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SCHNUTZ RUDOLF DÜRR¹
CONSTITUTIONAL JUSTICE – A KEY MISSION OF THE
VENICE COMMISSION

1. Introduction

Since its establishment 30 years ago, the Venice Commission has considered the promotion of constitutional justice (or constitutional review) as one of its key missions, as an essential part of its wider goal to promote constitutionalism in its member States and beyond.

The Venice Commission² of the Council of Europe is a group of distinguished constitutional lawyers who provide advice to the Commission's member States in constitutional matters in the wide sense, covering para-constitutional law, such as electoral legislation, laws on various state institutions, such as the judiciary or the ombudsman, or laws on specific rights such as the right to assembly or the right to religion, etc.

While advice on the drafting of opinions on constitutional and legal texts is the main work of the members of the Venice Commission, it was clear from the outset that these texts must be properly implemented in order to be of use. Under its first President Antonio La Pergola who had been a professor of constitutional law and constitutional judge himself, the Commission turned to the bodies which are charged with overseeing

¹ Secretariat of the Venice Commission, Head of Constitutional Justice Division, Secretary General of the World Conference on Constitutional Justice. This paper was written in a strictly personal capacity and does not necessarily reflect the official position of the Venice Commission or the Council of Europe.

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² The statutory name of the Commission, which is rarely used, is the European Commission for Democracy through Law.

the implementation of the constitution and the principles embodied therein. These are foremost the judiciary in general and constitutional courts in particular.

The Venice Commission facilitates and promotes an exchange of information and discussion between constitutional courts and equivalent bodies (constitutional councils, supreme courts with constitutional jurisdiction, constitutional chambers within supreme courts – hereinafter, “constitutional courts” in the wider sense).

The practical tools for this exchange of information are the electronic *Bulletin on Constitutional Case-Law* and the database CODICES, which contains more than 10.000 judgments. The confidential on-line Venice Forum allows all the courts co-operating with the Commission to seek information from other courts on specific topics or to inform them on on-going or recently decided cases.

The Commission organises seminars with the courts (called CoCoSems) and, when necessary, assists them when they come under undue pressure from other state powers.

It was probably this panoply of unique services that triggered the interest in the work of the Venice Commission by apex courts not only in Europe, but also abroad. Soon after its creation as a partial agreement³ of the Council of Europe by 18 out of its then 23 member States, a number of non-European countries became interested in the Venice Commission and sought observer status with the Commission. The strong interest, witnessed by the accession of all 47 member States of the Council of Europe and a number of non-European countries,⁴ is probably due to the fact that no comparable body exists on the international level. While a number of governmental and non-governmental organisations also provide constitutional advice, they lack the specific mix, notably a collegiate group of independent experts who nonetheless operate within the framework of an intergovernmental organisation, which gives them important institutional access to state bodies in the countries they work with.

³ A partial agreement allows some member States of the Council of Europe to participate in an activity in spite of the abstention of other member States.

⁴ In addition to the 47 member States of the Council of Europe, the following countries are member States: Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, Republic of Korea, Kosovo, Kyrgyzstan, Mexico, Morocco, Peru, Tunisia and the United States of America. The remaining observers are Argentina, the Holy See, Japan and Uruguay (since 2002, only full accession is available to for non-Council of Europe member States; many previous observers became full members). South Africa and Palestine have a special co-operation status, which is equivalent to that of an observer.

The Venice Commission provides tailor-made advice to each country, taking into account the historic and political background of the country concerned. There is no perfect constitution, which would fit all countries. On the basis of common minimum standards, the Commission accepts the choices made by the constitutional or legislative drafters, but it aims for a coherent system, for instance accepting a country's choice for a strong executive, but at the same time insisting on appropriate checks on government by parliament and, even more importantly, by the judiciary.

This open attitude has allowed the countries that the Commission is working with, to accept advice, as the constitution and legislation drafters see that their basic choices are being respected. The drafters, in turn, recognise that the Venice Commission's recommendations help in making their texts coherent.

II. Documentation exchange – cross-fertilisation

A. The origins – Antonio La Pergola

The backbone of judicial dialogue is mutual knowledge of each other's judgments. From his experience as constitutional judge, the Venice Commission's founding President Antonio La Pergola knew about the difficulties for exchange between constitutional lawyers in Europe, marked by a rich diversity not only of legal systems, but also of the use of languages. Thanks to available legal literature, constitutional lawyers might be able to follow the case-law of courts in large countries like Germany or France, but even the rich constitutional jurisprudence of La Pergola's own country, Italy, was accessible to a few only.

Already since 1972, the prestigious Conference of European Constitutional Courts⁵ tried to remedy to this problem, but the Courts could meet only every three years, being able to discuss to great avail only one specific topic in depth. After such a meeting, called congress, the Courts would split and the Conference could not ensure the follow-up of the topics discussed.

In 1991 Antonio La Pergola invited the Presidents of the Constitutional Courts to a conference on constitutional justice in Piazzola sul Brenta,⁶

⁵ www.confueconstco.org/en/common/home.html and <https://www.cecc2017-2020.org/> (accessed 06/2020).

