1. ARTICLES

THE VENICE COMMISSION OF THE COUNCIL OF EUROPE
FROM ADVISORY BODY TO ACTOR IN THE DEFENCE OF THE RULE OF LAW AND DEMOCRACY (1990-2022)

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I. Introduction

The European Commission for Democracy through Law, better known as the Venice Commission, has gained steadily increasing importance since its foundation in 1990. In many states, especially in Central and Eastern Europe, it has considerable influence on the development of the constitution and the legislation. At the international level, the EU in particular uses its expert opinions to justify legal requirements addressed not only to candidate countries but also to third countries and member states. The Commission has contributed decisively to the further development of constitutional justice and maintains close contacts with constitutional courts from all over the world.

A comprehensive account of the history and activities of the Commission is lacking so far, although a considerable number of articles on specific topics have been published, in particular in a *Festschrift* for the 30th anniversary of the Commission.[1]

II. Establishment, mandate and functioning of the Commission

1. Establishment and status of the Commission

At the beginning of the Commission there was one man and one idea: Antonio La Pergola, one of the most renowned professors of constitutional law in Italy and a former President of the Italian Constitutional Court with excellent international contacts, saw the need to strengthen and institutionalise international cooperation in the field of constitutional law. The Council of Europe seemed to him the appropriate organisation to host a forum of constitutional lawyers. In 1988, in his capacity as Italian Minister of State for European Affairs, he proposed to the then Secretary General of the Council of Europe, Marcelino Oreja, one of his former students, that such a forum be established within the Council of Europe.[2]

This proposal was received with great reluctance by the member states of the Council of Europe and proposals to establish a commission on democracy through law failed several times in the Committee of Ministers, which at that time was composed of the representatives of the 23 Western European democracies. Constitutional law appeared to many states to be too sensitive and too strongly linked to national sovereignty to make interference by an international body appear desirable. States such as the Netherlands and the United Kingdom were afraid that they would be pressured by such a commission to establish a constitutional court.

However, the Italian Foreign Minister Gianni de Michelis, a Venetian, supported La Pergola's initiative. Italy organised two conferences in 1989 and 1990 with the participation of European ministers of justice and foreign affairs, which advocated the establishment of a commission for democracy through law within the framework of the Council of Europe. The decisive factor was that, with the fall of the Iron Curtain, the need for a European advisory body in the field of constitutional law became obvious.

As a result, on 10 May 1990, the representatives of 18 states[3] adopted Resolution (90)6 of the Committee of Ministers of the Council of Europe "on a Partial Agreement Establishing the European Commission for Democracy through Law".[4] This establishment as a Partial Agreement meant that not all member states of the Council of Europe automatically became members of the Commission, but only the interested states. Non-member states of the Council of Europe could become associate members or observers at the invitation of the Committee of Ministers. It was explicitly stated that the Commission could cooperate with Council of Europe member states and with non-member states, especially in Central and Eastern Europe.

Germany joined the Partial Agreement a few weeks later, the other member states of the Council of Europe, which expanded greatly in the 1990s, in the following years. The European Union participated in the work of the Commission from the beginning. By 2002 all member states of the Council of Europe had become members of the Commission.

Thereupon, the Committee of Ministers of the Council of Europe adopted Resolution(2002)3 which transformed the Partial Agreement into an Enlarged Agreement and to which a revised Statute of the Commission is appended. This meant that from now on all member states of the Council of Europe are automatically members of the

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* Thomas Markert started working for the Venice Commission in 1992. From 2010 until his retirement in 2020 he was the head of the Secretariat of the Commission.

[1] S. Granata-Menghini / Z. Tanyar (eds.), *Venice Commission – Thirty Years of Quest for Democracy through Law 1990-2020,* 2020.

[2] The most detailed description of the founding phase of the Commission is G. Buquicchio, "Vingt ans avec Antonio La Pergola pour le développement de la démocratie", in: P. van Dijk / S. Granata-Menghini (eds.), *Liber amicorum Antonio La Pergola,* 2008, pp. 29 ff.

[3] Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey.

[4] The common name Venice Commission is based on the fact that the Commission holds its four annual plenary sessions in Venice.

Commission and non-member states of the Council of Europe can become members of the Commission at the invitation of the Committee of Ministers. This possibility has since been taken up by 14 non-European states and Kosovo.[5] The possibility for states to become associate members or observers was abolished, but a previously acquired status as associate member or observer was maintained.[6] The Commission's Statute no longer contains a specific reference to the states of Central and Eastern Europe, but this does not change the fact that the focus of the Commission's work is still on these states.

Since the Commission also includes non-members of the Council of Europe who contribute to its budget, it has its own budget within the framework of the Council of Europe, which strengthens its independence. However, this budget has always been quite modest in relation to its importance[7] and the Commission has therefore always depended on working efficiently and receiving voluntary contributions from states or the European Union.

2. Mandate and functioning of the Commission[8]

According to its Statute, the Commission is "an independent consultative body which cooperates with the member states of the Council of Europe, as well as with interested non-member states and interested international organisations and bodies". The Statute describes its mandate in rather general terms as "the guarantees offered by law in the service of democracy".[9] In practice, the Commission regards itself as the constitutional advisory body of the Council of Europe, which can deal with all constitutional (and international) law issues, including, for example, provisions of criminal law and criminal procedure law, insofar as they are constitutionally relevant. In addition to the text of the Constitution itself, the focus is on electoral law, constitutional justice, legislation on the judiciary and legislation relevant to fundamental rights.

The Commission can deal at its own initiative with general legal questions within the scope of its mandate and submit reports, guidelines and proposals for laws and international agreements. On the other hand, it can issue opinions (French: *avis*) on legal questions concerning a specific state only upon request. This makes sense in order to preserve the Commission's impartiality, as it would otherwise be accused of being biased and arbitrarily focusing on certain states.

As a rule, the Commission issues its opinions on draft laws or draft constitutions. However, it can also issue opinions on texts that have already been adopted, for example because the state in question is considering reforming them or because the Parliamentary Assembly of the Council of Europe wants to have their compatibility with international standards examined. Some requests are also directed at a specific legal issue, for example the compatibility with constitutional principles of the referendum on the annexation of Crimea to Russia.[10]

Most of the requests come from the states themselves. The Commission applies a broad standard and accepts requests from all constitutional bodies within the scope of their constitutional powers, for example, the head of state, the government, chambers of parliament or the ombudsman. In contrast, parliamentary committees, which are often chaired by a representative of the opposition, can only address questions to the Commission via the speaker of parliament. This is to prevent the Commission from becoming involved in party-political disputes. Constitutional courts (and the ECtHR) may request *amicus curiae* briefs from the Commission. However, states cannot make requests to the Commission regarding another state without its consent, unless the Committee of Ministers of the Council of Europe agrees. This restriction has become particularly significant in legislation for the protection of national minorities and is intended to prevent the Commission from being instrumentalised in inter-state disputes.

Of crucial importance is that Council of Europe organs (Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities and Secretary General) can also address requests to the Commission. While the Committee of Ministers hardly ever uses this power out of diplomatic considerations and the Secretary General rather rarely, a considerable part of the requests to the Commission come from the Parliamentary Assembly. The Legal Affairs and Monitoring Committees play a leading role here, but it has also become customary in general for the Assembly to address a request to the Commission on difficult issues with legal implications. This power of the Assembly influences the character of the Commission: it is not a mere advisory body to the member states, with which they cooperate voluntarily, but it is involved in the monitoring of the obligations of the member states by the organs of the Council of Europe.

It is also very significant that the European Union can address requests to the Commission. It exercises this power mainly with regard to the candidate countries but has never addressed a question to the Commission on a member state. The Statute of the Commission would not prevent this. The OSCE, with which the Commission cooperates on a permanent basis, can address requests to the Commission and the Committee of Ministers has also authorised the Organisation of American States (OAS) to do so.

As soon as a request reaches the Commission, rapporteurs, usually three to five, are appointed under the responsibility of the President of the Commission. As a rule, these are members or substitute members of the Commission. However, specialists on specific subjects may also be called in. Representatives of other Council of Europe institutions and services, such as the Group of States against Corruption (GRECO), are often included in the circle of rapporteurs. This helps to ensure a unified position of the Council of Europe on certain issues. In the area of electoral law, and to some extent also in the area of fundamental freedoms, the Commission adopts joint opinions with the OSCE's Office for Democratic Institutions and Human Rights (hereinafter: ODIHR).[11]

The rapporteurs prepare personal comments on the text and usually travel to the state concerned to discuss the respective text with the representatives of the relevant institutions, with the parliamentary majority and the

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[5] In order: Kyrgyzstan (2004), Chile (2005), South Korea (2006), Morocco and Algeria (2007), Israel (2008), Peru and Brazil (2009), Mexico and Tunisia (2010), Kazakhstan (2011), USA (2013), Kosovo (2014), Costa Rica (2016) and Canada (2019).

[6] Associate member: Belarus. Observers: Holy See, Japan, Argentina and Uruguay.

[7] Most recently slightly more than four million Euros.

[8] For a detailed description of the mandate and functioning of the Commission, *see* G. Buquicchio / S. Granata-Menghini: "Conseil de l'Europe: Commission de Venise", *Rep. eur. Dalloz,* April 2014, pp. 1 ff.; C. Grabenwarter: "Standard-Setting in the Spirit of the European Constitutional Heritage", in: *Venice Commission – Thirty Years* ... (note 1), pp. 257 ff.

[9] It adds: "It shall fulfil the following objectives:

– strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer;

– promoting the rule of law and democracy;

– examining the problems raised by the working of democratic institutions and their reinforcement and development."

[10] CDL-AD(2014)002. The Commission documents have the acronym CDL and are available on its website. www.venice.coe.int

[11] For more details *see* below at p. 350 (V.2).

opposition and with NGOs. The Secretariat then prepares a consolidated draft text which, after amendment and approval by the rapporteurs, is sent to the members of the Commission and the representatives of the state concerned. It is then adopted in Venice, in the case of complex opinions first internally in the sub-commission responsible for the subject matter[12] and then in the plenary session after discussion with the representatives of the state concerned. Particularly in the case of politically sensitive topics, the rapporteurs also discuss outside the formal framework with the representatives of the state in Venice in order to clear up any misunderstandings and, as far as possible, to find mutually acceptable compromise formulations without giving up positions of principle.

The Commission's opinions are not legally binding. However, all texts adopted by the Commission are public. This gives them considerable additional weight compared to other texts produced as part of the work of the Council of Europe or other institutions. This is reinforced by the fact that the Commission enjoys an excellent reputation in the states that cooperate with it on a regular basis, and the opinions therefore receive a great deal of attention from both the political class and the press.

The Commission has always endeavoured to answer requests very promptly. Those responsible have always been aware that national parliaments and other institutions would not be prepared to wait too long for the Commission's opinions and that once the text in question had been adopted, the opinions would lose much of their significance. This is all the more true if the state concerned has no interest in the opinion but fears criticism from the Commission and would therefore find it convenient to have an opinion after adoption. This applies not only to cases where the request comes from an outside institution such as the Parliamentary Assembly, but also to the not infrequent cases where the request is only made by the State in order to protect itself against criticism from inside or outside, for example from the European Union, because of the non-involvement of the Venice Commission. The Commission therefore always endeavours to adopt opinions in such a way that they are relevant to the discussion in the country concerned. If possible, the opinions are adopted at the next of the four annual plenary sessions. However, in particularly urgent cases, it is also possible to adopt an opinion in an urgent procedure with the draft opinion being circulated to a part of the members. These urgent opinions are then submitted to the next plenary session for confirmation.[13]

This very rapid method of working puts great pressure on the members and the Secretariat but has proved its worth in practice. The justifications of individual points in the Commission's opinions may not always be comprehensive and fully meet academic standards, especially when it comes to less controversial points.[14] However, they meet the practical requirements in the discussion with the state concerned and there are no known cases of the Commission taking hasty positions that it would have liked to revise later.

As a rule, the Commission adopts its texts by consensus. Only in a few cases does a formal vote take place at the request of a member.

The Commission's meetings are almost always held in Venice, which is designated as the Commission's seat in the Statute. This undoubtedly contributes to the attractiveness of the Commission for its members and makes it easier to invite prominent personalities to the Commission's sessions.

The Commission Secretariat is part of the Council of Europe Secretariat in Strasbourg. This makes sense in order to ensure cooperation with the Council of Europe bodies and coordination with the other services of the organisation. Unlike the members of the Commission, the members of the Secretariat work full-time for the Commission.

3. The members and organs of the Commission

The members of the Commission are appointed by the respective governments for a term of four years. Each member state may appoint one member and one substitute member. According to the Statute, they must be independent experts "who have achieved eminence through their experience in democratic institutions or by their contributions to the enhancement of law and political science". Members may not take any instructions and their independence is protected by the fact that they cannot be dismissed during their mandate. Several states have introduced formal procedures for the selection of the Commission member although the Statute of the Commission does not require this.

Most members of the Commission are professors or senior judges, often members of the respective constitutional court. In some states, there is an informal practice that the member of the Commission is appointed by the constitutional court. At the end of their term of office, Commission members can be reappointed without restriction. In Western Europe in particular, reappointment of the members, most of whom are highly respected in their states, is the rule rather than the exception, and the membership of the Commission is thus characterised by a high degree of continuity. This is very conducive to the Commission's work, since its field of work and its working methods are very specific and require a lot of experience. Moreover, knowledge over a longer period of time of the situation and problems in the countries that are regular "clients" of the Commission is extremely important in order to be able to make meaningful recommendations. Long-term membership in the Commission also contributes to the fact that the members, who work in the Commission in addition to their main job, usually identify very strongly with the Commission.

In the countries, especially in Eastern and Central Europe, on which the Commission often prepares expert opinions, the governments naturally have a greater interest in influencing the Commission's work. The members from these countries change more frequently and in some cases politicians with a legal background are appointed as members, which has advantages for the Commission's communication with the states concerned.

Proposals by the Parliamentary Assembly to introduce a selection procedure for members with the involvement of the Assembly to protect their independence have not been taken up. In practice, the fact that a few members may see themselves as representatives of the respective government has not led to insoluble problems. For one thing, members are not allowed to take part in votes on opinions that affect their state and are obliged to exercise restraint in expressing their views in discussions on such opinions. More importantly, however, members' influence depends on their standing within the Commission. If the other members have the impression that a member

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[12] There are sub-commissions on fundamental rights, the protection of minorities, democratic institutions, the judiciary, constitutional justice, the rule of law, international law, the federal or regional state, ombudsman institutions, gender equality, working methods, Latin America and the Mediterranean region.

[13] The details of this procedure are set out in the Protocol on the Preparation of Urgent Opinions, CDL-AD(2018)019.

[14] This is the criticism of M. de Visser: "A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform", *American Journal of Comparative Law* 63(2015), 963 ff. (981).

represents the interests of a government, they are less inclined to follow his or her arguments.

The President of the Commission is elected by the members in accordance with the Statute. In practice, this is done by consensus, on the proposal of a search committee of "wise persons". Here, too, there is great continuity: founding President La Pergola remained in office until his death in 2007, the relatively short presidency of the Norwegian Jan Helgesen was followed by the presidency of the Italian Gianni Buquicchio from 2010 to 2021. Since then, the French member Claire Bazy Malaurie has been the first female President.

In addition to the President, the Commission elects three Vice-Presidents, four members of the Bureau and the chairs of the sub-commissions every two years. These members meet at the beginning of each session as the Enlarged Bureau to prepare the session.

The members of the Commission receive a modest fee for the preparation of their comments, but no general allowance apart from travel expenses. As a result, members are active out of interest and not because of financial incentives.

III. The role of the Commission in the drafting of the new constitutions after the fall of the Iron Curtain

1. The early period after the end of the Iron Curtain

In the early years, the Commission naturally had to develop its working methods and gain the trust of the states. Initially, it limited itself to exchanges with representatives of the reforming states at the sessions in Venice, during visits to the countries concerned and at separate events. This was followed by the sending of comments by members of the Commission on a draft constitution.[15] The Commission only began to adopt formal opinions on draft constitutions in 1994. Its influence on the new constitutions at this early stage is therefore difficult to assess, even though the response to its proposals from the countries concerned was consistently positive.

Cooperation began with Poland, Bulgaria and Romania as early as 1990, with Albania, Estonia and Latvia in 1991, with Kyrgyzstan, Lithuania, Russia and Ukraine in 1992 and with Georgia and Moldova in 1993. However, Poland, Albania and Ukraine initially failed to adopt a new constitution and Latvia decided to reinstate the 1922 constitution.

During this period, cooperation with the Venice Commission was always based on the initiative of the respective state. All these states had the goal of breaking with the immediate past, which was characterised by an authoritarian and extremely centralist system, and adapting to European standards.[16] Especially for the Central European states it was not a matter of adopting a foreign model, but of returning to their European roots. These states did not share the reservations that originally stood in the way of founding the Commission but were open in a historically unique way to cooperating with foreign experts in this sensitive matter closely linked to national sovereignty.

The states were dependent on cooperation with foreign countries to very different degrees. For Polish constitutional lawyers, contacts with other Western countries were possible even before the fall of the Iron Curtain, while the non-Russian successor states of the Soviet Union in particular had hardly any experts who were familiar with the functioning of a democracy. In these states, the mentality was also most strongly influenced by the Soviet period, which was quite noticeable in the constitutional commissions.

With regard to today's situation, it deserves to be emphasised that during this period Russia was one of the states more interested in cooperating with the Commission. There were several meetings between representatives of the Commission and the Russian Constitutional Commission, and the Venice Commission sent written comments on the draft Constitution at various stages of its elaboration. In its opinion on the Russian Constitution,[17] the Commission noted that several provisions of the Constitution reflect earlier comments by the Commission. This is also confirmed by the Russian side.[18] Overall, the Commission's assessment of the Russian Constitution was rather positive. It stated that the constitution "does not give rise to any serious question as to its conformity with the principles of a democratic State governed by the rule of law and respectful of human rights". In addition to criticism of individual provisions, the Commission also referred to fundamental problems for future development: "Only the future will prove whether or not the Russian system of semi-presidentialism is viable" and "The new Russian Constitution ... establishes a fairly centralised federal system".

2. Later constitutions

In some countries (Georgia, Ukraine, Poland and Albania) the adoption of a new constitution was delayed due to domestic political conflicts. With the exception of Poland, the Commission was particularly closely involved in the constitution-making process in these countries. Due to the break-up of Yugoslavia, new constitutions were also adopted much later in its successor states.

At the same time, another aspect was added to the Commission's role as adviser to these countries. The Council of Europe had accepted Hungary, Poland and Czechoslovakia as new members without much hesitation. Afterwards, however, there were increasing concerns as to whether the other candidates for membership were really willing and able to comply with European standards of democracy and the rule of law and the protection of human rights. For political reasons, it seemed imperative to continue the accession process. On the other hand, major deficits were unmistakable in most of these countries.

As a minimum requirement for admission, the constitution had to meet European standards. In addition, upon admission, the new member states had to undertake reforms to ensure compliance with Council of Europe standards. In order to ensure compliance with these obligations, a system of monitoring was introduced primarily within the Parliamentary Assembly, which set up a separate Monitoring Committee. This Monitoring Committee does not limit itself to verifying compliance with specific obligations at the time of admission, but also monitors compliance with obligations arising from the Council of Europe Statute: protection of human rights, rule of law, democracy. On the basis of the Monitoring Committee's reports, the Parliamentary Assembly adopts Resolutions that are widely discussed in the countries concerned.

