Strasbourg, 12 October 2004

CDL-AD(2004)035
Or. Engl.

Opinion no. 279/2004

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON THE DRAFT FEDERAL CONSTITUTIONAL LAW "ON MODIFICATIONS AND AMENDMENTS TO THE FEDERAL CONSTITUTIONAL LAW ON THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION"

on the basis of comments by
Mr José CARDOSO DA COSTA (Member, Portugal)
Mr Georg NOLTE (Substitute member, Germany) and
Mr Peter PACZOLAY (Substitute member, Hungary)

Introduction

1. By letter of 18 May 2004, the Chairman of the Constitutional Court of the Russian Federation, Mr. Zorkin, asked the Venice Commission to give an opinion on the Draft Federal Constitutional Law "on modifications and amendments to the Federal Constitutional Law on the Constitutional Court for the Russian Federation", approved by the Plenary of the Court on 11 May 2004 (current law CDL(2004)076, draft amendments CDL(2004)077, explanatory note CDL(2004)078). The Commission invited Messrs Cardoso da Costa, Nolte and Paczolay to act as rapporteurs in this issue. Their comments have become documents CDL(2004)085, 075 and 084 respectively. This opinion has been adopted by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2003).

Contents of the Draft Constitutional Law

2. The Draft Federal Constitutional Law "on modifications and amendments to the Federal Constitutional Law on the Constitutional Court for the Russian Federation" would amend seven articles of the Constitutional Law, adopted in 1994. The main purpose of this text is to introduce the possibility for a written procedure in cases in which norms are at issue which are "analogous" to those which have already been the object of a proceeding by the Constitutional Court. This proposal would therefore abolish the current requirement of having an oral hearing in every admissible case brought before the Court. The present opinion concerns the question whether this draft legislation is in conformity with constitutional principles and European standards.

3. The introduction of a strict requirement of an oral procedure before the Constitutional Court of the Russian Federation can be explained by the transformation in the early 1990's of the Soviet judicial system into a constitutional system based on the rule of law. However, if the rules on admissibility are generous and if a Constitutional Courts must decide many cases, as it is the case for the Constitutional Court of the Russian Federation, an overly broad requirement to conduct oral hearings can become counterproductive.

European practice

4. The requirement of oral hearings can be justified by several considerations. It allows for the direct involvement of the parties, enables their direct contact with the judges and can accelerate the procedure. Oral hearings are an aspect of transparency, which is a core democratic value. Oral hearings can improve the quality of judicial decision-making because the judges obtain a more immediate impression of the facts, of the parties and of their divergent legal opinions. At the same time, oral hearings serve as a form of democratic control of the judges by public supervision. Oral hearings thereby reinforce the confidence of the citizens that justice is dispensed independently and impartially. They counteract the experience from previous times that the judgments are the results of secret contacts or even instructions. Therefore on the European continent a well-known reform movement emerged already in the early 20th century that aimed to foster the primacy of "orality" in order to create an immediate contact between judges, parties, and witnesses. The desired aim of this reform movement was to make litigation procedures simple, inexpensive, and quick.

5. These reasons speak powerfully in favour of oral hearings. At the same time, however, Constitutional Courts must remain capable of rendering meaningful decisions within a

reasonable time. Oral hearings can take much time and do not serve in all cases the necessary speed of the procedure.

6. The use of written procedure has become quite widespread for constitutional courts in Europe. Certain European countries opt for oral hearings (Italy), others for written procedures (Hungary, Portugal), others combine the two procedures (Austria, Germany).

7. It is, of course, possible to shorten oral hearings to a large extent, as it seems to be done in Italy. Shortening oral hearing too rigorously, however, risks to make them a mere formality which does not serve its original purpose.

8. Following the tradition in ordinary appeal courts in Portugal, the Constitutional Court of that country deals with all cases of abstract and concrete norm control in a written procedure only. Oral hearings are provided for some secondary types of procedures only.

9. According to the general provision of Article 25.1 of the German Law on the Federal Constitutional Court, an oral hearing must take place in every proceeding, except when all the "parties to the proceedings" renounce this right. However, although this general rule seems to impose a strict requirement to conduct an oral hearing in every case, other provisions in the same law and judicial interpretation have had the effect of reversing the relationship of the rule and the exception with the result that oral hearings are exceptional in proceedings before the German Constitutional Court. As the Court considers that in cases of abstract and concrete control of norms there are no "parties to the proceedings" strictly speaking except in the rare cases when "constitutional organs" (such as the government or the parliament) accede to such proceedings, the Court exercises its discretion whether to hold oral hearings. Even more importantly, in the procedure of constitutional complaint, which is the source of more than 97% of all proceedings before the German Court, the individual him- or herself has no right to require an oral hearing.

10. It is widely recognised that oral hearings can be dispensed with by Constitutional Courts in proceedings where it is to be expected that an oral hearing either will not contribute much to the judicial decision-making or if no other relevant interests are at issue. In cases when the Court has a discretion to hold an oral hearing, this decision should be taken by judges of the Constitutional Court and not merely by the Court administration. Furthermore, it is important to note that also a "written procedure" should have an adversarial character allowing for the exchange of opposing arguments. With these elements in mind, we can state that the use of a written procedure before Constitutional Courts is widespread, and that it is in conformity with European standards.

"Analogous normative provision"

11. The clause used in the Draft Constitutional Law "analogous normative provision" seems to be somewhat imprecise. While it may not always be absolutely clear what this clause means, it is difficult to define the intention of the draftspersons much more precisely without reducing the scope of the exception so much that it loses much of its substantial practical effect. This would be the case, for example, if only "identical" norms would give rise to the exception). The proposed exception to the general rule requiring oral proceedings in all cases guarantees that the legal question at issue has already been debated at least once in an oral hearing.

12. Notwithstanding the choice already made for a written procedure in cases of control of norms, the Portuguese legislator has adopted, within that procedure, a further solution in order to shorten the proceedings, allowing for a summary procedure in cases of concrete control when not an "analogous normative provision" but a "question already dealt with the by the Court in a previous decision" is at stake. The Portuguese Constitutional Court applied this seemingly stricter rule in practice with quite some flexibility.

Conclusion

13. It is for the Constitutional Court of the Russian Federation as the author of the draft constitutional law and Parliament as the legislator to judge whether the proposed amendments live up to the trust of the public in the Constitutional Court. Part of this trust is clearly grounded in transparency. In the light of the right to a procedure within reasonable time, an important part of this trust however also depends on the effectiveness of constitutional justice. The proposed amendments do intend to preserve the Court's ability to deal effectively with its heavy case-load.

14. The suggested amendments serve a legitimate purpose and are a legitimate means to achieve this purpose. The draft amendments are in conformity with European standards.