⁶ Venice Commission, CDL-STD(1990)001. Proceedings of the conference, (Meeting with the Presidents of Constitutional Courts and other equivalent bodies. Documents starting with "CDL" as a reference are available at the web-site of the Venice Commission at www.Venice.CoE.int.

Italy, where he proposed the establishment of a constitutional justice documentation centre. This idea was welcomed by the Court Presidents, who appointed liaison officers with the Venice Commission. In 1992, the Venice Commission established this centre⁷ and the first issue of the *Bulletin on Constitutional Case-Law* produced by this centre was published in 1993.

B. The Bulletin on Constitutional Case-Law and the CODICES database

The Constitutional Court of Belgium (formerly the Court of Arbitration) was at the very origin of the Commission's co-operation with the constitutional courts through the pioneering work by its liaison officers Rik Ryckebroe and Pierre Vandernoot, which shapes this co-operation to our days. They not only provided the first proposals for a Systematic Thesaurus for the classification of constitutional case-law, they also prepared a report on the needs and possibilities of consolidating and computerising the documentation centre.⁸ Their report⁹ set out the basic framework of the co-operation between the Constitutional Courts and equivalent bodies¹⁰ and the Venice Commission. They proposed the presentation of a regular *Bulletin*, defined the need for a database to search the case-law and most importantly provided the concept and first draft for a Systematic Thesaurus allowing annotating the case-law according to coherent search criteria.

On this basis, the Commission has published since 1993 three times per year the *Bulletin on Constitutional Case-Law*. Some 80 regular and 21 special issues of the *Bulletin* have been published so far.¹¹ The topics of the special issues are often the themes of the congresses of the Conference of European Constitutional Courts; the draft version of these special issues serve the Conference as a working document. The contents of all *Bulletins* have been included in the CODICES database. Since 2018, the *Bulletin* is published in electronic form.¹² The contributions for the *Bulletin* and CODICES are kindly provided by

⁷ Venice Commission, CDL-JU(1992)005, Documentation Centre for Constitutional Case-Law.

⁸ The documentation centre also includes a physical library at the seat of the Venice Commission Secretariat in Strasbourg to which notably the constitutional courts donate books generously: www.venice.coe.int/WebForms/cocentre/new.aspx?lang=en.

⁹ Venice Commission, CDL-JU(1994)002, Study on the possibilities for improving and developing the *Bulletin on Constitutional Case-Law* and on establishing a computerised data bank on this Case-Law.

¹⁰ Such as the Constitutional Council of France or a Supreme Court with constitutional jurisdiction (e.g. Supreme Courts of Norway, Monaco or Ireland).

¹¹ See www.venice.coe.int/WebForms/pages/?p=02_02_Bulletins (accessed 06/2020).

¹² Subscription page: www.venice.coe.int/files/bulletin/eBulletin-subscription.html; see for instance issue 2018/3: www.venice.coe.int/Files/Bulletin/Bulletin2018-3-E.HTM (accessed 06/2020).

the Court's liaison officers who send summaries (*précis*) of relevant cases be published in English or French, the official languages of the Council of Europe. With the help of external proof-readers, the Secretariat of the Commission in Strasbourg proof-reads the contributions, ensures that the headnotes are draft in abstract terms, checks the indexing according to the Systematic Thesaurus and translates the contributions to the other language (English/French).

Since 1996, the Venice Commission has operated the database CODICES,¹³ which present important constitutional decisions (judgments), including human rights case-law. The database CODICES (www.CODICES.CoE.int¹⁴) contains more than 10,000 judgments (*précis* and full texts), court descriptions (allowing to understand the functioning of the courts), 97 constitutions and the laws on the courts searchable in full text and via the Systematic Thesaurus of the Commission.

The *Bulletin* and the database CODICES¹⁵ are appreciated by the participating Courts¹⁶ and the public at large as a unique source of information on comparative constitutional case-law. In addition to some 140 national apex courts world-wide, the European Court of Human Rights and the Court of Justice of the European Union, as well as the Inter-American Court of Human Rights, contribute to CODICES.

Another service provided by the Venice Commission is the (classic) Venice Forum, which enables liaison officers to ask questions relating to pending case-law to other liaison officers.¹⁷ The Constitutional Justice Media Observatory¹⁸ reflects the outside view on the participating courts as it contains links to on-line articles referring to the work of the courts.

The cooperation between the constitutional courts and the Venice Commission is steered by the Joint Council on Constitutional Justice, which is composed of members of the Venice Commission and the liaison officers who are appointed by the constitutional courts in the Commission's member

¹³ The programming of the database (Folio View/NXT, VBA) was the first task of the author at the Venice Commission's secretariat since October 1994.

¹⁴ User's guide available at [www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2019\)005-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2019)005-e) (accessed 06/2020).

¹⁵ www.CODICES.coe.int.

¹⁶ The *Bulletin on Constitutional Case-Law* is open to Courts in the member, associate member and observer countries of the Venice Commission. The CODICES database is open to all courts that co-operate with the Venice Commission in the framework of the World Conference on Constitutional Justice or a regional group (see further below).