When assessing the situation in the individual states, complicated legal questions often arise. The Parliamentary Assembly, or its Monitoring Committee, therefore regularly requests opinions from the Venice Commission

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[15] *See,* for example, the letter from Commission President La Pergola to Secretary of the Constitutional Commission of the Russian Federation Rumyantsev of 3 March 1992, CDL(1992)20.

[16] H. Suchocka, "The Role of the Constitution in the Creation of a Law-Governed State", in: *Liber amicorum Antonio La Pergola* (note 2), pp. 287 ff. (288).

[17] CDL(1994)011.

[18] T. Khabrieva, "Russia and the Venice Commission of the Council of Europe", in: *Venice Commission – Thirty Years ...* (note 1), pp. 393 ff.

in order to base their political assessment of the situation on the legal assessment by a body of independent experts. The Commission's opinions form a basis for the Committee's report and the Assembly's Resolution. The Resolution then usually calls on states to undertake legal reform in cooperation with the Venice Commission to resolve the problem. In this way, the Commission, which is not a monitoring body, participates in the monitoring of the Assembly. The Monitoring Committee also often tells countries that it is in their interest to make a request to the Commission, as otherwise the Committee would do so itself.

Georgia. In Georgia, the adoption of a new Constitution was delayed because the country was initially politically extremely unstable and faced separatist tendencies in some areas (Abkhazia, Adjara, South Ossetia). In 1994 and 1995, however, there was intensive cooperation with the Commission. Initially, the discussion focused on the question of minority rights and the autonomy of specific areas, and the Georgian side was very reluctant to grant such rights.[19] Overall, however, the Commission found that the Georgian side had taken the Commission's suggestions into account to a considerable extent.[20] However, the very strong position of the President in the Constitution did not appear unproblematic.

Ukraine.[21] Ukraine had shown interest in cooperating with the Commission at a very early stage in 1992. In 1993, cooperation took off, but due to tensions between the President and the parliament, the Verkhovna Rada, a constitution was not adopted. This created problems internally, because the 1978 Constitution of the Ukrainian Soviet Socialist Republic was clearly not suited to the new situation, and externally, because the absence of a democratic constitution was an obstacle to admission to the Council of Europe. In order to find a way out of the crisis, a constitutional agreement was reached between President Kuchma and the Verkhovna Rada and adopted as law by the Rada. This agreement regulated in particular the distribution of competences between the President and the Rada on a provisional basis. The Commission gave a rather positive opinion[22] on this agreement as a temporary solution and this enabled the Parliamentary Assembly to give a favourable opinion on Ukraine's accession to the Council of Europe.[23] Therefore, Ukraine was able to become a member of the Council of Europe before Russia.

However, the country had to commit to the Parliamentary Assembly to adopt a new Constitution within one year. As a result, the country's cooperation with the Commission intensified and the country's new Constitution was adopted in June 1996. At the request of the Parliamentary Assembly, the Commission issued an opinion on the adopted text.[24] This opinion was quite positive and acknowledged the considerable progress made in the text thanks to the cooperation with the Commission. This concerned in particular the definition of the powers of the individual state organs and the clear emphasis on the principles of the rule of law. However, the Commission also expressed concern that the transitional provisions of the Constitution could lead to the continued existence of problematic institutions such as the Soviet type *prokuratura*.[25]

Albania. In Albania, despite intensive cooperation with the Commission, which began quite early, the adoption of the Constitution was delayed due to partly chaotic conditions and the polarisation between Sali Berisha's Democratic Party and the Socialist Party as the successor organisation of the former Communist Party. The attempt to adopt a new Constitution by referendum failed in November 1994.

The situation stabilised after the crisis caused by fraudulent money investment schemes was overcome, and in 1998 a new Constitutional Commission began to work. This commission worked very closely with the Venice Commission and in a series of joint meetings the individual chapters of the draft Constitution were discussed article by article, almost always taking into account the suggestions of the Venice Commission. The Constitution was approved by referendum in November 1998 and establishes a clearly parliamentary system of government. In many points, such as the constructive vote of no confidence, it is recognisably inspired by the German Basic Law. Of all the new constitutions, it is most strongly marked by the influence of the Commission. Despite continuing problems, the new Constitution led to a stabilisation of the situation in the country and has proven its worth to this day.

Serbia.[26] During the Milošević regime, there was naturally no cooperation between Serbia and the Commission. After the fall of the dictator, the prospects for a new Constitution initially appeared very favourable, as proposals from civil society, which were very positively evaluated by the Venice Commission, were available.[27] However, the political situation did not allow for an early adoption, especially since the continuation of the state union with Montenegro remained unresolved for the time being.[28] In June 2005, the Serbian Ministry of Justice asked the Commission for an opinion on the chapter on the judiciary in a draft Constitution approved by the Serbian government. This text met with little favour from the Commission, which criticised in particular that the power to appoint and dismiss judges lay with the Parliament, in line with Yugoslav tradition.[29] This approach was fairly typical of the Koštunica government, which was very much committed to Yugoslav tradition.

Then, in September 2006, everything suddenly happened very quickly. Behind closed doors, a draft Constitution was worked out between the political parties, approved by the National Assembly at a special session just one day after it was finalised, and submitted to the population for approval in a referendum. The reason for this sudden haste was that Kosovo's status as a constituent part of Serbia was to be constitutionalised once and for all before UN mediator Ahtisaari could present his proposal. Accordingly, the Constitution is very rigid and amending most of its provisions requires not only a two-thirds majority in the National Assembly but also a referendum.

In its opinion on the adopted Constitution,[30] which the Commission delivered at the request of the Parliamentary Assembly and not at the request of Serbia, the Commission was very critical of the rushed procedure and noted that this had had a negative impact on the quality of the text. In terms of content, however, the Constitution largely

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[19] CDL(1994)037.

[20] CDL(1995)08.

[21] For a more detailed account, *see* S. Holovaty: "Backbone of the Rule of Law: The Decisive Contribution of the Venice Commission in Ukraine", in: *Venice Commission – Thirty Years* ... (note 1), pp. 339 ff.

[22] CDL-INF(1995)002.

[23] Opinion 190(1995) on the Application of Ukraine for Membership of the Council of Europe.

[24] CDL-INF(1997)002.

[25] *See* below at p. 364 (IX.3.a)).

[26] For a more detailed description *see* V. Petrov / M. Prelic: "Contribution of the Venice Commission to the Constitutional Reform in Serbia", in: *Venice Commission – Thirty Years* ... (note 1), p. 547 ff.

[27] CDL-INF(2021)023.

[28] *See* below at p. 354 (VI.3.e)).

[29] CDL-AD(2005)023.

[30] CDL-AD(2007)004.

met European standards with two exceptions: Firstly, it explicitly provides for the possibility of members of parliament making an irrevocable blank declaration in which they place their mandate at the disposal of the party leadership; secondly, the influence of politics on the judiciary remains too strong, even though the election and dismissal of judges by the National Assembly, which had been criticised by the Commission, was abandoned.

Montenegro. The country was always interested in a good cooperation with the Commission and twice submitted the draft Constitution to the Commission for review. In its opinion on the adopted Constitution,[31] the Commission found that many, but not all, of its suggestions had been taken into account in the text and gave a positive verdict. As in Serbia, the difficulties mainly concerned the chapter on the judiciary. Confidence in the impartiality and efficiency of the judiciary was low in the country. Accordingly, it did not seem desirable to introduce a pronounced self-administration of the judiciary on the Italian model. However, the election of the President of the Supreme Court by Parliament seemed to the Commission to be acceptable only as a transitional solution.

In **Hungary**, the Constitution from the communist era had been amended in almost all points, but no new Constitution had been adopted. This changed after the return to power of Viktor Orban, who succeeded in gaining the two-thirds majority in Parliament required for amending the Constitution in the 2010 elections. He used this majority to have a new Constitution drafted and adopted. In its opinion,[32] the Commission criticised above all that the new Constitution had been drafted in a rushed and non-transparent procedure. There was no real dialogue between the majority and the opposition, but the new Constitution unilaterally reflected the government's view. The Commission regretted that the new Constitution remained rather vague in the area of the judiciary and limited the powers of the Constitutional Court in the area of the budget and taxation. It criticised the fact that the new Constitution stipulates that broad areas that are regulated by ordinary laws in other states, such as family policy and the pension system, are to be regulated by so-called cardinal laws that must be passed by a two-thirds majority. As a result, a future democratically elected government, which unlike the then Orban government does not have a two-thirds majority, will be severely restricted in its freedom of action.

The new Hungarian Constitution is the last new constitution to be adopted in a state of Central or Eastern Europe. In conclusion, the Commission's influence on the text of the new constitutions grew significantly over time, even if this was not consistently the case, as was evident in Serbia and Hungary.

IV. The protection of the democratic pluralist system

1. Disputes over the political system in the successor states of the former Soviet Union[33]

Already during the drafting of the new constitutions in the states of the former Soviet Union, it proved to be the main problem to maintain the balance of power between president, parliament and government. All constitutions provided for direct election of the president by the people. However, with the exception of the states of the Caucasus, the constitutions of the European successor states of the Soviet Union provided at the same time that the government had to be confirmed by parliament. They thus resembled the French semi-presidential system rather than the American presidential system. The political culture favoured the concentration of power in the hands of the presidents, which tended to be stronger in practice than prescribed by the text of the constitution.

The Venice Commission emphasised from the outset that the choice of political system was at the discretion of the individual states,[34] but that sufficient checks and balances had to be in place in any case. In practice, the Commission always preferred parliamentary solutions, as presidential systems tend to be authoritarian under regional conditions.[35] The difficulty for the Commission was that in the field of state organisation, unlike in the field of human rights, there are no detailed international standards. Parliamentary democracy is the prevailing system in Europe but is not a mandatory standard. The Commission therefore relied heavily on comparative law arguments. It warned against picking and choosing from the existing democratic constitutions those elements that strengthen the power of the president without taking into consideration the system as a whole. For all the diversity of constitutional structures in Europe, there are common principles and the Commission saw its task as elaborating these common principles as part of a European constitutional heritage.

The balance of power established by the initially adopted constitutions proved to be fragile and in several states the presidents attempted to break away from the limitations on their power provided for in the respective constitution.[36] This development began with a constitutional reform in Kazakhstan in August 1995, in which the Commission was not involved.

In Europe, **Belarus** was the first country to revert to an authoritarian system. In November 1996, President Lukashenko organised a referendum to expand his power. Although the Constitutional Court ruled that such a referendum, which did not follow the constitutional amendment procedure, could at best be consultative in nature, the President declared the results of the referendum binding and implemented them. The Commission was asked by the Speaker of Parliament for an opinion and bluntly stated that the amendments did not meet minimum democratic standards and gave the President strong influence over, if not complete control of, the other constitutional bodies.[37] This was the first time that the Commission opposed a constitutional amendment head-on. As a result of this constitutional amendment, Belarus was deprived of its special guest status in the Parliamentary Assembly.

The further constitutional reforms did not improve the situation in the country. When the end of President Lukashenko's second and, according to the Constitution, last term in office loomed, he organised another referendum in October 2004, which abolished the two-terms limit and allowed him personally to run again. In its opinion,[38] adopted at the request of the Parliamentary Assembly, the Commission branded the procedure chosen as illegal also under the law of Belarus and stressed that the constitutional amendments further increased the democratic deficit in the country. The further constitutional referendum organised in February 2022

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[31] CDL-AD(2007)047.

[32] CDL-AD(2011)016.

[33] The Baltic states, whose constitutional development was more in line with that in Central Europe, are not considered in this chapter.

[34] For example, CDL(1994)037 on Georgia.

[35] Likewise V. Volpe, "Drafting Counter-Majoritarian Democracy", *ZaöRV* 76(2016), 811 ff. (835 ff.).

[36] A. Nußberger, "Setting Limits and Setting Limits Aside. The Constitutional Framework of Presidential Power in Post-Communist Countries", in: *Liber amicorum Antonio La Pergola* (note 2), pp. 233 ff. (237).

[37] CDL-INF(1996)008.

[38] CDL-AD(2004)029.

also did not change the imbalance of power, but rather reinforced it, according to the Commission.[39]

In **Moldova**, President Lucinschi organised a consultative referendum in May 1999 to introduce a presidential system. However, the Constitutional Court ruled that the Constitution could not be amended without a vote in Parliament and the President did not have the required qualified majority of votes there. Instead, bills to amend the Constitution in the direction of a parliamentary democracy were introduced in Parliament.

At the suggestion of the President of the Parliamentary Assembly, Lord Russell Johnston, a joint Constitutional Commission was set up to reach a compromise. Parliament and the President each nominated half of the members of this Commission, which was chaired by the Swiss member of the Venice Commission, Giorgio Malinverni. This Commission drew up a proposal for constitutional reform in the direction of a stable parliamentary system on the German model.[40] This draft was to be submitted to the Constitutional Court, which must examine proposals for constitutional reform before they are adopted. However, before this could happen, a draft that had already been approved by the Court, which envisaged a purely parliamentary system without stabilising elements, was passed by Parliament.

The weaknesses of this text became clear in 2010. In Parliament, it proved impossible to elect a new head of state with a qualified majority. In such cases, the Constitution prescribed the dissolution of Parliament and new elections. However, repeated new elections did not produce any results for a considerable time. The Venice Commission proposed to amend the Constitution on this point but warned against doing so in an unconstitutional way through a referendum without a vote of the Parliament with a constitution-amending majority.[41]

In 2016, the Constitutional Court ruled in an unorthodox decision that the indirect election of the President was unconstitutional. Since then, the President has again been elected by popular vote. In a 2017 opinion,[42] the Commission underlined that the fact of direct election of the President by the people does not justify extending his power to dissolve parliament.

In **Ukraine**, President Kuchma attempted to strengthen his power through a referendum in April 2000. Voters were asked to express their lack of confidence in the Verkhovna Rada and to approve constitutional amendments that would weaken parliament by, among other things, facilitating the dissolution of the Rada by the President. The presidential decree left open whether the referendum should directly amend the Constitution or have a consultative character.

The Parliamentary Assembly and the Secretary General of the Council of Europe requested an opinion from the Commission. Although the Ukrainian authorities tried to influence the Commission through an unusual lobbying campaign, the Commission took a very clear position[43] : the proposed vote of no confidence in the Rada was clearly unconstitutional and the referendum could at best be of a consultative nature, as it did not respect the constitutional amendment procedure. In terms of content, the proposed amendments were problematic as they would have upset the balance of power between the President and the Rada. The Constitutional Court, which had become aware of the draft opinion, declared the proposed vote of no confidence in the Rada unconstitutional and endorsed, albeit in a not very clear manner, the Commission's view that the referendum was consultative in nature. The referendum was then held, but the result, which produced majorities in favour of the amendments proposed by the President, was never implemented.[44] This was the first time that the Commission entered into a clear conflict with a member state of the Commission and the Council of Europe.

The issue of constitutional change has remained on the agenda in Ukraine and the Commission has always been involved in the discussions on possible constitutional changes. Between 2001 and 2019, it adopted 19 opinions on proposed or adopted constitutional amendments or on the procedure of constitutional amendment. It always emphasised that the Constitution cannot be directly amended by referendum and that all constitutional amendments must follow the constitutional amendment procedure. Mostly, as in 2000, the proposed constitutional amendments were about the distribution of power between the President, parliament and government, and the Commission consistently advocated strengthening parliament and government. The attitude of most Ukrainian politicians on this issue was purely opportunistic: the forces close to the respective President advocated a strengthening of his position, the respective opposition advocated a strengthening of the parliament.

Kyrgyzstan is the only one of the Central Asian republics that tried to build a democratic system from the start and cooperated with the Commission to this end. However, the country did not succeed in establishing a stable system. Democratic beginnings were followed by efforts by the respective President to concentrate power in his hands. Revolutions were followed by the adoption of Constitutions with more parliamentary features, but these did not last. The last version of the Constitution was assessed very critically in a joint opinion by the Venice Commission and ODIHR from 2021.[45] It became apparent that, although the democratic forces were strongly interested in cooperation, the Commission's possibilities of exerting influence in a non-European state remained limited.

In **Russia**, the democratic features of the system were weakened for a considerable time without constitutional change through legislative and other measures, including a 2004 law that undermined the federal character of the Constitution and was criticised by the Venice Commission for this reason.[46] The country no longer showed any interest in cooperation. Requests for opinions always came from the Parliamentary Assembly. In 2020, a comprehensive constitutional reform was passed, which was very critically assessed by the Commission.[47] In particular, the excessive strengthening of the President's power and the abolition of the two-terms limit for the incumbent President appeared problematic.

Azerbaijan has had a presidential Constitution with weak checks and balances from the beginning. The situation deteriorated further due to a referendum in March 2009, which abolished the constitutional two-terms limit for the President, and another referendum in September 2016, which extended the President's mandate to seven years and introduced unelected Vice-Presidents appointed by the President. Both amendments were clearly criticised by the Commission.[48]

However, there were not only countries where presidents tried, with or without success, to change the constitution

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[39] CDL-AD(2022)035.

[40] *See* CDL-INF(2001)003: Co-operation between the Venice Commission and the Republic of Moldova on Constitutional Reform.

[41] *See* Venice Commission: *Annual Report of Activities for 2010,* p. 34.

[42] CDL-AD(2017)014.

[43] CDL-INF(2000)011.

[44] *See* also Opinion on the implementation of the constitutional referendum in Ukraine, CDL-INF(2000)014.

[45] CDL-AD(2021)007.

[46] CDL-AD(2004)042.

[47] CDL-AD(2021)005.

[48] CDL-AD(2009)010 and CDL-AD(2016)029.

in an authoritarian direction. In Georgia and Armenia, parliamentary democracy was introduced in several stages through constitutional reforms with the help of the Commission.

The starting point in **Georgia** was the so-called Rose Revolution in November 2003, which led to the resignation of President Shevardnadze. The new President Saakashvili, however, was not willing to give up too much power either and was therefore not very interested in cooperating with the Commission in this respect. However, due to his pronounced European orientation, he felt compelled to commit himself, *nolens volens,* to consulting the Venice Commission on planned constitutional amendments during his speech to the Parliamentary Assembly on 28 January 2004. The planned amendments were indeed sent to the Commission in sections in the following days with the understanding that their adoption was foreseen in a few days. The Commission had prepared for this eventuality and sent comments from the rapporteurs within a week. In the opinion,[49] adopted on the basis of these comments, the Commission pointed out that the approach of the reform was not coherent. The drafters seemed conflicted between the desire to strengthen the powers of the government and Parliament and the desire to keep a very strong President.

The same contradiction was also evident in the constitutional reform of 2009/10 initiated by President Saakashvili. While this reform undoubtedly improved the text of the Constitution, inconsistencies remained, in particular an excessive role of the President with regard to the constructive vote of no confidence.[50]

These inconsistencies were addressed in another round of constitutional reform launched by the new majority after President Saakashvili lost power in the 2016 elections. While the Commission acknowledged that this reform completed the country's evolution towards a parliamentary democracy, it noted that the political system remained very centralised and there was a risk of a lack of pluralism, not least because of the electoral law, which encouraged the emergence of strong majorities.[51] It was not possible for the Commission to point out the main problem, which was that real power was in the hands of an oligarch without a political office.

