, other courts are also empowered to invalidate provisions that are directly linked to those found unconstitutional, if the continuing operation of those additional provisions would result in an incoherence in the legal system.

26. In Decision 13-r/2020 the Constitutional Court of Ukraine indeed went beyond the request of the 47 Members of Parliament. In addition to the challenged provisions, the Court also (partly) invalidated Articles 11, 13, 35, 48, 65, 131 of Law no. 1700 "On Preventing Corruption".

⁹ Rulings are procedural decisions of the Constitutional Court.

In paragraph 10 of Decision 13-r/2020 the Court states that these provisions are linked to Article 11.1.8 of Law No.1700 but it does so summarily and does not examine in which way specific provisions would violate judicial independence. In the light of the principle of presumption of constitutionality and the principle *ne eat iudex extra petita*, such an examination is required, notably when the scope of the request is extended.

27. Among the provisions invalidated by extension of the scope of the request, Article 35¹⁰ is particularly relevant because it provides that in the event of a real or potential conflict of interest of a member of a number of public bodies, including the Constitutional Court, that person must not participate in the decision making. Other members of that public body who know about such a conflict of interest may raise that issue and a reference to such a conflict shall become part of the decision taken. However, even after the annulment of that article, Article 60 of the Law on the Constitutional Court remains in force (see below).

28. The situation in Ukraine concerning the extension of the scope of the request is specific because it was among the countries that in the past explicitly provided for such an extension of the scope of the request. The previous version of the Law of Ukraine "On the Constitutional Court of Ukraine"¹¹ provided in its Article 61, para 3 that *"If in the course of consideration of a case on a constitutional petition or constitutional appeal non-compliance with the Constitution of Ukraine of other legal acts (their separate provisions) is revealed, except for those in respect of which proceedings have been opened and which influence the decision or opinion in the case, the Constitutional Court Ukraine recognizes such legal acts (their separate provisions) as unconstitutional"*.

29. However, this provision no longer exists in the current Law in force.¹² There is a presumption that a removal of a provision indicates that the legislature made a deliberate choice and that this was not an "oversight". If that is the case, then the Court's judgment apparently exceeded its proper scope in Decision 13-r/2020. In order to overcome any uncertainty in future proceedings, Parliament should clarify this in the Law on the Constitutional Court.

¹⁰ Article 35. Peculiarities of resolving a conflict of interest arising in the activity of certain categories of persons authorized to perform the functions of government or local self-government

1. Rules for resolving a conflict of interest in the activities of the President of Ukraine, People's Deputies of Ukraine, members of the Cabinet of Ministers of Ukraine, heads of central executive bodies, which are not part of the Cabinet of Ministers of Ukraine, judges, judges of the Constitutional Court of Ukraine, the chairmen, vice-chairmen of regional and district councils, city, village, settlement heads, secretaries of city, village and settlement councils and deputies of local councils are determined by laws governing the status of the respective persons and the basis of the organization of the respective bodies.

{Part 1, Article 35 as amended according to the Law No. 1798-VIII of December 21, 2016}

2. In the event of a real or potential conflict of interest of a person authorized to perform the functions of government or local self-governments, or other similar person, who is part of a collective body (committee, commission, board, etc.), this person has no right to participate in the decision-making process of this body.

Any relevant member of the collegial body or participant of the meeting who is directly related to the question under consideration may state the conflict of interest of such person. A statement about a conflict of interest of a member of a collegial body shall be included in the minutes of the meeting of the collegial body.

If the non-participation in the decision-making process of an agency of a person authorized to perform the functions of government or local self-governments, or other similar person, who is a part of that collective body, results in loss of competence by this agency, the person's participation in decision-making should be subject to external controls. The respective collective agency makes the decision on exercising external control.

¹¹ <https://zakon.rada.gov.ua/laws/show/422/96-bp#Text>

¹² <https://zakon.rada.gov.ua/laws/show/2136-19#Text>.

D. Absence of postponement of the entry into force of the annulment of provisions found unconstitutional.

30. The Venice Commission notes that in this case the Constitutional Court did not make use of its competence provided by Article 91 of the Law on the Constitutional Court,¹³ which gives the Court the power to establish in a decision a time-limit for its implementation by the legislature. The Constitutional Court imposed this three-month time-limit for instance in its Decision 11-r/2020 of 16 September 2020 declaring several provisions of the law establishing NABU unconstitutional, stating that it was doing so “given the necessity to ensure the proper functioning of the National Anti-Corruption Bureau of Ukraine”. Notwithstanding the fact that NABU is also a body working on anti-corruption, in Decision 13-r/2020 the Court did not do the same, with the effect that the decision entered into force with its publication and numerous anti-corruption cases were therefore immediately closed and criminal judgments based on Article 366-1 of the Criminal Code of Ukraine were overturned.

31. Not all systems of constitutional adjudication allow for such a delayed implementation of a judgment of unconstitutionality. Where the power to suspend temporarily a declaration of unconstitutionality does exist, however,¹⁴ the Venice Commission is generally in favour of such delays of the entry into force of decisions of the constitutional courts to avoid legal gaps and legal uncertainty following the repeal of legal provisions¹⁵ In its 2016 Opinion on the draft Law on the Constitutional Court of Ukraine, the Venice Commission had strongly supported that possibility.¹⁶ Such delays are particularly important when they concern the annulment of criminal provisions which can lead to the immediate acquittal of persons who may have committed deeds that could be punishable even under other criminal provisions. The practice of any Constitutional Court in imposing delays of this kind should be consistent given the fact that they lead to a continued application of a law found unconstitutional.

