

## THE VENICE COMMISSION'S ACTION IN AFRICA

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### 1 The Venice Commission

The European Commission for Democracy through Law of the Council of Europe (usually referred to as the Venice Commission as its seat is in the city of the Doges) is a group of distinguished constitutional lawyers – Ergun Özbudun is one of the founding members - which advises the organs of the Council and its 47 member States. Its name reveals its purpose; its works consists of devising a legal framework, which is to regulate the forces of democracy, thus protecting the minority – political but also ethnic or linguistic – from being subjected to the excesses of the majority. This framework is known as the constitution of a country, which defines the respective powers of parliament, government and the courts. A key function of a constitution is, of course, to protect the rights of the individual.

The Venice Commission sees its purpose in providing tailor-made advice to each country, taking into account the specific historic and political background and the needs of society. There is no perfect constitution, which could fit all countries. On the basis of common standards, the Commission will accept the choices made by a country, but will try to aim for a coherent system, e.g. accepting a country's choice for a strong executive, but at the same time insisting on appropriate checks on government by parliament and, probably even more importantly, the judiciary.

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

The Commission covers not only constitutions, but also para-constitutional law such as electoral legislation, laws on various institutions

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such as the judiciary or the ombudsman, or laws on specific rights such as the right to assembly or on the right to religion.

While assistance in the drafting of these texts is the main objective of the Venice Commission, it was clear from the outset that these texts must be implemented in order to be of any use. Merely programmatic constitutions, such as the one of the Soviet Union which proclaimed human rights that were not granted in reality, can be of no use to society. Therefore, the Commission turned to the bodies which oversee the implementation of the constitution and its principles, the judiciary and especially constitutional justice. 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). The practical tools for such an exchange of information are the Bulletin on Constitutional Case-Law<sup>1</sup> and the database CODICES, which contains more than 5000 decisions, together with constitutions, descriptions of the courts and the laws governing their activities. The Commission organises seminars (so-called CoCoSems) with these courts and, when necessary, assists them when they are under undue pressure from other state powers. The confidential on-line Venice Forum Newsgroup 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.

It was probably also 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 agreement<sup>2</sup> 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<sup>3</sup>. The strong interest, witnessed by the accession of all 47 member States of the Council of Europe and a number of non-European countries<sup>4</sup>, is probably due to the fact that no comparable

<sup>1</sup> Publishing case-law from constitutional courts and equivalent bodies in member and observer states of the Venice Commission, including South Africa.

<sup>2</sup> A partial agreement is a particular form of arrangement, which allows some member States of the Council of Europe to participate in an activity in spite of the abstention of other member States.

<sup>3</sup> Argentina, Canada, the Holy See, Israel, Japan, Kazakhstan, Mexico, the United States and Uruguay. South Africa has a special co-operation status, which is equivalent to that of an observer.

<sup>4</sup> All Council of Europe member states are members of the Venice Commission: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg,



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 institutional access to state bodies in the countries they work with.

Conversely, while undeniably a European body, the Venice Commission's Statute, first as a partial agreement and even more so since its conversion into an enlarged agreement<sup>5</sup> in 2002, allowed the Commission to reply positively to the expression of interest in its work from abroad. When the Commission pursues the basic principles of the Council of Europe – democracy, the protection of human rights and the rule of law – it is well aware that these are not only European, but truly universal values and much can be gained by exchanging not only within our continent, but also with other regions of the world.

Interestingly, it was in Africa where the Commission became most active in the pursuit of its main activity: the promotion of constitutionalism for the benefit of the people, for the benefit of each individual. Its work spilled from South Africa to the whole Southern African region, covered Western Africa through co-operation with francophone constitutional courts and now includes Northern Africa via the exchange with Arab constitutional courts and councils.