The Constitution of **Armenia** was adopted in 1995 without the help of the Commission. It had several weaknesses, notably a strong presidential power without sufficient checks and balances and excessive political influence on the judiciary. However, it was very difficult to reform, as any change had to be approved in a referendum by at least one third of the registered voters. This number was hard to achieve in a country where a large proportion of voters live abroad. A first referendum on a draft reform prepared with the help of the Commission therefore failed in 2003 due to a lack of sufficient participation.

In 2004, cooperation with the Commission was resumed. There were several disagreements between the Commission and the Armenian side, as the Commission originally considered the position of the President too strong. However, the final text contained enough improvements to allow the Commission to give a positive verdict.[52] The remaining problems in the text were addressed in a further constitutional reform, which was launched in 2014 in close cooperation with the Commission. As a result, Armenia became a parliamentary democracy and the new Constitution adopted in 2015 received strong praise from the Commission.[53]

2. The role of the Commission in protecting the democratic system

If one tries to take stock of the Commission's role in the defence of democracy in the countries of the former Soviet Union, these countries can be divided into two groups: In the first group, consisting of Armenia, Georgia, Moldova and Ukraine, the role of the Commission was decisive. In Armenia and Georgia, the constitutions underwent a total revision in the direction desired by the Commission; in Moldova and Ukraine, the Commission played a decisive role in preventing steps back towards an authoritarian system. It thus gave Ukrainian society in particular time to develop freely, which was certainly one of the conditions for its resilience in front of Russian aggression. In all these countries, it is hardly conceivable that a major constitutional reform would be undertaken without the involvement of the Venice Commission. This would neither be understood by public opinion in the country nor accepted by its international partners. Even though not all of the Commission's recommendations were immediately taken up, they remained part of the discussion and gave rise to further reforms. For example, the outstanding recommendations on the 2005 Armenian Constitution were implemented in the 2015 constitutional reform. The importance of the Commission lies not just in its individual opinions, but rather in its consistent commitment to contribute to establishing a legal order based on European values.

In Azerbaijan, Belarus and Russia, on the other hand, the Commission did not succeed in getting its recommendations accepted, and in Kyrgyzstan it succeeded only temporarily. This shows that the Commission's influence also depends on the geopolitical situation and the integration of the respective country into European structures. It is no coincidence that the negative examples are countries that are not interested in the prospect of joining the EU and where Western influence is low. However, the Commission's opinions did not remain without effect in these countries either. They were the basis for the European institutions' assessment of the relevant developments. Belarus lost its special guest status in the Parliamentary Assembly after the Commission's criticism of the constitutional amendments and never became a member of the Council of Europe.

With respect to the negative developments, two elements appear to be of particular importance: Firstly, it is noticeable that the authoritarian constitutional amendments were usually pushed through by a referendum, that did not comply with the constitutional amendment provisions, and not by a vote in parliament. For this reason, the Commission has consistently warned against amending constitutions through an unconstitutional referendum and insisted on the need for constitutional amendments to require a qualified majority in parliament.[54] It is therefore extremely important that the requirements for constitutional amendments are very precisely defined in the text of the constitution and leave no room for circumvention by a referendum based on other provisions. The Commission has therefore paid close attention to the rules on amending the constitution and produced a detailed report on the subject in 2009.[55] This issue also played an important role in its guidelines on referendums.[56] On the other hand, it is an alarm signal when limitations on presidential terms to a maximum of two mandates are abolished, as has been the case in

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[49] CDL-AD(2004)008.

[50] *See* the opinion of the Commission CDL-AD(2010)028.

[51] CDL-AD(2017)013.

[52] CDL-AD(2005)025.

[53] CDL-AD(2015)037 and CDL-AD(2015)038.

[54] Likewise V. Volpe (note 35), *ZaöRV* 76(2016), 811 ff. (840/841).

[55] CDL-AD(2010)001: Report on Constitutional Amendment.

[56] *See* below at p. 351 (under V.3.).

Belarus, Azerbaijan and Russia (and in Kazakhstan). This has always been a sign that authoritarian rule has been consolidated.

This point also was crucial in the opinion of the Commission on the constitutional reform in **Turkey.**[57] The constitutional amendment initiated by President Erdoğan introduced a presidential system and allowed exceptions to the limitation of the term of office of the President to two electoral periods. The Commission particularly criticised the fact that – unlike usual in democratic presidential systems – the amendments did not follow a logic of separation of powers but one of concentration of power. This was particularly evident in the fact that elections to Parliament and the presidency have to take place at the same time, which almost guarantees the President a majority in Parliament. The President can appoint ministers and vice-presidents as he sees fit and is only accountable to Parliament through an impractical impeachment procedure. No specific legal basis is required for presidential decrees. The constitutional reform weakened judicial independence[58] and took place during a state of emergency due to which democratic rights were severely restricted. This hampered debate during the campaign for the referendum on the constitutional amendment, which resulted nevertheless in a fairly narrow majority in favour of the amendments.

In Central and South-Eastern Europe, the distribution of power provided for by the constitution was usually more balanced from the outset than in Eastern Europe and this point played a lesser role in the Commission's work there. In **Croatia,** after the end of the Tudjman era, the President's powers were significantly reduced without the Commission's intervention.[59] In **Romania,** the Commission repeatedly criticised the excessive use of emergency decrees by the government without parliamentary involvement. Emergency decrees may be justified for more technical matters such as the alignment of economic law provisions with European Union law in the course of accession to the Union. However, they should remain the exception and should not be used for institutional issues and sensitive reforms in the field of justice.[60]

However, the most common problem identified by the Commission throughout Central and Eastern Europe and beyond was and is that laws are very often passed in a rush by the parliamentary majority without sufficient discussion and without giving the opposition sufficient opportunity to comment or to take their concerns into account. This problem is difficult to deal with through legal rules, as there are often situations where a law is really urgent and there can be no delay. However, the Commission regularly emphasises the need for sufficient discussion of draft laws in its opinions and also in its Checklist on the Rule of Law.[61] Especially in the area of state organisation and electoral law, hasty decisions should be avoided. The Commission has dealt with this issue in particular detail in its reports on the role of the opposition.[62]

V. Free and fair elections

1. The Code of Good Practice in Electoral Matters

Free and fair elections are not a sufficient but a necessary condition for the existence of a democracy. Therefore, electoral law is naturally a central area of work for the Venice Commission. However, this was not the case from the beginning. In the 1990s, electoral law played only a limited role in the Commission's activities, with a focus on problems of representation of national minorities.[63] This changed fundamentally, however, as it became increasingly obvious that elections were often not really free and fair, especially in many successor states of the Soviet Union. Partly there was very obvious manipulation up to and including falsification of the election results, partly there was sophisticated technology to influence and deceive voters.[64]

These manipulations were of course not dictated by legislation, but legislation often favoured those in power and did not provide for sufficient safeguards to protect the integrity of the election. It was not an easy task to comment on these electoral laws. There were hardly any standards at the European level, with the exception of Article 3 of the First Protocol to the ECHR, which is by nature quite general. Comparative law was of limited help here, as traditional Western European democracies had often seen little need to provide specific safeguards against electoral manipulation. Russia's proposal to conclude an international treaty on the requirements for democratic elections was rejected by the Western states. There was the certainly justified fear that such a treaty could only contain the lowest common denominator and that any criticism of an election, that would not have been based directly on a provision of the treaty, would then have been rejected as unjustified.

It was therefore a far better solution to mandate the Venice Commission as a body of independent experts to elaborate guidelines on electoral legislation that could only have a soft law character. In its Resolution 1264(2001), the Parliamentary Assembly requested the Venice Commission to devise a code of good practice in electoral matters and the Venice Commission adopted its Code of Good Practice in Electoral Matters[65] in October 2002. This text contains quite detailed provisions and has since served as a guide for the Venice Commission in assessing electoral legislation. The Code of Good Practice is also not just a text of the Commission, but it has been explicitly supported by the organs of the Council of Europe. It has been endorsed by both the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe. The Committee of Ministers of the Council of Europe, in a declaration adopted at ministerial level on 13 May 2004, called on all member states to take the Code of Good Practice into account when drawing up and implementing electoral legislation. The Code is also frequently referred to by the European Court of Human Rights.[66] The Code of Good Practice specifies the five principles of European electoral law: universal, equal, free, secret and direct suffrage. As conditions for the implementation of these principles, respect for fundamental rights, the stability of electoral law (which should preferably not be changed in the year preceding the election), and procedural guarantees are mentioned and explained in more detail. Procedural guarantees include the organisation of the election by an impartial body, the observation of the elections and the existence of an effective complaints system. Subject to these principles, states are free to

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[57] CDL-AD(2017)005.

[58] *See* below at p. 365 (IX.4.c)).

[59] Constitutional amendments of 9.11.2000 and 23.4.2001.

[60] CDL-AD(2012)026, CDL-AD(2019)014.

[61] CDL-AD(2016)007: Rule of Law Checklist, II.A.5

[62] CDL-AD(2010)025: Report on the Role of the Opposition in a Democratic Parliament, and CDL-AD(2019)015: Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: A Checklist.

[63] *See* the report of the Commission on Electoral Law and National Minorities, CDL-INF(2000)004. *See* also VI.1 below.

[64] Fundamental to the last point A. Wilson: *Virtual Politics: Faking Democracy in the Post-Soviet World,* 2005.

[65] CDL-AD(2002)023.

[66] References in P. Garrone: "Vingt ans de codification du patrimoine électoral européen: adolescence ou maturité?", in: *Venice Commission – Thirty Years* ... (note 1), pp. 233 ff. (237 ff.).

choose their own electoral system. In this context, the Code of Good Practice stipulates in particular that, in constituency division, the electoral strength should not deviate from the mean by more than 10% and in no case by more than 15%, unless there are special circumstances such as the existence of a concentrated minority. The Code of Good Practice has since been supplemented by individual studies on topics such as electoral disputes[67] or the use of digital technologies.[68]

2. The Commission's practice in the field of electoral law

Also in its Resolution (1264)2001, the Parliamentary Assembly called on the Venice Commission to form a joint working group with the Assembly, the Congress of Local and Regional Authorities of Europe and other organisations to deal with electoral issues. This was done in 2002 with the establishment of the Council for Democratic Elections. In addition to the Commission, the Parliamentary Assembly and the Congress, organisations specialising in electoral law are also represented as observers in this body, in particular ODIHR as the most important partner.

In 2002, the practice was also introduced that opinions in the field of electoral law are generally adopted as joint opinions by the Commission and ODIHR. On the one hand, this is intended to prevent forum shopping by the states concerned. On the other hand, this has also proved fruitful in terms of content, as the legal approach of the Commission is usefully complemented by the more practical approach of the ODIHR, which has great experience in election observation and is the leader in this field in Europe. In total, the Commission has adopted a good 150 opinions on electoral law. This is not an easy task, as electoral legislation directly affects the interests of politicians and their willingness to respond to expert recommendations is therefore comparatively low in this area.

Many of the opinions again and again concern the same countries, such as the states of the Caucasus, which frequently reform their electoral legislation. Some issues, such as measures to ensure better representation of women, are always addressed. The repeated opinions take into account the extent to which the recommendations of the previous opinion have been implemented. The experiences from the election observation are also taken up. Unlike the ODIHR, the Venice Commission does not conduct its own election observation, but representatives of the Commission participate as legal advisers in election observation by the Parliamentary Assembly and thus gain practical experience in the respective country.

The topics addressed in the opinions are diverse and often go into great technical detail. The aim is to avoid manipulation in the voting and counting process. Election observation and transparency also in the counting process are of utmost importance for this. Voter registers are often very inaccurate, especially if many citizens live abroad. This then opens up the possibility of others voting for them. Safeguards against multiple voting, such as marking fingers with ink, can be helpful but do not provide perfect protection. Mobile ballot boxes, for example in hospitals and homes, are particularly vulnerable to manipulation.

More recently, direct manipulation tends to be replaced by more subtle methods such as the use of administrative resources.[69] The boundaries between the state and the ruling party are blurred and the state apparatus works for the party. The opposition is denied adequate access especially to the audiovisual media, and funding favours the ruling parties.

Free and fair elections are only possible if fundamental rights are respected in the country as a whole and freedom of expression in particular is guaranteed. This of course applies beyond the period of the election campaign. However, election laws often contain restrictions on freedom of expression during the election campaign. Such restrictions are regularly criticised in the opinions. The same applies to excessive requirements for the nomination of candidates, which usually disadvantage small and opposition parties.

One principle of the Code of Good Practice is the organisation of elections by an impartial body. In states such as Germany with a long tradition of an impartial administration, the organisation of the election by the Ministry of the Interior is unproblematic. In new democracies, this would lead to officials also making unsolicited efforts to help the government win in order to secure their careers. This is why most new democracies have independent election commissions that are responsible for conducting the election. Ideally, these would be technical bodies staffed by professionals. In practice, however, there is then again the risk that the commission is *de facto* controlled by the government. In an opinion on Albania, the Venice Commission and ODIHR noted that it appeared extremely difficult to find neutral personalities in the country to staff the electoral commission and that the attempt to establish an electoral commission not composed of party politicians had failed.[70] In such cases, the aim should be to achieve as balanced a composition of the election commission as possible without this leading to a paralysis of the work. The members of the election commission appointed by political parties should also be protected from direct influence of the parties, for example by excluding the possibility of their dismissal at any time.

The Code of Good Practice leaves the decision on the electoral system to the states. However, certain limits must be observed. The Commission and ODIHR have consistently criticised excessive thresholds for representation in parliament that exceed five per cent. Majority voting systems always run the risk of artificial division of constituencies to the advantage of the ruling party, so-called gerrymandering. Moreover, the first-past-the-post system, or a mixed system in which some MPs are elected by list and others by the first-past-the-post system, has often proved problematic in new democracies. It often leads to locally influential businessmen controlling the election through financial means or to formally independent candidates being elected, who are in fact close to the government and supported by the local administration. The Commission has therefore recommended the use of proportional representation for Ukraine and Moldova,[71] as well as for Georgia. There, however, the motive was different: the majority voting system regularly led to the dominance of one party, which then alone obtained a constitution-amending majority in parliament and was thus able to undermine any separation of powers.

To support the work of election commissions, the Venice Commission organises seminars, trains their staff and makes experts available to individual commissions over a longer period of time. Since 2005, it has co-organised the European Conference of Election Management Bodies, which has increasingly opened to the participation of non-European election authorities.

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[67] CDL-AD(2020)025: Report on Election Dispute Resolution.

[68] CDL-AD(2020)037: Principles for a Fundamental Rights-Compliant Use of Digital Technologies in Electoral Processes.

[69] *See* CDL-AD(2016)004: Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes.

[70] CDL-AD(2011)042, § 24.

[71] CDL-AD(2014)003.

Overall, it can be said that, thanks to the efforts of the Commission and ODIHR, in Central and Eastern Europe the quality of electoral legislation has improved significantly in recent decades and the legal situation is not an obstacle to the holding of free and fair elections. The problems now lie more in the conduct of the elections and a dominant position of governments in the media.

3. Referendums

As stated above, referendums in the states of the former Soviet Union were often a tool to roll back democratic gains and expand presidential power. The Commission therefore adopted guidelines for constitutional referendums in July 2001,[72] which set out the requirements for such referendums and emphasise that they must in any case have an explicit legal basis in the constitution and that parliament must have the opportunity to comment.

In 2007, the Commission adopted a Code of Good Practice on Referendums.[73] The Code regulates many issues, such as eligibility to participate in referendums, in parallel with the Code of Good Practice in Electoral Matters, and in addition contains specific rules applicable to referendums, such as unity of form and content. With regard to the requirements for referendums, the Code of Good Practice takes up rules from the 2001 Guidelines on constitutional referendums.

Overall, however, the Code of Good Practice was more referendum-friendly and opposed a participation quorum for the validity of referendums and a quorum based on the total number of registered voters for the approval of a proposal. This was not without controversy within the Commission and in 2022 a revised version of the Code was adopted,[74] which explicitly allows for an approval quorum for referendums on fundamental constitutional issues. This new version seems more appropriate to the realities, especially in Central and Eastern Europe, and makes it more difficult to exclude the opposition when amending the constitution.

As in the area of electoral law, the Commission provides opinions on laws on referendums, which are also first submitted to the Council for Democratic Elections and then approved by the Commission at the plenary session.

4. Legislation on political parties

The weakness of political parties in most countries of Central and Eastern Europe proved to be a basic problem for democratic development in these countries and is often used as an argument for a presidential system and against a parliamentary system of government. In fact, with the exception of the successor parties to the Communist Party, the parties in most countries were weak and did not have a developed programme but were rather associations in support of a particular politician. It certainly did not help that democracy was introduced in Eastern Europe at a time when political parties were also losing support in the West.

Good legislation can contribute to the consolidation of political parties. Moreover, from the very beginning, the Commission has been concerned to counter efforts by governments to ban opposition parties or to obstruct them. Party bans were an issue not only in Eastern Europe, but also in particular in Turkey. The Commission therefore adopted very restrictive guidelines on the prohibition and dissolution of political parties in December 1999,[75] allowing a ban only for parties that advocate or use violence. In 2009, the Commission adopted an opinion on the rules on party bans in Turkey.[76] It especially criticised the fact that too many reasons could lead to a party ban, that there were insufficient safeguards in the procedure and that party bans did not appear to be exceptional measures but a structural part of the constitutional system.

The guidelines on the prohibition and dissolution of political parties were supplemented in March 2001 by a report and guidelines on the financing of political parties.[77] Moreover, it seemed desirable to develop comprehensive guidelines on the law of political parties, especially as states with authoritarian tendencies increasingly moved towards denying registration to opposition parties rather than banning them.[78] The Commission therefore adopted a Code of Good Practice in the Field of Political Parties in March 2009.[79] This was not easy, as there are two distinctly different conceptions of the law of political parties in Western Europe. In France, political parties are treated as normal associations, while German legislation contains comprehensive guarantees to safeguard intra-party democracy. The weakness of political parties in Central and Eastern Europe might have made it seem appropriate to adopt the German model. However, the Code of Good Practice did not take this step, partly because of the fear that some states might abuse such provisions to interfere with the functioning of opposition parties. The emphasis of the Code is therefore on ensuring the free formation of parties and the possibility to freely join parties. In October 2010, the Commission, together with ODIHR, adopted joint guidelines for state regulations on political parties.[80]

VI. Protection of minorities, territorial organisation and integrity

1. Protection of minorities

In the period immediately following the founding of the Commission, there were great and justified fears that the end of the Iron Curtain could lead to the revival of ethnic conflicts that had been frozen during communist rule. Protection of minorities seemed to be the order of the day and one of the first activities of the Commission was to prepare a draft Convention for the Protection of National Minorities.[81] This draft was submitted to the Committee of Ministers in February 1991 but was not adopted by the Committee. However, elements of the proposal were incorporated into the Council of Europe's Framework Convention for the Protection of National Minorities of 1994. The Council of Europe also drew up the European Charter for Regional or Minority Languages, which entered into force in 1998. Thus, binding European standards exist for broad areas of minority protection.

In its transnational work, the Venice Commission subsequently took up minority protection mainly in the field of electoral law and political parties. The Code of Good Practice in Electoral Matters emphasises that the existence of a concentrated national minority can justify the existence of an unusually small constituency and that constituency division must not disadvantage national minorities. It explicitly allows for regulations that guarantee seats to national minorities or favour them in the allocation of seats, for example through exceptions to a minimum threshold requirement. It calls for the

[72] CDL-INF(2001)010: Guidelines for Constitutional Referendums at National Level.

[73] CDL-AD(2007)008.

[74] CDL-AD(2022)015.

[75] CDL-INF(2000)001:Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures.

