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

**AMICUS CURIAE BRIEF  
FOR THE EUROPEAN COURT OF HUMAN RIGHTS**

**IN THE CASE OF SHEVCHUK V. UKRAINE**

**ON**

**STANDARDS ON THE DISCIPLINARY RULES CONCERNING  
PRESIDENTS AND JUDGES OF CONSTITUTIONAL COURTS**

**Adopted by the Venice Commission  
at its 141<sup>st</sup> Plenary Session  
(Venice, 6-7 December 2024)**

**on the basis of comments by**

**Mr Eirik HOLMØYVIK (Member, Norway)  
Ms Jasna OMEJEC (Member, Croatia)**

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## I. Introduction

1. By letter dated 13 September 2024 and pursuant to Rule 44, paragraph 3(a), of the Rules of Court, the European Court of Human Rights (ECtHR) requested an opinion from the Venice Commission on the following questions raised by the pending case of Shevchuk v. Ukraine (Application No. 474/21):

*1. In case disciplinary proceedings against a Judge of the Constitutional Court are limited to a procedure within the Constitutional Court itself, what procedural guarantees shall this procedure contain, having regard to the Council of Europe standards and the Members States' law and practice? Shall such proceedings concerning the President of the Constitutional Court be accompanied by specific additional guarantees compared to those concerning a Judge of that court?*

*2. Should the right of access to court and the principle of independent and impartial tribunal be seen, in a situation where the President of the Constitutional Court was dismissed, as requiring access to Judicial proceedings outside of the Constitutional Court to challenge that dismissal?*

*3. If so, would such an external review (i.e. by an administrative court) be compatible with the special role and function of a Constitutional Court?*

2. Mr Eirik Holmøyvik and Ms Jasna Omejec acted as rapporteurs for this *amicus curiae* brief.

3. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs.

4. The draft *amicus curiae* brief was examined at the meeting of the Sub-Commissions on Constitutional Justice, Democratic Institutions and Latin America on 5 December 2024. It was adopted by the Venice Commission at its 141<sup>st</sup> Plenary Session (Venice, 6-7 December 2024).

## I. Scope of the *amicus curiae* brief

5. The Venice Commission underlines at the outset that its role is not to assess the facts of the case at hand or to focus on the interpretation to be given to the ECHR and ECtHR case law. The questions raised by the ECtHR inquire into issues of general comparative constitutional law. This is the basis on which the Venice Commission will respond.

6. In order to place the issue in its context, it is of interest to report the following facts, as provided in the Court's request:

*In March 2014, the Ukrainian Parliament elected the applicant as a judge of the Constitutional Court of Ukraine (CCU). In February 2018, the applicant was elected Chairman of the CCU. By Resolution dated 14 May 2019, the CCU, having considered at the special plenary meeting the Report of the Standing Commission on Rules and Ethics on the applicant's dismissal as a Judge as a disciplinary sanction, the applicant (who at that time was the Chairman of the CCU) was dismissed from the office of the judge based on Article 149-1 para. 2 (3) of the Constitution<sup>1</sup> on the grounds of the pressure on judges when considering a case, the politicisation of the CCU<sup>2</sup> and recruitment of freelance advisers to the CCU Chairman contrary to the current legislation.*

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<sup>1</sup> "The grounds for dismissal of a judge of the Constitutional Court of Ukraine shall include: ... "committing a significant disciplinary misdemeanour, gross or systematic disregard of his/her duties, which is incompatible with the status of judge of the Court or has shown his/her incompatibility with the position held".

<sup>2</sup> His comments in an interview: "According to Article 104 of the Constitution of Ukraine, the Chairman of the Constitutional Court shall swear in the newly elected President in the absence of circumstances preventing this. But I want to emphasize specially – I will never swear in the president if the elections are rigged".