IV. Method of reform

32. In light of issues identified in Decision 13-r/2020, it is appropriate and even necessary to go beyond the analysis of the decision itself to discuss possible ways of addressing structural problems that are revealed by the Commission’s analysis of the decision in question.

33. The difficulties presented by the problematic Decision 13-r/2020, on the one hand, and the corresponding proposal of the President in Draft Law 4288, on the other, concern an underlying issue that in different ways arises in all constitutional democracies: “who has the final say? the Constitutional Court or Parliament?” The answer depends in part on the temporal scope of the conflict: in relation to a specific case being litigated, the final say is for the Constitutional Court. The Constitutional Court’s decisions are final and binding. Its decisions are not infallible, but they are final nonetheless, even when they might be considered wrong. This principle is clearly stated in many constitutions, including the Constitution of Ukraine.¹⁷

34. On the other hand, Parliament can enact legislation that replaces annulled provisions as long as they do not repeat the same provisions that have been invalidated and take into

¹³ Article 91: “Determination by the Court of the Date of Loss of Effect of an Act (Specific Provisions Thereof)

1. Where laws of Ukraine or other acts or specific provisions thereof are found by the Court to be non-conforming to the Constitution of Ukraine, they shall lose their effect from the day of the adoption by the Court of a decision declaring their unconstitutionality, unless otherwise provided by the same decision, but not earlier than the date of its adoption.”

¹⁴ Venice Commission, CDL-AD(2010)039rev, Study on individual access to constitutional justice, paras 197-198.

¹⁵ *Ibid.*, para. 195; CDL-AD(2015)024, Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, para. 11.

¹⁶ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 63.

¹⁷ Article 151 of the Ukrainian Constitution reads: “Decisions and opinions adopted by the Constitutional Court of Ukraine shall be binding, final and cannot be challenged.”

account the Court's arguments.¹⁸ Only the constituent power, often Parliament with a qualified majority or other reinforced procedure, can establish a new framework that will be binding also on the Constitutional Court, through the constitutionally-established procedures for enacting constitutional amendments.

35. Political bodies must not be allowed to terminate the powers of individual judges of the Constitutional Court (except through processes of impeachment where this is established by the constitution), or of the whole body of the Court collectively. Nor should Parliament block the activity of the Constitutional Court through financial pressure or procedural obstacles or similar efforts.¹⁹ This would amount to a major, severe, breach of the rule of law,²⁰ and the constitutional principles of the separation of powers and the independence of the judiciary.

36. In a democratic state, governed by the rule of law, criticism of constitutional court decisions is permissible but the holders of public office must show restraint in their criticism. In particular threatening statements against judges aimed at influencing the Court's decisions are inadmissible.

37. Notwithstanding the circumstances set out in Section III above, the rule of law therefore requires that Decision 13-r/2020 be implemented. As pointed out in the joint letter by the Presidents of the Venice Commission and GRECO the annulment of a decision of the Constitutional Court and the dismissal of all its judges would be unconstitutional and would contradict the rule of law.

38. The Constitutional Court cannot be "punished" for its decisions, but its working can be improved. Therefore, while the parallel opinion CDL-PI(2020)018 examines ways to implement Decision 13-r/2020 in order to enable the effective continuation of the work of the anti-corruption bodies within the framework of the Ukrainian Constitution, this opinion examines ways in which the Constitutional Court could be reformed in ways consistent with the Constitution of Ukraine and with sound principles of constitutionalism. Decision 13-r/2020 is therefore only an indication that a reform of the Constitutional Court is warranted and a starting point for a reform. In this context, the Commission will also refer to its 2016 Opinion on the then draft law on the Constitutional Court for reference.²¹

39. During the video-meetings, the parliamentary working group informed the rapporteurs about a proposal of regulating the procedure of the Constitutional Court entirely in the Law on the Constitutional Court, and not to leave part of it to be defined by the Constitutional Court itself. The proponents of this idea refer to Article 153 of the Constitution, which provides that the *"organisation and operation of the Constitutional Court of Ukraine, status of judges of the Court, grounds to apply to the Court and application procedure, case consideration procedure and enforcement of decisions of the Court shall be defined by the Constitution of Ukraine and by law."* (emphasis added)

40. There is no doubt that important parts of the procedure before the Constitutional Court should be regulated in the Law on the Constitutional Court, notably aspects that create rights or obligations for individuals. This is important in order to be in conformity with Article 6 ECHR.

¹⁸ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.3.iii and iv., iii. "Are Parliament and the executive obliged, when adopting new legislative or regulatory provisions, to take into account the arguments used by the Constitutional Court or equivalent body? Do they take them into account in practice? iv. Do Parliament or the executive fill legislative/regulatory gaps identified by the Constitutional Court or equivalent body within a reasonable time?"