[76] CDL-AD(2009)006.

[77] CDL-INF(2001)008.

[78] *See* the opinions on the Law on Political Parties of Azerbaijan, CDL-AD(2011)046 and Russia CDL-AD(2012)003.

[79] CDL-AD(2009)021.

[80] CDL-AD(2010)024.

[81] CDL(1991)007: Proposal for a European Convention for the Protection of Minorities.

admission of parties representing national minorities. The Joint Guidelines with ODIHR on State Regulations on Political Parties also advocate the admission of regional parties.[82] This is a sensitive issue, as there are states whose party laws require parties to demonstrate support in large parts of the country in order to be registered.[83]

The Commission broke new ground in its report on the preferential treatment of national minorities by another state in which the ethnic group concerned constitutes the majority, the so-called "kin-state".[84] The starting point was a request from Romania for an opinion from the Commission on the Hungarian law on Hungarians living in neighbouring states. At that time, there was no rule in the Commission's Statute on whether a state could request an opinion on another state. As a compromise agreed with both states, the Commission prepared a general report that did not refer to a specific country or law. The Commission saw the risk of infringement of the sovereignty of the state in which the members of the minority live by acts of the "kin-state" and indicated a preference for settling such issues through bilateral treaties. However, it also noted that the support of minorities by the "kin-state" is quite common in Europe and has a constitutional basis in a number of states. According to the Commission, preferential treatment of members of the ethnically related minority should be limited to the areas of education and culture, and acts of sovereignty on the territory of the other state should be avoided. Both Hungary and Romania expressed their agreement with the conclusions of the report.

The Commission was also innovative in a report on the possible application of the Framework Convention for the Protection of National Minorities in Belgium.[85] It found that even members of a group that is dominant at the national level, such as Flemings and Walloons, can be a minority within the meaning of the Framework Convention in the region dominated by the other ethnic group.

2. Territorial organisation and territorial integrity

The communist states, with the exception of federal Yugoslavia, were extremely centralised. The federal character of the Soviet Union was more formal than real. In its work, the Commission always advocated more decentralised solutions. However, the political class in the new democracies was reluctant to cede power and saw federal or autonomy arrangements as a risk to the cohesion of the state. When Georgia's constitution was being drafted,[86] suggestions by members of the Commission to federalise the country met with a negative response. In its opinion on the Constitution of Ukraine, the Commission noted that the autonomy of Crimea was quite limited and that the region was not allowed to pass its own laws.[87] Autonomy as a concept seemed less attractive in the region due to the fact that during the communist period many regions were called autonomous without this having any real substance. An autonomous status therefore tended to be considered inferior.

In addition to a general preference for decentralised solutions, the Commission was aware that in states with little tradition of the rule of law, it was not sufficient to provide minority protection by granting rights to members of minorities. Geographically concentrated minorities were interested in being able to regulate their own affairs in their region. In addition, this was often a way to exert influence at the national level for example through regional representatives in second chambers.

The Commission's work on general issues of territorial organisation and integrity was carried out in parallel with its involvement in these issues in individual countries. In 1997, it adopted a still rather general study on federal and regional states.[88] Three studies followed in 2000: a report motivated by the situation in Bosnia and Herzegovina on the possibility of regions in federal and regional states to conclude treaties under international law,[89] a report requested by the Parliamentary Assembly on self-determination and secession in constitutional law[90] and a report requested by the Committee of Ministers on possible solutions to so-called ethno-political conflicts.[91] The Commission emphasised that the constitutions of most states do not grant a right to secession and that the right to self-determination cannot be equated with a right to secession, but must as a rule be realised within the framework of the respective state.

The Commission also later reiterated its sceptical position towards secessionist efforts. In its opinions on the Russian annexation of Crimea,[92] it stressed that the secession of Crimea violated Ukraine's Constitution, that the conditions for organising a referendum in line with European democratic standards were not met, and that the incorporation of Crimea into Russia was illegal under international law. In 2017, the President of the Venice Commission responded to a letter from the President of the Catalonia region that any referendum on the independence of the region would have to be held in full compliance with the Spanish Constitution.[93] This letter received the greatest attention from the Spanish public and was cited by the highest Spanish courts.

3. The Venice Commission and the consequences of the dissolution of Yugoslavia[94]

Issues of minority protection and territorial organisation and integrity were central to the work of the Venice Commission in the former Yugoslavia. The Commission was to play an important role there.

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[82] CDL-AD(2010)024, §§ 80-81.

[83] *See* Opinion on the Law on Political Parties of the Russian Federation, CDL-AD(2012)003, §§ 18 ff.

[84] CDL-INF(2001)019: Report on the Preferential Treatment of National Minorities by their Kin-State.

[85] CDL-AD(2002)001: Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could be Applied in Belgium. On this *see* S. Granata-Menghini: "The Application of the Framework Convention for the Protection of National Minorities in Belgium: The Opinion of the European Commission for Democracy through Law", in: *European Yearbook on Minority Issues,* 2(2002/03) p. 357 ff.

[86] CDL(1994)037: Visit by a Delegation of the Commission to Georgia: Report by the Secretariat.

[87] CDL-INF(1997)002.

[88] CDL-INF(1997)005: Federal and Regional States.

[89] CDL-INF(2000)003: Federated and Regional Entities and International Treaties.

[90] CDL-INF(2000)002: Self-determination and Secession in Constitutional Law.

[91] CDL-INF(2000)016: A General Legal Reference Framework to Facilitate the Settlement of Ethno-Political Conflicts in Europe.

[92] CDL-AD(2014)002: Opinion on "whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles" and CDL-AD(2014)004: Opinion on "whether Draft Federal Constitutional Law No. 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject Within the Russian Federation is Compatible with International Law".

[93] For more details, *see* J.M. Castella Andreu: "The Venice Commission and Referendums on Secession", in: *Venice Commission – Thirty Years* ... (note 1), pp. 153 ff. (163 ff.).

[94] For more details on this topic *see* T. Markert: "The Consequences of the Dissolution of Former Yugoslavia", in: *Venice Commission – Thirty Years* ... (note 1), p. 451 ff.

a) Croatia

In Croatia, the main concern of the international community was to ensure adequate protection of the rights of national minorities, *de facto* the Serb minority. As part of its consideration of Croatia's application for membership of the Council of Europe, the Parliamentary Assembly asked the Commission to examine the country's constitutional provisions for the protection of minorities. As a result of the Venice Commission's recommendations, international advisers were integrated into the Croatian Constitutional Court.[95] These advisers participated in all decisions of the Constitutional Court on the protection of minorities. In December 2002, after much hesitation, the country adopted a new constitutional law on the protection of national minorities, which, however, only partially incorporated the recommendations of the Venice Commission.[96]

b) Bosnia and Herzegovina

The Venice Commission was not involved in the drafting of the Constitution of Bosnia and Herzegovina, an annex to the Dayton Agreement. However, it was asked by the High Representative in May 1996 to examine the extent to which the Constitutions of the two entities, Republika Srpska (hereinafter RS) and the Bosniak-Croat Federation of Bosnia and Herzegovina, were compatible with the state Constitution.[97] The High Representative was originally established in Annex X of the Dayton Agreement as the authority empowered to interpret the Agreement on the ground but was then given additional powers in 1997 to make binding decisions to enforce the Agreement, the so-called "Bonn powers". As a result of the opinion of the Venice Commission,[98] the Constitution of the Federation was amended in some technical points and the Constitution of the RS was amended in several important respects.[99] However, the RS Parliament did not follow the Commission's recommendation to explicitly state in the entity's Constitution that the RS is part of Bosnia and Herzegovina. In the opinion, the Commission characterised Bosnia and Herzegovina as a federation, albeit an unusually weak federation, which was important for the Commission's further interpretation of the state Constitution.

In the following years, at the request of the Office of the High Representative, the Commission adopted a considerable number of opinions on the interpretation of the Constitution. In doing so, the Commission sought to interpret the Constitution in a way that would ensure a minimum of functionality of the state. As an example, an opinion of the Commission[100] was the basis for the establishment of a court at the level of the state of Bosnia and Herzegovina. The Constitution explicitly only provided for the Constitutional Court as a court at the state level, but there were issues that concerned the state as a whole that could not be resolved by entity courts or the Constitutional Court.

However, the possibilities to establish a functioning state on the basis of the Dayton Constitution were limited. The competences of the state level provided for in the constitution are too limited and the possibility of transferring competences from the entities to the state level has been insufficiently used despite the efforts of the High Representatives. Decisions at the state level, but also at the entity level, can all too easily be blocked by representatives of one ethnic group. The country's constitutional structure is probably the most complicated and least functional of any state in the world.[101] It contains too many incentives to conduct politics as a zero-sum game, looking only to the interests of one's own ethnic group and not to the public interest.

In March 2005, at the request of the Parliamentary Assembly, the Venice Commission therefore adopted an opinion on the constitutional situation in Bosnia and Herzegovina, in which it attempted to present a realistic concept for a fundamental reform of the state structures and the Constitution in several stages.[102] In the first stage, the competences of the state as a whole were to be expanded in order to enable the country to participate in European integration and to become a member of the EU in the long term. In addition, the blocking of decisions at the state level was to be made more difficult and veto rights reduced. Two of the institutions, the three-member Presidency and the House of Peoples, represented only the three dominant ethnic groups and excluded others. This discrimination had to be ended. Ideally, the collective Presidency should be replaced by an indirectly elected president and the House of Peoples abolished. The equally dysfunctional structure of one of the entities, the Federation of Bosnia and Herzegovina, should also be reformed. In the long term, the state should then be transformed from a state of the three ethnic groups to a state of the citizens.

The opinion found a broad echo in the country and was taken up by a former Deputy High Representative, the American Donald Hays. In 2005, he launched an initiative for constitutional reform based on the opinion, in which the Commission was involved. In the end, the initiative failed because it did not achieve the required majority in parliament to amend the Constitution. A part of the Bosniak representatives rejected it as not far-reaching enough. This turned out to be a tragic mistake, as it was the last time that the political representatives of the Serbs were prepared to agree to a substantial constitutional reform. Another, this time joint, attempt by the EU and the USA to push through constitutional reform accordingly failed in 2009 due to the resistance of the Bosnian Serbs.

Since then, efforts have focused on implementing the ECtHR's ruling in the *Sejdić and Finci case,*[103] which, in agreement with the Venice Commission, had declared the rules on the election of the presidency incompatible with the ECHR. This has not yet been achieved despite several attempts involving the Commission.

c) Kosovo

In 1998, the United Kingdom and the Austrian EU Presidency asked the Venice Commission to prepare elements for an agreement on the status of Kosovo that could be introduced into future negotiations. A Commission working group drafted a text that envisaged extensive autonomy for the region. Yugoslavia would have retained competences essentially for foreign relations, Serbia would no longer have exercised sovereign rights in Kosovo.

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[95] *See* CDL-INF(1997)003: Report on the State of Progress of Co-operation between the Venice Commission and the Republic of Croatia.

[96] CDL-AD(2003)009.

[97] For a detailed account of the activities of the Venice Commission up to the year 2000, *see* T. Markert: "Der Beitrag der Venedig-Kommission", in: W. Graf Vitzthum / I. Winkelmann (eds.): *Bosnien-Herzegowina im Horizont Europas,* 2002, pp. 87 ff.

[98] CDL(1996)056final.

[99] Details in CDL(1996)070.

[100] CDL-INF(1998)017.

[101] For details *see* T. Markert: "The Impossible Reform? The Quest for New Constitutional Arrangements in Bosnia and Herzegovina", in: H. Swoboda / C. Solioz (eds.): *Conflict and Renewal: Europe Transformed. Essays in Honour of Wolfgang Petritsch,* 2007, p. 261 ff.

[102] CDL-AD(2005)004.

[103] ECtHR, Judgment of 22.12.2009, *Sejdić and Finci v. Bosnia and Herzegovina,* nos. 27996/06 et al.

The Commission's proposal never became part of the negotiations conducted by the USA with both sides.[104] However, the Commission was asked by the European side to comment on the proposals made by the Americans and these comments were also appreciated by the Americans. As a result, the Venice Commission was invited to the Rambouillet Conference as part of the EU delegation, where a solution to the crisis was negotiated with both sides. The agreement worked out at the conference, the so-called Rambouillet Accords,[105] was accepted by the Kosovar side after some hesitation, but rejected by Serbia. The consequences are well known. Serbia was not prepared to accept an international presence on the ground. Without such a presence, however, the agreement would hardly have been put into practice. The Rambouillet Accords never entered into force but were the starting point for all subsequent arrangements.

After the end of the NATO air strikes, Kosovo was placed under UN administration. The United Nations Mission in Kosovo (UNMIK) worked with the Commission from the beginning and the Commission was represented in particular in the working group that drafted a Constitutional Framework for Self-Government. This text, adopted as UNMIK Regulation 2001/9, allowed for the formation of organs of self-government in Kosovo, but reserved essential competences for UNMIK.

The Venice Commission was also consulted by the UN Secretary General's Special Envoy Martti Ahtisaari on the constitutional parts of his proposal. This proposal was rejected by Serbia, although it contained comprehensive guarantees for the protection of the Serbian ethnic group and other minorities. However, it was the basis for Kosovo's independence and its future Constitution, which was drafted with the help of the EU and with the involvement of the Venice Commission and entered into force in June 2008.

d) North Macedonia

North Macedonia, then still called the Republic of Macedonia according to its constitution, had succeeded in gaining independence without bloodshed. However, there were internal tensions between the Macedonian majority and the Albanian minority, which felt discriminated against. In 2001, a group of Albanians took up arms as the National Liberation Army and gained control of part of the territory. The European Union and the USA reacted immediately to prevent the outbreak of a full-fledged civil war and sent mediators. The European mediator, François Léotard, asked the Venice Commission for help and the author of this article participated in the negotiations as his legal adviser. The official negotiations were not with the guerrillas but with the Albanian political parties.[106]

They led to the conclusion of the Ohrid Framework Agreement, which was signed on 13 August 2001.[107] The Framework Agreement provided for constitutional amendments, which were later adopted by the Macedonian Parliament, and the enactment of several laws. Albanian demands for federalisation or regionalisation of the country were not accepted, as it was feared that this could lead to secession at a later stage. Instead, local self-government was strengthened. Unlike in Bosnia, no veto rights were introduced with respect to votes in parliament, but for the adoption of certain laws, especially in the field of education, culture, local self-government and the use of languages, a double majority is required, both a majority of all MPs and a majority of MPs belonging to ethnic minorities.[108] This also applies to the election of the Ombudsman and some members of the Constitutional Court.

The agreement contains provisions on the police and the preferential treatment of minorities. Most controversial, however, and typical of the Balkans, were provisions of a more symbolic nature and, in particular, issues concerning the use of languages. Macedonian remains the only official language mentioned in the constitution, but Albanian, as a language spoken by more than 20 per cent of the population, became an official language in certain areas and, limited to certain situations, at the national level. The implementation of these provisions remains politically contentious. In 2018, the largest Albanian party demanded, as a condition of its entry into the governing coalition, the adoption of a language law that would have made the administration effectively bilingual. This went beyond the requirements of the Ohrid Agreement and was criticised in the Commission's opinion.[109] In particular, the Commission feared the paralysis of the judiciary in a country where few ethnic Macedonians were bilingual.

Despite these remaining problems, the Ohrid Agreement remains one of the few clear successes of the international community in the Balkans. The armed conflict ended, and the country stabilised.

e) The independence of Montenegro

Montenegro was the only Republic besides Serbia to remain in the Federal Republic of Yugoslavia. The country's leadership sought independence, while a considerable part of the population wanted to remain linked to Serbia. The functioning of a federation of two entities of extremely different sizes was problematic: either small Montenegro was extremely overrepresented in the common institutions compared to the size of its population, or it had little influence. A report by the Commission on the Constitutional Situation in the Federal Republic of Yugoslavia[110] called on both sides to engage in *bona fide* negotiations. These then took place with the support of the European Union and the participation of the Venice Commission and led to the formation of a loose union of states. Both member states were given the right to initiate a procedure for gaining their independence after three years on the basis of a referendum, which had to take into account internationally recognised democratic standards.

The Parliamentary Assembly asked the Commission for an opinion on what these standards were. There were two crucial questions: firstly, the required majority, and secondly, whether Montenegrin citizens living in Serbia were allowed to vote. In its opinion,[111] the Venice Commission advocated requiring a qualified majority for a decision in favour of independence but did not specify this majority. Such a fundamental decision should not depend on a random majority on one day but requires a clear majority for its legitimacy. This is confirmed by international practice, both by the constitutional

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[104] The American negotiator described the negotiations in detail in his memoirs, C. Hill, *Outpost, A Diplomat at Work,* 2014, p. 120 ff.

[105] The agreement is reprinted in M. Weller, *The crisis in Kosovo 1989-1999,* 1999, p. 453 ff., together with extensive further material.

[106] They are described in the book by the American mediator J. Pardew: *Peacemakers: American Leadership and the End of Genocide in the Balkans,* 2017, p. 255 ff.

[107] For a good analysis of the agreement, *see* B. Stankovski: "Peacemaking and Constitutional Change: Negotiating Power-Sharing Arrangements and Identity Issues", *Berghof Foundation 2020,* www.berghof-foundation.org/pmcb

[108] The Agreement speaks of communities that are not in the majority, as in the Balkans the term minority has negative connotations.

[109] CDL-AD(2019)033.

[110] CDL-INF(2001)023.

[111] CDL-AD(2005)041.

provisions of individual European states and, in particular, by the decision of the Supreme Court of Canada on the independence of Québec[112] and the Canadian Clarity Act of 29 June 2000 based on it. Moreover, the Commission pointed out that the right to vote within a state usually depends on residence and opposed the inclusion of Montenegrins living in Serbia in the electoral rolls.

The report was a starting point for the negotiations between Montenegro and Serbia, which were mediated by the EU. In the end, they agreed on the requirement that 55 percent of the voters had to approve independence. This hurdle was narrowly achieved with 55.5 percent in favour.

4. The protection of minorities and territorial conflicts in the states of the former Soviet Union

a) Georgia

Since gaining independence, Georgia has been confronted with separatist aspirations in three regions, namely Abkhazia, Adjara and South Ossetia. Georgia's Constitution contained only a rather vague promise of autonomy for these regions after the country's territorial integrity was restored and provided for the formation of a second chamber in this case. After the Rose Revolution in November 2003, the new President Saakashvili succeeded in bringing the Adjara region, with its very predominantly ethnic Georgian population, back under Georgia's control. However, the constitutional law on the status of the Autonomous Republic of Adjara that was subsequently adopted was viewed rather critically by the Commission,[113] as it granted the region only extremely limited self-government.

Georgia is a country consisting of several historical regions and the Commission recommended that the country consider the concept of asymmetric federalism.[114] According to this concept, the regions where a large part of the population consists of national minorities could have been given more competences than the other regions. However, the Georgian political class was never really ready to move away from a centralist concept of the state. Since the Russian-Georgian war of 2008, the possibility of reintegrating the two regions has in any case become remote.

b) Moldova

The Republic of Moldova also was not able to control its entire national territory since its independence. The economically most developed area, Transnistria, where Russian troops are stationed, had seceded from Moldova after brief fighting. Behind this was no real ethnic conflict, even if the proportion of Russian and Ukrainian population there was higher than on the other bank of the Dniester, but the fear of the *nomenklatura* there of losing their positions. The resolution of this conflict should therefore be easier than that of the conflicts in Georgia but has not succeeded to date.