## **2 Southern Africa**

### **2.1 Swiss funded co-operation programme with South Africa**

It was at the end of Apartheid in South Africa that the Venice Commission first came into contact with an African country. Lord Carrington, Henry Kissinger and Antonio La Pergola<sup>6</sup>, the founding

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Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine, United Kingdom; in addition, Kyrgyzstan joined the Commission in 2004, Chile in 2005, the Republic of Korea in 2006 and Algeria and Morocco in 2007. An accession requests by Israel was approved by the Committee of Ministers of the Council of Europe in 2007.

<sup>5</sup> In February 2002, the Commission became an enlarged agreement, allowing non-European states to become full members.

<sup>6</sup> Assisted by the first author, Mr. La Pergola was the driving force for the creation of the Venice Commission. Professor of Constitutional Law and former President of the Constitutional Court of Italy, La Pergola pushed for the creation within the Council of Europe of an advisory body composed of independent members providing opinions in

President of the Venice Commission, participated in a mediation panel to resolve the conflict, which opposed the African National Congress, the National Party and the Inkatha Party. This experience made Mr La Pergola and with him the Venice Commission known in South Africa and in countries interested in a success of the transition from apartheid to democracy. Switzerland was one of these countries and it was the Swiss Foreign Ministry that invited the Venice Commission to run a co-operation programme in and with South Africa and provided the necessary funds to do so.

The South African authorities were most keen to benefit from the wealth of common knowledge in the constitutional field available through the Venice Commission. The programme of co-operation included Government, especially the Department for Constitutional Development, Parliament, various regions, the South African Human Rights Commission and most notably the recently created Constitutional Court. The focus of the programme was twofold: the three tiers of government in South Africa (national, provincial and local) were keen to study the European experience in the field of federalism and regionalism<sup>7</sup>, while the Constitutional Court and the Human Rights Commission wanted to exchange information and experience in the field of constitutionalism in general and fundamental rights in particular and especially about the implementation of social rights.

During the programme, the Venice Commission also benefited from learning about the unique South African experience of wide public consultation in constitution drafting as well as the exemplary certification of the Constitution by the Constitutional Court of South Africa.

Together, the Venice Commission and the Constitutional Court of South Africa pushed for the geographical extension of the programme. The Constitutional Court was convinced of the usefulness of its co-operation with the Venice Commission and wanted to make the apex courts in the whole Southern African region benefit from it. In line with its open attitude to dialogue also with non-European countries, the Venice Commission favoured this geographical extension, which was also approved by the Swiss Government.

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constitutional matters. Mr La Pergola remained the President of the Venice Commission until his death in July 2007.

<sup>7</sup> In particular, a university chair on intergovernmental relations was established in South Africa.



## 2.2 Meetings of Chief Justices of the SADC region

The extension of the programme to the whole region<sup>8</sup> also brought about a change in the nature of the activities undertaken. The North-South dialogue was complemented by a South-South exchange. With the exception of Angola and Mozambique, the countries concerned had a common law background and often faced similar problems. Their open discussion also enriched the European side.

Topics discussed at the meetings of the Chief Justices covered issues such as equality, the relationship between the courts and the media and, often, the independence of the judiciary. The regular meetings of the Chief Justices allowed them to address specific problems in the various jurisdictions. In one case, a delegation of Chief Justices made a successful mediation mission to a participating country, which resulted in the solution of a dire conflict between the Judiciary and the Head of State. In other cases, the Chief Justices were at least able to express their moral support for judges under pressure by the government or parliament in their country. In such situations, judges often feel abandoned when faced with aggressive accusations from politics and the media. Support from the judiciary in the region can provide a judge with the necessary force to stand up against unjustified demands, even if they seem impossible to surmount at first.

An important vector of co-operation was the offer by the Venice Commission to the Chief Justices not only to benefit from the case-law already contained in the CODICES database, but also to actively contribute to it in order to have a forum to present their decisions within the region and abroad. For this purpose, each of the Chief Justices appointed a liaison officer with the Venice Commission to contribute selected case-law in the field of constitutional law (including human rights issues) to the database. In 2001 (Mangochi, Malawi) and 2003 (Windhoek, Namibia), the Commission gathered these liaison officers to train them in the preparation of *précis* and their indexing according to the Systematic Thesaurus of the Commission's Joint Council on Constitutional Justice.

