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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

CONCERNING LEGAL CERTAINTY[1]

[1] *This document will be updated regularly. This version contains all opinions and reports adopted up to and including the Venice Commission's 129th Plenary Session (10-11 December 2021).*

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I. INTRODUCTION

The present document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning legal certainty. The aim of this compilation is to give an overview of the doctrine of the Venice Commission in this field.

This compilation is intended to serve as a source of references for drafters of constitutions and of legislation relating to political parties, 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.

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

The compilation is not a static document and will continue to be regularly updated with extracts of newly adopted opinions or reports/studies by the Venice Commission.

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 that country. This is not to say that such recommendation cannot be of relevance for other systems as well.

The Venice Commission’s reports and studies quoted in 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.

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.

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 that a quote is missing, superfluous or filed under an incorrect heading (venice@coe.int).

The present compilation does not address the specific issue of stability of electoral law, which is dealt with in the Compilation of Venice Commission opinions and reports concerning the stability of electoral law (CDL-PI(2020)020).

II. DEFINITION AND FUNCTION OF LEGAL CERTAINTY

A. The rule of law checklist of the Venice Commission

A. Legal certainty

37. One of the relevant contextual elements is the legal system at large. Sources of law which enshrine legal rules, thus granting legal certainty, are not identical in all countries: some States adhere largely to statute law, save for rare exceptions, whereas others include adherence to the common law judge-made law.

B. Legal certainty

1. Accessibility of legislation

Are laws accessible?

i. Are all legislative acts published before entering into force?
ii. Are they easily accessible, e.g. free of charge via the Internet and/or in an official bulletin?

2. Accessibility of court decisions Are counts decisions accessible?

i. Are court decisions easily accessible to the public?
ii. Are exemptions sufficiently justified?

57. As court decisions can establish, elaborate upon and clarify law, their accessibility is part of legal certainty. Limitations can be justified in order to protect individual rights, for instance those of juveniles in criminal cases.

3. Foreseeability of the laws

Are the effects of laws foreseeable?

i. Are the laws written in an intelligible manner?
ii. Does new legislation clearly state whether (and which) previous legislation is repealed or amended? Are amendments incorporated in a consolidated, publicly accessible, version of the law?

58. Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.

59. The necessary degree of foreseeability depends however on the nature of the law. In particular, it is essential in criminal legislation. Precaution in advance of dealing with concrete dangers has now become increasingly important; this evolution is legitimate due to the multiplication of the risks resulting in particular from the changing technology. However, in the areas where the precautionary approach of laws apply, such as risk law, the prerequisites for State action are outlined in terms that are considerably broader and more imprecise, but the Rule of Law implies that the principle of foreseeability is not set aside.

4. Stability and consistency of law

Are laws stable and consistent?

i. Are laws stable, to the extent that they are changed only with fair warning?
ii. Are they consistently applied?

60. Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself: law must also be capable of adaptation to changing circumstances. Law can be changed, but with public debate and notice, and without adversely affecting legitimate expectations (see next item).

5. Legitimate expectations

Is respect for the principle of legitimate expectations ensured?

61. The principle of legitimate expectations is part of the general principle of legal certainty in European Union law, derived from national laws. It also expresses the idea that public authorities should not only abide by the law but also by their promises and raised expectations. According to the legitimate expectation doctrine, those who act in good faith on the basis of law as it is, should not be frustrated in their legitimate expectations. However, new situations may justify legislative changes going frustrating legitimate expectations in exceptional cases. This doctrine applies not only to legislation but also to individual decisions by public authorities

6. Non-retroactivity Is retroactivity of legislation prohibited?

i. Is retroactivity of criminal legislation prohibited?
ii. To what extent is there also a general prohibition on the retroactivity of other laws?
iii. Are there exceptions, and, if so, under which conditions?

7. Nullum crimen sine lege and nulla poena sine lege principles

Do the nullum crimen sine lege and nulla poena sine lege (no crime, no penalty without a law) principles apply?

62. People must be informed in advance of the consequences of their behaviour. This implies foreseeability (above II.B.3) and non-retroactivity especially of criminal legislation. In civil and administrative law, retroactivity may negatively affect rights and legal interests. However, outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally). The legislator should not interfere with the application of existing legislation by courts.

8. Res judicata

Is respect of res judicata ensured?
i. Is respect for the ne bis in idem principle (prohibition against double jeopardy) ensured?
ii. May final judicial decisions be revised?
iii. If so, under which conditions?

63. Res judicata implies that when an appeal has been finally adjudicated, further appeals are not possible. Final judgments must be respected, unless there are cogent reasons for revising them.

> CDL-AD(2016)007, Rule of Law Checklist ,chapter II.B Legal certainty, § 37, 57, 58, 59, 60, 61, 62, 63

34. The *Rule of Law Checklist* sets out that legal certainty depends on whether laws are accessible (*accessibility of legislation*) and whether court decisions are accessible (*accessibility of court decisions*). Since court decisions can establish, elaborate and clarify the law, access to these decisions forms an integral part of legal certainty. Limitations thereto are only allowed where individual rights need to be protected. The effects of the law must also be foreseeable, which means that the law must be proclaimed before its implementation and its effects foreseeable i.e. the law must be worded with sufficient precision and clarity to enable legal subjects to align their conduct accordingly. The degree of foreseeability required will depend on the nature of the law (especially important for criminal law), followed by the question of whether laws are stable and consistent (*nullum crimen, nulla poena sine lege* or non-retroactivity, see below under F).

> CDL-AD(2020)005 Armenia - Amicus curiae brief relating to Article 300.1 of the Criminal Code, § 34

B. Legal certainty according to other international standards

43. Any restriction on the freedom of expression should be “prescribed by law”. Two requirements flow from this expression. (1) The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. (2) The law must be foreseeable: a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his/her conduct: s/he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” As underlined by the UN Human Rights Committee, “Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not” and they must comply with the non-discrimination provision of the Covenant.

> CDL-AD(2021)050, Hungary - Opinion on the compatibility with international human rights standards of Act LXXIX amending certain Acts for the protection of children, § 43.

22. The principle of legal certainty, which is one of the fundamental elements of the Rule of Law, requires *inter alia* that statutory norms be formulated clearly, and their application be foreseeable. As repeatedly stated by the European Court of Human Rights (ECtHR), the law must be “formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct”.