In 2003, the central government and Transnistria negotiated the drafting of a new, federal constitution with the participation of the Commission, the OSCE and the EU. However, it was more a matter of broad autonomy than federalism, as there was no provision for making the government-controlled territory into its own region or dividing it into several regions. The negotiations ended when Russia submitted its own proposal, the so-called Kozak Memorandum, which would have given Transnistria a completely disproportionate influence on the state as a whole and made it largely impossible to take decisions against the will of Transnistria's representatives. The communist President of Moldova, Voronin, who had already accepted the text, backed out at the last moment on the advice of his international partners.

c) Ukraine

According to its Constitution, Ukraine has been a unitary state from the beginning, subject to the limited autonomy of Crimea. Like other successor states to the Soviet Union, it was also an extremely centralised state with little room for local self-government. This changed from 2015 onwards, as the then Prime Minister Grojsman sought and largely realised extensive decentralisation. It would have been desirable to place decentralisation on a solid constitutional foundation, and the Ukrainian Constitutional Commission drew up proposals to this end, which were welcomed by the Venice Commission.[115] However, the final adoption of these proposals failed because President Poroshenko included in the package a clause that would have created a constitutional basis for introducing special arrangements for parts of the Donbas, which would have made it possible to conclude and implement an agreement on this region without amending the Constitution. This was in line with the advice of the Commission[116] and other international institutions but met with an emotional negative reaction from the Ukrainian public.

The question of the status of the Russian language has been controversial in Ukraine from the beginning. Article 10 of the Constitution makes Ukrainian the sole official language, but guarantees the free development, use and protection of the Russian language and the languages of the other national minorities. The Russian language was not a minority language in the classical sense, as its use in public sphere outweighed that of Ukrainian and many ethnic Ukrainians, especially in the east and south, spoke Russian better than Ukrainian. Language legislation changed according to the political situation and the Venice Commission produced several opinions on the subject. After the Russian aggression of 2014, the language issue was seen even more as a matter of national security, not least because the Russian media served as a vehicle for Kremlin propaganda. This initially led to a 2017 law severely restricting the use of the Russian language and minority languages in education. This law was heavily criticised by the Russian side and led to diplomatic tensions with Hungary, despite a clause granting privileged status to official languages of EU countries. In its opinion,[117] the Commission expressed understanding for the desire to promote the Ukrainian language but criticised the lack of guarantees for the continued use of minority languages and the discrimination against languages that are not official languages of an EU country. In an opinion on the Law on the Promotion of the Ukrainian Language as a State Language,[118] the Commission welcomed the intention to strengthen the Ukrainian language but criticised the very restrictive provisions on the use of other languages, for example in the media.

VII. Protection of fundamental rights

1. The Commission's role in the protection of human rights in Europe

After the fall of the Iron Curtain, there was a broad consensus in the new democracies on the need for constitutional protection of fundamental rights. Moreover, these countries were striving for membership

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[112] (1998) 2 S.C.R. Reference on Secession of Québec.
[113] CDL-AD(2004)018.
[114] *See* document CDL(2004)039Syn.
[115] CDL-PI(2005)008.
[116] *Ibid.* § 27.
[117] CDL-AD(2017)030.
[118] CDL-AD(2019)038.

in the Council of Europe and therefore had to bring their legal system in line with the ECHR. Accordingly, the new constitutions generally provided for a very broad catalogue of fundamental rights. A broad catalogue of social rights, moreover, was in keeping with the socialist tradition. The Commission therefore had little reason to criticise gaps in the catalogue of fundamental rights.[119] Rather, it warned that an overly broad catalogue of social rights could raise false expectations and lead to rights guaranteed by the constitution being understood more as programmatic sentences than as individual rights enforceable in court.[120] In such cases, a formulation as a state objective would be preferable. The provisions should be formulated in such a way that it is clear whether a state objective or a subjective right is meant.

The Commission saw problems above all in the formulation of the limitations of fundamental rights. These were sometimes too general,[121] too unclear[122] or too complex.[123] Often, too many fundamental rights were only guaranteed for citizens and not for all persons. In contrast, the Commission always welcomed when constitutions explicitly stipulated the direct applicability of fundamental rights and gave constitutional status to international treaties in the area of human rights protection.

In the area of fundamental rights, it was a great advantage for the Commission that here, unlike in the area of state organisation, it could refer to elaborated international standards. As an institution of the Council of Europe, it relied primarily on the ECHR, but increasingly included texts from the European Union, the United Nations and other organisations. However, since no other international treaty in the field of human rights protection has such a differentiated body of case-law as the ECHR, the case-law of the ECtHR remains the most important guide when the Commission examines legislation relevant to human rights.

Its task is primarily preventive[124] and thus complementary to the ECtHR, which can only pass binding judgment on human rights violations that have already occurred. In contrast, good legislation in line with the Commission's recommendations should prevent subsequent human rights violations from occurring in the first place. The ECtHR values this role of the Commission and increasingly refers to its opinions and reports in its judgments. In some cases, it has also requested an *amicus curiae* brief from the Commission. For its part, the Commission is often asked by states to help them transpose ECtHR judgments into national legislation.[125] At the request of the Parliamentary Assembly, the Commission has criticised as incompatible with the country's international obligations the Russian law allowing the Russian Constitutional Court to declare ECtHR judgments unenforceable according to the Russian Constitution.[126] It repeated this criticism when Russia included an explicit basis for this law in the Constitution.[127]

The Commission has also sought to systematise its approach in some areas of fundamental rights protection and has developed its own soft law standards. This has been done partly in cooperation with ODIHR and has concerned in particular the freedoms of assembly and association and aspects of freedom of religion and expression.[128] It has also dealt in depth with restrictions on fundamental rights in a state of emergency and powers of the secret services.

2. Selected problems of the protection of fundamental rights

In its opinions on national legislation, the Commission has dealt with the entire range of fundamental rights and with the conformity of laws with fundamental rights in many different areas. Only specific problems of particular importance for the development in Central and Eastern Europe can be addressed here.

a) Abolition of the death penalty

The complete abolition of the death penalty in Europe was a main aim of all European institutions and especially of the Council of Europe. However, the ban on the death penalty was not enshrined in all new constitutions and some parliaments were reluctant to abolish it by law, as the death penalty did enjoy support in public opinion. In some countries, such as Hungary in 1990 and Lithuania in 1998, the death penalty was declared unconstitutional by the Constitutional Court. Outside Europe, the decision of the South African Constitutional Court to abolish the death penalty received particular attention.

The Venice Commission was asked by the Parliamentary Assembly to provide opinions on the constitutionality of the death penalty in Ukraine and Albania and concluded in both cases that the death penalty was unconstitutional.[129] In the case of Ukraine, this was not without problems, as the Constitution stipulates that no one may be arbitrarily deprived of life. For the Commission, the term "arbitrary" was not clear in this context. Due to the fact that the right to life enjoys a high status in the Ukrainian Constitution, that there is no explicit basis for the death penalty in the Constitution, that it prohibits cruel and inhuman punishments, and due to the development in Europe towards the fundamental inadmissibility of the death penalty, according to the Commission the death penalty contradicts the Ukrainian Constitution. Another argument was the comparison with the ICCPR, whose wording on the right to life underlies the corresponding provision of the Ukrainian Constitution, but which itself contains an explicit exception on the admissibility of the death penalty. In the case of Albania, the Commission additionally relied on the high importance of the protection of human dignity in the Albanian Constitution

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[119] Examples in J. Velaers: "Constitutional Versus International Protection of Human Rights: Added Value or Redundancy?", *Revue interdisciplinaire d'études juridiques* 77(2016), 265 ff. (291/292).

[120] CDL-INF(1996)006 on Ukraine, CDL-AD(2005)022 on Kyrgyzstan, CDL-AD(2007)004 on Serbia.

[121] CDL(1994)011 on Russia.

[122] CDL-INF(1996)006 on Ukraine.

[123] CDL-AD(2007)004 on Serbia.

[124] *See* in detail G. Malinverni, "The Contribution of the European Commission for Democracy through Law", in: L.A. Sicilianos (ed.), *The Prevention of Human Rights Violations,* 2001, pp. 123 ff.

[125] On the ECtHR-Commission relationship as a whole, G. Buquichio / S. Granata-Menghini: "The Interaction between the Venice Commission and the European Court of Human Rights: Anticipation, Consolidation, Coordination of Human Rights Protection in Europe", in: L.A. Sicilianos et al. (eds.): *Regards croisés sur la protection nationale et internationale des droits de l'homme, Liber amicorum Guido Raimondi,* 2019, p. 35; P. Van Dijk / B. Vermeulen: "The European Court of Human Rights and the Venice Commission", in: *Venice Commission – Thirty Years* ... (note 1), p. 687 ff.

[126] CDL-AD(2016)016. On this subject in detail I. Cameron: "Russian Constitutional Law and Judgments of the European Court of Human Rights", in: E. Bylander / A.J. Cornell / J. Ragnwaldh (eds.), *Forward! Essays in Honour of Prof. Dr. Kaj Hober,* 2019, pp. 57 ff.

[127] CDL-AD(2020)009.

[128] References on the Commission's website under the heading Fundamental Rights.

[129] CDL-INF(1998)001rev on Ukraine, CDL-INF(1999)004 on Albania.

and the guarantee of the essence of fundamental rights. In both cases, the constitutional courts followed the Commission's opinion. The opinions made it easier for them to take a decision which was unpopular in the country.

b) Lustration

After the fall of the Iron Curtain, people who had been close to the communist regime were removed from public service in many countries. This also happened in the former German Democratic Republic. This process was internationally referred to with the neologism lustration, which avoids the historically loaded term purge. The Commission was not consulted on this issue in the 1990s, but there is extensive later case-law from the ECtHR. In Albania and Macedonia, such laws were still passed decades after the end of communism and the constitutional courts there asked the Venice Commission to provide *amicus curiae* briefs. The Venice Commission recognised that lustration measures can be justified to protect the democratic system, but they must respect the rights of the individuals concerned and be proportionate. They should be temporary and, decades after the end of the totalitarian system, can only be justified in exceptional circumstances.[130]

However, lustration measures can not only refer to behaviour during the communist period, but also to ties with later regimes. In Ukraine, after the end of Viktor Yanukovych's presidency, a lustration law was passed that covered both the communist period and his presidency, while also serving to combat corruption. The Commission recognised that corruption was a feature of his rule but was rather critical of the combination of anti-corruption and lustration and demanded significant corrections to the law, some of which were accepted.[131] After the end of Russia's war against Ukraine, the lustration issue could arise again.

c) Extremism as a basis for restrictions on fundamental rights

Since Putin became President again in 2012, Russia has passed a considerable number of laws to restrict the opposition's ability to act. While the Commission was not consulted by Russia, the Parliamentary Assembly asked the Commission to provide opinions on several of these laws. The Russian authorities received the Commission's delegations and participated in the discussions in Venice but did not implement the Commission's recommendations.

Some of these laws, such as the 2012 amended Law on assemblies, which was criticised by the Commission,[132] correspond to laws traditionally enacted by authoritarian regimes to restrict political rights. Special mention should be made of the Law on Combating Extremist Activities, which forms the basis of the restriction of civil rights of so-called extremists and of extremist organisations in many areas. The Law contains a long catalogue of extremist activities, which was criticised by the Commission as being far too broad and vague.[133] The Law was further tightened in 2020 to include questioning Russia's territorial integrity. This means that criticism of the integration of Crimea or the annexation of four Ukrainian regions in 2022 is also covered by the term extremism.

d) Foreign funding of NGOs

In many countries, NGOs depend to a considerable extent on foreign funding. This leads to fears that they represent foreign interests and concerns rather than being an expression of the respective society. However, this dependence is not least due to the fact that authoritarian states hamper the funding of truly independent organisations from domestic sources. In the case of political parties, the Commission has recognised or even advocated that funding from foreign sources can be prohibited. However, this rule cannot be applied to NGOs that do not participate to the same extent in political decision-making. A general ban on funding NGOs from foreign sources does not exist in any European state, but more subtle methods are used to prevent NGOs from receiving such funds.

In 2012, Russia introduced the requirement that the NGOs in question register as foreign agents and identify themselves as such in all their publications and materials. These rules have been extended and tightened several times. In two opinions the Commission strongly criticised the obligation to use this stigmatising designation and the further obligations associated with it.[134] In Kyrgyzstan, a bill to this effect was not passed after the Commission and ODIHR urged parliament not to adopt it.[135]

Hungary took a much more subtle approach. In 2017, the parliament passed a Law on transparency of organisations supported from abroad, which introduced the obligation for NGOs (partially) financed from abroad to be registered in a publicly accessible register with detailed information on the financial supporters from abroad and to indicate this in their publications. This was justified by the need for transparency and the fight against money laundering and terrorist financing and accompanied by a campaign against NGOs. The Commission pointed out in its opinion[136] that the fight against money laundering and terrorist financing is a legitimate reason for transparency requirements, but only if there are concrete indications that such a danger really exists and that they are not merely a pretext. Reporting obligations of NGOs to the authorities may be justified, but this does not necessarily include full transparency about donors to the public.

Following a request from the Secretary General of the Council of Europe, the Commission adopted in March 2019 a general report on the financing of associations, which addresses this issue in detail and points out that all state interventions in this area must pursue a legitimate purpose under Article 11(2) ECHR and be proportionate.[137]

e) Protection of freedom of expression

Turkey has always tended to severely restrict freedom of expression and the situation has further deteriorated in recent years. In an opinion on relevant provisions of the Turkish Penal Code,[138] the Commission recommended that the offence of insulting the President of the Republic be abolished altogether, as it was being used increasingly frequently and excessively, contrary to the European consensus. Furthermore, the offence of incitement to hatred or enmity against individual groups or their disparagement should be applied much more restrictively and only in serious cases of disturbance of public security and order, and the offence of disparagement of the Turkish nation, the Turkish state and its institutions should be recast and limited to cases of incitement to violence and

[130] CDL-AD(2009)044 on Albania; CDL(2012)028 on Macedonia.

[131] CDL-AD(2015)012.

[132] CDL-AD(2013)003.

[133] CDL-AD(2012)016.

[134] CDL-AD(2014)025 and CDL-AD(2021)027.

[135] In a joint opinion – CDL-AD(2013)030 – the Commission and ODIHR urged the Kyrgyz Parliament not to adopt this law.

[136] CDL-AD(2017)015.

[137] CDL-AD(2019)002.

[138] CDL-AD(2016)002.

hatred. This criticism by the Commission was not accepted by Turkey, but on the contrary an additional offence of disseminating false or misleading information was recently introduced, which the Commission considered too broad and unnecessary in view of pre-existing legal provisions.[139]

The Commission also criticised Turkish legislation for allowing access to content on the internet to be blocked in too many cases, without regard to proportionality and without sufficient judicial oversight.[140] Following the failed coup attempt of 15 July 2016, numerous media outlets were closed and a large number of journalists were prosecuted. The Commission saw these measures as a threat to democracy and freedom of the press.[141]

3. Ombudsman institutions

The new democracies in Central and Eastern Europe have established ombudsman institutions across the board. This is not so much the classic ombudsman, who is supposed to protect citizens from hardship caused by maladministration but an institution for the protection of human rights. In countries without a long tradition of the rule of law, where trust in the judiciary was traditionally low and an administrative judiciary still had to be established, this corresponded to an obvious necessity. Accordingly, this trend was supported by the Commission from the beginning[142] and an anchoring of this institution in the respective constitutions was urged.[143]

The Commission has also very often commented on laws concerning such institutions, consistently advocating for a strengthening of their powers and independence. In doing so, it realised that there were only quite rudimentary international standards in this area. It therefore took the initiative to draw up such standards itself and in March 2019 adopted the "Venice Principles on The Protection and Promotion of the Ombudsman Institution".[144] This text was welcomed and supported not only by the Council of Europe organs and the ombudsman associations but also by the UN General Assembly. In order to strengthen the independence of such institutions, it advocates that an ombudsman should be elected by a qualified majority in parliament, and it should only be possible to dismiss him or her by the same or a higher majority and if there are serious grounds. An ombudsman should be able to independently decide which complaints are to be investigated in detail and should have access to the relevant documents of the administration. The authorities should be obliged to respond to his or her enquiries within a reasonable time. An ombudsman should be able to make recommendations to parliament and the executive and have the constitutionality of norms reviewed by the courts.

VIII. Constitutional justice[145]

1. Establishment and competences of constitutional courts

From the beginning, the Commission has advocated that the new democracies should establish constitutional courts with broad competences. One of the first general studies of the Commission in 1993 dealt with "Models of Constitutional Jurisdiction" under the leadership of the former German Federal Constitutional Court judge Steinberger. This was not a matter of course, as the classical European democracies did not have constitutional courts, with the exception of Belgium, whose constitutional court, then still called the Cour d'Arbitrage, was conceived primarily as an arbitration body for conflicts between Flemings and Walloons. The French Conseil constitutionnel still had very limited powers at that time and could hardly be considered a fully-fledged constitutional court.

In contrast, it was certainly no coincidence that the Western European states that had experienced a right-wing dictatorship in the 20th century – Germany, Italy, Spain and Portugal – like Austria already before had established strong constitutional courts. In Germany in particular, the Federal Constitutional Court played an important role in strengthening democracy and the rule of law. The hope and expectation were that constitutional courts in Central and Eastern Europe could play a similar role. Diffuse constitutional review along common law lines seemed ill-suited for states with a judiciary that had been formed in a totalitarian system. The establishment of a constitutional court is also important as a symbolic act reflecting the will of the constituent power to establish the rule of law and ensure the supremacy of the constitution. There were also already initiatives to introduce a constitutional jurisdiction during the communist period, first in Yugoslavia and then in Poland. In 1988, even the Soviet Union established a Committee for Constitutional Oversight.[146]

Accordingly, the new democracies in Central and Eastern Europe established constitutional courts, with the exception of small Estonia, which provided a chamber of the Supreme Court with the respective powers. This was in line with the recommendations of the Commission, which in its opinions on the new constitutions of Russia and Ukraine[147] noted with satisfaction that many of its suggestions on this chapter of the constitution had found expression in the text. In contrast, in its opinion on the draft Law on the Constitutional Court of Azerbaijan, the Commission complained that the Constitution of that state did not provide that the parliamentary minority could appeal to the Constitutional Court, but only granted this possibility to the Parliament as a whole.[148] The parliament that has passed a law is hardly interested in submitting it to the constitutional court for a review of its constitutionality.

However, a major concern of the Commission was that not only state organs but also individuals should have access to the constitutional court. This is important for the Council of Europe as a whole, as it is an effective means of reducing the caseload of the ECtHR. In 2010, at Germany's request, the Commission produced an extensive report on this subject and adopted an updated version of this report in 2020.[149] Many states were reluctant to introduce a constitutional complaint on the German model, fearing that it would overburden their constitutional court. In such cases, the Commission recommended at least introducing the possibility for a court to stay the proceedings and refer the question of the constitutionality of a legal provision, upon which the decision in the case depends, to the constitutional court, thus allowing indirect access to the Constitutional Court. It also urged that the ombudsman be given the opportunity to have the constitutionality of laws reviewed by the constitutional court.

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[139] CDL-AD(2022)034.

[140] CDL-AD(2016)011.

[141] CDL-AD(2017)017.

[142] *See* for example CDL(1993)003 on Ukraine.

[143] CDL(1994)001 on Russia.

[144] CDL-AD(2019)005.