¹⁹ Venice Commission, CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland; CDL-AD(2016)026, Poland - Opinion on the Act on the Constitutional Tribunal.

²⁰ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para. 107, II.3.iii.

²¹ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court.

41. Completely removing the autonomy of the Constitutional Court to adopt its own rules of procedure is not warranted, however. In respect of Azerbaijan, the Commission observed that “[t]he 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.”²²

42. In respect of Armenia, the Venice Commission criticised the level of detail of the Law on the Constitutional Court: “One pervasive issue in this draft Law is the very detailed nature of some of its provisions. A number of them could be considered to be too detailed for a constitutional law such as this draft Law and might find their place in the Rules of Procedure, which are easier to amend. In light of the above, the Venice Commission strongly suggests that the Armenian authorities reconsider the demarcation between what should appear in this draft Law and what should appear in the Rules of Procedure”.²³

43. In the light of the principle of loyal co-operation between State bodies (see below), the Constitutional Court should be available to provide its expertise for the improvement of the Law on the Constitutional Court. In the light of the specific situation in Ukraine, if amended provisions of the Law were to be challenged before the Court itself, the Court should show some restraint. The Venice Commission would be available for assistance in distinguishing provisions which can improve the work of the Court from others that might block its work..

V. Possible avenues for a reform of the Constitutional Court

A. Quality of the reasoning

44. The Venice Commission regularly insists on the importance of a coherent reasoning by constitutional courts: “It is important to stress the relevance of the Constitutional Court’s reasoning, which should guide ordinary courts. Respect shown by the ordinary courts for the Constitutional Court’s reasoning is the key to providing an interpretation that is in conformity with the Constitution”.²⁴ The decision has to be sufficiently clear to allow the public and notably the legislature to react appropriately and to implement the decision. The Commission has also pointed out that “for the sake of constitutional stability and legal certainty, a Constitutional Court should be consistent with its own case-law”.²⁵

45. The type of reasoning applied in constitutional court decisions can be somewhat different from that of civil or criminal courts, where typically facts are established, and these facts are then evaluated against applicable legal provisions. Because of the very nature of constitutions, constitutional courts often interpret the provisions of the Constitution in light of general constitutional principles, such as judicial independence or separation of powers. It is then their task to judge the conformity of legal provisions with the constitution.

²² Venice Commission, CDL-AD(2004)023 Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, paragraphs 5-6

²³ Venice Commission, CDL-AD(2017)011 Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, paragraphs 100-101.

²⁴ Venice Commission, CDL-AD(2007)036 Opinion on Draft Amendments to the Law on the Constitutional Court, the Civil Procedural Code and the Criminal Procedural Code of Azerbaijan, paragraphs 22.

²⁵ Venice Commission, CDL-AD(2019)012, Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament in the Republic of Moldova, para. 53.

46. For a constitutional court decision to be well reasoned, it is therefore necessary to examine specific legal provisions that are being assessed, and to explain for each provision why it is either compatible with or contradicts the constitution. In Ukraine, the legislature could prescribe in the Law on the Constitutional Court that each legal provision found unconstitutional has to be examined individually in the decision of the Court.

47. As constitutional interpretation sometimes differs from the interpretive techniques applied by courts to ordinary laws, it might be useful that newly appointed judges (and the staff of the Court) benefit from special training on methods of constitutional interpretation. This can apply even to highly qualified persons who are legal experts in their field of law (see below as concerns the qualifications for judges). Together with other stakeholders, the Venice Commission might be in a position to assist in such an effort.

B. Conflicts of interest

48. Before referring to the specific situation in Ukraine, a comparative overview of how conflicts of interest are handled in other constitutional courts and equivalent bodies may be useful.

1. Comparative perspective

49. From a comparative perspective, laws on the organisation and the procedure of constitutional courts regularly provide for cases and situations in which a justice has a conflict of interest and as a consequence is excluded from participating in a decision. There is a great diversity of the applicable systems, ranging from the express exclusion of withdrawal of constitutional courts judges to strict rules excluding judges.

50. The extreme case is the Constitutional Court of Romania, where the legislation provides that parties cannot demand recusal of the judges and that judges are obliged to sit and vote in all cases without exception.

51. Given that nearly all legislation (tax, social security, electoral matters) can concern the judges also as an individual, there are not such general recusals, as they always would lead to a *non liquet*. The reason for such a position may be that in abstract proceedings constitutional courts do not resolve concrete controversies that involve definite persons with whom a specific situation of incompatibility may arise, but reviews parliamentary legislation, applicable to the general public, including the judges of the constitutional court. This may of course be different for complaints to the Constitutional Court involving a specific case or controversy. This position also does not address the situation that may arise where a judge has given reason to believe that he or she has prejudged a case or otherwise enters into a dispute with an improper bias.

52. In the United States, there is no formal obligation for the Supreme Court justices to withdraw, although in practice justices will occasionally do so when a party requests recusal. This is also generally the case with respect to the Supreme Court of Canada. In Italy Article 29 of the Rules of Procedure explicitly states that the general principles on recusal and withdrawal of judges do not apply to judges of the Constitutional Court. Austria is a country where the application of rules for the judge's recusals is very strict. There the Court also benefits from the system of substitute judges who can sit when a titular member has to withdraw.