¹⁷ After a formal check of the request, the Secretariat sends it to the other liaison officers. Their replies go directly to the requesting court. The Secretariat keeps a copy of all replies in the archive at the Venice Forum site.

¹⁸ Available on the restricted Venice Forum site.

and observer States. The Joint Council has a double presidency, which means that its meetings are co-chaired. One of the presidents is a member of the Venice Commission, elected by the Commission, while the other is a liaison officer, elected by the liaison officers. The Joint Council meets annually upon invitation of a participating court or in Venice.

III. Geographical scope

C. Regional co-operation (agreements)

While clearly a European body, the Venice Commission's Statute, first as a partial agreement and even more so since its conversion into an enlarged agreement in 2002, allowed the Commission to reply positively to the expression of interest in its work from abroad. While the Commission promotes the basic principles of the Council of Europe – democracy, the protection of human rights and the Rule of Law – it is aware that these are not only European, but truly universal values and much can be gained by exchanging not only within one continent, but also with other regions of the world.

Due to the strong interest from non-European constitutional courts in its activities, the Venice Commission established cooperation¹⁹ with 10 regional or language based groups of courts, such as the Association of Francophone Constitutional Courts,²⁰ the Southern African Chief Justices Forum,²¹ the Eurasian Association of Bodies of Constitutional Control,²² the Association of Asian Constitutional Courts and Equivalent Bodies, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice, the Conference of Tribunals of Countries of Portuguese Language and the Conference of Constitutional Jurisdictions of Africa and Commonwealth Courts. The courts members of all these groups are invited to contribute to the CODICES database.

D. World Conference on Constitutional Justice

By 2008, the Venice Commission had established fruitful co-operation with a number of regional groups. Possibly with the exception of the encounter between the Arab and Southern African groups in March 2006 during a plenary

¹⁹ www.venice.coe.int/WebForms/pages/?p=02_Regional&lang=EN (accessed 06/2020).

²⁰ Formerly the Association of Constitutional Courts using the French Language (AC-CPUF), of which the Constitutional Court of Belgium is a founding member.

²¹ Formerly the Southern African Judges Commission (SAJC).

²² Formerly the Conference of Constitutional Control Organs of Countries of New Democracy.

session of the Venice Commission, these were however bilateral relationships between the Commission and the respective partners. In order to provide further occasion for exchange and judicial cross-fertilisation, the Constitutional Court of South Africa and the Venice Commission invited all the relevant groups²³ to come together in Cape Town on 22-24 January 2009 for a World Conference on Constitutional Justice on the topic “Influential Constitutional Justice - its influence on society and on developing a global jurisprudence on human rights”.

This topic was chosen to show that such a gathering was not to be seen as a protocol exercise for the highest courts, but that the World Conference was to have a purpose, such as promoting democracy, human rights and the Rule of Law not only in countries with a long tradition in the pursuit of these values, but also in countries still struggling to live up to the principles enshrined in their constitutions. Even in countries where democracy is far from being achieved or where we had to witness setbacks, the support for constitutional judges is a goal worth pursuing. In some countries, the judges have little leeway, some risk losing their position or even their life if they dare to confront power outright. However, the judges are only too aware of the flaws in their countries and international and foreign support can help them to stand up to pressure and to decide on the sole basis of the Constitution, which often enounces all the principles required for a ‘just’ decision. Support from abroad will allow these judges to take at least some steps in ensuring these principles.

The reply to the call for participation from the courts was so overwhelming that a larger venue had to be found shortly before the beginning of the conference. 93 constitutional courts and equivalent bodies as well as 9 regional and linguistic groups participated in Cape Town. The Conference²⁴ adopted a Declaration,²⁵ which also highlights the value of judicial cross-fertilisation²⁶ between the courts, within the regions and world-wide.

The Cape Town Declaration also “entrusted a Bureau, composed of the Presidents of the regional groups and the three Courts which hosted the preparatory meetings, assisted by the Venice Commission, with the goal of organising a second World Conference on Constitutional Justice” and “with

²³ And Commonwealth Courts, see above.

²⁴ While the Cape Town event was called “conference”, the draft Statute provides that the organisation is to be called “Conference”, whereas the gatherings of the members for an exchange on a subject (chosen by the Bureau) are called “congresses”.

²⁵ www.venice.coe.int/WCCJ/WCCJ_CapeTown_E.asp.

²⁶ Buquicchio, Gianni / Dürr, Schnutz, Judicial Cross-Fertilisation - Co-operation between Constitutional Courts as a means to promote Democracy, the Protection of Human Rights and the Rule of Law, in Martens, Paul *et. al.*, *Liber Amicorum* Michel Melchior, Bruxelles (2010), pp. 311-323.

making proposals for the establishment of a world-wide association open to the Courts belonging to the regional or linguistic groups”.

During consultations throughout the year 2009 at the occasion of gatherings of the regional and linguistic groups, most groups and courts welcomed the idea of establishing the World Conference as a permanent body, others, especially in the Conference of European Constitutional Courts were more hesitant and preferred to move towards this goal at a slower pace.