*The applicant filed an appeal against the CCU Resolution before the Kyiv District Administrative Court, which, by its decision on 11 October 2018, cancelled the Resolution and ordered the applicant's immediate reinstatement both as a judge and as Chairman of the CCU.*

*On 8 November 2019, the CCU filed an appeal against that decision with the Administrative Court of Appeal, requesting the closure of the case based on Article 19, para. 2.1 of the Code of Administrative Procedure of Ukraine.<sup>3</sup> On 2 December 2019, the CCU adopted Decision No. 11-r/2019 on the official interpretation of Article 151-2 of the Constitution<sup>4</sup> stating that no acts of the CCU can be challenged in courts of general jurisdiction, including the CCU's individual acts (resolutions) that are not for constitutional proceedings. On 6 February 2020, the Administrative Court of Appeal granted the CCU request to close the case referring as a legal basis to Article 19, para. 2.1 of the Code of Administrative Procedure CCU Decision No. 11-r/2019.*

*On 2 March 2020, the applicant filed a cassation appeal to the Administrative Court of Cassation of the Supreme Court. The cassation appeal was rejected on 14 August 2020.*

*In his application to the ECtHR, the applicant complains under Article 6 § 1 of the Convention that the CCU was not "an independent and impartial tribunal established by law" as (i) it failed to follow the rules when dealing with the applicant's dismissal, notably there was no ruling by the plenary CCU authorising the CCU Standing Committee to deal with the disciplinary matter and the applicant was not duly informed of those proceedings; (ii) certain CCU judges, who had requested the disciplinary proceedings against the applicant or had been witnesses in relation to the disciplinary charges, later participated in the deliberations on the case by the CCU. The applicant argues that the CCU Standing Committee and the plenary CCU failed to ensure equality of arms. The applicant was not allowed to defend himself in person or through his lawyer and refute the disciplinary charges. The applicant further complains under Article 6 § 1 and Article 13 that the domestic administrative courts violated his right of access to a court because they refused to exercise their jurisdiction to review the CCU decision on the applicant's dismissal. The applicant complains that his dismissal violated Article 8, given that it had a serious impact on his private life, and Article 10 because it was a measure of retaliation in response to the public comments he had made in March 2019 in connection with the election of the President of Ukraine.*

## **II. Preliminary remarks**

7. European standards allow for the criminal, civil or disciplinary liability of judges in the exercise of their judicial functions under certain conditions. Paragraph 66 of Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe reads: "The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence."

8. The Consultative Council of European Judges (CCJE) has taken the same position in Opinion No. 18 (2015): "With respect to civil, criminal and disciplinary liability (what has been called above "punitive accountability"), the CCJE stresses that the principal remedy for judicial errors that do not involve bad faith must be the appeal process. In addition, in order to protect judicial independence from undue pressure, great care must be exercised in framing judges' accountability in respect of criminal, civil and disciplinary liability. The tasks of interpreting the law, weighing of evidence and assessing the facts that are carried out by a judge to determine cases should not give rise to civil or disciplinary liability against the judge, save in cases of malice, wilful default or, arguably, gross negligence".<sup>5</sup>

9. The Venice Commission has previously pointed out that the European standards on the liability of judges, as well as their irremovability, apply equally to Constitutional Court judges "taking into account the general principles of the law, the principles specified in international documents and the overriding principles emerging from previous Venice Commission opinions, CCJE opinions

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<sup>3</sup> "2. The jurisdiction of administrative courts does not extend to cases: 1) that are referred to the jurisdiction of the Constitutional Court of Ukraine".

<sup>4</sup> "Decisions and opinions of the Constitutional Court of Ukraine shall be binding, final and shall not be subject to appeal".

<sup>5</sup> See CCJE Opinion No.18, para. 37.

and established European standards".<sup>6</sup> At the same time, the Commission noted that "while the basic requirements for judicial independence are the same for both ordinary and constitutional court judges, the latter must be protected from any attempt of political influence due to their position, which is particularly exposed to criticism and pressure from other state powers. Therefore, constitutional court judges are in need of special guarantees for their independence".<sup>7</sup>

10. In its Rule of Law Checklist, the Venice Commission requires that the grounds for disciplinary measures be "*clearly defined*" and "*sanctions limited to intentional offences and gross negligence*".<sup>8</sup> The Commission also specified that "failures performed intentionally by Constitutional Court judges in the exercise of their functions, with deliberate abuse, may give rise to disciplinary actions and should only give rise to penalties, criminal responsibility or civil liability in exceptional cases of extreme deviation from principles and standards of the rule of law and constitutionality. ... only the Constitutional Court should decide on the disciplinary liability of its judges in the exercise of their judicial functions".<sup>9</sup> The Commission considers that "[d]isciplinary rules for [constitutional court] judges and rules for their dismissal should involve a binding vote by the court itself. Any rules for dismissal of judges and the president of the court should be very restrictive".<sup>10</sup>