53. While the judges of the Constitutional Court of Romania have to participate in all cases and a quorum is ensured, the Constitutional Court of South Africa does not decide when there is no quorum because of withdrawals. However, the Constitutional Court of South Africa is on top of the pyramid of ordinary courts and the last judgement of the Court of Appeals will then stand in such a case.

54. Although there is a wide variation in constitutional practice, the Venice Commission regards it as preferable that there be clear rules requiring withdrawal of judges in cases of personal conflicts of interest or any other circumstances that could create a perception of possible bias.

2. Situation in Ukraine

55. As pointed out above, Article 60 of the Law on the Constitutional Court of Ukraine recognises situations of conflict of interest of the Constitutional Court judges and provides for withdrawal/recusal from the case for judges who might find themselves in a conflict of interest.

56. Article 60 (5) refers to the Rules of Procedure as concerns the manner of statements of recusal or withdrawal of the judge. Indeed, Section 44 of the Rules of Procedure of the Constitutional Court²⁶ establishes the rules of the recusal of a judge upon request by a party and self-recusal by the judge him-/herself. The Grand Chamber or the Senate concerned decide on the validity of the (self-)recusal without the judge concerned. According to Section 44 (8) of the Rules of Procedure, a “[f]ailure to notify the Court by the Judge of the existence of an actual conflict of interests entails execution of actions or making decisions by him/her provided there is an actual conflict of interests entails liability in accordance with the legislation.”

57. In principle, disregard of the legal provisions on recusal is a grave threat to the institutional integrity of the Court and to the rule of law. There may however be specific reasons why this is not the case for a given decision to be made.

58. During the discussions with the rapporteurs, the judges of the Constitutional Court argued that in the procedure resulting in Decision 13-r/2020, potentially all judges were affected by the challenged provisions and would be obliged to withdraw, with the effect of a *non liquet* – the impossibility to adopt a decision - that had to be avoided.

59. First, a distinction has to be made between legal provisions that potentially affect in a generic way the court and its judges and those where there is a direct application of challenged provisions to the judge concerned. While all judges were indeed potentially concerned, as is the case for virtually all legislation, it seems that in this case some judges had much more direct, personal, and serious interests in the outcome of the case that would fall under the obligation specified in Article 60. Even if the withdrawal of some judges might not have affected the quorum of the Court, the valid point raised that a *non-liquet* has to be avoided merits discussion.

60. When the quorum of the Court is potentially affected, the Venice Commission agrees that “[...] 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. [...]”²⁷ Such a situation can even arise in a case that concerns the integrity of the judges of the Court itself, as the Commission found in an *amicus curiae* brief relating to Albania: “However, if there are grounds to believe that a judge considering the constitutionality of the Vetting Law would fail the requirements established by this very law and thus appears to be unfit for the office, not only the judge has a right but, in certain circumstances, may be under the obligation to resign, for instance, if the judge concerned foresees his/her failure to satisfy the background assessment due to inappropriate contacts with the members of the organized crime. However, since there is a presumption that

²⁶ http://www.ccu.gov.ua/sites/default/files/rules_2018_0.pdf.

²⁷ Venice Commission, 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, paragraph 7.

*judges of the court are acting in good faith, the judge should be allowed to evaluate constitutionality of the requirements established by law*²⁸

61. For all judges, including those of constitutional courts, it is important not only to act in an impartial way but also to convey the perception of impartiality to the public. What is essential in such a difficult situation is therefore that this issue be presented transparently in the decision of the Court itself or – where the legal tradition is open for alternative ways – also in a separate public decision or procedural ruling to avoid any speculation why a judge participated in a decision. This seems not to be the case in Decision 13-r/2020, which lacks discussion of this issue and does not explain why some judges, including even the reporting judge, did not withdraw when this a priori would have been warranted. The procedure under Article 60 of the Law and Section 44 of the Rules of Procedure is not set out in the decision.

62. An amendment to the Law on the Constitutional Court could ensure that decisions on (self-) recusals and their reasoning be set out clearly in the main decision adopted by the Constitutional Court or in a separate public procedural ruling or decision. The principle that conflict of interest (notably financial) should lead to recusal unless there is a problem of *non liquet* could be explicitly set out.

63. An amendment to the Law could also change the quorum requirements in those cases where a quorum is lost due to the recusal of judges, thereby avoiding the risk of non liquet.

64. It would also be helpful if the Law on the Constitutional Court gave a better, more detailed, definition of “conflict of interest”, for example singling out financial conflicts of interest, specifically when this results resulting from protocols established by NAPC or the opening of investigations by NABU, as a most serious kind of conflict.

C. Disciplinary sanctions

65. In Ukraine, judges of the Constitutional Court can be dismissed only by the Court itself²⁹ and it is only the Court which is empowered to take disciplinary any disciplinary measures against one of its judges. The adoption of disciplinary sanctions against the judges of the Court seems to be within the competence of the Standing Commission on the Rules of Procedure and Ethics of the Court but this is not spelled out. The disciplinary procedure should be regulated in the Law on the Constitutional Court, with further details set out in the Rules of Procedure.