A few months later, at the VIth Ibero-American Conference on Constitutional Justice in Mérida, Mexico, the Bureau met for the first time²⁷ and prepared a first draft statute for the Conference. This first version of the Statute laid much emphasis on the role of the Bureau and the representatives of the regional and linguistic groups. However, it soon became clear that both individual Courts and the groups themselves preferred to attribute important deciding powers to the General Assembly, in which the member Courts are represented individually. Later versions of the draft Statute, which were discussed at further Bureau meetings in Venice in December 2009 and in June 2010, provided a clear shift of competences towards the General Assembly.

The 2nd Congress in Rio de Janeiro, Brazil, in January 2011 was an important step on this path, because it gave the potential member courts the opportunity to express their views also informally, at coffee breaks or meals.

The Statute²⁸ for the World Conference was prepared before and at the second Congress in January 2011 in Rio de Janeiro, Brazil. It was adopted in Bucharest in May 2011 and entered into force on 24 September 2011, once 30 courts had accepted it. The Statute establishes a General Assembly, chaired by the host court of the congress, a Bureau²⁹ and provides that the Venice Commission acts as the Secretariat for the World Conference. Membership is open to the members of ten regional and linguistic groups as well as to the courts participating in the Joint Council on Constitutional Justice (see above).³⁰

²⁷ During the preparation of the Cape Town Conference, the representatives of the groups had already met three times for preparatory meetings held in Vilnius, Seoul and Algiers, but they have met formally as the Bureau of the World Conference on Constitutional Justice only since the Cape Town Declaration.

²⁸ Venice Commission, CDL-WCCJ-GA(2017)010, Revised Statute of the World Conference on Constitutional Justice.

²⁹ The revised Statute 2017 provides that the Bureau is composed of four individual courts representing four continents, the host courts of the last and next host congresses and representatives of the 10 regional and linguistic groups – current composition - Venice Commission, CDL-WCCJ-GA(2019)002rev4 - [www.venice.coe.int/webforms/documents/?pdf=CDL-WCCJ-GA\(2019\)002rev4-bil](http://www.venice.coe.int/webforms/documents/?pdf=CDL-WCCJ-GA(2019)002rev4-bil) (accessed 06/2020).

³⁰ 2020 the WCCJ has 117 members: Albania, Constitutional Court, Algeria, Constitutional

The latter criterion allowed also some courts that were not member of a regional or linguistic group to join the World Conference.³¹

Council, Andorra, Constitutional Court, Angola, Constitutional Court, Armenia, Constitutional Court, Australia, High Court, Austria, Constitutional Court, Azerbaijan, Constitutional Court, Bahrain, Constitutional Court, Belarus, Constitutional Court, Belgium, Constitutional Court, Benin, Constitutional Court, Bosnia and Herzegovina, Constitutional Court, Brazil, Federal Supreme Court, Bulgaria, Constitutional Court, Burkina Faso, Constitutional Council, Burundi, Constitutional Court, Cambodia, Constitutional Council, Cameroon, Supreme Court, Canada, Supreme Court, Cape Verde, Constitutional Court, Central African Republic, Constitutional Court, Chad, Supreme Court, Chile, Constitutional Court, Colombia, Constitutional Court, Comoros, Supreme Court, Congo (Brazzaville), Constitutional Court, Congo, Democratic Republic, Constitutional Court, Costa Rica, Constitutional Chamber of the Supreme Court, Côte d'Ivoire, Constitutional Council, Croatia, Constitutional Court, Cyprus, Supreme Court, Czech Republic, Constitutional Court, Denmark, Supreme Court, Djibouti, Constitutional Council, Dominican Republic, Constitutional Court, Ecuador, Constitutional Court, Egypt, Supreme Constitutional Court, Estonia, Supreme Court, ESwatini, Supreme Court, Ethiopia, Council of Constitutional Inquiry, Finland, Supreme Administrative Court, Finland, Supreme Court, France, Constitutional Council, Gabon, Constitutional Court, Georgia, Constitutional Court, Germany, Federal Constitutional Court, Ghana, Supreme Court, Guinea, Constitutional Court, Guinea-Bissau, Supreme Court of Justice, Hungary, Constitutional Court, Indonesia, Constitutional Court, India, Supreme Court^{>54}, Ireland, Supreme Court, Israel, Supreme Court, Italy, Constitutional Court, Jordan, Constitutional Court, Kazakhstan, Constitutional Council, Kenya, Supreme Court, Korea, Republic, Constitutional Court, Kosovo, Constitutional Court, Kuwait, Constitutional Court, Kyrgyzstan, Constitutional Chamber of the Supreme Court, Latvia, Constitutional Court, Lithuania, Constitutional Court, Lebanon, Constitutional Council, Luxembourg, Constitutional Court, Madagascar, High Constitutional Court, Malaysia, Federal Court, Mali, Constitutional Court, Mauritania, Constitutional Council, Mauritius, Supreme Court, Mexico, Supreme Court, Mexico, Electoral Court of the Federal Judiciary, Moldova, Constitutional Court, Monaco, Supreme Court, Mongolia, Constitutional Court, Montenegro, Constitutional Court, Morocco, Constitutional Court, Mozambique, Constitutional Council, Namibia, Supreme Court, Netherlands, Council of State, Netherlands, Supreme Court, Nicaragua, Constitutional Chamber of the Supreme Court, Niger, Constitutional Court, North Macedonia, Constitutional Court, Norway, Supreme Court, Pakistan, Supreme Court, Palestine*, Supreme Constitutional Court, Panama, Supreme Court, Peru, Constitutional Court, Poland, Constitutional Tribunal, Portugal, Constitutional Court, Romania, Constitutional Court, Russia, Constitutional Court, Samoa, Supreme Court, São Tomé and Príncipe, Supreme Court / Constitutional Court, Senegal, Constitutional Council, Serbia, Constitutional Court, Seychelles, Supreme Court, Slovakia, Constitutional Court, Slovenia, Constitutional Court, Somalia, Supreme Court, South Africa, Constitutional Court, Spain, Constitutional Court, Sweden, Supreme Administrative Court, Switzerland, Federal Court, Tajikistan, Constitutional Court, Tanzania, Court of Appeal, Thailand, Constitutional Court, Togo, Constitutional Court, Turkey, Constitutional Court, Uganda, Supreme Court, Ukraine, Constitutional Court, Uzbekistan, Constitutional Court, Zambia, Supreme Court, Zimbabwe, Constitutional Court.