Following the conclusion of the Swiss funded programme, Italy, Norway and most recently Ireland continued to support the on-going programme both financially and by providing speakers.

<sup>8</sup> Angola, Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

### 2.3 The creation of the Southern African Judges Commission

In 2003, time was ripe for an institutionalisation of the meetings of Chief Justices. At their gathering in Zanzibar, they formally established themselves as the Southern African Judges Commission (SAJC). Their statutes, called Constitution<sup>9</sup>, explicitly provide for co-operation with the Venice Commission as a means to pursue the goals of the SAJC.

When serious problems in one of the SAJC countries were brought up at one of the meetings, the question was raised whether the SAJC Constitution provided a sufficient basis to deal with such issues. Consequently, the SAJC established a working group entrusted with drafting guidelines on how to deal with such situations effectively and this even in between the meetings of the SAJC in urgent cases. Even before the adoption of these Guidelines on Addressing Issues of Concern among Member States of the SAJC at the meeting in Maputo (August 2006), the SAJC continued to debate specific problems of the judiciary in some of its member countries.

An important step in the co-operation between the SAJC and the Venice Commission was the visit to Europe of the SAJC Chief Justices in March 2003. In Venice, the SAJC Chief Justices held an exchange of views with the Commission on constitutional review in common law countries and countries with specialised constitutional courts. The topics discussed were the advantages and disadvantages of centralised constitutional review and the repercussions on the composition of these courts. The simultaneous presence of the representatives of the Union of Arab Constitutional Courts and Councils (see section 0, below) provided an opportunity not only for an exchange with Europe, but also between these sub-regions.

In addition to its general meeting in Strasbourg, where the above-mentioned Guidelines were discussed, the SAJC met with a group of judges of the European Court of Human Rights and discussed various issues ranging from private life vs. freedom of the press, the human rights and criminal law, the right to cross-examine witnesses in criminal proceedings to the prohibition of torture. Both sides found this exchange very enriching.

The co-operation with the SAJC courts focuses on two levels, that of the Chief Justices and that of the registrars, the meeting of which focus on practical issues of court organisation. Following a first seminar for the registrars in December 2006 in Dublin, a second seminar was held in Johannesburg in December 2007, where a number of issues relating to the duties of a registrar were discussed, in particular: administrative/financial duties and responsibilities, the modernisation of the legal system,

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<sup>9</sup> [http://www.venice.coe.int/sajc/Basic\\_texts/SAJC\\_constitution.htm](http://www.venice.coe.int/sajc/Basic_texts/SAJC_constitution.htm)



development and management of court archives and record management, case flow management, law researchers programme, legal aid and (electronic) court libraries. The participating registrars from South Africa and the other SAJC countries found the meeting very useful and inspiring for their daily work.

### 3 Western Africa – Francophone Courts

A number of constitutional courts and equivalent bodies in francophone countries participated from the outset in the Venice Commission's co-operation with these courts. In fact, Messrs Rykeboer and Vandernoot, the liaison officers from the Court of Arbitration of Belgium (now Constitutional Court) prepared a concept paper which set out all elements of the Commission's co-operation with the courts (an English / French *Bulletin on Constitutional Case-Law*, a database, the Systematic Thesaurus as the key element for indexing and search in the database). Taking into account the needs and constraints of the partner courts, this report formed the basis for the Venice Commission's successful activities in the field of constitutional justice. Through its head librarian, Mr Cottin, it was the French Constitutional Council that provided valuable advice on how to set up the CODICES database with the limited resources of the Venice Commission.