66. The question arises whether the absence of a withdrawal in a pending case can lead to disciplinary sanctions when such withdrawal was warranted under Article 60 of the Law on the Constitutional Court. Section 44 (8) of the Rules of Procedure provide for “liability in accordance with the legislation” when the judge did not make a statement of withdrawal in a situation of a conflict of interest. As shown above, the reference to liability in accordance with the legislation seems to be moot if there is a lack in the legislation.

67. In extreme cases, that might even lead to the dismissal of the judge concerned. Article 149 of the Constitution provides that only the Constitutional Court itself, acting with a qualified majority, can dismiss a judge of the Constitutional Court for, among other reasons:

“[...] 3. commission by him or her of a serious disciplinary offence, flagrant or permanent disregard of his or her duties to be incompatible with the status of judge of the Court or reveals non-conformity with being in the office”.

²⁸ Venice Commission, CDL-AD(2016)036 *Amicus Curiae* Brief for the Albanian Constitutional Court on the Law on the Transitional Re-Evaluation of Judges and Prosecutors, para. 25.

²⁹ Article 149 of the Constitution.; Article 21 of the Law on the Constitutional Court; Section 13 of the Rules of Procedure of the Constitutional Court.

In these cases, “dismissal of a judge of the Constitutional Court of Ukraine from his or her office shall be decided by not less than two third votes of full Court”.

68. The question is however what happens when the judge made such a statement for self-recusal or when a party requested the recusal of a judge and the Grand Chamber of senate respectively decide that the (self-)recusal is not warranted. It would seem that in such a situation the judge concerned would not incur disciplinary liability.

69. In the absence of a discussion of this topic in Decision 13-r/2020 it remains unclear whether there was a decision of the Grand Chamber under Section 44 of the Rules of Procedure in this case.

70. In view of the special need for integrity of the judges of the Constitutional Court, an amendment to the Law on the Constitutional Court could ensure that disciplinary proceedings and decision regarding a judge of the Constitutional Court are transparent and always made public not only during the hearing (as provided for by Section 44 of the Rules of Procedure but systematically together with the adopted decision. The rulings on recusal should be reasoned in substance).

D. Procedure for appointment of judges to the Constitutional Court

71. In order to ensure a high quality of the decisions of the Constitutional Court, the procedure for appointment of the judges is essential. The constitutional amendments of 2016 introduced the principle of competitive selection of the judges, which was welcomed by the Venice Commission.³⁰

72. In its opinion on the draft constitution in 2015, the Venice Commission had also recommended to introduce an election of the judges on the parliamentary quota with a qualified majority. That recommendation has not been taken up. The Commission repeats it, hoping that it can be considered in the framework of a future constitutional amendment.³¹

73. The judges of the Constitutional Court are appointed by the President, the Parliament and the Congress of Judges (Article 148 of the Constitution and Article 9 of the Law on the Constitutional Court – each appointing body appoints six judges respectively).

74. While the general principle of competitive selection by screening committees applies to all three appointing bodies, the appointment procedures applied by the three appointing bodies do not ensure the highest level of moral and professional qualification of the candidates. Each of the appointing bodies can determine its own procedures. In its Opinion on the draft Law on the Constitutional Court, the Venice Commission had deplored the absence of clear regulations on the composition and work of the screening committees.³²

³⁰ Venice Commission, CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015, para. 24; see also CDL-AD(2015)043, Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027), para. 6.

³¹ Venice Commission, CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015, para. 25; see also CDL-AD(2015)043, Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027), para. 17.

³² Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), para; 13 seq.

75. Following a recommendation by the Venice Commission, in 2017 the President of Ukraine established a commission with international participation³³ (Ms Hanna Suchocka, Honorary President of the Venice Commission), which screened the candidates. This experience has been assessed very positively by all interlocutors. Conversely, Parliament conducts the screening in a political procedure, without expert input. For the Judiciary, the Council of Judges is responsible for conducting the first stage of the competition and the preselecting of candidates for a final vote by the Congress of Judges. There is a widespread perception that appointments are too often politically motivated.³⁴

76. A reform of the appointment system might be the occasion to remedy to that problem. The judges of the Constitutional Court need to have high moral values and be lawyers of recognised competence. Certain rules of incompatibility apply: *“A citizen of Ukraine who has command in the state language, attained the age of forty on the day of appointment, has a higher legal education and professional experience in the sphere of law not less than fifteen years, has high moral character and is a jurist of recognised competence can be a judge of the Constitutional Court of Ukraine”*.³⁵

77. Among these qualities, the requirement of a “high moral character” merits particular attention, alongside professional qualities. To ensure that only persons with these qualities can become judges of the Constitutional Court, a screening body with an international component could be established.

78. For comparison, in co-operation with the international donor community, the Ukrainian authorities are currently preparing urgent legislation to establish an “Ethics Commission” for the ordinary judiciary.³⁶ In parallel, draft Law no. 3711 currently being examined in Parliament, provides for a Competition Committee, which would be in charge of ensuring the integrity of the members of the High Council of Justice and of re-establishing the High Qualification Commission of Judges (HQCJ) that is in charge of the selection of candidates for judicial office.³⁷ These bodies would have a mixed national and international composition.