11. The requirements for judicial independence are therefore the same for judges of the courts of general and specialised jurisdiction, including judges of the supreme or other highest courts, and those of the constitutional courts. However, the specific nature of the constitutional courts has an impact on certain specificities related to the constitutional court judges. The ways in which the constitutional court judges are elected or appointed are good examples of such specificities.<sup>11</sup>

12. In the context of this *amicus curiae* brief, the Venice Commission Secretariat has carried out a comparative overview to identify the rules on the disciplinary liability of judges and presidents of constitutional courts and equivalent bodies in the 46 Council of Europe Member States ([CDL-PI\(2024\)034-bil](#)). The comparative overview shows that most (35)<sup>12</sup> member States have separate constitutional courts (also called Tribunal (Poland), Council (France), Guarantors' Panel on the Constitutionality of Rules (San Marino), Supreme Constitutional Court (Cyprus), Special Highest Court (Greece), etc.). As regards other member States, the supreme courts (Denmark, Estonia, Iceland, Ireland, Monaco, Norway, Switzerland), the supreme courts and supreme administrative courts (Finland and Sweden) are competent for constitutional review. The Supreme Court of the United Kingdom concentrates, among others on cases of the greatest public and constitutional importance. The legislation of many countries does not provide for specific disciplinary procedures for constitutional court judges. Other, more specific, findings of the comparative overview will be examined below.

### III. Analysis

#### A. First question concerning procedural guarantees in cases of disciplinary proceedings against the constitutional court judges

<sup>6</sup> Venice Commission, [CDL-AD\(2019\)028](#), Republic of Moldova - Amicus Curiae brief on the criminal liability of constitutional court judges, para. 27.

<sup>7</sup> Venice Commission, [CDL-AD\(2008\)029](#), Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, para. 14.

<sup>8</sup> Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, E, 1 a. iii.

<sup>9</sup> Venice Commission, [CDL-AD\(2019\)028](#), op. cit., para. 33.

<sup>10</sup> Venice Commission, [CDL-STD\(1997\)020](#), The Composition of Constitutional Courts - Science and Technique of Democracy, no. 20 (1997), p. 21.

<sup>11</sup> Venice Commission, [CDL-AD\(2022\)054](#), Opinion on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", para. 19.

<sup>12</sup> Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Republic of Moldova, Montenegro, North Macedonia, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Türkiye and Ukraine.

13. The first question contains two parts. For the sake of coherence, the Venice Commission will respond to each part separately.

- a. *In case disciplinary proceedings against a Judge of the Constitutional Court are limited to a procedure within the Constitutional Court itself, what procedural guarantees shall this procedure contain, having regard to the Council of Europe standards and the Members States' law and practice?*

14. In its previous opinions, the Venice Commission has held the view that the European standards on the liability of judges, as well as their irremovability, apply equally to Constitutional Court judges.<sup>13</sup>

15. When addressing the issue of procedural guarantees in disciplinary proceedings against a constitutional court judge, the presumption should be that the ordinary guarantees apply, unless there can be identified grounds specific to the function of Constitutional Courts that require derogation from, or adaptation of the procedural guarantees applicable for other judges. Given the sensitive function of constitutional courts in the legal and political system,<sup>14</sup> also recognised by the ECtHR,<sup>15</sup> one could argue that the justification for procedural guarantees in relation to disciplinary proceedings applies *a fortiori* for Constitutional Court judges.