³¹ For instance, the Constitutional Court of Kosovo, the Supreme Court of Israel, the Council of State and the Supreme Court of the Netherlands (the latter joined the European Conference after becoming member of the World Conference).

Depending on the gross domestic product per person of their country, the member courts contribute a membership fee between 200 and 2000 Euros to the budget of the Conference.

The World Conference promotes constitutional justice as a key element for democracy, the protection of human rights and the Rule of Law. Member Courts which violate these principles in a flagrant way can be suspended.

The 2nd Congress of the World Conference in Rio de Janeiro in 2011, hosted by the Supreme Court of Brazil, was dedicated to the independence of the Constitutional Courts.³²

The 3rd Congress of the World Conference on Constitutional Justice on the topic “Constitutional Justice and Social Integration”³³ was hosted by the Constitutional Court of the Republic of Korea on 28 September – 1 October 2014. The participants in the 3rd Congress of the World Conference on Constitutional Justice adopted the Seoul Communiqué.³⁴

During the 3rd Congress the General Assembly of the World Conference took place for the first time (the two first congresses had taken place before the Statute entered into force in September 2011).

Upon invitation by the Constitutional Court of Lithuania, the 4th Congress of the World Conference on the “Rule of Law and Constitutional Justice in the Modern World” was held in Vilnius, Republic of Lithuania, on 11-14 September 2017.³⁵ In Vilnius, the General Assembly amended the Statute replacing these individual courts as members of the Bureau with four courts elected in respect of four continents.

³² www.venice.coe.int/WCCJ/Rio/Papers/WCCJ_papers_E.asp. See also key-note speech at: www.venice.coe.int/WCCJ/Rio/Papers/AUT_Grabenwarter_keynotespeech.pdf (accessed 06/2020).

³³ The 3rd congress examined how Constitutional Courts have dealt with social integration and – in its absence – with social conflict. The participating judges were able to draw inspiration from the experience of their peers, whether from positive examples or from cases where the courts were unable to solve these issues. Notwithstanding the diversity of jurisdictions of the World Conference Member Courts, there was consensus among the participants of the 3rd Congress that “their work, whether directly related to social rights, or to civil and political rights or to institutional issues, contributes to social integration. At some point, all Constitutional Courts have to deal with social issues, be it because they have to solve a legal conflict, which developed between actors in society, be it because they act preventively and have to examine the constitutionality of legislation before it enters into force.” (Seoul Communiqué).

³⁴ Venice Commission, WCCJ Seoul Communiqué, www.venice.coe.int/wccj/seoul/WCCJ_Seoul_Communique-E.pdf (accessed 06/2020).

³⁵ Venice Commission, CDL-WCCJ-GA(2017)007, The Vilnius Communiqué. [www.venice.coe.int/webforms/documents/?pdf=CDL-WCCJ-GA\(2017\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-WCCJ-GA(2017)007-e) (accessed 06/2020).

With the 5th Congress on the topic “Constitutional Justice and Peace” in Algiers in 2021, the World Conference will return to Africa.

The defence of the independence of its members is a main issue of the World Conference, after being the topic of the 2nd Congress in Rio de Janeiro. Following that Congress, the Bureau decided that all future congresses should include a special session on stock-taking on the members’ independence. The 2014 and 2017 congresses included such stock-taking exercise and it will be part of the 5th Congress. This stock-taking showed that several courts had come under undue pressure from other state powers.³⁶

A reaction to such situations is foreseen in the Statute. Upon request, the World Conference can offer its good services³⁷ and - if need be - the Bureau of the Conference can make public declarations in this framework. The Bureau has not yet made any such statement but in order to operationalize the support for its members, the Bureau authorised the President of the Venice Commission to make statements supporting WCCJ member courts under undue pressure in consultation with the regional or linguistic group(s) concerned, unless there is an explicit objection by a member of the Bureau or the court concerned.³⁸

The President of the Venice Commission already had a practice of making statements³⁹ supporting courts or judges in the member States of the Venice Commission (see below) but the mandate by the Bureau of the World Conference extends the geographical scope of this possibility to the Member Courts of the World Conference in countries that are not Members of the Venice Commission.