79. A body with a similar – or even the same – international component could be entrusted with the screening of candidates for office as judge of the Constitutional Court. Such a screening body could also include representatives of civil society, possibly drawn from the existing Public Integrity Council, which advises on the qualities of judges candidates for the ordinary courts.³⁸

80. In addition, the expertise of highly reputed international experts (e.g. former presidents or judges of the European Court of Human Rights) could be sought as concerns an evaluation of the qualities of the candidates in the field of comparative constitutionalism or the protection of human rights. Examples for such expertise on the European level are the Article 255 TFEU panel for the Court of Justice of the European Union³⁹ and the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.⁴⁰

³³ For an earlier case of an international contribution to the work of a Constitutional Court, see Venice Commission, CDL(1999)079, Secretariat memorandum on progress in co-operation with Croatia.

³⁴ <http://en.dejure.foundation/library/new-model-for-selecting-constitutional-court-judges>.

³⁵ Article 148 of the Constitution.

³⁶ Venice Commission, CDL-AD(2020)022, Ukraine – Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Law ‘on the Judiciary and the Status of Judges’ and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no. 3711), paras. 19 seq.

³⁷ Ibid., CDL-AD(2020)022, para. 40 seq.

³⁸ In the USA, the American Bar Association undertakes a very rigorous investigation of the character and competence of every nominee to the federal judiciary, and makes public evaluations (“highly qualified,” “qualified,” or “not qualified”) that are taken into account by the Senate in its confirmation process.

³⁹ Cf. M. Bobal, *Selecting Europe’s judges*, 2015.

⁴⁰ Cf. C. Grabenwarter/M. Pellonpää, “High judicial Office” and “Jurisconsult of Recognised Competence”: Reflections on the Qualifications for Becoming a Judge at the Strasbourg Court, *ZaöRV* 2020, pp. 1-22.

81. The screening body could be a strict filter, admitting for appointment by the three appointing authorities only candidates who were positively evaluated. Alternatively, the pre-filtering body would make public recommendations only.

E. Improving the procedural legitimacy of the decision of the Constitutional Court

82. With the introduction of constitutional complaints against legal provisions (normative constitutional complaint)⁴¹ under Article 151 of the Constitution and the revised Law on the Constitutional Court, senates of six judges were introduced at the Court to decide on these complaints together with boards of three judges to examine the admissibility of complaints.⁴²

83. Already in its 2016 Opinion on the draft Law on the Constitutional Court, the Venice Commission raised the problem of possibly diverging case-law of the senates: *“The annulment of a law on the basis of an individual complaint can be as important as that on the basis of a request from an institution (petition / appeal). The problem with deciding in parallel senates (there seems to be no distribution by substance matter as in Germany) may be the coherence between their case-law.”*⁴³ At the time, the Venice Commission recommended to solve this issue by obliging senates to relinquish jurisdiction to the Grand Chamber when they wanted to deviate from previous case-law.

84. In the light of current discussions, it might be useful to amend the Law on the Constitutional Court to provide that when a senate comes to the conclusion that a legal provision should be annulled, before the entry into force of that decision, the President of Ukraine or the Verkhovna Rada can request that the final decision be taken by the Grand Chamber. A full procedure by the Grand Chamber would significantly slow down the work of the Constitutional Court. However, this risk could be limited if the Grand Chamber would not start its own proceedings but simply vote on the decision already prepared by the senate and only either confirm it or invalidate it. This would lead to enhanced coherence between the case-law of the senates. In parallel to such a procedure for individual complaint proceedings, the transparency of abstract proceedings upon request by state authorities (“petitions”) should be improved by providing that written proceedings in the Grand Chamber are exceptional only.

F. Possibility for re-opening of cases

85. The Law on the Constitutional Court does not allow for the re-opening of the proceedings of the Constitutional Court. Its decisions are final and binding.⁴⁴ The Court can provide clarifications of its decisions⁴⁵ but it cannot change the substance of its decisions when there is a fundamental change of circumstances.

86. Such a possibility could be provided for in the Law on the Constitutional Court in cases where the Constitutional Court has failed to abide by the laws and procedures applicable to itself – in particular, where judges have participated who should have been excluded because of conflicts of interest. The problem with such a provision would be that due to the final and binding nature of the decision of the Constitutional Court, it would be for the Court itself to come to the conclusion that it failed to abide by the law.

⁴¹ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 34 seq; general: CDL-AD(2010)039rev, Study on individual access to constitutional justice, para. 77 seq.

⁴² Article 61 of the Law on the Constitutional Court.

⁴³ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 59.

⁴⁴ Article 150 of the Constitution.

⁴⁵ Article 95 (2) of the Law on the Constitutional Court.