> CDL-AD(2021)004, Spain - Opinion on the Citizens’ Security Law, § 22.

32. The principle of legal certainty is found in legal instruments to which Armenia is a party, notably the European Convention on Human Rights (ECHR) (Articles 5-7) (just a brief mentioning here) and the International Covenant on Civil and Political Rights (Articles 14-15). The principle is also found in soft-law instruments adopted by the United Nations and the Council of Europe. On the European level, the unequivocal standard is Article 7 ECHR and

the case-law pertaining to it – but this is the subject of the advisory opinion before the European Court of Human Rights.

> CDL-AD(2020)005 Armenia - Amicus curiae brief relating to Article 300.1 of the Criminal Code, § 32.

6. The Venice Commission has dealt with questions pertaining to the judiciary of Bosnia and Herzegovina (BiH) in a number of its opinions since the late 1990s. These opinions have covered questions involving electoral, criminal and human rights matters and issues ranging from the assessment of the structure of BiH's judicial system, covering the need of enhancing judicial co-operation between the Entities and the District, to the establishment of a new judicial body at the state level, i.e. the Court of BiH. It is however, the first time that it has been asked to deal with this issue up front, as a whole, from the perspective of the strengthening of two fundamental principles of the rule of law: legal certainty and the independence of the judiciary.

7. Legal certainty and the independence of the judiciary are principles that are found in international instruments by which BiH is bound, notably the European Convention on Human Rights and the International Covenant on Civil and Political Rights. More concrete definitions of legal certainty and the independence of the judiciary are provided by soft-law instruments adopted by the United Nations and the Council of Europe and fine-tuned through international case law.

> CDL-AD(2012)014 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, § 6, 7.

C. Goals of the legal certainty according to the Venice Commission

18. As regards legal certainty, the Venice Commission observed that it is "essential to the confidence in the judicial system and the rule of law", it "requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable. Retroactivity goes against the principle of legal certainty, at least in criminal law (Article 7ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests".

19. Components of legal certainty "could be defined as including the following requirements: publicity, precision, consistency, stability, non-retroactivity and the finality and binding force of decisions". And further: "Stability means that legal instruments must not change so often as to make the principle *ignorantia juris non excusat* impossible to be applied by an ordinary individual. Courts should not depart from a previously held interpretation of a legal instrument, unless they have a good reason to do so. Non-retroactivity requires that legal instruments not be applied retroactively. This rule can be derogated from only in exceptional circumstances".

20. However, legal certainty should not mean that legal regulations are unchangeable. Just the opposite is true: legal development, new principles or generally shared opinions may and in certain cases even should lead to amendments of laws.

> CDL-AD(2014)021 Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), § 18-20.

24. Legal certainty has several functions: it helps in ensuring peace and order in a society and contributes to legal efficiency by allowing individuals to have sufficient knowledge of the law

so as to be able to comply with it. It also provides the individual with a means whereby he or she can measure whether there has been arbitrariness in the exercise of state power. It helps individuals in organising their lives by enabling them to make long-term plans and formulate legitimate expectations.

25. In its Report on the Rule of Law, the Venice Commission underlined that the principle of legal certainty plays an essential role in upholding trust in the judicial system and the rule of law and that this, in turn, is important for business arrangements and the economic development of a country. If this trust does not exist, citizens (and investors from abroad) may not enter into contractual relationships with local partners and in turn renounce to economic activities that are indispensable for the economic development of the country. The existence of legal certainty (or lack of it) therefore has an important economic impact. It should be promoted by all three branches of state power. It urges the legislature to ensure the good quality of laws and other legal instruments that it adopts. Legal certainty requires the executive to respect it when it implements these legal instruments and in making decisions in general or on individual matters. Judicial power has to adhere to this principle when it applies legal instruments to concrete cases and in interpreting legal provisions.

27. This case law, scholarly views and those of the Venice Commission suggest that legal certainty could be defined as including the following requirements: publicity, precision, consistency, stability, non-retroactivity and the finality and binding force of decisions. *Publicity* means that legal instruments and judicial decisions must be publicly accessible. Access to them should not involve undue hurdles and should take into account the capacities of an ordinary individual. *Precision* requires that legal instruments and judicial decisions must be clear and precise as to their legal basis and content. Individuals need to be able to determine which court is competent to adjudicate their case, whether in private or in public litigation.

> CDL-AD(2012)014 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, § 24, 25, 27.

III. ACCESSIBILITY OF THE LAW

73. Although not uncommon in other countries, this situation [the publication of only part of the case-law] is particularly worrying in a country with such a level of decentralisation of the judiciary as Bosnia and Herzegovina. Publicity is one of the main requirements of legal certainty and access to legal instruments and judicial decisions should not involve hurdles. The effort of the HJPC to run a uniform case-law database should therefore be supported with the aim of making this database accessible to the public as soon as possible. It would also be useful if this database were recognised and used by the courts as a central database.

> CDL-AD(2012)014 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, § 73.

i. Legal Certainty, Judicial Review and Right to an Effective Remedy for Human Rights Violations

57. The legal system of Kosovo is a complex mixture of Socialist Federal Republic of Yugoslavia (SFRY) legislation (laws passed until March 1989, and laws passed until 1999 if they are not discriminatory and do not contravene international human rights instruments applicable in Kosovo, and do not overlap with other laws in force), United Nations Mission in Kosovo (UNMIK) Regulations, and Administrative Directions and Laws passed by the Kosovo

Assembly. All laws passed by the Assembly or UNMIK regulations, as a rule, supersede all previous laws concerning the same matter, but there from does not always result a clear indication of which laws are superseded and which remain in force. In addition, there is still no official legal procedure regarding the publication of laws in Kosovo and there are often significant delays in providing the Albanian and Serbian translations of UNMIK regulations. As a result, there is a general confusion as to the legislation in force, described by the Ombudsperson as "legal chaos". In addition, there is very little general knowledge, on the part of both The Provisional Institutions of Self-Government in Kosovo authorities and the public, of human rights standards.

> CDL-AD(2004)033 Opinion on Human Rights in Kosovo*: possible establishment of review mechanisms, § 57.