IV. Constitutional and legal advice in the field of constitutional justice

The main task of the Venice Commission is to adopt opinions on specific countries and general reports for the benefit of its member States. This includes advice on constitutional and legal provisions concerning constitutional justice or constitutional review. During the 30 years of its

³⁶ See also Dürr, Schnitz Rudolf, *Constitutional Courts: an endangered species?*, in Rousseau, Dominique, ed., *Les Cours constitutionnelles, garantie de la qualité démocratique des sociétés?*, LGDJ, Lextenso, Issy-les-Moulineaux (2019), pp. 111-136.

³⁷ Venice Commission, CDL-WCCJ(2011)001, Statute of the World Conference on Constitutional Justice. [www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-WCCJ\(2011\)001](http://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-WCCJ(2011)001) (Articles 1 and 4.b.7).

³⁸ Venice Commission www.venice.coe.int/webforms/events/?id=2589 (accessed 06/2020); CDL-WCCJ(2019)002, 14th Meeting of the Bureau of the World Conference on Constitutional Justice, Santo Domingo, Dominican Republic - available in the Venice Forum.

³⁹ www.venice.coe.int/WebForms/pages/?p=01_02_statements_GB&lang=en (accessed 06/2020).

existence, the Venice Commission has given numerous opinions relating to constitutional justice, as part of opinions on draft constitutions or constitutional amendments or in opinions on draft (constitutional) laws on the constitutional courts and their procedures.

While the Commission supported in many opinions the establishment of specialised constitutional courts, the Commission also made it clear that constitutional justice (review/control) by the ordinary (supreme) courts is a valid model.⁴⁰ However, the Commission also regretted that an existing specialised constitutional court had been dissolved following a revolution.⁴¹

In the field of constitutional justice, the Venice Commission adopted two major reports, on individual access and on the composition of constitutional courts, together with numerous opinions for individual countries relating also to other issues. An overview of these opinions is available in the Commissions' compilation on constitutional justice.⁴² In addition, the Commission's Rule of Law Checklist sets out important benchmarks for constitutional justice as part of the Rule of Law.⁴³

A. Individual access

The Venice Commission's Study on Individual Access to Constitutional Justice⁴⁴ examined various forms of indirect and direct access of the individual to the Constitutional Court, including via petitions to parliament or the ombudsman, where the link between the individual and the Court is very weak, however.

A widely used form of indirect access are preliminary requests from ordinary courts to the Constitutional Courts. In such a case, either upon request by a party or upon initiative by the ordinary court, the requesting court (judge *a quo*), suspends the case at hand and sends (either directly or via a supreme court) a request to control the constitutionality of a provision that has to be applied in the current case to the constitutional court (judge *ad quem*). Once the Constitutional Court has decided, the judge *a quo* resumes

⁴⁰ Venice Commission, CDL(1998)059, Opinion on the Reform of Constitutional Justice in Estonia.

⁴¹ Venice Commission, CDL-AD(2010)015, Opinion on the draft Constitution of the Kyrgyz Republic.

⁴² Venice Commission, CDL-PI(2017)008, Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice (updated) - [www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2017\)008](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)008) (accessed 06/2020).

⁴³ Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, section II.E.3.

⁴⁴ Venice Commission, CDL-AD(2010)039rev, Study on Individual Access to Constitutional Justice.

the case and decides it on the basis of the decision of the Constitutional Court, possibly without applying the challenged provision if it was found to be unconstitutional. The study welcomes this type of individual access, which often co-exists with direct access (e.g. Belgium, Germany) but which is the only way for individuals to have access to the Constitutional Court in other countries (e.g. Italy, Romania).

Individual complaints provide direct access to the Constitutional Court. They come in two major types: normative constitutional complaints and full constitutional complaints.

Normative constitutional complaints exist for instance in Poland or Russia. Here, the individual challenges before the Constitutional Court an allegedly unconstitutional legal provision that has already been applied in a final judgement of the ordinary courts. The Constitutional Court annuls the challenged legal provision if it is unconstitutional.

The Venice Commission's Study found that normative complaints can remedy only a smaller part of human rights violations because more often they result from the unconstitutional application of a constitutional law rather than an unconstitutional law itself. The introduction of a merely normative constitutional complaint thus can raise high expectations in the population, which sometimes cannot be fulfilled.

The Study found that the most efficient remedy is the full constitutional complaint, which allows challenging also unconstitutional individual acts. Here the individual challenges a last instance judgment of the ordinary courts as such. It does not matter whether the unconstitutionality stems from an unconstitutional legal provision or an unconstitutional application of the law. The constitutional court will annul the legal provision if it is unconstitutional. The Study found that countries which have such a full individual complaint have significantly lower levels of violations found by the European Court of Human Rights than those with normative complaints only.⁴⁵

The introduction of a full constitutional complaint is therefore a very efficient means of human rights protection. It even reduces the workload of the European Court of Human Rights because fewer cases come to Strasbourg. Therefore, the Venice Commission usually recommends the introduction of full constitutional complaints in countries which already have a normative complaint, such as Ukraine,⁴⁶ in countries which have a

⁴⁵ *Ibidem*, para. 5.

