



**Influential Constitutional Justice: its influence on society
and on developing a global human rights jurisprudence**

**World Conference on Constitutional Justice
Cape Town, 22 – 24 January 2009**

**organised by
the Constitutional Court of South Africa
and
the Venice Commission**

**Speech by
Ms Maud de Boer-Buquicchio
Deputy Secretary General of the Council of Europe**

As the Deputy Secretary General of the Council of Europe, which this year celebrates its 60th anniversary, I take great pleasure in welcoming you to the World Conference on Constitutional Justice which is organised by the Constitutional Court of South Africa and the Venice Commission of the Council of Europe.

Constitutional justice has become an indispensable element to guarantee democracy, human rights and the rule of law, which are the founding principles of the Council of Europe.

I should point out that Council of Europe should not to be confounded with the European Union. Of the two, the Council – with its 47 member States - is the older institution and brings together all countries in Europe ranging from Portugal in the West to Russia in the East and from Iceland in the North to Azerbaijan in the South. While broader in membership, we have a more focused mandate, concentrated on the protection, promotion of democracy, human rights and the rule of law.

The way we work can be described as a circle of change. Its first dimension is standard-setting. The Council of Europe's body of law includes some 200 treaties and conventions. Most of the more recent

conventions are also open to non-European countries and South Africa has already signed our treaty on the fight against cybercrime. Other conventions with a potentially broad, even global geographical scope are the Council of Europe Convention on Action against Trafficking in Human Beings and our Convention on protection of children against sexual exploitation and abuse to mention only two. All these Council of Europe Conventions combine measures for effective legal cooperation and strict insistence on the respect of human rights.

Compliance with legally binding obligations under our Conventions is monitored through our monitoring mechanisms – starting with the European Court of Human Rights - and this is the second pillar of the Council of Europe circle of change. The results of the monitoring are fed into the third pillar – assistance and cooperation activities and, if necessary, back into standard-setting to produce new treaties to fill gaps in our legal arsenal.

Finally, the Council of Europe is also a campaigning organisation with the aim of raising awareness about challenges to human rights and ways to deal with them.

What is extraordinary about the Venice Commission is that it covers all of these three pillars. Standard-setting, monitoring and assistance are three distinct, yet key features, of the Venice Commission's work.

But let me return to the subject of this conference. As you know, constitutional law is complex. It determines notably the relations between the various state powers - legislative, executive and judiciary -, which sometimes can be quite delicate. When the Council of Europe wanted to set up a body dealing with constitutional law, it was well aware of this delicate balance. Therefore, while the Council of Europe is itself an intergovernmental organisation, the Venice Commission was created as an advisory body composed of independent members, who act in their personal capacity and who do not take any instructions from their Governments. This allowed the Commission's member states to accept advice without any apprehensions about interference from other governments.

As a result, the Venice Commission has an outstanding record in providing constitutional advice. Its suggestions in drafting constitutions and related laws were often followed by the countries seeking

assistance. This is probably due to the fact that in its membership the Commission combines the collective experience of outstanding constitutional lawyers from various legal traditions and because it does not give standardised answers but will tailor its opinions to the specific needs of each country. It does so only following thorough research and exchange with everyone involved.

The Venice Commission is very proud to have participated in the creation of the Southern African Judges Commission (SAJC) in 2003 and has been co-operating with South Africa since 1993.

From the outset, the Venice Commission was aware that it is not enough to draft and adopt constitutions. They have to be implemented to be of any use and it is the very task of constitutional courts, constitutional councils and supreme courts to ensure that this implementation is carried out.

We have gathered here at the World Conference to explore the impact of Constitutional justice on society. An extraordinary example of this is the decision of the Constitutional Court of South Africa of 1995 which ruled the death penalty unconstitutional in *State v. Makwanyane & Another* (Makwanyane), despite evidence of the time that many South Africans favored the death penalty. The abolition of the death penalty in Europe is one of the Council of Europe's main achievements: for us, and I am glad for South Africa too, this is not a matter of opinion polls, it is a matter of respect for Human Rights and for the dignity of every human being.

However, decisions of constitutional courts are not always welcome by the legislative and executive power whose acts may be annulled by the courts. Sometimes, they face stiff resistance, even pressure.

My position is however clear, and it stems from the very text of the European Convention on Human Rights: the independence and impartiality of the judiciary must prevail in all circumstances. Moreover, a Council of Europe recommendation of 1994 specifies this principle by stating that "all necessary measures should be taken to respect, protect and promote the independence of judges" and by calling upon the executive and legislative powers to "ensure that judges are independent and that steps are not taken which could endanger the independence of judges." In other words, the respect for the independence of the

judiciary is not a privilege for judges, but a guarantee for a fair justice system, a system in which people can have confidence. Independence of the judiciary is an absolute prerequisite for a genuine democracy and for any State governed by the Rule of Law.

I therefore fully support the approach by the Venice Commission to promote co-operation between the courts on a regional and a global level to help the courts to master any resistance which may arise from their decisions and to maintain their effective impact of the Constitution on society.

Especially in the field of human rights we have witnessed that constitutional courts and equivalent bodies in various parts of the world often arrive at similar conclusions. Such a common understanding of human rights is of course linked to the Universal Declaration of Human Rights whose 60th anniversary we celebrated not long ago. However, more and more the exchange between the courts in regional groups adds to this result. Our conference will explore these tendencies in depth.

The tools allowing for such exchange provided by the Venice Commission are a formidable means to derive inspiration but also to inspire others.

I do wish us all a fruitful Conference and I am convinced that this World Conference on Constitutional Justice, the first of its kind, will prove useful and lead to a permanent exchange between your courts, which in the end will benefit not only your courts but also the people in your countries.

Thank you very much for your attention.