87. The Venice Commission was rather hesitant as to the possibility for a constitutional court to re-open its proceedings: *“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.”*⁴⁶

88. In a more recent opinion, referring to criminal activity of judges of a constitutional court, the Venice Commission was more nuanced: *“Since the decision of a Constitutional Court is regarded as final and respecting its decision is in conformity with the constitutional order and in the interest of legal certainty, reviewing a judgment by a Constitutional Court must be an exception. This is where a separation needs to be drawn between the judge’s criminal activity (e.g. there could be a video recording of the judge accepting a bribe and promising to take a decision in a given way) from the adopted court decision itself. The judge should be punished for the crime s/he has committed. Functional immunity does not cover ordinary crimes and hence the judge should face criminal responsibility. ...*

In general, a judgment enters into legal force and becomes binding on the court itself, which cannot start a new procedure. In some situations, a provision for the reopening of a judgment may be required. This requirement often exists, for instance, for member States of the Council of Europe in response to a judgment by the European Court of Human Rights, which finds that the member State has breached its obligations under the European Convention on Human Rights (ECHR) and the Constitutional Court has rendered a decision contributing to this breach. There are, generally, no legal provisions that allow for the reopening or reviewing of a judgment specifically on the basis of offences (e.g. bribery) committed by a Constitutional Court judge in his or her function leading to a tainted judgment. However, proof that a bribe has been accepted by a Constitutional Court judge (criminal conviction) could provide a new element to reopen a judgment under the applicable general procedural rules. Constitutional court laws often refer to general (mostly civil) procedural codes to be applicable in constitutional proceedings - subsidiarily.

In summary, it is important that only the Constitutional Court itself be able to revise its judgments if there is proof of a criminal act in adopting it (criminal conviction of a judge). No other public authority can be authorised to do so. ...

*However, such a procedure would only be possible if it has a legal basis in the country concerned, i.e. if there is legislation that clearly provides for this possibility. For this reason, an internal reexamination procedure of the Constitutional Court would be needed rather than a review procedure by other public authorities such as Parliament or the Supreme Court (which already deals with minor and administrative offences by Constitutional Court judges (Article 16(2) of Law No. 317-XIII)). When there is no such possibility, and if this is warranted in substance, a constitutional amendment may be necessary to overcome a Constitutional Court judgment that was adopted involving a criminal act of one of the court’s judges.”*⁴⁷

89. The Venice Commission, therefore, does not recommend instituting a possibility for a Constitutional Court to re-open its proceedings, in general. That could easily be abused for exerting pressure on the Court to re-open its proceedings for political reasons. Such a possibility could however be opened when the criminal liability of a judge relating to that case

⁴⁶ Venice Commission, CDL-AD(2002)016, Opinion on the Draft Law on the Constitutional Court and Corresponding Amendments of the Constitution of the Republic of Moldova, paragraph 66.

⁴⁷ Venice Commission, CDL-AD(2019)028 Republic of Moldova – *Amicus Curiae* Brief on the criminal liability of the Constitutional court judges, paras. 45-50.

(e.g. bribe-taking) has been established. [In any case, a re-opening of the decision cannot lead to the reinstatement of a law that has already been annulled. That would change the nature of the Court from a negative to a positive legislator.]

G. Recourse to international assistance

90. Constitutional courts or the European Court of Human Rights can make requests for "*amicus curiae* briefs" to the Venice Commission relating to cases pending before them, in which the Commission provides information on comparative constitutional and international law issues. In briefs, the Venice Commission does not address the question constitutionality of a specific legal provision, but it leaves that decision to the requesting constitutional court. For this reason, against the background of the pending case, the requesting Courts formulate specific questions they would like the Venice Commission to answer.

91. When the Venice Commission prepared its Opinion on the draft Law on the Constitutional Court of Ukraine in 2016, the Court had then showed a rather restrictive attitude towards international assistance.⁴⁸ However, since then, the Constitutional Court of Ukraine has already twice requested the assistance of the Venice Commission on two difficult pending cases relating to international standards in the form of requests for *amicus curiae* briefs.⁴⁹ In its 2016 Opinion on the draft Law on the Constitutional Court, the Venice Commission had even recommended that the law provide that Court should actively request *amicus curiae* briefs.⁵⁰

92. In the discussion with the rapporteurs, the judges of the Constitutional Court accept the usefulness of *amicus curiae* requests to the Venice Commission. However, they pointed out that it may be necessary to adapt the Law on the Constitutional Court to allow for longer deadlines in constitutional complaint cases when the Court requests an *amicus curiae* brief from the Venice Commission.⁵¹

93. The Venice Commission is available to provide more such *amicus curiae* briefs, when the deadlines required by the Constitutional Court allow the Commission to adopt these briefs at its plenary sessions.

VI. Constitutional culture - loyal co-operation between State Powers as a precondition for effective constitutional justice

94. With regard to defamatory declarations reportedly directed against members of the Constitutional Tribunal, the Commission – in the opinion on Romania – held that a "*public authority, in its official capacity does not enjoy the same freedom of expression as does an individual who is not entrusted with public functions. State bodies may of course also publicly disagree with a judgment of the Constitutional Court but in doing so they have to make clear that they will implement the judgment and they have to limit criticism to the judgment itself. Personal attacks on all judges or individual judges are clearly inadmissible and jeopardize the position of the judiciary and the public trust (...)*".

95. The Commission emphasised that "*independence and neutrality of the Constitutional Court is at risk when other state institutions or their members attack it publicly. Such attacks are in*

⁴⁸ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 66.

⁴⁹ Venice Commission, CDL-AD(2019)001, Ukraine - *Amicus Curiae* Brief on separate appeals against rulings on preventive measures (deprivation of liberty) of first instance cases; CDL-AD(2019)029, Ukraine - *Amicus Curiae* Brief for the Constitutional Court of Ukraine on draft law 10257 on the early termination of a Deputy's mandate.