⁴⁶ Venice Commission, CDL-AD(2016)034, Ukraine - Opinion on the draft law on the Constitutional Court, Section II.B.

preliminary request to the Constitutional court, as was the case in Turkey⁴⁷ and in countries which have no individual access at all, like Bulgaria.⁴⁸

The Study on individual access thus showed that in countries with a specialised constitutional court,⁴⁹ individual access to that Court is a key to the settlement of human rights issues on the national level before these cases reach the European level. The full constitutional complaint is the most efficient means to protect human rights.⁵⁰

B. Composition of Constitutional Courts

In its Report on the Composition of (specialised) Constitutional Courts⁵¹ the Commission identified three main issues. These are balance, independence and effectiveness.

Depending on the country and its society, several types of balance may need to be achieved. This can concern *inter alia* political sensitivities, regional or ethnic representation and gender balance. A balance between state powers can also be an objective pursued.

The pursuit of these balances is limited by the need to maintain the independence and impartiality of constitutional judges.

As concerns the appointing authorities, roughly two main systems of their appointment exist; either all judges are elected by Parliament (German model) or the three state powers each appoint one third of the judges: the President (executive), Parliament (legislative) and the Supreme Court / congress of judges (judicial power) – Italian model. Both models are perfectly valid.

The Venice Commission insists that the parliamentary component be elected by a qualified majority.⁵² Ideally, this brings forward non-political candidates who are acceptable to the majority and the opposition or – at the very least – there is a trade-off and both the majority and the opposition appoint “their” candidates who balance each other.

⁴⁷ Venice Commission, CDL-AD(2004)024, Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey.

⁴⁸ Venice Commission, CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, para. 88.

⁴⁹ The issue is not relevant to countries where constitutional justice is exercised by the regular courts. In these countries, access of individuals is governed by the general rules on access to court.

⁵⁰ The Study also deals with the question on how an overburdening of the constitutional court can be avoided.

⁵¹ Venice Commission, CDL-STD(1997)020, The Composition of Constitutional Courts - Science and Technique of Democracy, no. 20 (1997).

⁵² The introduction of anti-deadlock mechanisms may be necessary.

Any rules for dismissal of judges and the president of the court should be very restrictive.

Obviously, constitutional judges should live up to the highest standards of professional qualification and strict rules of incompatibility must ensure that they do not have any interests compromising their neutrality.

Contrary to ordinary judges who are typically appointed until retirement, constitutional judges usually have a fixed term mandate. The Commission insists that this be a long mandate, much longer than the term of parliament. A re-election of constitutional judges should not be possible,⁵³ at least not immediately after the end of the first mandate. In order to avoid that all judges retire at the same time, the first appointments should be staggered. Judges should retire only when their successor takes office.⁵⁴

The Study finds a central key role of collegiality, i.e. the fact that the members adjudicate as a group, whether or not they deliver separate opinions, constitutes an important safeguard. This can help them to overcome any expectations on how they would adjudicate. Once in office, the judges have to live up to the “duty of ingratitude” towards those who have nominated and elected them.

C. Other topics dealt with in Venice Commission opinions

In its opinions, the Venice Commission insisted that the basic tenets of the composition and jurisdiction of constitutional courts be regulated at the constitutional level.⁵⁵ This is because an organ that is empowered to annul laws adopted by Parliament representing the sovereign people, needs a high level of constitutional legitimacy for this task.

The discipline of a judge at the Constitutional Court should be in the hands of the other judges,⁵⁶ no other state body, including the judicial council, often in charge of discipline of ordinary courts, should be competent for that.

The position of the President should be that of a *primus inter pares*. She or he should not be in a position to push other judges towards the adoption

⁵³ Venice Commission, CDL-STD(1997)020, *op. cit.*, Section I.4.2.

⁵⁴ See also Venice Commission, CDL-AD(2006)016, Opinion Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine.

⁵⁵ Venice Commission, CDL-AD(2004)023, Opinion on the Rules of Procedure of the Constitutional Court of Azerbaijan, paras. 5-6.

⁵⁶ Venice Commission, CDL-STD(1997)020, *op. cit.*, p. 21.

of specific judgments.⁵⁷ Specifically, the President should not be alone in full control of case-allocation among the judges.⁵⁸

In many opinions and notably the report in individual access (see above), the Commission insisted on wide access to the constitutional court by parliamentary minorities, the ombudsman and by ordinary courts (preliminary requests).

As to the scope of jurisdiction, while no statutory act should be removed from the control by the Constitutional Court, the Venice Commission warned against burdening the Court with the control of sub-statutory acts, lest the Court turns from a constitutional court to a ‘court of hierarchy’.⁵⁹ The Commission strongly insisted that while *a priori* constitutional control of international treaties is useful, it is important that legislation be controlled *a posteriori*, after its entry into force because only practice can reveal unconstitutionality that remain undetected by a mere abstract control of a bill before promulgation.⁶⁰ In addition to international treaties, other exceptions can be *a priori* constitutionality control of questions to be put to referenda and *a priori* control of constitutional amendments that can be controlled against basic principles of the Constitution or its unamendable provisions.