When in 1996 the Constitutional Council of France gathered French speaking courts and councils in a conference on equality, which lead to the formal establishment of the Association of Constitutional Courts using the French language (ACCPUF), its Secretary General, Ms Remy-Granger, was well aware of what had already been achieved by the Venice Commission. ACCPUF was keen to follow the model of co-operation established by the Commission and first requested to use the type of presentation of cases and indexing via the Systematic Thesaurus (Vaduz, 1999) and later to contribute directly to the CODICES database (Djibouti, 2002). The Venice Commission was happy to grant these requests, however insisted that the ACCPUF Secretariat remain responsible for the correct presentation of cases from francophone courts in countries, which were not member or observer states of the Commission.<sup>10</sup>

In 2007, the co-operation was further intensified through the organisation of two seminars for the correspondents (liaison officers) of ACCPUF at the seat of the Venice Commission's Secretariat in Strasbourg in order to train them in the preparation of contributions to the CODICES database. It is important to note that the Commission also invited one of the

<sup>10</sup> This concerns mostly constitutional courts and councils in Africa as well as Cambodia and Haiti.

Vice-Presidents of the Supreme Constitutional Court of Egypt to one of the seminars, as a representative of the Union of Arab Constitutional Courts and Councils<sup>11</sup> in view of future Arab contributions to the database. Similar to the invitation both of a delegation of the Union of Arab Constitutional Courts and Councils and the Southern African Judges Commission for an exchange of views with the Venice Commission in March 2006 (see above, section 0), this invitation provided an occasion for dialogue between Arab and Francophone courts.

The successful co-operation between ACCPUF and the Venice Commission became a model for the Commission's contacts with other regional bodies in Africa, the Americas and Asia. Its fruitfulness is also recognised by the 'mother' organisation of ACCPUF – the Intergovernmental Organisation of the Francophonie (OIF), which invited both bodies to a conference on legal reporting (Yaoundé, December 2006) to make a presentation on their co-operation as an inspiration to other groups (ombudsmen, administrative courts, courts of cassation) within the francophone group of countries.

#### **4 Northern Africa – Arab Courts**

As opposed to the co-operation with ACCPUF, the co-operation with Northern African Courts started off in a bi-lateral form. Already in 2004, the Constitutional Council of Algeria was invited as a special guest to the Joint Council for Constitutional Justice and showed a keen interest in the work of the Venice Commission in general. Also in 2006, the Supreme Constitutional Court of Egypt was represented at the 60th Plenary Session of the Venice Commission (8-9 October 2004).

It was probably the first author's keynote speech at the opening of the Constitutional Court of Bahrain in April 2005, which contributed to the knowledge about the Venice Commission in the Arab World in general.

This is probably also the reason for which the Union of Arab Constitutional Courts and Councils<sup>12</sup> mandated the Constitutional Council of Algeria and the Secretary General of the Union and Vice-President of the Constitutional Court of Egypt to explore ways of co-operating with the Venice Commission. They participated in the 66<sup>th</sup> Plenary Session of the Commission (17-18 March 2006), where they presented the Union of Arab Constitutional Courts and Councils, which was created in 1997 with the objective to promote co-operation and exchange of ideas between the courts,

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<sup>11</sup> See below, section 0.

<sup>12</sup> Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Palestinian National Authority, Sudan, Tunisia, Yemen.



to encourage research in the constitutional field and in particular in the human rights area and to establish contacts with similar organisations. The delegation offered to co-operate with the Venice Commission based on the exchange of documentation, mutual participation and co-organisation of seminars and conferences.

Following this visit and that of a delegation of the Commission to Algiers in April 2006, Arab courts participated in a number of Venice Commission seminars. In the framework of its 72<sup>nd</sup> Plenary Session (October 2007), the Commission organised a fruitful exchange of views between the member courts of the Union and the Commission on the topic "Limits of Constitutional Control". The Union and the Commission agreed on a co-operation programme, which comprises seminars, contributions of the Arab courts to the Commission's CODICES database, translations of case-law and contributions to the Union's library. This programme of co-operation is funded by the Government of Norway and puts a special emphasis on the needs of the High Court of the Palestinian Authority.