16. As for the components of such procedural guarantees, the international reference documents on judicial independence are rather general, referring to a fair hearing by an independent and impartial body, similar to Article 6 ECHR. The fair hearing criteria, emphasising an independent decision-making body and the right for the judge to be heard and to challenge the decision, is reiterated in the international standards on judicial independence such as Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities,<sup>16</sup> the UN Basic Principles on the Independence of the Judiciary of 1985,<sup>17</sup> General Comment no. 32 on Article 14 of the International Covenant on Civil and Political Rights,<sup>18</sup> Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges.<sup>19</sup>

17. The comparative overview suggests that the most important procedural guarantee provided in the member States' legislation is the right for the judge to be heard, to dispute the allegations against him or her and to have access to the files used in proceedings against him/her.<sup>20</sup> Some member States have established additional procedural requirements for decisions to dismiss a Constitutional Court judge. Their laws specify that disciplinary sanctions can only be adopted by the plenary of the Constitutional Court.<sup>21</sup> In some member States, the decision to dismiss a Constitutional Court judge must be approved by a qualified majority of the Constitutional Court judges.<sup>22</sup>

<sup>13</sup> Venice Commission, CDL-AD(2019)028, op. cit., para. 27; [CDL-AD\(2020\)016](#), Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court, para. 39.

<sup>14</sup> CDL-AD(2019)028, op. cit., para. 54.

<sup>15</sup> ECtHR, *Ovcharenko and Kolos v. Ukraine*, nos. [27276/15](#) and [33692/15](#), judgment of 12 January 2023, para. 105.

<sup>16</sup> "69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate".

<sup>17</sup> "20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings".

<sup>18</sup> "20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law".

<sup>19</sup> "60. (...) (b) that the intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline".

<sup>20</sup> Andorra, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Estonia, Greece, Iceland, Liechtenstein, Malta, Monaco, Romania, Slovakia, Türkiye.

<sup>21</sup> Andorra, Armenia, Belgium, Czechia, France, Georgia, Latvia, Luxembourg, Romania, Slovakia, Spain, Türkiye, Ukraine. Plenary requirement for decisions of dismissal by Supreme Courts: Estonia, Finland, Greece.

<sup>22</sup> Austria (2/3), Bulgaria (2/3), Czechia (for termination of office, 9 out of 15 judges), Germany (2/3), Spain (3/4), Türkiye (2/3), Ukraine (2/3). Andorra requires a unanimous vote in the Constitutional Court.

18. The above-mentioned trends are consistent with the Venice Commission's position. In its opinions on disciplinary proceedings against judges in general, the Venice Commission has emphasised the right of the judge to be heard and to contradict the accusations brought against him or her<sup>23</sup> at the different stages of the proceedings, including the decision to terminate the office.<sup>24</sup> Furthermore, the Venice Commission has previously recommended that "the decision on exclusion be taken by at least a two-thirds majority or even the unanimity of the other judges"<sup>25</sup> as additional guarantees against external pressure.

19. The Venice Commission sees the small number of judges of the constitutional courts as the most sensitive aspect of the disciplinary proceedings from the point of view of the right to a fair trial. Disciplinary proceedings require the involvement of multiple judges, from those who initiate the dismissal of a judge, to those who decide on the initiative, to several of them who conduct the proceedings. Due to the multiple roles the judges play in disciplinary proceedings, it is possible, especially regarding the constitutional courts consisting of seven or nine judges, that the same judge may have the role of initiator of the proceedings and/or the role of the conductor of the proceedings and, in the end, the role of judge-voter. In other words, there is a risk of potentially sensitive situations that may call into question the impartiality requirement in Article 6, para. 1 ECHR. On the other hand, overly strict requirements for the recusal of the constitutional court judges who initiated/conducted the disciplinary proceedings against their pairs could easily lead to the impossibility of deciding on the disciplinary liability of the constitutional court judge (who must be obligatorily excluded of voting<sup>26</sup>) in case the number of remaining judges drops below the quorum required.

20. The Venice Commission has dealt with the recusal, including self-recusal, and exclusion of a constitutional court judge from the "ordinary" cases only. The Commission pointed out 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. ... in the context of the general jurisdiction ... there are always other judges available to step in for a judge who has withdrawn. This is not the case for the Constitutional Court. **If rules for challenging of a judge were deemed necessary** ... they would have to apply specifically to the Constitutional Court and exclude the possibility *non liquet* applying the fundamental principle of the Constitutional Court as a guarantor of the supremacy of the Constitution".<sup>27</sup> In such situations, the Venice Commission has relied on the Bangalore Principles of Judicial Conduct 2002, which provide that "disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case" (Doctrine of Necessity<sup>28</sup>), concluding that "This is certainly the case when there is only one court with constitutional

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<sup>23</sup> Venice Commission, [CDL-AD\(2014\)032](#), Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, para. 50; See also [CDL-AD\(2015\)042](#), Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", paras 93 and 98.