IV. FORESEEABILITY/CLARITY OF THE LAW

A. In general

45. The Childcare Allowance Case concerns the principle of legal certainty, which is a fundamental rule of law requirement, and includes both the foreseeability of laws and legitimate expectations. The childcare allowance scheme was construed so that parents did not receive benefits and thus a legal right, but were rather provisionally granted advances, and payments were conditional. While such a legal structure is acceptable, it is vulnerable for misunderstanding in the context of welfare allowances, which often are considered legal rights. Confusion as to the legal nature of childcare allowance appears to have been aggravated by the fact that there was little or no verification at the time of application and demands of repayment came only years later. Further, until 7 July 2020, the law in question did not contain a general hardship clause, but only a limited one.

46. It is the responsibility of the legislator to ensure that laws are foreseeable and have effects that meet the individuals' legitimate expectations. It is also the responsibility of the legislator to balance the public administration's interests of efficiency with the individual's interest in legal certainty.

> CDL-AD(2021)031 Netherlands - Opinion on the Legal Protection of Citizens, § 45-46.

46. Article 8 of Law No. 7262 adds a paragraph to Article 9 of the Law on Aid collection where "the procedures and principles regarding the aid to be made in the country and abroad shall be arranged through a regulation." This amendment could be considered as running counter to the principle of legality and legal certainty, enshrined in Article 11 of the ECHR and Article 22 of the International Covenant on Civil and Political Rights (ICCPR).

47. The amended Article 29 of the Law on Aid Collection has introduced heavy administrative fines for organisations that engage in unauthorised fundraising activities and for those which provide internet domains for such activities, as well as a possibility to seize the funds that have been collected without authorisation (per Article 10 of Law No. 7262). The major difference between the lower limits and upper limits of the prescribed administrative fines (5.000-100.000 or 10.000-200.000) paves the way for arbitrary abuse and constitutes a violation of the principle of legal certainty and predictability.

> CDL-AD(2021)023cor Turkey - Opinion on the compatibility with international human rights standards of Law no. 7262 on the Prevention of Financing of the Proliferation of

Weapons of Mass Destruction recently passed by Turkey's National Assembly, amending, inter alia, the Law on Associations (No. 2860), § 46-47.

86. The criterion of "the nature of the infringement in respect of which the penalty, fine, sanction or measure is or may be imposed" is very vague. On the other hand, the Venice Commission has not ascertained whether at present the criteria for categorising a sanction as "criminal" are sufficiently clear; in order to improve legal certainty, it would seem necessary for the regulatory authorities and for the parties in the procedures to know in advance, or sufficiently early, whether the case requires to be tried in court. The formula in Article 13A §2 a) does not increase legal certainty and risks to complicate the situation rather than to contribute to the identification of a solution.

CDL-AD(2021)021 Malta - Urgent Opinion on the reform of fair trial requirements related to substantial administrative penalties, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 1 June 2021, § 86.

17. The Court further refers to the importance of the rule of law notably of legal certainty and the role of national courts in maintaining it *"in so far as certain courts disapply national provisions of their own motion which they consider to be contrary to European law while others apply the same national rules, considering them to be in compliance with the European law, the standard of predictability of the rule would be severely affected, which would entail a serious legal uncertainty and hence the violation of the rule of law principle."*

CDL-AD(2021)019 Romania - Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary,§ 17.

33. Furthermore, the Venice Commission observes that the criteria to be fulfilled for appointing a special manager are not sufficiently precisely defined in Art. 46 No. 1 where they are listed as "suspension of the authorisation/cancellation of licence may harm the economic interest of the country, legal interests of authorised persons/licence holders in the field of the electronic communication, and the competition on the market." As a result, the margin of appreciation of the Georgian National Communications Commission in the interpretation of such a vague basis for the institution of the special manager creates a situation of legal uncertainty. Consequently, an appointment decision under Art. 46 No. 1 is not foreseeable. In view of the appointment of a special manager leading to a de facto expropriation of the former owner, this severe interference with Art. 1 Prot. 1 ECHR requires more precision and more responsibility to be taken by the legislator. Notably the term "the economic interest of the country" is overly broad and cannot be left to the discretion of the executive without any guidance given by the legislator. It would also be helpful in the interest of legal certainty and in the current absence of guidance from the legislator if the Georgian National Communications Commission issued an explanatory memorandum or a guidance note to explain its understandings of these terms. Furthermore, in view of the severity of the sanction, the "harm" referred to in Art. 46 No. 1 should be qualified as "serious harm".

CDL-AD(2021)011 Georgia - 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 recent amendments to the Law on electronic communications and the Law on broadcasting, § 33.

140. Therefore, the vague reference in Article 10(4) of the Draft Constitution to the protection of the younger generation, or to contradiction with "moral and ethical values and public conscience of the people of the Kyrgyz Republic" as a potential ground for limiting freedom of

expression and of the media (and potentially other freedoms) appears unduly broad and vague to comply with the principle of legal certainty and should be removed entirely).

> CDL-AD(2021)007 Kyrgyzstan - Joint Opinion of the OSCE/ODIHR and the Venice Commission, § 140.

23. The requirement of clarity in legal rules also follows from the principle of equal treatment under the law. Leaving too much discretion to an administrative body or a judge (even the most reasonable and well-intended one) to decide, in the circumstances of each specific case, what is proportionate and what is not, will be detrimental both to the legal certainty (understood as the predictability of State action) and to the principle of equal treatment, because even reasonable people can disagree in their assessment of the proportionality. Finally, such wide discretion can disturb the balance of powers in a democratic State in that it can mean, in substance, delegating to the executive authority (the police) the power to determine the content of the regulated (prohibited) conduct.

94. Law no. 4/2015 contains a number of open-ended provisions which entrust the police with broad powers but do not indicate in which situations these powers may be used, or what sort of measures can be taken by the police. Some offences are also formulated in the Law in an overly extensive manner. The Commission acknowledges that it is not unusual for the legislation to provide for a general power for the police to take measures necessary to maintain order in public places, but it recalls that clarity and foreseeability of the law ensure equal and non-arbitrary treatment and legal certainty (understood as the predictability of State action). This is particularly important in the criminal law sphere. Due to the nature of the offences and the seriousness of fines provided for them under Law no. 4/2015, they can arguably fall within the ambit of the criminal law. The Venice Commission therefore recommends that such “quasi-criminal” offences and/or coercive powers of the police should be described in the Law with more precision.