[145] For an overview of the Commission's activities in this area, *see* S.R. Dürr: "Constitutional Justice – A Key Mission of the Venice Commission", in: *Venice Commission – Thirty Years* ... (note 1), pp. 215 ff.

[146] On this M. Hartwig: "Das Komitee für Verfassungsaufsicht der UdSSR", *EuGRZ* 1993, 1 ff.

[147] CDL(1994)011 and CDL-INF(1996)006, respectively.

[148] CDL-INF(1996)010.

[149] CDL-AD(2021)001: Revised Report on Individual Access to Constitutional Justice.

However, this indirect access to the Constitutional Court has the disadvantage that its effectiveness depends on the ability and willingness of other bodies to use this possibility. The Commission's preference has therefore always been to introduce in addition the possibility of a constitutional complaint, also as the most effective means of reducing the caseload of the ECtHR.[150] The argument of relieving the ECtHR was indeed a main reason for the introduction of the constitutional complaint in Turkey.[151] In a number of countries, for example Poland and Russia, this took the form of a constitutional complaint only against the violation of fundamental rights through the application of an unconstitutional norm. In contrast, the Commission advocated the introduction of a genuine constitutional complaint also against individual acts that are not based on a possibly unconstitutional norm.[152] In the end, however, even the countries in the territory of the former Soviet Union that thoroughly reformed their constitutions with the help of the Commission – Armenia, Georgia, Ukraine in the area of the judiciary – only allowed constitutional complaints against norms. The Commission did not criticise this in its opinions, probably because it acknowledged the concern that these courts would be overburdened. It also has reservations about the *actio popularis* because of the risk of overburdening the constitutional court.[153]

2. The composition of the constitutional courts

The pluralistic composition of the constitutional court is a basic prerequisite for its independence. If the judges of the constitutional court are all appointed by the head of state, the government or the parliamentary majority, there is a risk that the court will not serve as an institution for the defence of the rule of law but as an institution for the legitimisation of government action. Accordingly, the Commission has always paid particular attention to the rules on the composition of the constitutional court and called for balance in this respect. For example, it pointed out that the previous rule of the Constitution of Montenegro, according to which all members of the Constitutional Court were elected by the Parliament by simple majority on the proposal of the President, entailed risks of political dependence on the majority and politicisation of the court.[154]

The election of the members of the constitutional court by the parliament with a qualified majority, as in Germany, usually appears to be a good way to ensure the impartiality and democratic legitimacy of the constitutional court. However, this safeguard is not effective if one party or political camp alone disposes of the qualified majority, as in Hungary. Moreover, the political culture in the new democracies is usually characterised by the fact that opposing parties are incapable of reaching compromises. Therefore, it is necessary to provide for a deadlock-breaking mechanism in the event that no candidate achieves the necessary majority. However, this mechanism should not simply consist of reducing the majority requirement, as otherwise the majority would have no incentive to compromise. Rather, the right to appoint judges could then be transferred to other institutions.

Another possibility would be to ensure pluralism through a proportional election in parliament, which also gives the minority the opportunity to elect members of the court. However, this leads to the election of candidates who do not enjoy broad support and to difficulties if – as is actually desirable – not all judges are elected at the same time.

Many constitutions attempt to create pluralism by having several institutions participate in the appointment or nomination of constitutional judges. The constitutions of Albania and Ukraine provide for one-third of the judges to be appointed by the parliament, one-third by the president and one-third by the judiciary (the Supreme Court and the Congress of Judges, respectively); in Armenia, the Parliament elects judges by a three-fifths majority, one-third each on the proposal of the President, the government and the Supreme Court. The effectiveness of these mechanisms depends very much on the situation in each country.

In order to safeguard the independence of judges, the Commission has always insisted that the re-election of judges should be excluded.[155]

3. The Commission's cooperation with constitutional courts

The Commission has adopted a large number of opinions on constitutional court laws. It also adopts *amicus curiae* briefs at the request of constitutional courts. The primary purpose of such briefs is to provide the constitutional court concerned with comparative law material to assist it in reaching a decision, rather than to prescribe a decision. In practice, the constitutional court in question often very much hopes that the brief will provide arguments that a decision disliked by the political state organs is legally inevitable and that this will enhance the credibility of the judgment and the independence of the court.

The Commission has created its own institution, the Joint Council on Constitutional Justice, to institutionalise cooperation with the constitutional courts and courts of equivalent jurisdiction. In this Council, members of the Commission and liaison officers of the constitutional courts of the member states meet to coordinate activities in the field of constitutional justice. The Joint Council is responsible in particular for the Bulletin on Constitutional Case Law, which is now sent out electronically, and the CODICES database. The constitutional courts feed English and French summaries of their most important decisions into the Bulletin and the database, thereby making them accessible to other courts and academia. The Commission Secretariat also provides material on relevant decisions of other constitutional courts at the request of a liaison officer.

From the beginning, the Commission has organised numerous seminars and conferences together with constitutional courts. These serve not only to exchange views on current problems but also to strengthen the international profile of the respective constitutional court and thus its independence. The Commission also works closely with the international associations of constitutional courts,[156] such as the European Conference of Constitutional Courts and the Association of Francophone Constitutional Courts. It took the initiative to set up the World Conference on

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[150] For more details *see* R.S. Dürr: "Individual Access to Constitutional Courts as an Effective Remedy against Human Rights Violations in Europe – The Contribution of the Venice Commission", in: *Nagoya Journal of Law and Politics* 258(2014) p. 67 ff.

[151] *See* CDL-AD(2011)040.

[152] CDL-AD(2016)034 on Ukraine.

[153] CDL-AD(2008)030 on Montenegro, CDL-AD(2011)001 on Hungary.

[154] CDL-AD(2007)047 and CDL-AD(2008)030.

[155] CDL-AD(2011)016, § 95 on Hungary; CDL-AD(2014)033, § 7 on Montenegro.

[156] For more details *see* G. Buquicchio / S.R. Dürr: "Constitutional Courts – The Living Heart of the Separation of Powers. The Role of the Venice Commission in Promoting Constitutional Justice", in: G. Raimondi / I. Motoc / P. Pastor Vilanova / C. Morte Gomez (eds.): *Human Rights in a Global World. Essays in Honour of Judge Luis Lopez Guerra,* 2018, pp. 515 ff. (522 ff.).

Constitutional Justice and provides its secretariat. This World Conference now includes constitutional courts and courts with constitutionally relevant competences from 119 countries (as of December 2022).

4. Attacks on the independence of constitutional courts

Constitutional courts often make politically sensitive decisions and are therefore exposed not only in new democracies to pressures that can endanger their independence. But they can also be misused to legitimise dubious state action or to pursue certain interests.

The focus of the Commission's work has traditionally been on strengthening the independence of constitutional courts and almost all activities in the area of constitutional justice serve this purpose. Some opinions on constitutional court laws have been about direct attacks on their independence and functioning.[157]

In 2005 and 2006, the functioning of the Ukrainian Constitutional Court was jeopardised by the failure of Parliament to elect successors to constitutional judges elected by Parliament and to swear in judges appointed by the President and the Congress of Judges. In its opinion,[158] the Commission recommended a number of amendments to the legislation to ensure the continuous functioning of the Court. The law should be amended so that a retiring judge remains in office until his successor takes office, and the procedure for taking the oath of office should be simplified.

In 2015, the newly elected Polish Sejm elected judges to positions on the Constitutional Tribunal that had already been filled by the previous Sejm. The President, who is close to the new parliamentary majority, had delayed the swearing-in of these judges. The Constitutional Tribunal ruled that the President had to swear in the three judges whose mandate would have started during the term of the previous Sejm and that the election of their successors was invalid. The Polish Prime Minister refused to make this decision public. In its opinion,[159] the Commission stressed that this was not only a violation of the rule of law but would also deepen the constitutional crisis created by the double election. In fact, since then, three judges have been serving on the Polish Constitutional Tribunal who, as later confirmed by the ECtHR,[160] are not legally in office. The Polish authorities vehemently rejected the criticism of the Venice Commission and accused it of not being impartial.

The Polish Parliament did not limit itself to this double election but passed a considerable number of legislative amendments to hamper the work of the Constitutional Tribunal while a majority of judges were still elected by previous compositions of the Sejm. The Polish Constitution allows for the election of constitutional judges by simple majority and thus does not contain any safeguard against a takeover of the Tribunal by a parliamentary majority. In two opinions,[161] the Commission criticised in particular that the law hampered decision-making by excessive quorum rules and that the Tribunal was deprived of flexibility by rigid rules on the order of decisions, that new procedural rules artificially prolonged the duration of proceedings, and, in addition, a minority of judges could delay the processing of cases. The Commission underlined that paralysis of the Tribunal's effectiveness jeopardised all three fundamental values of the Council of Europe Statute – democracy, the rule of law and the protection of human rights.

The case of Armenia was less clear. There, a peaceful revolution took place in 2018, toppling an authoritarian regime. In 2015, a new Constitution had been adopted, with the support of the Commission. This Constitution provided for a term of 12 years for constitutional judges, whereas the previous version of the Constitution only specified an age limit and no other term limit. The new majority, through a new transitional provision of the Constitution, wanted to apply the 12-year term of office also to judges appointed under previous versions of the Constitution, which would have led to the immediate dismissal of some judges. It also wanted to replace the President of the Court, a former Minister of Justice who had taken office just before the new Constitution came into force. The Commission acknowledged that the unification of judges' terms of office was a legitimate objective but stressed the high importance of the principle of the irremovability of judges. It proposed[162] to amend the transitional regime so that the Court would only be reconstituted in stages. With regard to the term of office of the President of the Court, it noted that the principle of irremovability had less weight here, but also recommended a transitional period instead of an immediate replacement by another member.

Attacks on the independence of constitutional courts have often been carried out not through legislative changes, but through pressure on members or threats from other state organs. In December 2015, the Commission therefore authorised its President to make public statements when the independence of a constitutional court is at risk in a country.

5. Abuse of constitutional courts

Constitutional courts can make a valuable contribution to the consolidation of democracy and the rule of law. However, they can also be misused by the executive to legitimise dubious actions or to protect particular interests. For this reason, as already described, the Commission has attached great importance from the outset to the fact that the rules governing the election (and dismissal) of constitutional judges should guarantee their independence.

Overall, the experience with constitutional courts in Central and Eastern Europe was rather positive, especially at the beginning. The Hungarian and Polish constitutional courts in particular made an important contribution to the development of the democratic system. In rather authoritarian states such as Armenia, the constitutional court tried to use the leeway remaining within the system. The Russian Constitutional Court also tried to comply with rule-of-law standards at the beginning. As late as 2016, in its ruling on the implementation of the ECtHR's *Anchugov and Gladkov* judgment,[163] it tried to point out possibilities for compromise in order to avoid a confrontation with the ECtHR.

However, there were increasingly cases where constitutional courts were apparently misused to justify authoritarian tendencies. It was difficult for the Commission to object to a ruling of a constitutional court because it risked undermining its authority. It was therefore very reluctant to criticise constitutional courts and always emphasised that the authoritative interpretation of the constitution was not its responsibility but that of the court.

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[157] Examples *ibid.* p. 535 ff.

[158] CDL-AD(2006)016.

[159] CDL-AD(2016)001.

[160] ECtHR, Judgment of 7.5.2021, *Xero Flor w Polsce sp. z o.o. v. Poland,* no. 4907/18.

[161] CDL-AD(2016)001 and CDL-AD(2016)026.

[162] CDL-AD(2020)016.

[163] ECtHR, Judgment of 4.7.2013, *Anchugov and Gladkov v. Russia,* nos. 11157/04 et al = 33 HRLJ 119 (2013). *See* the analysis of the situation in CDL-AD(2016)016: Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation.

In Kyrgyzstan, President Akayev, who after a good start had become increasingly authoritarian, was overthrown by the Tulip Revolution of 2005. In 2006, parliament adopted two new Constitutions in quick succession and the second version of the new Constitution came into force in January 2007. In September 2007, the Constitutional Court declared that both new versions of the Constitution had been adopted in an unconstitutional manner and were therefore null and void. This gave President Bakiyev the opportunity to have a third version of the Constitution, concentrating power in his hands, adopted by referendum. In its opinion, the Commission expressed clear doubts about the decision of the Constitutional Court.[164] When, after another revolution in 2010, a new version of the Constitution was drafted, the Commission nevertheless criticised the fact that this text no longer provided for a separate constitutional court.[165]

When in 2010 the Ukrainian Constitutional Court annulled the limitations on presidential power introduced by a constitutional amendment in 2004 on the grounds of a procedural error, the Commission also expressed clear misgivings.[166] In particular, it criticised the Constitutional Court for failing to address its own case-law that before had upheld the validity of the constitutional amendment. It emphasised that a constitutional court should only change its case-law in exceptional cases and based on convincing arguments. It was also problematic to declare important constitutional provisions, on the basis of which the constitutional bodies had acted for a considerable period, null and void after several years, thus giving for example the President powers he had not had when elected. After the Euromaidan, the 2004 constitutional amendments were reinstated in February 2014.

The Constitutional Court of the Republic of Moldova had already issued far-reaching rulings in the past that reflected the political convictions of the judges rather than the text of the Constitution. In 2016, for example, it reintroduced the direct election of the President by the people[167] and in 2013, based on the Republic of Moldova's declaration of independence, it ruled that the official language was, factually correct but contrary to the wording of the Constitution, to be called Romanian and not Moldovan. In a completely absurd decision, the Constitutional Court ordered the dissolution of the Parliament on 8 June 2019 without even hearing the Parliament and the President. This was obviously motivated by the Court's desire to keep the party of oligarch Plahotniuc in power, as the parliament was about to elect a new government on the same day from among representatives of the previous opposition. In this case, the Commission did not hesitate to unequivocally condemn the behaviour of the Court, which withdrew the decision after a week due to domestic and international pressure.[168]

Corruption has become a major problem in many Central and Eastern European countries. It is an important function of constitutional courts to ensure that fundamental rights and rule of law standards are respected in the fight against corruption. However, the rulings of some constitutional courts have given the impression that the aim of the ruling was rather to protect corrupt individuals from prosecution. For example, several decisions of the Romanian Constitutional Court served as a pretext for the government of the day to amend legislation in the area of justice and criminal law in a way that made it more difficult to prosecute influential politicians such as the former social democratic Prime Minister. In its opinions on these amendments,[169] the Commission avoided clearly criticising the Court's judgments and tried to point out ways to effectively fight corruption without violating the Court's guidelines.

In contrast, in the case of the Ukrainian Constitutional Court, which had questioned the penalisation of deliberately false declarations of assets by public officials, the Commission felt compelled to point out that the Court had not provided clear reasons for its decision and had not addressed possible conflicts of interest of individual judges.[170] Nevertheless, the Commission insisted that the ruling was to be respected in accordance with the Constitution. However, the judgment, which was unclear in many areas, was to be interpreted very restrictively. For the Commission, the judgment also showed the need for reform of the Constitutional Court. It advocated several changes in the law, including the establishment of a body with international participation to verify the integrity and competence of candidates before their election as constitutional judges.[171] When the Ukrainian authorities submit laws in the field of anti-corruption to the Commission for review, this is motivated not least by the wish to prevent a subsequent rejection of these laws by the Constitutional Court, which would then lose all credibility.

IX. The struggle for the rule of law

Building the rule of law has proven to be a particularly difficult and lengthy process in Central and Eastern Europe. Issues of judicial reform have increasingly become the focus of the Commission's work, and an ever-increasing proportion of the opinions deal with this topic. In the recent[172] or planned[173] constitutional reforms undertaken in cooperation with the Commission, issues of the judiciary have also often been a main focus. Problems of the independence and quality of the judiciary have become a central element of the European Union's enlargement strategy.[174] The Union relies heavily on the opinions of the Venice Commission and a state that disregards its recommendations in the field of justice has little prospect of accession.

1. Safeguarding the external independence of the judiciary

Without an independent judiciary, there can be no rule of law.

After the fall of the Iron Curtain, the principle of the independence of the judiciary was enshrined in all constitutions. This did not meet with political resistance. The appointment of judges for life up to the pension age and the irremovability of judges were also accepted as standard in the new democracies. However, details remained controversial, and the devil is always in the detail. The Commission has therefore always paid the utmost attention to questions of judicial independence not only in its opinions on draft constitutions and laws but has also systematically presented its position in a

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[164] CDL-AD(2007)045: Opinion on the Constitutional Situation in the Kyrgyz Republic.

[165] CDL-AD(2010)015.

[166] CDL-AD(2010)044: Opinion on the Constitutional Situation in Ukraine.

[167] *See* above at p. 347 (IV.1.).

[168] CDL-AD(2019)012.

[169] CDL-AD(2018)017 and CDL-AD(2018)021.

[170] CDL-AD(2020)038 and CDL-AD(2021)028.

[171] CDL-AD(2020)039 and CDL-AD(2022)054.

[172] *See* CDL-AD(2013)028 on Montenegro and CDL-AD(2015)027 on Ukraine.

[173] *See* CDL-AD(2021)048 on Serbia.

[174] G. Lazarova-Déchaux: "L'exigence de qualité de la justice dans la nouvelle stratégie d'élargissement de l'Union européenne", *Revue du droit public* 2015, 729 ff.

report on the appointment of judges[175] and a report on the independence of judges.[176]

The Commission repeatedly criticised too vague grounds for dismissing judges and too much influence of the executive in disciplinary proceedings against judges. It also consistently argued that the transfer of judges should only be permitted in exceptional cases such as a reorganisation of the judiciary. The Commission considers probationary periods for judges to be a threat to their independence and acceptable only if the decision not to confirm the judge in office at the end of the probationary period is based on objective reasons and sufficient procedural guarantees exist.[177] Probably not least because of this criticism, such probationary periods have been abolished in several countries. The Commission has no objection to judicial candidates assisting judges in drafting judgments during a probationary period, if the responsibility for the judgment remains with the lifetime judge.

Of particular importance are the rules on the appointment (and dismissal) of judges.[178] At the beginning of the 1990s, judicial councils with a decisive influence on the appointment of judges existed in Western Europe only in a few countries, mainly belonging to the Roman legal family, such as Italy, Spain and Portugal. Initially, the Commission did not insist on the establishment of such councils in the new constitutions. However, it soon realised that the appointment of judges by the executive is problematic in states without a legal culture that has been consolidated over a long period of time. The election of judges of the ordinary judiciary by parliament, which was common in the Yugoslav tradition, carries a great risk of politicisation of the judiciary and has always been criticised by the Commission. Its abolition in Montenegro was welcomed by the Commission[179] and it is no longer included in the Serbian government's proposals for constitutional reform in the area of the judiciary, prepared in consultation with the Commission. The election of judges by the people has also been consistently rejected by the Commission.[180]

This leaves only a judicial council as a suitable institution with responsibility for the appointment of judges, at least in new democracies, whereas the purely formal appointment of judges can also be made by the head of state on the proposal of the judicial council. This is now also the position of the member states of the Council of Europe, as expressed in Recommendations adopted by the Committee of Ministers.[181] The new democracies have also consistently introduced such judicial councils, which, as an institutional guarantee of judicial independence in these states, constitute a necessary complement to personal guarantees such as irremovability.