<sup>24</sup> Venice Commission, [CDL-AD\(2009\)011](#), Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, para. 26. See also [CDL-AD\(2010\)029](#), Joint opinion on the law amending certain legislative acts of Ukraine in relation to the prevention of abuse of the right to appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, para. 48.

<sup>25</sup> Venice Commission, [CDL-AD\(2012\)009](#), Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, para. 54(2).

<sup>26</sup> "[T]he constitutional court judge concerned by the procedure should not sit on the bench which takes such a decision" – see Venice Commission, [CDL-AD\(2016\)009](#), Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 40.

<sup>27</sup> Venice Commission, [CDL-AD\(2006\)006](#), Romania - Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court, para. 7.

<sup>28</sup> "Extraordinary circumstances may require departure from the principle discussed above. The doctrine of necessity enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice. This may arise where there is no other judge reasonably available who is not similarly disqualified, or if an adjournment or mistrial will cause extremely severe hardship, or if a court cannot be constituted to hear and determine the matter in issue if the judge in question does not sit. Such cases will, of course, be rare and special. However, they may arise from time to time in final courts that have few judges and important constitutional and appellate functions that cannot be delegated to another judge". UNODC, [Commentary on the Bangalore Principles of Judicial Conduct](#), 2007, [para. 100](#).



jurisdiction and/or there are limited number of judges and when disqualification may actually result in denial of justice".<sup>29</sup>

21. Finally, the Venice Commission notes that the wider the discretion of the Constitutional Court as to what constitutes a serious disciplinary offence that may lead to the termination of office of its judges, and the higher the severity of the sanction, the more comprehensive procedural guarantees are necessary. Conversely, if the grounds for dismissal are clearly and narrowly set out in the law (Constitution, statutory laws and by-laws), so that violations can be determined objectively with little discretion necessary, for example, following the criminal conviction by another court, leaving the Constitutional Court a mostly formal power of dismissal, less comprehensive procedural guarantees may be acceptable. Yet, even if the role of the Constitutional Court is largely formal, it is hard to see any justification for denying the judge who is subject to disciplinary proceedings the right to be heard, to challenge the grounds for dismissal and to present evidence of his or her innocence.

- b. *Shall such proceedings concerning the President of the Constitutional Court be accompanied by specific additional guarantees compared to those concerning a Judge of that court?*

22. The Venice Commission has previously noted that the President of a Constitutional Court is usually *primus inter pares*, acting in a representative, managerial and administrative capacity and not exercising any jurisdictional function higher than that of the other judges.<sup>30</sup>

23. The comparative overview shows that the Council of Europe member States' legislation does not provide for additional procedural guarantees in disciplinary proceedings conducted against the constitutional courts' presidents. While few member States distinguish between disciplinary procedures against the President and other judges of constitutional courts, none of these member States' legislation that regulates specifically disciplinary procedures against the constitutional court presidents requires a separate or external procedure in these cases. Such legislation rather regulates who can initiate disciplinary proceedings and enforce sanctions against the President of the Constitutional Court.<sup>31</sup>

## **B. Second question concerning the external review to challenge the dismissal of the Constitutional Court's President**

24. The second question put by the ECtHR is the following:

*Should the right of access to court and the principle of independent and impartial tribunal be seen, in a situation where the President of the Constitutional Court was dismissed, as requiring access to Judicial proceedings outside of the Constitutional Court to challenge that dismissal?*

<sup>29</sup> Venice Commission, [CDL-AD\(2016\)036](#), Albania - Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law), paras 20-22.

<sup>30</sup> Venice Commission, [CDL-STD\(1997\)020](#), The Composition of Constitutional Courts - Science and Technique of Democracy, no. 20 (1997), page 11.