> CDL-AD(2021)004 Spain - Opinion on the Citizens’ Security Law, § 23 ; 94.

45. Since the constitutionality of broadly worded criminal statutory law in terms of legal certainty may very well depend on its actual application, the lack of cases in which these provisions have been applied – because most member States of the Venice Commission have never had to apply them – precludes any statement on what would constitute a constitutional best practice. Any such inference would suffer from the fact that potential constitutional shortcomings of these provisions might not have come to light because they have not come under constitutional review.

> CDL-AD(2020)005 Armenia - Amicus curiae brief relating to Article 300.1 of the Criminal Code, § 45.

27. The Commission is mindful that not all types of illegal media content may be precisely defined in law. It is an illusion that absolute legal certainty may be achieved through a legal text. Thus, for example, it may prove difficult to describe obscenity without using obscene language and/or images. In principle, the legislator may defer to the courts and let judges develop and clarify those concepts through case-law. Therefore, by itself, the reference in the Press Act to the "constitutional order", "morals" etc. is not contrary to European standards. It is legitimate for the State to combat seditious, obscene, defamatory speech or hate speech. However, the law should be revisited in order to ensure that those vague concepts ("morals", "constitutional order" etc.) are not interpreted by the courts too broadly.

> CDL-AD(2015)015 Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, § 27.

80. Article 8.5 obliges all parties and candidates to submit declarations of their property and income to the relevant election commission and that these declarations be published automatically in the case of parties. The code is ambiguous since it does not establish whether these rules are applicable to all elections or only to national elections. Part 3 of the same Article 8.5 gives the Central Electoral Commission discretion to decide the period for which the declaration of income is to be submitted. In the interests of legal certainty, this period could be established by the law. The declarations about candidates are made available to the media under Article 8.6. It is unclear which "other candidates" are covered by this provision.

> CDL-AD(2016)019 Armenia - Joint Opinion on the draft electoral code as of 18 April 2016, § 80.

54. The lack of legal certainty also arises regarding the FSB's apparently unlimited power to determine what information on Russian military activities should serve as a ground of becoming a "foreign agent" if gathered by an individual. The kinds of information that constitute grounds for being designated a "foreign agent" should be clearly determined in the law so that government agencies only apply the criteria defined in the law and are not free in defining the criteria themselves. This applies especially to decisions of intelligence agencies that tend to be classified.

55. Due to the lack of legal certainty concerning the scope of the "foreign agent" designation, the Venice Commission is concerned about the risk of arbitrary implementation and the potential chilling effect on civil society. No administrative guidelines or practice seem to exist that would render the legislation more foreseeable in practice.

> CDL-AD(2021)027 Russian Federation - Opinion on the Compatibility with international human rights standards of a series of Bills introduced to the Russian State Duma between 10 and 23 November 2020, to amend laws affecting "foreign agents", § 54-55.

62. Yet, since the ethno-cultural district of Taraclia is a district, be it a special one, it would have been logical, from a perspective of legal certainty, transparency and coherence, that such a special law be coupled with a reference, in the law on administrative-territorial organisation, to potential specific rules for such "special" districts. However, there is no such provision in that law, which is in fact in line with the framework established by the Constitution for the country's administrative-territorial organisation.

129. The draft nevertheless raises serious issues of legal certainty. It fails to a great extent to provide clear, precise and consistent legal definitions and regulations for the specific concepts

and principles it introduces, which appear as essential for the operation of the proposed ethnocultural district. The division of responsibilities, under the ethno-cultural status, between the state authorities and the district lacks the necessary clarity. Also, the draft law seems to mix rules for the protection of Bulgarians at national level and specific arrangements envisaged for the district of Taraclia. To summarise, the concept itself of "ethno-cultural district" is not properly defined, which may give rise to many problems of interpretation and implementation. On the other hand, in the opinion of the Venice Commission, it brings little added value to the existing legal framework.

> CDL-AD(2016)035 Republic of Moldova - Opinion on the Draft Law on the Ethno-Cultural Status of the District of Taraclia, § 62, 129.

34. During the meetings in Moscow, the authorities stated that the notion of "nongovernmental organisation" is similar to that of "non-commercial organisations" and that during the discussions before the State Duma on the Draft of the Federal Law, both terms "non-governmental" and "non-commercial" were used interchangeably, in a similar manner. They underlined that the commercial organisations, as business companies, are not covered by the Federal Law and that in any case, "the federal executive power body exercising the functions of formulation and implementation of state policy and normative legal regulation in the sphere of registration of not-for-profit organisations" (i.e. the Ministry of justice) (Article 5(2) of the Federal Law) is not competent to include the business companies in the List. Other interlocutors stated that for the sake of legal certainty, the notion of "non-governmental organisation" should be defined in the Federal Law.

59. Consequently, the Venice Commission considers that unless the Federal Law is changed in respect of the grounds for declaring an activity as undesirable, of the prior judicial decision for an NGO to be included in the List and of meaningful judicial appeals, the prohibitions imposed on listed NGOs constitute an interference with several rights guaranteed under the Convention i.e. freedom of expression, freedom of assembly or the right to property (concerning the prohibition of using bank accounts) which does not appear to be proportionate. Further, the Federal Law should clarify and limit the forms of "directing of" and "participating in" the activities of a listed NGO for the sake of the principle of legal certainty.

> CDL-AD(2016)020 Russian Federation - Opinion on federal law no. 129-fz on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations), § 34, 59.

89. Art. 2 of the Draft Law on Making an Amendment and a Supplement to the Criminal Code of the Republic of Armenia will supplement the Criminal Code with a new Article 160.1 on "*Proselytism*". As was mentioned above, in order to avoid wrongful prosecution of traditional non-coercive forms of proselytism - which is protected under international law - it is strongly recommended that the name of the offence be changed to "*improper proselytism*".

90. It is further noted, as previously mentioned, that the definition of "proselytism" given in the draft amendments to the Criminal Code does not require the purpose of the act to be the conversion of others to another religion, which is contained in the definition provided by Art. 4 paragraph 3 of the Draft Law. In the interests of legal certainty and foreseeability, it is recommended that the two definitions be aligned and made consistent.