⁵⁰ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 61.

⁵¹ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 48.

*contradiction with the Court's position as the guarantor of the supremacy of the Constitution (...) and they are also problematic from the point of view of the constitutionally guaranteed independence and irremovability of the judges of the Court (...).*⁵²

96. In its 2016 Opinion on Poland, the Venice Commission highlighted that institutional legislation needs thorough scrutiny and the consideration of the opinions of all relevant stakeholders. *"Even if Parliament is not obliged to follow their views, this input can avoid technical errors, which can defeat the purpose of the legislation."* The Commission concluded authorities should be guided by the principle of loyal co-operation between State organs.⁵³

97. These observations were made at a time when the Constitutional Court was in a very difficult situation as Government introduced reforms in order to remove certain rules safeguarding the proper functioning of the Court. Unfortunately, if we look at the current situation in Ukraine, we can see that these observations are highly relevant here, too.

98. This also means that the Constitutional Court, as an institution, should be consulted as concerns reforms of its working methods. Parliament is not obliged to follow the advice given and not doing so will not result in the unconstitutionality of the reform but the views of any institution that will have to apply revised working methods can only be beneficial for the legislative process.

99. Conversely, the principle of loyal cooperation also applies to the Constitutional Court, not only to the political branches. It has an obligation, within the limits of the Constitution, of course, to seek a harmoniously functional constitutional system. For example, the Court should facilitate the implementation of its decisions, by giving Parliament sufficient time to address the situation following a decision of unconstitutionality of a legal provision.

100. Also in respect of Ukraine, "[t]he Venice Commission reiterates that in a state governed by the rule of law, it is essential that constitutional bodies decide within the parameters of their legal authority and responsibility, lest the robustness of State Institutions in the country in line with the Constitution be seriously undermined and the democratic functioning of state institutions be irreparably compromised."⁵⁴

VII. Conclusion

101. The Venice Commission takes Decision 13-r/2020 of 27 October 2020 of the Constitutional Court as an indication that a reform of the Constitutional Court is warranted and as starting point for reform. In this context, the Commission will notably refer to its 2016 Opinion on the then draft law on the Constitutional Court.⁵⁵

102. Therefore, the Venice Commission makes the following recommendations as concerns amendments to the Law on the Constitutional Court:

1. Parliament should consider making more explicit its presumed intention to limit the scope of Constitutional Court decisions to the specific questions raised by the parties before it.
2. The Court should be obliged to provide specific reasons for each legal provision which it finds unconstitutional.
3. The disciplinary procedure should be regulated in the Law on the Constitutional Court, with further details set out in the Rules of Procedure.

⁵² Venice Commission, CDL-AD(2012)026, paras. 63 seq.

⁵³ Venice Commission, CDL-AD(2016)001, paras. 132 seq.

⁵⁴ CDL-AD(2019)012, Republic of Moldova - Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament.

⁵⁵ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court.

4. The possibility for the re-opening of cases of the Constitutional Court should be established only when the criminal liability of a judge in relation to that decision has been established (e.g. bribe taking).
5. A better, more detailed, definition of "conflict of interest" should be provided, for example singling out financial conflicts of interest, specifically when this results from protocols established by NACP or the opening of investigations by NABU;
6. Decisions on (self-) recusals and their reasoning should be set out clearly in the main decision adopted by the Court or in a separate public procedural decision or ruling.
7. The quorum requirements should be reduced in those cases where a quorum is lost due to the recusal of judges, thereby avoiding the risk of *non liquet*.
8. Parliament should consider adopting legislation detailing the consequences of judges of the Constitutional Court failing to abide by the legal provisions regarding withdrawal, including making public disciplinary proceedings and decisions against judges of the Court.
9. A screening body for candidates for the office of judge of the Constitutional Court should be established, with an international component, which could include international human rights experts and participation from civil society, to ensure the moral and professional qualities of the candidates.
10. When a senate comes to the conclusion that a legal provision is unconstitutional and should be annulled, it should seek confirmation from the Grand Chamber upon request by the President of Ukraine or the Parliament. Grand Chamber proceedings should be held in public hearings as a rule.

103. While the procedure before the Constitutional Court and notably aspects relating to the rights and obligations of parties should be regulated in the Law on the Constitutional Court, the Court should be able to define further details of its procedure in its own Rules of Procedure.

104. The Venice Commission recommends filling the current vacancies at the Constitutional Court by the Parliament and the Congress of Judges only after an improvement of the system of appointments as set out above (screening body). The establishment of such a system is therefore urgent to fill these vacancies.

105. In order to depoliticise the composition of the Constitutional Court, the judges on the parliamentary quota should be elected with a qualified majority. For this, a constitutional amendment would be required at a later stage.

106. A useful practical measure would be that newly appointed judges of the Constitutional Court should benefit from special, including international, training on constitutional interpretation.

107. In the process of reform of the Constitutional Court the latter should be properly consulted on all aspects of the reform. In the light of the specific situation in Ukraine, the Constitutional Court should show some restraint if amended provisions were challenged before the Court. The Venice Commission is available to assist in this matter.

108. The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter, including a more profound examination of the Law on the Constitutional Court.