<sup>31</sup> In Croatia, proceedings for determining permanent incapacity of the President of the Constitutional Court must be proposed by three judges of the Court. In Serbia, for the duration of the procedure for determining whether requirements for dismissal of the President of the Constitutional Court have been fulfilled, he/she may be suspended from duty. Decision on suspension of the President of the Court is passed at the proposal of at least three Constitutional Court judges. In Estonia, only the plenary of the Supreme Court can initiate disciplinary proceedings against the President of the court, and s/he can subsequently only be released from office by the Parliament on the proposal of the President of the Republic. In Slovakia, a reasoned motion to initiate disciplinary proceedings against the President of the Constitutional Court may only be filed by at least 3/5 of the members of Parliament. In Azerbaijan, the President and Vice President of the Constitutional Court can only be removed from their office by their own initiative, and they remain judges at the court. In Slovakia and in Türkiye, the law states that the Vice President of the Constitutional Court will enforce disciplinary sanctions against the President.



25. The Venice Commission considers that the question is formulated as a question *de lege ferenda*. Therefore, in order to identify the standard, the Commission will refer to the comparative practice in the Council of Europe's member states.

26. The comparative overview shows a clear trend among the member States that disciplinary procedures against the judges of Constitutional Courts or equivalent bodies (i.e. the Supreme Courts with constitutional jurisdiction) are carried out within those courts.<sup>32</sup> In most member States, these courts have an exclusive competence to terminate the office of their judges. In a few member States, termination of the office of judges is carried out by the Parliament or the President of the Republic after disciplinary procedures are conducted within the constitutional court or due to another judicial decision.<sup>33</sup> In a minority of member States, the Parliament and/or the executive branch have the power to terminate the office of the Constitutional/Supreme Court judges.<sup>34</sup> The Venice Commission has always been sceptical of the involvement of Parliament in the termination of the office of constitutional court judges<sup>35</sup> or the initiation of disciplinary proceedings against constitutional court judges by the President of the Republic or a minister.<sup>36</sup>

27. The analysis of the legislation of the Council of Europe member States, therefore, shows that there is no common requirement to provide access to judicial proceedings outside of the Constitutional Court in relation to the dismissal of the Constitutional Court's President or judges. The predominant view among the member States appears to be that the special role of constitutional courts, being particularly vulnerable to political pressure, justifies that disciplinary procedures leading to the dismissal of its judges/President should be carried out within the constitutional courts.

28. In its opinions, the Venice Commission has expressed a clear preference for constitutional courts having a decisive role in disciplinary matters either by the power to decide on disciplinary sanctions against their own judges<sup>37</sup> or by the competence to lift their (functional) immunity.<sup>38</sup> In its assessment of constitutional and legislative regulations of constitutional courts, the Venice Commission has so far not considered the position of the constitutional courts' Presidents as substantially different from that of the other judges.

29. On the other hand, the above-mentioned findings reflect the general dilemma that arises for disciplinary procedures in apex courts, because an appeal on the decisions of an apex court may undermine the authority of that apex court. Should apex courts be subject to decisions taken by other judicial bodies that normally would be subject to the decisions of the apex courts? This dilemma is addressed by the UN Basic Principles on the Independence of the Judiciary, which states that the principle of an independent review of decisions in disciplinary, suspension or removal proceedings "may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."<sup>39</sup>

30. In this context, the Venice Commission recalls that special guarantees needed for the independence of constitutional court judges refer to independence from the other branches of state power and independence from the parties. Compliance with this requirement is assessed

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<sup>32</sup> Albania, Andorra, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czechia, Estonia, France, Georgia, Germany, Hungary, Latvia, Liechtenstein, Luxembourg, the Republic of Moldova, Montenegro, North Macedonia, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Türkiye, Ukraine.

<sup>33</sup> Serbia (termination by Parliament), Slovakia (termination by the President of the Republic), Slovenia (termination by Parliament upon the proposal of the President of the Republic).

<sup>34</sup> Azerbaijan, Ireland (joint resolution by both Chambers in the Parliament), Slovenia (termination by the Parliament upon a proposal of the President of the Republic), the United Kingdom.