> CDL-AD(2011)028 Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, the administrative offences code and the law on the relations between the Republic of

Armenia and the Holy Armenian Apostolic Church of the Republic of Armenia, § 89-90.

48. While welcoming the special protection, in several provisions of the draft, of the regional and minority languages and their use in areas where the 10% numerical threshold was reached, the Commission noted that the criterion used in these provisions was unclear and therefore failing to ensure legal certainty in this field. In particular, the exact meaning of terms such as “region”, “regional language” and “speaking the language” was unclear (§83-89) as well as the question whether in a given territorial unit two or more languages can enjoy this protection (§90).

CDL-AD(2011)047, Opinion on the draft law on principles of the state language policy of Ukraine, § 48.

52. The Venice Commission therefore strongly recommends redrafting the provisions dealing with the issue of termination of religious organization in order to comply firstly with the principle of legal certainty, by describing in a exhaustive way the acts prohibited, and secondly in order to comply with the requirements of proportionality when providing the sanctions of the violation of the law.

CDL-AD(2006)030, Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine adopted, § 52.

B. Effects *ratione temporis*

1. Time – limits for applications

75. There is a broad variety of time-limits for different types of applications. Time limits serve the purpose of legal certainty, as they ensure that, after a certain period of time, an act’s validity becomes unassailable.

CDL-AD(2021)001, Revised Report on individual Access to Constitutional Justice, § 75.

178. Several variants of *ex nunc* effects exist. In its strictest form, the legal provision that was found unconstitutional remains even applicable to facts that arose before the invalidation entered into force. Thus, decisions of the constitutional court do not influence legal relationships that had been finalised before the publication of the decision. The rationale for this solution is to prioritise legal certainty over the protection of individual rights. If the court invalidates the norm with prospective effect only, the applicant’s case will not be solved by the removal of the unconstitutional norm as the facts in his or her case took place in the past.

CDL-AD(2021)001, Revised Report on individual Access to Constitutional Justice, § 178.

180. Only relatively few countries have introduced *ex tunc* effects to constitutional court decisions. For instance, Germany restricts the declaration of pre-existing nullity to acts other than final court decisions in order to preserve the legal certainty of court decisions.

CDL-AD(2021)001, Revised Report on individual Access to Constitutional Justice, § 180.

56. Yet, during the transitional period, the above provisions will still be in force, and will continue to confer upon prosecutors considerable powers to act outside the criminal field. These powers should either be removed from the Draft, or should be more narrowly circumscribed. Moreover, these powers, in particular those in Article 7(4) - and the right, which is not set to expire, to control the enforcement of the law on special investigation authorities and registration of notifications under Article 6.1.a - should only be exercisable with the prior authorisation of a court. Also, since these matters, as well as prosecutors' "rights and obligations" (stipulated in Article 6) may be regulated by the Criminal Procedure Code, it is important to make sure, for the purpose of clarity and legal certainty, that provisions of the two acts are harmonised, including, should this Draft Law be adopted, by subsequently amending the Criminal Procedure Code. To this effect, the Transitional and Final provisions may specifically call for changes to the Criminal Procedure Code.

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 56.

i. Legal Certainty, Judicial Review and Right to an Effective Remedy for Human Rights Violations

57. The legal system of Kosovo is a complex mixture of Socialist Federal Republic of Yugoslavia (SFRY) legislation (laws passed until March 1989, and laws passed until 1999 if they are not discriminatory and do not contravene international human rights instruments applicable in Kosovo, and do not overlap with other laws in force), United Nations Mission in Kosovo (UNMIK) Regulations, and Administrative Directions and Laws passed by the Kosovo Assembly. All laws passed by the Assembly or UNMIK regulations, as a rule, supersede all previous laws concerning the same matter, but there from does not always result a clear indication of which laws are superseded and which remain in force. In addition, there is still no official legal procedure regarding the publication of laws in Kosovo and there are often significant delays in providing the Albanian and Serbian translations of UNMIK regulations. As a result, there is a general confusion as to the legislation in force, described by the Ombudsperson as "legal chaos". In addition, there is very little general knowledge, on the part of both The Provisional Institutions of Self-Government in Kosovo authorities and the public, of human rights standards.

> CDL-AD(2004)033 Opinion on Human Rights in Kosovo*: possible establishment of review mechanisms, § 57.

2. Decisions

75. There is a broad variety of time-limits for different types of applications. Time limits serve the purpose of legal certainty, as they ensure that, after a certain period of time, an act's validity becomes unassailable.

178. Several variants of *ex nunc* effects exist. In its strictest form, the legal provision that was found unconstitutional remains even applicable to facts that arose before the invalidation entered into force. Thus, decisions of the constitutional court do not influence legal relationships that had been finalised before the publication of the decision. The rationale for this solution is to prioritise legal certainty over the protection of individual rights. If the court invalidates the norm with prospective effect only, the applicant's case will not be solved by the removal of the unconstitutional norm as the facts in his or her case took place in the past.

180. Only relatively few countries have introduced *ex tunc* effects to constitutional court decisions. For instance, Germany restricts the declaration of pre-existing nullity to acts other than final court decisions in order to preserve the legal certainty of court decisions.

> CDL-AD(2021)001, Revised Report on individual Access to Constitutional Justice, § 75, 178, 180.

56. Yet, during the transitional period, the above provisions will still be in force, and will continue to confer upon prosecutors considerable powers to act outside the criminal field. These powers should either be removed from the Draft or should be more narrowly circumscribed. Moreover, these powers, in particular those in Article 7(4) - and the right, which is not set to expire, to control the enforcement of the law on special investigation authorities and registration of notifications under Article 6.1.a - should only be exercisable with the prior authorisation of a court. Also, since these matters, as well as prosecutors' "rights and obligations" (stipulated in Article 6) may be regulated by the Criminal Procedure Code, it is important to make sure, for the purpose of clarity and legal certainty, that provisions of the two acts are harmonised, including, should this Draft Law be adopted, by subsequently amending the Criminal Procedure Code. To this effect, the Transitional and Final provisions may specifically call for changes to the Criminal Procedure Code.

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 56.