However, the problem then shifts to the composition of the members of the judicial council. If the majority of the members are representatives elected by parliament with a simple majority and/or appointed by the government, the danger of political influence is evident. It is irrelevant whether the members are judges or laymen. The Commission has therefore consistently called for representatives elected by parliament to be elected by qualified majority, or at least by proportional representation, which would allow the opposition to send representatives as well. In principle, the participation of representatives elected by parliament strengthens the democratic legitimacy of the body and is therefore to be welcomed. There were different positions within the Commission on the question of the possible membership of the minister of justice. It can promote dialogue between the judicial council and the executive, but in states with an authoritarian tradition his or her influence can quickly become dominant. However, the Commission has always emphasised that the minister or his representative should not have voting rights in disciplinary matters.

On the other hand, the Commission has always underlined that, if a large majority of the members are elected by the judges, there is a risk of corporatist behaviour of the body, focusing on the interests of the judiciary rather than those of the general public. It therefore advocated a balanced approach whereby a substantial proportion, if not the majority, of the members of the judicial council should be judges elected by their peers. In its Recommendation CM/Rec(2010)12, the Committee of Ministers goes further and calls for at least half of the members to be judges elected by their peers. The Commission has endorsed this standard in principle, but allows for exceptions, such as when the president of the supreme court is an *ex officio* member of the council.[182]

The involvement of representatives of the bar would seem a possible solution, but especially in smaller states there is a risk of conflicts of interest. It also seems possible to give to the law faculties or NGOs the power to appoint some members. However, the question then arises as to who determines which NGOs can nominate representatives.

A uniform ideal model for the composition of judicial councils can hardly be identified. Experience in Europe with judicial councils, even if they are dominated by judges, is quite mixed.[183] In Ukraine, a judicial council composed in accordance with European standards – as confirmed by the Commission[184] – has proved to be an obstacle to judicial reform. It is certainly appropriate to demand that a significant proportion of the members should be judges elected by their peers. However, it is not crucial that as many members as possible are judges, but that the composition is pluralistic and that the government and parliamentary majority cannot control the judicial council. Ultimately, the legal culture of the respective country is more important than the legal rules, but good rules can certainly contribute to strengthening judicial independence.[185]

2. Internal independence and integrity of judges

The hope that the courts in the former communist states would prove to be independent and impartial in the sense of Article 6 ECHR, if only they were freed from external

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[175] CDL-AD(2007)028: Report on Judicial Appointments.

[176] CDL-AD(2010)004: Report on the Independence of the Judicial System, Part I: The Independence of Judges.

[177] CDL-AD(2007)028, §§ 40-43.

[178] For a detailed discussion of the Commission's position on the organisation of the judiciary, *see* S. Bartole: "The Contribution of the Venice Commission to the Internationalization of the National Constitutional Law on the Organisation of the Judiciary", in: I. Motoc / P. Pinto de Albuquerque / K. Wojtyczek (eds.): *New developments in Constitutional Law. Essays in Honour of András Sajó,* 2018, pp. 1 ff. (6 ff.).

[179] CDL-AD(2007)047.

[180] CDL-AD(2007)028, § 28.

[181] First in Recommendation No. R(94)12 of the Committee of Ministers on the independence, efficiency and role of judges; even more clearly in Recommendation CM/Rec(2010)12 on the independence, efficiency and accountability of judges.

[182] *See* CDL-AD(2012)024 on Montenegro.

[183] *See* the Special issue on "Judicial Self-Government in Europe" in: *German Law Journal* Vol. 19 No. 7 (2018), pp. 1567-2188 (online only), it contains numerous country reports that are rather sobering overall.

[184] CDL-AD(2015)027 and CDL-AD(2015)043. However, the two members elected by Parliament were elected by simple majority rather than qualified majority.

[185] Likewise E. Holmoyvik / A. Sanders: "A Stress Test for Europe's Judiciaries", in: *European Yearbook of Constitutional Law* 2019, pp. 290 ff. (308). *See* also S. Bartole (note 178), pp. 1 ff. (7-8).

political influence, has proved naïve, if one disregards Central Europe. It has become obvious that the problem also lies within the judiciary and that a mere change of norms without a change of mentality and legal culture is not sufficient.

The communist system was extremely centralised and hierarchical and accordingly judges saw themselves as part of a hierarchical state apparatus and not as independent upholders of the law. In addition, after the previous system had proven to be hypocritical, there was the temptation to only cynically look out for one's own interests and to use the opportunities for individual enrichment due to the position of power as a judge.

The Commission therefore very strongly emphasises the need to pay attention not only to the external independence of the judiciary from politics but also to the independence of the individual judge within the judiciary. The president of the court is not the head of the judges but should be understood as *primus inter pares*. This is important because the president of the court may be particularly exposed to political pressure. There is also a danger that the president will assign sensitive cases to politically reliable judges. The Commission has therefore insisted in several countries on consistent adherence to the principle of the lawful or natural judge, which is constitutionally enshrined in Germany and Italy, but is not consistently applied in all democracies.

The Commission also emphasises that the higher instance courts should influence the decisions of the lower courts through their judgments and not through general instructions. The common practice in Armenia of lower court judges seeking instructions from higher courts on how to decide a case is unacceptable, also because it deprives the parties of the possibility of an unbiased review of the judgment in the higher court.[186] On the other hand, in the case of Serbia, the Commission has emphasised that judges are very much obliged not to decide cases at their personal whim but have to look at the relevant decisions of the higher courts and to deviate from them only in duly justified cases.[187] The non-hierarchical character of the judiciary should also be reflected in the judicial councils, which should be elected by judges of all instances and not dominated by judges of the higher courts and court presidents.

Corruption has proven to be a particular challenge for courts in Eastern and South-Eastern Europe. On the one hand, it is difficult for courts, and often dangerous for judges and prosecutors, to take action in complicated corruption cases against locally influential politicians or businessmen. On the other hand, the courts in some countries are particularly affected by corruption.

In Ukraine, corruption had reached particularly high levels and the country was under strong pressure from Western donors to take effective action. It was obvious that the courts did not dare to take action against corrupt practices of influential politicians and businessmen, and the efforts of the national anti-corruption agency NABU therefore mostly came to nothing. The country had to commit to the International Monetary Fund to establish a separate anti-corruption jurisdiction. However, the Ukrainian political class had little interest in effectively fighting corruption and, based on constitutional concerns, tried to prevent the establishment of a separate jurisdiction or at least deprive it of its effectiveness.

The Commission enjoys a particularly high reputation in Ukraine, and it depended on its opinion whether the concerns raised were considered credible both within the country and vis-à-vis international partners. The Commission took a very clear position[188] and stressed the high importance of an effective fight against corruption. It stated that the planned anti-corruption court had features of a constitutionally permissible specialised court and did not appear to be an impermissible exceptional court. It emphasised that the participation of international experts in the selection of judges to guarantee their integrity was not to be considered a violation of Ukrainian sovereignty. The Commission's opinion enabled the adoption of the Law on the High Anti-Corruption Court in June 2018, which has since started its work.

Even before that, the Commission had been confronted in Ukraine with the problem of which anti-corruption measures in the judiciary could be considered compatible with European standards. The judiciary in Ukraine was considered one of the most corrupt state institutions and the public had lost all confidence in its impartiality. Corrupt judges are easy to put under pressure and this was another reason why the judiciary could hardly be considered independent. Disciplinary proceedings were not enough, especially since the High Council of Justice was part of the problem rather than the solution. After the fall of the corrupt Yanukovych regime in 2014, large parts of civil society demanded the dismissal of all judges and the reappointment of candidates to positions in the judiciary only after a review of their integrity.

In its opinions[189] the Commission pointed out that the immediate dismissal of all judges was not in accordance with the rule of law and would lead to a paralysis of the Ukrainian judiciary. A review of the competence and integrity of judges already in office could only be justified in exceptional cases and on the basis of a separate provision in the Constitution. However, such an exceptional situation appeared to exist in Ukraine. It was essential, however, that sufficient procedural guarantees be provided. The Commission also recommended that the submission of incorrect declarations of assets by judges be included in the Constitution as a possible ground for dismissal. The subsequent reform of the judiciary was accompanied by numerous other Commission opinions and led to an improvement in the situation, especially in the Supreme Court, even though the problem of corruption in the Ukrainian judiciary remains virulent.

In Albania, too, corruption in the judiciary was so widespread that the public had lost all confidence in its independence and impartiality. The conditions in the judiciary appeared to be the main obstacle to the opening of accession negotiations with the European Union and both the EU and the USA were pushing for radical reform. The government proposed a comprehensive constitutional reform. An annex to the Constitution provided for the review of the competence and integrity of all judges by independent institutions with international participation. As in the case of Ukraine, the Commission accepted the need to derogate from the principle of the irremovability of judges in this exceptional situation.[190] It reiterated the need for sufficient procedural safeguards and, in particular, for an appellate body independent of the first instance to deal with complaints from the judges who had been dismissed. Its recommendations were essentially implemented.

These decisions were not easy for the Commission, which always saw itself as the guardian of judicial independence. But they were essential, because a state cannot function as a constitutional state with a corrupt judiciary.

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[186] CDL-AD(2014)007.
[187] CDL-AD(2018)011.
[188] CDL-AD(2017)020.
[189] CDL-AD(2015)007 and CDL-AD(2015)027.
[190] CDL-AD(2015)045 and CDL-AD(2016)009.

3. The reform of the public prosecutor's office[191]

a) Abolition of the *prokuratura* system

The Soviet-style public prosecutor's office, the so-called *prokuratura,* was not comparable to a public prosecutor's office in the Western sense. It was one of the most powerful institutions within the state and an important instrument of power of the communist party, or after the end of communism, of the respective state president. The *prokuratura* was by no means limited to the area of criminal law but served as a general control authority to ensure that both state institutions and citizens had to follow all laws precisely and uniformly. Since the *prokuratura* was strictly hierarchical and centralised, the prosecutor general was one of the most powerful persons in the state. Prosecutors were more important and respected than judges, and the criminal justice system routinely followed the motions of the prosecution. The prosecution could appeal against court decisions that were already final, even in civil cases in which it had not previously been involved.

The public prosecutors naturally resisted a restriction of their powers and tried to justify this by saying that they could play an important role in protecting the rights of citizens and especially of members of vulnerable groups who cannot defend themselves. They also pointed out that a number of Western public prosecutors' offices, particularly those in the Latin countries, do have considerable non-criminal powers. In contrast, the Commission pointed out that the protection of civil rights is better served by ombudsman institutions and pleaded for a concentration of prosecutorial powers in the area of criminal law.[192] The ECtHR ruled[193] that it is incompatible with the principle of legal certainty for the public prosecutor's office to be able to challenge final judgments in civil cases.

Russia pushed hard at the European level for the retention of extra-criminal prosecutorial powers and did a lot of lobbying in the Council of Europe to this end. The main venue for this dispute was Ukraine.[194] The 1996 Constitution abolished, in principle, the general supervisory function of the prosecutor's office, but only with effect from the time when the necessary legislative conditions had been met. The Commission already expressed concern at the time that the lack of an end date for entry into force could lead to excessive delay[195] and indeed the general control function was abolished only after 20 years by the 2016 judicial reform.

b) The structure and independence of the public prosecutor's office[196]

It is not desirable for political bodies to interfere with the prosecution's handling of cases and, in particular, to prevent the prosecution of offences committed by politicians or politically well-connected persons. Unjustified charges can be dismissed by the courts, but courts cannot replace the investigative work of the prosecution. The principle of legality, which in any case only applies in some European states, does not provide sufficient protection, as there must always be exceptions for practical reasons.

The Commission has therefore welcomed a trend towards greater independence of prosecutors' offices, but at the same time pointed out that prosecutors do not enjoy independence to the same extent as a court. It therefore often speaks of the autonomy rather than the independence of the prosecution service. The reason for this is, on the one hand, that the executive is also responsible to parliament for the effectiveness of prosecution. Instructions of a general nature from the ministry of justice to the prosecution service can therefore not be ruled out from the outset. On the other hand, public prosecutor's offices are usually hierarchically structured, and this also appears to make sense for reasons of efficiency. An independence of the public prosecutor's office therefore threatens to become the independence of one person, the prosecutor general.

The – not perfect – solution to the problem therefore does not lie in a general principle of independence but in limiting both the right of political bodies to issue instructions to the public prosecutor's office and instructions within the public prosecutor's office. The ministry of justice should limit itself to general instructions and not interfere in individual cases, and instructions within the service should, as also provided for in a Recommendation of the Committee of Ministers,[197] be in writing and justified upon request. Illegal instructions are of course inadmissible.

A political appointment of the prosecutor general, such as his election by parliament, appears legitimate. In this case, the Commission recommends an election by qualified majority. The other prosecutors, however, should be appointed according to exclusively professional criteria.

4. Attacks on the rule of law

While it had been apparent for some time that the establishment of the rule of law in South-Eastern and Eastern Europe would be more protracted than hoped, attacks on the rule of law began with Viktor Orban's return to power in Hungary, especially in states that had already established quite well-functioning rule-of-law structures.

a) Hungary

The otherwise extremely detailed new Hungarian Constitution of 2011 contained rather imprecise regulations in the area of the judiciary. The Commission highlighted this in its opinion and criticised the fact that the judicial council had not been given a constitutional basis.[198] The judiciary laws enacted on the basis of the new constitution then led to a considerable setback for the rule of law in Hungary. The main problem was that competences in the field of justice were concentrated in the hands of the President of the National Judicial Office, who was given an overwhelming position of power. This was a judge elected by the ruling parties with their qualified majority in parliament. She was a personal friend of the Orban family and was not afraid to go on a course of conflict with the elected National Council of Judges. Unlike the Minister of Justice, she was not answerable to parliament. This – unique – construction thus weakened judicial independence without increasing the democratic legitimacy of the judiciary. The new legislation also lowered the retirement age of judges and undermined the principle of the lawful judge in several respects.

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[191] J. Hamilton: "Prosecution Services Thirty Years after the Fall of Communism", in: *Venice Commission – Thirty Years ...* (note 1), p. 303 ff.

[192] CDL-AD(2010)040: Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service, §§ 77 ff.

[193] Starting with the judgment of 28.10.1999, *Brumărescu v. Romania,* no. 28342/95.

[194] For more details *see* S. Holovaty, "The Decisive contribution of the Venice Commission in Ukraine", in: *Venice Commission – Thirty Years ...* (note 1), pp. 339 ff. (344 ff.).

[195] CDL-INF(1997)002; *see* above at p. 345.

[196] *See* in particular CDL-AD(2010)040.

[197] CM/Rec(2000)19.

[198] CDL-AD(2011)016.

In its opinion[199] the Commission criticised this legislation unusually harshly and saw the right to a fair trial guaranteed by Article 6 ECHR in danger. The Hungarian government reacted somewhat constructively to this criticism and initiated a number of amendments to the law. These changes were not purely cosmetic but did not go far enough. The power of the President of the National Judicial Office was restricted, but remained too extensive, as pointed out by the Commission.[200]

The new Constitution had already begun to limit the previously very broad powers of the Hungarian Constitutional Court. At that time, the Court was not yet dominated by judges elected by the government majority and made some decisions that displeased the government. As a result, the Parliament, with the qualified majority of the governing parties, adopted several amendments to the Constitution, which had been adopted by the same majority only a short time before. These amendments incorporated the legal provisions objected to by the Constitutional Court into the Constitution. The Commission did not dispute that parliaments have the right to amend the constitution if they disagree with the judgments of a constitutional court. However, if this happens systematically, it undermines the authority of the Constitutional Court and puts the principle of separation of powers in jeopardy,[201] especially if the ruling parties have a constitution-amending majority.

The Venice Commission adopted numerous other opinions on Hungarian legislative reforms, some of which have already been discussed above.[202] While the Hungarian government showed some willingness to engage in dialogue in the area of justice, the tone became harsher over time and it became very clear that the government was not willing to compromise in areas – especially migration and the position of sexual minorities – where it could rely on popular support for populist positions.

b) Romania

The political crisis of 2012 in Romania has already been addressed above[203] with regard to the excessive use of emergency decrees by the government. Of particular concern in terms of the rule of law was that the government attempted to curtail the powers of the Constitutional Court through an emergency decree and that other constitutional bodies criticised the court in a not objective manner. The Commission called for mutual respect among constitutional bodies.[204]

In 2018 and 2019, there were renewed attacks on the judiciary, this time not aimed at the Constitutional Court, which in a new composition provided pretexts for the actions of the government and parliamentary majority with dubious rulings, but at the ordinary judiciary and especially the prosecution. The political class was worried because the judiciary was becoming more effective in cracking down on corruption of political office holders and there was even the imprisonment of the former social democratic Prime Minister.

A number of measures were directly aimed at the judiciary. A special department of the public prosecutor's office was established to deal with offences within the judiciary. On the one hand, this could have an intimidating effect on judges and prosecutors, on the other hand, it could lead to a significant delay in corruption cases against politicians, as such cases had to be handed over to the new department if judges or prosecutors were even marginally involved in the allegations. The liability rules for judges were extended. Rules on the appointment of senior prosecutors were changed and the role of the Minister of Justice was strengthened at the expense of the Superior Council of the Magistracy and the President, who was close to the opposition. Judges and prosecutors were offered favourable early retirement and at the same time recruitment requirements were tightened, threatening to lead to a large number of unfilled posts in the judiciary. The Commission again criticised in particular the fact that such rules were adopted by emergency government decrees and not through a parliamentary law based on a broad debate.[205]

Furthermore, amendments were made to the Criminal Code and the Criminal Procedure Code. The amendments to the Criminal Code were aimed at decriminalising the improper conduct of office holders, while the amendments to the Criminal Procedure Code were aimed at hampering the prosecution of offences in the field of corruption. It was unusual for the Commission to object to the strengthening of the rights of accused persons in criminal proceedings. However, it pointed out that Romania had committed itself internationally to fighting corruption, that there were no reasonable grounds for many of the amendments to the law, and that the law had numerous inconsistencies due to its hasty adoption.[206]

The resistance of the President of the Republic and national and international criticism prevented the full implementation of the measures and after a change of government, the executive changed course. A law abolishing the special department of the Public Prosecutor's Office to fight crime in the judiciary was passed and the government has consulted the Commission on this several times.[207] However, the new government also shies away from more far-reaching reforms to strengthen the judiciary.

c) Turkey

Turkey is not one of the former communist states and had not shown any interest in cooperating with the Commission for a long time for this reason. The situation in the judiciary, however, showed parallels with, but also differences from, the states of Central and Eastern Europe. As there, the judges saw themselves primarily as defenders of the interests of the state and not so much as protectors of the rights of the citizens, and the legal system was characterised by a strong centralisation with extensive possibilities of control over the courts. Unlike in Central and Eastern Europe, this system did not serve to ensure the control of the courts by the political bodies, but was intended to keep democratically elected politicians, to the extent that they had Islamic sympathies, under the control of the Kemalist elite, which dominated the military, the bureaucracy and the high courts. This was most evident in the proceedings before the Constitutional Court to ban the ruling AKP party, which narrowly failed.[208] Decision-making powers were concentrated in the bloated high courts, as there were not even appeal courts, the High Council of Judges and Prosecutors was dominated by judges from the highest courts, and the lower courts, which resembled rather chambers of courts

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[199] CDL-AD(2012)001.

[200] CDL-AD(2012)020.

[201] CDL-AD(2013)012.

[202] *See* at p. 357 (under VII.2.d)).

[203] *See* at p. 349 (under IV.2.).

[204] CDL-AD(2012)026.

[205] CDL-AD(2018)017 and CDL-AD(2019)014.

[206] CDL-AD(2018)021.

[207] *See* CDL-AD(2021)019 and CDL-AD(2022)003.