<sup>35</sup> Venice Commission, [CDL-AD\(2014\)033](#), Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 19.

<sup>36</sup> Venice Commission [CDL-AD\(2016\)026](#), Poland - Opinion on the Act on the Constitutional Tribunal, para. 23.

<sup>37</sup> Venice Commission, [CDL-AD\(2015\)045](#), Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania, para. 28.

<sup>38</sup> Venice Commission, [CDL-AD\(2017\)011](#), Armenia - Opinion on the draft Constitutional Law on the Constitutional Court, paras 36-37; [CDL-AD\(2019\)028](#), op. cit., para. 33.

<sup>39</sup> [UN Basic Principles on the Independence of the Judiciary](#), 6 September 1985, para. 20.

*inter alia* through the existence of sufficient safeguards against the risk of outside pressures. Constitutional courts must also appear to be independent.<sup>40</sup> Constitutional Courts are usually placed outside the system of the ordinary courts, whose rulings the Constitutional Courts supervise through either a full or a normative constitutional complaint.<sup>41</sup> Appealing the Constitutional Court's decisions on dismissal before the ordinary courts would, therefore, lead to the relativisation of the specific role of the constitutional courts meaning that their authority vis-à-vis ordinary courts could be put in question.

### **C. Third question concerning the compatibility of an external review with the special role and function of a constitutional court**

31. The third question put by the ECtHR is the following:

*If so, would such an external review (i.e. by an administrative court) be compatible with the special role and function of a Constitutional Court?*

32. The Venice Commission recalls that independent constitutional courts play an essential role as gatekeepers of constitutional values<sup>42</sup> limiting "the transgressions of the legislator and that of other state powers"<sup>43</sup> and putting "into practice democracy, the rule of law and the protection of human rights".<sup>44</sup> "Even Parliament has to respect the supremacy of the Constitution and it can be controlled by other organs, especially by the Constitutional Court. Constitutional justice is a key component of checks and balances in a constitutional democracy. Its importance is further enhanced where the ruling coalition can rely on a large majority and is able to appoint to practically all state institutions officials favourable to its political views".<sup>45</sup>

33. In such circumstances, any solution allowing ordinary courts, including administrative ones, to review the decisions of the Constitutional Courts on the disciplinary liability of their judges would endanger the constitutional structure of the state (that has an institutionalised and separate constitutional **judiciary**) itself.

34. As indicated in para. 9 above, Constitutional Courts must be protected from any attempt of political influence and the power to decide on disciplinary sanctions against the Constitutional Court judges belongs to the Constitutional Court itself. An external review of the decisions of the Constitutional Courts, therefore, appears to be incompatible with their special role and function. The comparative overview confirms that in most Council of Europe member States, the legislation does not provide for any appeal to other courts in this regard.

35. The comparative overview also shows that in some member States where the Supreme Courts have constitutional jurisdiction, the power to dismiss Supreme Court judges is placed in special courts or other courts at the same level.<sup>46</sup> In Sweden, the power to terminate the office of judges in the Supreme Court and the Supreme Administrative Court (which have constitutional jurisdiction) is placed in the other of the respective apex courts. That way, decisions on dismissing apex court judges are made at the same judicial level but by a different judicial body. Judicial review by a judicial body of the same level and with equivalent guarantees of independence and impartiality does not raise any issue.

<sup>40</sup> Venice Commission, [CDL-AD\(2021\)001](#), Revised Report on individual Access to Constitutional Justice, para 221.

<sup>41</sup> Venice Commission, [CDL-AD\(2018\)012](#), Georgia - Amicus curiae brief for the Constitutional Court on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, paras. 25 and 30-33; [CDL-AD\(2010\)039rev](#), Study on Individual Access to Constitutional Justice, para. 77.

<sup>42</sup> Venice Commission, [CDL-AD\(2020\)038](#), Urgent 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 Legislative Situation regarding anti-corruption mechanisms, following Decision N° 13-R/2020 of the Constitutional Court of Ukraine, para. 19.

<sup>43</sup> Venice Commission, [CDL-AD\(2017\)011](#), op. cit., paras 89-90.