C. Accountability of the judiciary

93. In addition, the benefits of application of the sanctions in case of low performance are highly questionable, especially taken in conjunction with Article 153, according to which judges may be subject to the disciplinary sanctions in case of "apparent and gross violation of a substantive norm in the process of administering justice", "apparent and gross violation of a procedural norm in the process of administering", etc. Article 153.2(10), (15) and (16) define as a gross violation a case of judge "(10) rendering a judicial act inconsistent with the principle of legal certainty; "(15) arriving at a decision on quashing the proceedings of a case in violation of the law"; "(16) other apparent or gross violations of substantive or procedural norms, which led to strict limitation of rights of persons guaranteed by respective legal acts or to deprivation of such rights and had an impact or could have had an impact on rendering a proper judicial act regarding the case". Article 153 being problematic of its own creates an additional danger when combined with Article 96.4.3 and Article 96.4.4.

122. It seems, therefore, that many of what are defined as gross violations effectively seek to penalise the judge who makes a wrong decision. This is true of decisions contradicting decisions of the Constitutional Court or of the European Court of Human Rights, or imposing a disproportionate measure of liability. Some of the grounds are extremely vague – for example, rendering a judicial act in violation of the principle of separation and balance of powers. And it is unclear what is meant by making it a subject of disciplinary responsibility to render a judicial act inconsistent with the principle of legal certainty. Does this mean that any decision inconsistent with previous case-law would be a subject of disciplinary responsibility? It is difficult to think of a more obvious interference with judicial independence. The wording "gross violation" of a substantive or procedural norm should be amended to exclude a well-reasoned interpretation of the law, even if it differs from previous case-law of higher instances. However, virtually all of the matters referred to in the definition could perfectly well be dealt with by means of a functioning appellate system.

> CDL-AD(2014)007 Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia, § 93, 102.

V. CONSISTENCY OF CASE LAW AND PRACTICE

A. Consistency of (constitutional) case law

17. The Court further refers to the importance of the rule of law notably of legal certainty and the role of national courts in maintaining it *"in so far as certain courts disapply national provisions of their own motion which they consider to be contrary to European law while others apply the same national rules, considering them to be in compliance with the European law, the standard of predictability of the rule would be severely affected, which would entail a serious legal uncertainty and hence the violation of the rule of law principle."*

> CDL-AD(2021)019 Romania - Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary,§ 17.

95. As already mentioned above, Article 97 sees the welcomed return of the institution of the Constitutional Court in the Kyrgyz Republic. The competences are evidently much larger than those of the current Constitutional Chamber. Particularly, it is welcomed that the Draft Constitution provides the possibility of individuals to challenge the constitutionality of laws and by-laws (Article 97(3)) in the case of violation of human rights and accordingly enabling a review of judgments made, based on subsequently abolished laws or provisions. Nevertheless, in the case of the latter, it will be of high importance to establish within constitutional law the procedure for the review of decisions based on such abolished laws. Article 97(6) outlines the citizen's complaint procedure stipulating that the decision on whether the court will review a matter is made on a case-by-case basis, therefore raising issues of legal certainty for citizens. It is therefore recommended to replace the wording "case by case basis" with a process which would be clear for individuals and ensure legal certainty as well as equality before the law, ensuring that their case be dealt with in accordance with the same procedures.

> CDL-AD(2021)007. Kyrgyzstan - Joint Opinion of the OSCE/ODIHR and the Venice Commission on the Draft Constitution of the Kyrgyz Republic, § 95.

11. A potential downside of this approach [diffuse constitutional review] is that different ordinary courts may interpret the constitutionality of the same norm differently. This may lead to conflicting decisions, incoherence and uncertainty. At the same time, it may also encourage experimentation and legal pluralism – like all diffuse systems arguably do – which may ultimately lead to better law. Another downside is that appealing the decisions all the way to a constitutional court may lead to lengthy and costly appellate proceedings. If litigants choose not to appeal, the law is left in an uncertain state with no judgment providing a definitive interpretation of the constitution.[10] Nonetheless, diffuse review remains a perfectly valid form of constitutional justice.

12. The effectiveness of this type of review relies both on the individual's capacity and willingness to defend their rights in court and on the ordinary judge's capacity and willingness to investigate violations of fundamental rights. Both conditions may not always be present. This system works well where it is well-rooted in the legal culture in countries such as the United States, Canada, Ireland or Norway.

13. In the 20th century, in contrast to the diffuse model, Hans Kelsen developed the model of concentrated review, as exemplified by the Austrian Constitution of 1920. In a concentrated system, a separate court, usually placed outside the ordinary court system, is given the power to review the constitutionality of normative acts and potentially to remove unconstitutional acts from the legal order. […]

14. The concentrated model has two main advantages. First, it leads to greater unity of jurisdiction. Second, it fosters greater legal certainty because it prevents divergent decisions on issues of constitutionality, which would render the application of a law unclear, from arising.

15. The main downside of concentrated constitutional review are the tensions and even conflicts it may create between ordinary courts and the constitutional court. When constitutional courts review the decisions of ordinary courts they interfere in concrete cases, evaluating the application and interpretation of statutes by ordinary courts.

190. In principle, a constitutional court's rulings on the constitutionality of normative or individual acts are final and binding. That is, there is no possibility of appeal. As the Venice Commission observes, "[s]ince 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." Moreover, complaints on the same issue will generally not be accepted again. In systems in which constitutional court interpretations are binding on all branches of government, constitutional courts retain the ultimate authority to determine the meaning of the constitution.

> CDL-AD(2021)001, Revised Report on individual Access to Constitutional Justice, § 11-15, 190.

30. It is more difficult to maintain legal certainty in a federal state than in a unitary state. This is due to the fact that a federal state has several laws on the same subject and several courts that might claim to have jurisdiction. Hence, the first thing to do is to determine what law is applicable and which court has jurisdiction. It is first costly in doing business and ordinary life leading to uncertainty and litigation.

64. However, there is a more general issue that needs to be considered at the state level. Although it forms one country, Bosnia and Herzegovina lacks a supreme judicial body that would guarantee the unity of its legal order and the uniformity or at least the harmonisation of its judicial and prosecutorial systems. The need for such a body seemed to be generally acknowledged by the interlocutors met by the Venice Commission's delegation during its visit.