Specific powers of providing a “binding interpretation of the Constitution” should not be part of the jurisdiction of the Court⁶¹ because in practice such a competence only hides conflicts of competence between state organs, which should be adjudicated with the conflicting powers as parties.

As concerns procedure, the Commission favoured written but adversarial procedures,⁶² notably when a Constitutional Court is faced with a high case-load due to wide individual access. The introduction of dissenting opinions was always welcomed by the Commission.⁶³

A clear regulation of the effects of constitutional court judgments is essential for the efficiency of the Court’s work. Mere declarations of

⁵⁷ Venice Commission, CDL-AD(2017)011, Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, para. 52.

⁵⁸ *Ibidem*, para. 66.

⁵⁹ Venice Commission, CDL-INF(1996)010, Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, p. 3.

⁶⁰ Venice Commission, CDL-AD(2011)001, Opinion on Three legal questions arising in the process of drafting the New Constitution of Hungary, paras. 49-50.

⁶¹ Venice Commission, CDL-AD(2008)029, Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, paras. 17-18.

⁶² *Ibidem*, para. 19.

⁶³ Venice Commission, CDL-AD(2018)030, Report on Separate Opinions of Constitutional Courts.

unconstitutionality, accompanied with recommendations to Parliament to change the legislation are clearly insufficient.⁶⁴ The Court must have the power to annul the unconstitutional provisions but it should be possible to postpone this effect to give Parliament enough time to adopt new legislation in order to avoid a legal gap.⁶⁵ Depending on the context, ordinary courts should be obliged to reopen a case, notably when individuals are detained on the basis of penal provisions found unconstitutional.

V. Support for Constitutional Courts under undue pressure

Constitutional Courts are an excellent means to limit excesses of state power. Therefore, those who want to exercise unchecked power often resent and fight them. The Venice Commission tries to support the Courts when there is a danger to the independence of the court and thus the constitutional values, which are also the values of the Council of Europe.

As a non-political actor, the Venice Commission does not monitor the constitutional situation in its member States but sometimes its opinions have the effect of supporting Constitutional Courts in difficult situations.⁶⁶ When there is undue pressure on a Court, the Commission or its President can make declarations or statements supporting the Courts.⁶⁷

It is political actors which take opinions or alerts from the Venice Commission as a basis for their support. Such actors are the Venice Commission's parent organisation, the Council of Europe (Secretary General, Parliamentary Assembly), but also by the EU, individual EU member States or the even the USA.⁶⁸

VI. Conclusion

The supremacy of Constitutions and the values enshrined in them are at the centre of the work of the Venice Commission. The Commission is aware that in order to be of practical use the Constitutions need to be implemented.

⁶⁴ Venice Commission, CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para. 27.

⁶⁵ Venice Commission, *op. cit.*, para. 197.

⁶⁶ Venice Commission, CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland; CDL-AD(2016)026, Poland - Opinion on the Act on the Constitutional Tribunal; CDL-AD(2012)009, Opinion on Act CL I of 2011 on the Constitutional Court of Hungary.

⁶⁷ www.venice.coe.int/WebForms/pages/?p=01_02_statements_GB&lang=en (accessed 06/2020).

⁶⁸ www.venice.coe.int/WebForms/pages/?p=02_references&lang=EN (accessed 06/2020).

Therefore, since its establishment in 1990, it supports Constitutional Courts as the bodies entrusted with supervising this implementation.

In addition to assistance in the drafting of Constitutions and legislation providing for an effective constitutional justice, the two main vectors of this support are judicial dialogue and cross-fertilisation on the one hand and direct support for the Courts against undue pressure on the other hand.

The Venice Commission's tools for judicial dialogue are conferences, the electronic *Bulletin on Constitutional Case-Law*, the CODICES database and the Venice Forum, which are the backbone of the co-operation. The key asset of these tools are their regularity and coherence.⁶⁹ The co-operation in the field of judicial documentation is not a purpose on its own, but it is a tool for judicial cross-fertilisation, allowing legal arguments to travel from court to court, from country to country, from continent to continent.

The Commission provides direct support to the Constitutional Court in various forms, through its opinions on constitutions, on the courts' legislation, through *amicus curiae* briefs, through formal or informal contacts with the authorities or - when necessary - through public statements.

The Venice Commission's model for co-operation with Constitutional Courts and equivalent bodies proved to be a successful one in Europe, so much so that soon courts and groups of courts from other regions wanted to participate in this work.

Following the establishment of co-operation with these groups, the Venice Commission assisted in the establishment of the World Conference on Constitutional Justice, for which it successfully acts as the Secretariat.

Several factors have contributed to the Venice Commission's success: its independent membership, its open approach based on dialogue and the acceptance of constitutional diversity.



⁶⁹ Through the Systematic Thesaurus developed by the liaison officers.



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Editors
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