<sup>44</sup> Venice Commission, [CDL-AD\(2010\)044](#), Opinion on the Constitutional Situation in Ukraine, para. 25.

<sup>45</sup> Venice Commission, [CDL-AD\(2013\)014](#), Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 76.

<sup>46</sup> For example, Denmark, Norway and Sweden.

36. Regardless of whether the disciplinary procedure is carried out exclusively within the Constitutional Court (in the countries with an institutionalised constitutional judiciary) or in the countries without a separate constitutional court - within the Supreme Courts with constitutional jurisdiction or by an external judicial body -, the Venice Commission would caution against an overly formal or institutional approach to the question. The issue should be whether, in the specific context of a member State, there are relevant reasons to believe that the Constitutional Court will not be sufficiently independent and impartial. For example, the Venice Commission has been concerned about granting court Presidents powers that put them in a hierarchically superior position vis-à-vis the other judges at the court.<sup>47</sup> Such an elevated position of the President may, in certain circumstances, raise objective concerns that the other judges are not sufficiently independent and impartial.

37. As to the disciplinary procedures, the Venice Commission has emphasised the principle of the "natural judge", which implies that disciplinary procedures have to be conducted by a disciplinary jurisdiction clearly set out in the law (Constitution, statutory laws and by-laws) and which excludes *ad hoc* disciplinary panels.<sup>48</sup>

#### IV. Conclusion

38. The Venice Commission has been invited by the European Court of Human Rights to submit an *amicus curiae* brief in the case of Shevchuk v. Ukraine on the following questions:

*1. In case disciplinary proceedings against a Judge of the Constitutional Court are limited to a procedure within the Constitutional Court itself, what procedural guarantees shall this procedure contain, having regard to the Council of Europe standards and the Members States' law and practice? Shall such proceedings concerning the President of the Constitutional Court be accompanied by specific additional guarantees compared to those concerning a Judge of that court?*

*2. Should the right of access to court and the principle of independent and impartial tribunal be seen, in a situation where the President of the Constitutional Court was dismissed, as requiring access to Judicial proceedings outside of the Constitutional Court to challenge that dismissal?*

*3. If so, would such an external review (i.e. by an administrative court) be compatible with the special role and function of a Constitutional Court?*

39. The Venice Commission, with regard to the Council of Europe standards and the Member States' law and practice, has reached the following conclusions:

- Concerning the first question, the Venice Commission finds that the most important procedural guarantees are the right to be heard, to challenge the grounds for dismissal, to have access to the files used in proceedings against him/her and to present evidence of his or her innocence. Additional procedural guarantees imply that disciplinary sanctions should be adopted by the plenary of the Constitutional Court and that the decision to dismiss a Constitutional Court judge should be approved by a qualified majority. No specific additional procedural guarantees, compared to those concerning a judge of the Constitutional Court or an equivalent body, are provided or necessary in disciplinary proceedings concerning the Presidents of such courts, while some specific features may be applicable (who initiates the procedure, who is responsible for the enforcement of the decisions for example).

<sup>47</sup> See among others Venice Commission, [CDL-AD\(2017\)018](#), Opinion on the Judicial System Act of Bulgaria, para. 113.

<sup>48</sup> Venice Commission, [CDL-AD\(2014\)038](#), Opinion on the draft laws on courts and on rights and duties of judges and on the Judicial Council of Montenegro, para. 69.

- Concerning the second question, the Venice Commission finds that there is no common European standard requiring to provide access to judicial proceedings outside of the Constitutional Court in relation to the dismissal of the Constitutional Court's President or judges. The special role of constitutional courts, being particularly vulnerable to political pressure, justifies that disciplinary procedures leading to the dismissal of its judges, including the President, should be carried out within the constitutional courts.
- Concerning the third question, the Venice Commission finds that most Council of Europe member States leave it to the Constitutional Court to carry out disciplinary procedures against its judges. A few exceptions exist in some member States which do not have separate constitutional courts and the supreme Courts have constitutional jurisdiction, where decisions on dismissing apex court judges are made by a judicial body at the same level and with equivalent guarantees for independence and impartiality.

40. The Venice Commission remains at the disposal of the European Court of Human Rights for further assistance in this matter.