Its creation is considered important both from the perspective of the judicial bodies themselves for which it would provide useful guidelines on how to proceed with the interpretation and application of certain legal provisions, as well as from the perspective of Bosnia and Herzegovina citizens for whom it would provide legal certainty, foreseeability, and uniformity in the interpretation and application of the law in the country.

> CDL-AD(2012)014 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina § 30, 64.

24. The Venice Commissions welcomes the fact that, in compliance with the principle of legal certainty the Constitutional Court of Azerbaijan intends to adopt Rules of Procedure, which fit into the classical triad of regulations on constitutional courts, i.e. rules on the level of the constitution, the law on the constitutional court and rules of procedure adopted by the Court itself. The draft Rules of Procedure are concisely drafted and coherent. Nevertheless, the Commission makes the following remarks:

> 1. The Court could introduce general clauses delimitating the respective competencies of the Plenum of the Court, the President and the judges. This might help to deal with issues which are not or could not be regulated in the Draft.
> 2. The Court might consider instituting a system of notification instead of authorisation for
> judges' business trips, which do not involve budgetary means and do not interfere with deliberations of the Court.
> 3. All issues reserved by the Law on the Court for the Rules of Procedure should be dealt
> with by the latter.
> 4. On the other hand, the Rules of Procedure should avoid repeating principles and regulations from the Constitution and the Law on the Court.
>
> CDL-AD(2004)023 Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, § 24.

B. Prosecutors

28. The law should define the situations in which a prosecutor may be dismissed. However, in the case at hand it is the draft law itself which *directly* provides for the removal of the Supreme State Prosecution from his position. In this part the draft law is a non-normative, *ad hominem* piece of legislation. The Venice Commission is concerned with such abuse of the legislative powers: it undermines legal certainty (because normally the removal of a prosecutor should be based on the grounds provided by a law in advance) and is contrary to the nature of the legislative activity, which is to define general rules of behaviour, not to take executive action in respect of specific individuals or situations.

> CDL-AD(2021)012 Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, § 28.

56. In its 2008 Opinion, the Venice Commission explained that "[t]he hierarchical model is an acceptable model although it is perhaps more common where Prosecution Services are sited within the judiciary for the individual prosecutor to be independent. The hierarchical model is more commonly found where the Prosecution Service is regarded as a part of the executive. A hierarchical system will lead to unifying proceedings, nationally and regionally and can thus bring about legal certainty." The Commission however expressed concern about the "obvious

contradiction between the principle of the autonomy of the individual prosecutor referred to in Article 2.4 and the principle of hierarchical control referred to in Article 2.5".

65. First, it leaves some room for potential abuse, since Article 34.4 does not specify who may challenge the actions, inactions and acts of prosecutors, or how often they may do so. Some limitation as to who may challenge (e.g. only interested parties) and how often they may do so (e.g. a decision not to prosecute may only be challenged once) would serve the interest of legal certainty and clarity. As it stands, anyone could potentially challenge the decision not to prosecute someone, and such challenges could be made numerous times. Whilst this issue may be regulated in the Criminal Procedure Code, the necessary clarifications should be provided, either by expressly stating the modalities of such appeal or by reference to other applicable provisions, e.g. in the Criminal Procedure Code.

> CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 56, 65.

18. Celerity of proceedings responds to the need for legal certainty, for both citizens and the State, and to the need to further, and restore as soon as possible, the peaceful coexistence of individuals (*Rechtsfrieden*). Indeed, the economic life too suffers from contested situations which remain unsettled for too long. Long-lasting disputes disturb such peaceful coexistence: judicial proceedings may not be pursued *ad infinitum*, not even when this prolongation may eventually lead to substantive justice. Decisions must at some foreseeable point become final.

20*. Justice delayed is justice denied.* The undue postponement of judicial decisions may result in a denial of justice for the parties to the proceedings (although it may happen that parties delay the proceedings on purpose). In more general terms and in the longer run, it risks to affect the confidence which the general public places in the capacity of the State to dispense justice, to decide disputes, and, very importantly, to punish crimes as well as to prevent and deter future crimes. This may cause or even incite the recourse by individuals to alternative means of dispute settlement or dispensation.

> CDL-AD(2006)036, Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings, § 18, 20.

VI. NON RETROACTIVITY

178. Several variants of *ex nunc* effects exist. In its strictest form, the legal provision that was found unconstitutional remains even applicable to facts that arose before the invalidation entered into force. Thus, decisions of the constitutional court do not influence legal relationships that had been finalised before the publication of the decision. The rationale for this solution is to prioritise legal certainty over the protection of individual rights.

> CDL-AD(2021)001, Report - revised Report on individual Access to Constitutional Justice, § 178.

35. The prohibition of retroactivity of criminal laws and the requirement of providing sufficiently clear and precise definitions of criminal acts in laws are crucial for their application. With respect to the requirement of clarity and precision in the context of this *amicus curiae* brief, it might be argued that the unspecified concept of *constitutional order* could present a problem in this respect. Yet, perhaps in most member States, there seems to be a widespread consensus that might cover possible criticisms of the imprecision of the constitutions and the laws, with respect to what this concept is (*constitutional order, the overthrowing of the constitutional order*). The common practice, disclosed by the material received by the Venice

Commission, on leaving the *constitutional order* undefined, does not allow us to conclude that the principle of legal certainty is breached where there is no further definition of this concept. If it is not possible to provide a general definition for *constitutional order* in all cases in which criminal law is applied, reference should be made to specific constitutional provisions or to clear constitutional principles that were allegedly violated.

> CDL-AD(2020)005 Armenia - Amicus curiae brief relating to Article 300.1 of the Criminal Code, § 35.

VII. NULLUM CRIMEN SINE LEGE AND NULLA POENA SINE LEGE

46. Another aspect of this *amicus curiae* brief request touches upon the *nullum crimen, nulla poena sine lege* – subcategory of the principle of legal certainty, i.e. the question of the retroactive application of criminal law (as mentioned under D, above). In the interest of legal certainty, the criminal prosecution of an act requires that the act was defined by law as a criminal offence before the act was carried out. If the *constitutional order* is a defining element of the crime and is not defined as such – be it by law or by case-law – then the alleged criminal act must be connected to a constitutional provision or at least to constitutional principles that were violated by the act.