[208] In an opinion CDL-AD(2009)006 requested by the Parliamentary Assembly, the Commission criticised the Turkish regulations, which regarded party bans not as rare exceptions but as routine measures. *See* also above at p. 351 (V.4.).

in other countries, were far too small to play any role in court administration.

The reform-minded Justice Minister of the then Erdoğan government showed interest in cooperating with the Commission. The Commission supported reforms that transferred powers from the Ministry of Justice to the High Council of Judges and Prosecutors, provided for the election of the High Council by all judges and not only judges of the highest instance, and strengthened the rights of judges in disciplinary proceedings, but urged further reforms to dismantle the extensive control and inspection rights over the courts.[209]

The elections to the High Council of Judges and Prosecutors were won by a group of judges, many of whom were close to the movement of the Islamic preacher Gülen. Some subsequent mass trials of representatives of the traditional Kemalist elite in the military were of dubious quality in terms of the rule of law. The alliance between the AKP and the Gülen movement ended abruptly at the end of 2013, when judges close to the movement began to take action against AKP politicians.[210] The reform process ended and some of the reforms were reversed. After the failed coup attempt in July 2016, in which representatives of the Gülen movement were involved, more than 3,600 judges and prosecutors suspected of being close to the movement were dismissed under an emergency decree without the need to prove their involvement in the coup or knowledge of the planned coup.[211] The constitutional amendments of 2017 then dealt a death blow to judicial independence in the country. In its opinion, the Commission criticised the fact that under the new Constitution, 6 members of the Council of Judges and Prosecutors are directly or indirectly appointed by the President and the remaining 7 members are elected by Parliament. There are no longer any elected representatives of the judiciary in the Council.

d) Poland

Poland has long been a success story in building the rule of law in Central Europe, and the Polish member of the Commission, former Prime Minister Hanna Suchocka, made a particularly important contribution to the Commission's work because of her understanding of the situation in the region. This leading role ended when the PiS government came to power in 2015. Unlike the Hungarian government, the Polish government never had a constitution-amending majority in parliament. Its first goal, as described above,[212] was therefore to eliminate the Constitutional Court's control of constitutionality, and it did not shy away from flagrant violations of the rule of law in this respect.

Once this was achieved, it was the turn of the ordinary judiciary. The prosecution was brought under the full control of the government. The Minister of Justice became the Prosecutor General in personal union with the power to intervene directly in individual cases, and the hierarchical character of the prosecution was strengthened. The Venice Commission criticised this very clearly and pleaded for a depoliticisation of the prosecution service.[213]

The parliamentary majority also took control of the National Council of the Judiciary. According to the Polish Constitution, it consists of 25 members: 15 judges, 6 members elected by the two chambers of Parliament and 4 other members. The judicial members were traditionally elected by the judges themselves, which is in line with the Council's constitutional mandate as guardian of judicial independence. Due to the amendment of the law, the judicial members are now also elected by Parliament. Two new chambers, one for disciplinary matters within the judiciary and one for extraordinary appeals, were created within the Supreme Court and staffed with judges selected by the newly constituted National Council of the Judiciary. The Minister of Justice was given the right to appoint and dismiss presidents of courts at his discretion for a period of 6 months and made extensive use of this right. A flood of disciplinary proceedings against judges was initiated and new disciplinary offences were introduced, applied against judges who, based on ECJ or ECtHR rulings, doubted the legality of the appointment of judges by the newly composed National Council of the Judiciary. The Venice Commission clearly criticised these (and other) legislative changes.[214] This criticism was taken up by the European Commission and confirmed in rulings by the ECJ and the ECtHR. The ECtHR ruled several times that the judges appointed by the newly composed National Council of the Judiciary cannot be considered as a court established by law in the sense of Article 6 ECHR.[215] A solution to the crisis in line with the case-law of the international courts will only be possible if the new rules on the composition of the National Council of the Judiciary are reversed.

e) The Rule of Law Checklist

It is a standard argument of all those who reject criticism of conditions in their country that are not in accordance with the rule of law that the notion of the rule of law has no clear contours and that the criticism is based on a purely subjective interpretation of the rule of law. The Commission has therefore endeavoured to fill the notion of the rule of law with content and already adopted a report on the rule of law in 2011,[216] which shows that the various traditions of the rule of law, the *Rechtsstaat* or the *état de droit* have far-reaching commonalities despite different starting positions. In order to make the notion of the rule of law even more operational, the Commission adopted a Rule of Law Checklist[217] in 2016. The term checklist was chosen because it is not possible to draw up a uniform list of criteria applicable in all states. For example, constitutional courts make an important contribution to the rule of law in many countries but are not a necessary element of the rule of law.

The checklist goes far beyond the issues of judicial independence. It lists legality, legal certainty, the prohibition of arbitrariness, equality before the law and access to justice as the main criteria of the rule of law and spells out these criteria in detail. The text has already been analysed in more detail in this journal by Andrew Drzemczewski.[218] The checklist was explicitly supported by the political bodies of the Council of Europe – Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities.

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[209] CDL-AD(2010)042 and CDL-AD(2011)004.

[210] E. Özbudun: "The Independence of the Judiciary in Turkey: One Step Forward, Two Steps Back", in: *Venice Commission – Thirty Years ...* (note 1), pp. 523 ff. (528).

[211] *See* CDL-AD(2016)037, Opinion on Emergency Decree Laws Nos. 667-676 Adopted following the Failed Coup of 15 July 2016, §§ 147 ff.

[212] *See* at p. 360 (under VIII.4.).

[213] CDL-AD(2017)028.

[214] CDL-AD(2017)031 and CDL-AD(2020)017.

[215] Starting with the judgment of 22.7.2021, *Reczkowicz v. Poland,* no. 43447/19.

[216] CDL-AD(20011)003rev.

[217] CDL-AD(2016)007.

[218] A. Drzemczewski, "The Council of Europe and the Rule of Law: Introductory Remarks regarding the Rule of Law Checklist Established by the Venice Commission", *HRLJ* 37(2017), pp. 179 ff.

X. The geographical extension of the Commission

1. The Commission's activities outside Central and Eastern Europe

Although the Commission's work has been strongly focused on Central and Eastern Europe from the beginning, it has never been limited to this region. In individual cases, Western European countries such as Andorra, Cyprus, Finland, Iceland, Luxembourg, the Netherlands and Norway have consulted the Commission. On several occasions, the Parliamentary Assembly requested opinions on legal issues arising in Western European countries. This concerned Belgium, France, Italy, Liechtenstein, Spain and the United Kingdom. The most significant role of the Commission in Western Europe, apart from the special case of Turkey, was in Malta. In a comprehensive report,[219] requested by the Parliamentary Assembly after the murder of the journalist Caruana Galizia, the Commission identified deficits in the area of separation of powers and the rule of law, in particular an excessive concentration of powers in the hands of the Prime Minister. Since then, it has been involved in the reform process in the country.

Outside Europe, the Commission's activities were initially largely limited to Central Asian Kyrgyzstan, whose situation was comparable to that in the European successor states of the Soviet Union, and to a Swiss-funded support programme for the transition to multiracial democracy in South Africa, particularly in the area of federalism. The amendment of the Commission's Statute in 2002, which allowed non-European states to join as full members,[220] provided an impetus to increase the Commission's engagement outside Europe. However, only some of the new member states are strongly interested in the Commission's advice, while others, such as Canada, South Korea and the USA, want to support the Commission's work in other states.

Another impulse for the expansion of the Commission were the contacts with constitutional courts and associations of constitutional courts from all over the world and the establishment of the World Conference on Constitutional Justice. As a result, the Commission is known to constitutional courts all over the world and in states such as Chile or Peru, the initiative to join the Commission came from the constitutional court. Overall, the Commission's activities are concentrated in three regions: Central Asia, the Arab states around the Mediterranean and Latin America.

2. Central Asia

In Central Asia, **Kyrgyzstan,** as the only country in the region seriously seeking democratisation, showed interest in cooperation from the outset and the Commission has since been involved in the various constitutional transformations in the country through its opinions. However, it also became apparent that the weight of its advice is less in a country that is not included in the institutional framework of the Council of Europe and has no prospect of EU accession, and more recently democracy has suffered setbacks there. **Kazakhstan** has traditionally been interested in cooperation with Europe in order to avoid too much dependence on Russia and China. The country made several requests to the Commission in the area of the rule of law, and more so recently. Since the ousting of the dictatorial President Karimov, **Uzbekistan** has also shown some interest in cooperation.

The European Union has involved the Venice Commission in its Rule of Law Initiative for Central Asia from the outset and funds Venice Commission cooperation projects within this framework. Unlike in Europe, the concept of the rule of law is less controversial in the region than the concept of human rights. Authoritarian-ruled Kazakhstan in particular sees the need for rule-of-law structures for economic modernisation and the country's attractiveness for foreign investment.

3. The Arab countries around the Mediterranean Sea

The Arab Spring provided the decisive impetus for the Commission's activities in this region. **Tunisia** was very open to cooperation with the Commission, which had a decisive influence on the country's new democratic Constitution. It worked closely with the Tunisian Constitutional Commission and, accordingly, the Commission's opinion on the draft Constitution[221] was very positive. Remarkably, the Commission also succeeded in winning the trust of the representatives of the Islamic Ennahda party, who appreciated the objectivity of the Commission's recommendations. The adoption of a Constitution in Tunisia that meets democratic and constitutional requirements was certainly one of the Commission's greatest successes. However, since the *de facto* coup by the newly elected President Saied, this progress appears to be in great danger.

In **Egypt** and **Libya,** the Commission was involved in discussions on the new Constitution but was unable to gain any decisive influence. However, the then Islamist government of Egypt asked for an opinion on the reform of the Law on NGOs and reacted quite positively to the opinion, which criticised in particular the restrictions on foreign NGOs.[222] **Morocco, Jordan** and **Lebanon** are interested in cooperation, especially in the field of justice. Within the framework of the Council of Europe's Neighbourhood Policy, the Commission is carrying out numerous cooperation projects with the Arab Mediterranean countries, particularly in the areas of electoral law, modernisation of the administration, reform of the judiciary and ombudsman institutions.

4. Latin America[223]

In Latin America, **Mexico** is a very active member state of the Commission and, particularly in the area of electoral law, Mexican members are also very active as advisers to other countries. Cooperation with Latin America is facilitated by a largely common legal culture. The problems are also quite similar. In Latin America, the position of state presidents is traditionally very strong, and this entails a considerable risk of authoritarian tendencies. The OAS, which does not have an institution similar to the Commission, recognised in it an interesting partner. At the request of the OAS, the Commission adopted a highly critical opinion on the Venezuelan President's decree on the election of a Constituent Assembly, which was aimed at disempowering Parliament and contradicted democratic and constitutional standards.[224] The purpose of the opinion was less to influence the situation in the country than to provide the OAS and other international institutions with a legal basis for their criticism. Also at the request of the OAS, the Commission adopted a report on presidential term limits, in which it considered presidential term limits to be justified because of the otherwise high risk of abuse of power.[225] The report

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[219] CDL-AD(2018).

[220] *See* above at p. 342 (II.1.).

[221] CDL-AD(2013)032.

[222] CDL-AD(2013)023.

[223] For an overview of the Commission's activities in Latin America, *see* J.L. Vargas Valdez: "The Venice Commission and Latin America", in: *Venice Commission – Thirty Years* ... (note 1), p. 717 ff.

[224] CDL-AD(2017)024.

[225] CDL-AD(2018)010: Report on Term-Limits – Part I – Presidents.

implicitly opposed in particular a decision of the **Bolivian** Constitutional Court, which had considered the limitation of the terms of office of the President of the Republic to two mandates in the country's Constitution as a violation of the President's human right to run for re-election and thus judged it to be contrary to human rights and invalid.

Recently, the Commission has been asked several times for expert opinions on constitutional conflicts in Latin American states. Due to a request from the Senate of **Peru,** the Commission dealt with the question of whether the President could combine a vote on constitutional amendments with a vote of confidence in the government. This would have given him the option of dissolving Parliament. The Commission pointed out that such a procedure was unusual from a comparative law perspective but emphasised that this was ultimately for the Peruvian Constitutional Court to decide.[226] Following a request from the **Chilean** Senate, the Commission was rather critical[227] of the draft of a new Chilean Constitution, which was then rejected in a referendum. In **Mexico,** the populist President is planning an electoral reform that would weaken the independent institutions in this field, the National Electoral Institute INE and the Electoral Tribunal. In its opinion,[228] which received considerable attention in Mexico, the Commission expressed its concern that the planned regulations would not provide sufficient guarantees for the independence of these institutions.

The role of the Commission in Latin America is growing in importance. In view of strong populist tendencies, an emphasis on the values of the constitution and on the importance of institutions seems more important than ever in the region. It remains to be seen whether the Commission can consolidate its role there.

XI. Summary and outlook

The history of the Commission is undoubtedly a success story. Despite limited resources it has managed to play an important role in constitutional and legal reforms in Central and Eastern Europe and beyond. It is no longer, as it was in the beginning, a mere advisory body, but an important player in the defence of the Council of Europe's fundamental values: democracy, the rule of law and the protection of human rights.

While the Commission is less well known in Western Europe, it enjoys great prestige among the public in the countries where it regularly operates. This is one reason why the governments concerned rarely reject the Commission's recommendations outright – as happened in the case of Poland – but usually try to implement them in part, even if they are unwelcome, often tending to interpret the advice quite idiosyncratically. When states accept the Commission's recommendations in principle, this enhances their reputation both nationally and internationally as states that want to act in accordance with the Council of Europe's fundamental values.[229] Formally, the Commission's opinions almost always refer to a specific text at a specific time. In the case of important reforms, however, it rarely remains a one-off intervention, but the Commission acts as a constant supporter of the reform process in the country concerned. For example, the recommendations it made on the constitutional reform in Armenia in 2005, which were not implemented at the time, became part of the constitutional reform of 2015.

In the states where the Commission is regularly active, it enjoys a high reputation and therefore often acts as an arbitral body in constitutional conflicts. The solutions it proposes are accepted by the various institutions and by government and opposition.

The Commission's texts also make an important contribution to the development of international soft law. This is indirectly true for its opinions, as requirements for the constitutional and legal systems of states can be derived from their totality. Its reports and guidelines, such as the widely accepted Code of Good Practice in Electoral Matters, contribute directly to this development. In this context, the Commission must be careful not to narrow the scope for democratically developed national rules too much by setting overly detailed standards.

The Commission has also made an important contribution to the international networking of constitutional courts, thereby strengthening their role and independence.

Formally, the Commission is not a monitoring or control body and its opinions are non-binding recommendations. *De facto,* however, it is difficult or impossible for European states, if they are interested in further European integration, to ignore these recommendations. The Parliamentary Assembly of the Council of Europe regularly calls on states to follow the Commission's recommendations, and the Committee of Ministers is increasingly doing so as well. The ECtHR increasingly cites the Commission and a state that implements its recommendations reduces the risk of being condemned by the ECtHR.

Even more importantly, the European Union regularly invites states to consult the Venice Commission and implement its recommendations.[230] Initially, this mainly concerned the candidates for EU membership, but now also member states such as Poland. It is also significant that the USA, a country that does not like to enter into additional international law commitments, have joined the Enlarged Agreement and also frequently urge states to implement the Commission's recommendations.[231] When the IMF makes loans to a country conditional on the implementation of the Commission's recommendations, as happened in the case of the High Anti-Corruption Court in Ukraine, its recommendations lose their non-binding character.[232]

The reasons for this success are, on the one hand, structural. As an institution of the Council of Europe, the organisation that stands for the fundamental values of democracy, the rule of law and the protection of human rights like no other, it benefits not only from the institutional framework but also from the prestige of this organisation. The fact that the members of the Commission are appointed by the member states strengthens its authority and ensures that the Commission's positions remain broadly in harmony with the positions of the member states. The fact that it is a body of independent experts who do not represent special interests is crucial to its credibility.[233]

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[226] CDL-AD(2019)022.

[227] CDL-AD(2022)004.

[228] CDL-AD(2022)031.

[229] W. Hoffmann-Riem: "The Venice Commission of the Council of Europe – Standards and Impact", *EJIL* 25(2014), 579 ff. (596) speaks of a "reputation enhancing community".

[230] References in S. Granata-Menghini / M. Kuijer: "Advisory or de facto binding? Follow-up to Venice Commission's Opinions: Between Reality and Perception", in: *Venice Commission – Thirty Years* .... (note 1), pp. 281 ff. (283/28.).

[231] *See* e.g. the statement of 25.6.2020 by the US ambassador to Albania, Yuri Kim, on judicial reform; the statement of 7.9.2021 by the US embassy to Georgia on the reform of the rules on the Prosecutor General; the joint statement of 16.6.2021 by the US embassy and the EU Delegation to Ukraine on the importance of independent commissions for the selection of candidates to judicial office.

[232] *See* the letter of 11.1.2018 by the IMF Mission Chief to Ukraine, Ron van Rooden, to the Head of the Presidential Administration of Ukraine, Ihor Rainin.

[233] Likewise V. Volpe (note 35), *ZaöRV* 76(2016), 811 ff. (819).

The Commission was founded at exactly the right time. Until the end of the Iron Curtain, the principle of non-interference in the internal affairs of other states largely applied also in Europe. Since then, due to the progress of European integration, but also of international human rights protection, states and international organisations have been less and less reluctant to criticise the internal conditions in other states. If this criticism is to be credible, it must be based on careful legal analysis, as undertaken by the Commission.

While the starting position was thus favourable, the Commission made full use of this opportunity. Due to its rapid and flexible working methods, it has been able to influence the debates in the target countries at the right time. It has also always been pragmatic and has tried to find the right solution for each country through dialogue. The fact that it has been working in the same countries for a longer period of time is very helpful and enables the Commission to realistically assess the situation on the ground. It also avoided appearing too missionary in the sense of human rights activism.[234] The Commission has tended to avoid the particularly controversial issues of migration and the rights of sexual minorities, the propagation of which has proved counterproductive in Central and Eastern Europe and led to a populist backlash,[235] but has insisted on respect for fundamental rights, especially freedom of expression and association, in this context as well.

The Commission has also always been open to cooperation with other actors, in particular the EU, the OSCE and the US, and has recognised this as an opportunity to increase its influence. It has been ready to address new challenges, in particular corruption in the judiciary, and in this context to accept necessary but strictly limited exceptions from important principles such as the irremovability of judges.

However, the Commission, if only because of its limited resources, is not in a position to systematically assess the implementation of the constitution and laws at the national level in its opinions, even though it always endeavours to take into account insights gained from practice when interpreting rules. It cannot be denied that in Eastern and South-Eastern Europe, too, the texts of the constitutions and laws nowadays largely correspond to international standards, but there are still clear deficits in their implementation.

The wave of populism poses new challenges for the Commission but confirms the importance of its role. Democracy through law is the opposite of a "winner takes all" mentality that gives all rights to the majority of the moment. The Commission has always stressed the importance of procedural rules and institutions, and the constitutional courts, as privileged partners of the Commission, are the institution at the state level whose task it is to enforce respect for rules and institutions. The environment for the Commission has become more difficult due to populism, but at the same time its role has gained a new relevance.

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[1] S. Granata-Menghini / M. Kuijer (note 230), p. 295.

[2] A. Nußberger, "Werte und Recht", in: M. Aust / A. Heinemann-Grüder / A. Nußberger / U. Schmid: *Osteuropa zwischen Mauerfall und Ukrainekrieg,* 2022, pp. 179 ff. (222).