In 2007, Algeria and Morocco even joined the Venice Commission as full members. This co-operation provides an example of a fruitful intercultural dialogue in a highly specialised field, that of constitutional justice. This dialogue is open and enriches both the Arab and the European side.

### **5 Outlook - World Conference on Constitutional Justice**

While the Venice Commission's co-operation with non-European states started off in Africa, it did not stop there.

During a visit in Strasbourg that was organised by the German Hanns Seidl Foundation, the Constitutional Court of Indonesia suggested that the Venice Commission establish contact with a group of Asian Constitutional Courts (Indonesia, Republic of Korea, Mongolia, Philippines and Thailand). In September 2005, the Commission participated in the third Conference of this Group in Ulan Bator, sponsored by the German Adenauer Foundation, and offered the same type of co-operation as is available to its African partners (contributions to the CODICES database, exchanges via the Venice Forum Newsgroup).

In October of the same year, the Venice Commission extended this offer also to the Ibero-American Conference of Constitutional Justice, which held its fifth meeting in Santiago de Chile.

These contacts brought about a nearly worldwide dimension of the Commission's co-operation with constitutional courts.<sup>13</sup>

Consequently, the Commission decided to convene all the courts covered by this system of regional co-operation in its first World Conference on Constitutional Justice. This Conference should bring together all the courts represented in the Commission's Joint Council on Constitutional Justice (courts in the Commission's member and observer states, the ACCPUF member courts, the SAJC courts, the Arab courts as well as the courts members of the Conference of Constitutional Control Organs of Countries of Young Democracy (CIS countries), the network of Asian Courts, the courts members of the Ibero-American Conference and the Commonwealth apex courts.

The theme of this World-Conference is "The impact of Constitutional Justice – its impact on Society, its impact on Foreign Courts". Since Africa is the cradle of the non-European co-operation in the field of constitutional justice, the Commission is organising this major event with the Constitutional Court of South Africa in Cape Town in January 2009.

## 6 Conclusion

While we have seen that the extra-European co-operation of the Venice Commission has taken a global dimension, we are aware that it was in Africa that it concretely started and where the co-operation remains most intense.

Co-operation with Southern African, French speaking or Arab courts is not a one way street, the Commission wishes to learn from the experience in these countries, to hear about the problems and success stories in Africa and to learn lessons, which can be applied in Europe as well.

It was probably this open attitude taken by the Commission, shared by Ergun Özbudun, which is to look at one another as equal partners that resulted in the confidence of the African courts in the Commission as a reliable partner. The Commission wishes to pursue this partnership and even to intensify it for the benefit not only of the courts, but even more for the benefit of the people in all the countries where it has the privilege to work.

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<sup>13</sup> The notable exception to this coverage is courts of ultimate appeal in Commonwealth countries in the Caribbean and in the Asia Pacific region (Commonwealth courts in Southern Africa and Europe as well as the Supreme Court of Canada were already linked to the Commission). Contacts with the Commonwealth Secretariat are currently under way to invite these courts as well.



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*Essays in Honor of Ergun Özbudun*

**Cilt II  
Anayasa Hukuku**

*Vol. II Constitutional Law*

ANKARA - 2008

**ÖDEMELİ İSTEME VE GENEL DAĞITIM**



**YETKİN Basım Yayım ve Dağıtım A.Ş.**

Strasburg Caddesi No: 31/A

06430 Sıhhiye / ANKARA

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Yayın Kodu: ISBN 978-975-464-461-6 (Takım)

ISBN 978-975-464-463-0 (II. Cilt)

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**Dizgi:** YETKİN Elektronik Yayımcılık Sistemleri

**Baskı:** YETKİN BASIMEVİ

Kâzım Karabekir Caddesi No: 95/7-8-10

Tel: 0 (312) 341 00 06 06060 ANKARA