47. If the law was amended with regard to the punishment after the crime was committed, the punishment to be imposed is determined by the law in effect at the time the crime was committed unless the amended law is more lenient. Article 72 of the Armenian Constitution of 2015 indicates that the Armenian Constitution recognises this principle.

> CDL-AD(2020)005 Armenia - Amicus curiae brief relating to Article 300.1 of the Criminal Code, § 46-47.

6. Both the first and the second sets of amendments propose to change articles 33 and 34 of the Constitution of Montenegro, which deal with the principles of legality, legal certainty, *nullum crimen sine lege*, as well as *nulla poena sine lege*. The new draft text introduces the possibility of regulating certain punishable acts or sanctions at an infra-legislative level (allowing therefore to adopt by-laws and rules instead of formal laws), although it makes a reservation concerning criminal laws and criminal sanctions, which may be regulated solely by law. The draft proposal does not specify what would be the punishable acts or sanctions to be regulated at the infra-legislative level and what would be the infra-legislative level acts.

7. As stated by the European Court of Human Rights in its case-law, Article 7 of the Convention *"goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets forth, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege).*

> CDL-AD(2012)024 Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, § 6-7.

VIII. RES IUDICATA

177. As to the "reasons provided by this Law", it is noted that the Constitutional Court of Romania (CCR) has recently ruled, in its Decision no. 377/2017, that introducing new grounds

for revision, with the potential effect of calling into question a significant number of judgments which have acquired the force of *res judicata*, was in breach of the principles of the non-retroactivity of the law and of legal certainty. By doing this, an extraordinary means of appeal would be transformed into a regular remedy, a “disguised appeal”, allowing for a new judicial review of final judgments. The Court stressed, with reference to Article 15 (2) of the Constitution, that the legislator can submit final judgments only to remedies which existed on the date when the judgment was rendered. Therefore, once the judgment is final, the removal or addition of a new ground of appeal cannot have any effect on the judgment already rendered. For the Court, such a legislative solution would be in breach of both the principle of legal certainty (Article 1 (5) of the Constitution) and of the requirements of the rule of law as an underlying principle of Romania's democracy (Article 1 (3) of the Constitution). This reasoning of the Constitutional Court should be taken into account for the drafting and interpretation of the transitional provisions.

178. In view of the uncertainties deriving from the proposed text of Article II, it is recommended to reconsider this article and revise it, while ensuring that the transitional solutions proposed are fully respectful of the requirements of legal clarity and certainty and in particular of the principle of *res iudicata.*

> CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code, § 177-178.

23. The functions of the Office are defined as prosecuting the perpetrators of criminal and other penal offences. It is also to apply legal remedies in order to protect constitutionality and legality. The Constitution is silent on what exactly is meant by this latter provision. It would appear from the fact that the Constitution, in Article 136 to 137, establishes a position of Ombudsman as a state authority to monitor the work of state administration and respect for human and minority rights that it is not intended that the prosecutor’s office should have these functions. Moreover, if this provision were to be understood as referring to the traditional socialist system of extraordinary appeals by the Public Prosecutor against final court decisions, there is a strong risk of conflict with the principle of legal certainty. The European Court of Human Rights repeatedly has found the exercise of such remedies to be in violation of the Convention. If the reference to the office of the public prosecutor applying legal remedies in order to protect constitutionality and legality is to remain, it ought to be clarified to make it clear that the principle of legal certainty will be respected and that the decision on such matters rests with the courts and that the prosecutor’s function is no more than to bring such issues before the court for determination.

> CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, § 23.

IX. LIST OF OPINIONS

CDL-AD(2021)001, Revised Report on individual Access to Constitutional Justice

CDL-AD(2021)007 Kyrgyzstan - Joint Opinion of the OSCE/ODIHR and the Venice Commission

CDL-AD(2021)021 Malta - Urgent Opinion on the reform of fair trial requirements related to substantial administrative penalties, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 1 June 2021

CDL-AD(2021)031 Netherlands - Opinion on the Legal Protection of Citizens

CDL-AD(2021)027 Russian Federation - Opinion on the Compatibility with international human rights standards of a series of Bills introduced to the Russian State Duma between 10 and 23 November 2020, to amend laws affecting "foreign agents",

CDL-AD(2021)019 Romania - Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary

CDL-AD(2021)011 Georgia - 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 recent amendments to the Law on electronic communications and the Law on broadcasting

CDL-AD(2021)004. Spain - Opinion on the Citizens' Security Law

CDL-AD(2021)050, Hungary - Opinion on the compatibility with international human rights standards of Act LXXIX amending certain Acts for the protection of children

CDL-AD(2021)023cor Turkey - Opinion on the compatibility with international human rights standards of Law no. 7262 on the Prevention of Financing of the Proliferation of Weapons of Mass Destruction recently passed by Turkey's National Assembly, amending, inter alia, the Law on Associations (No. 2860).

CDL-AD(2021)012 Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption

CDL-AD(2020)005 Armenia - Amicus curiae brief relating to Article 300.1 of the Criminal Code

CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code

CDL-AD(2016)035 Republic of Moldova - Opinion on the Draft Law on the Ethno-Cultural Status of the District of Taraclia

CDL-AD(2016)020 Russian Federation - Opinion on federal law no. 129-fz on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations)

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

CDL-AD(2016)019 Armenia - Joint Opinion on the draft electoral code as of 18 April 2016

CDL-AD(2015)015 Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova

CDL-AD(2014)021 Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents)

CDL-AD(2014)007 Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law amending and supplementing the judicial code (evaluation system for judges) of Armenia

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

CDL-AD(2012)014 Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina

CDL-AD(2012)024 Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, §6-7.

CDL-AD(2011)028 Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, the administrative offences code and the law on the relations between the Republic of Armenia and the Holy Armenian Apostolic Church of the Republic of Armenia

CDL-AD(2011)047, Opinion on the draft law on principles of the state language policy of Ukraine

CDL-AD(2006)036, Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings

CDL-AD(2006)030, Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine adopted

CDL-AD(2005)023, Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia

CDL-AD(2004)033 Opinion on Human Rights in Kosovo*: possible establishment of review mechanisms

CDL-AD(2004)023 Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan