

Constitutional courts - the living heart of the separation of powers / the role of the Venice commission in promoting constitutional justice^{1 2}

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I. Introduction

Before he was elected as a Judge at the European Court of Human Rights, Luis Lopez Guerra was the *de facto* member of the Venice Commission in respect of Spain. While his election to the Court was excellent for human rights protection in Europe, it was a sad moment for the Venice Commission as he could no longer fully participate in the work for the Commission.

His experience as Professor of Constitutional Law at the University Carlos III but also that as Vice-President of the Constitutional Court and Vice-President of the General Council for the Judicial Power of Spain between 1996 and 2001 had made him a valuable asset for the Venice Commission, notably in the field of constitutional justice.

Luis Lopez Guerra was rapporteur for Venice Commission on opinions on the Constitutions of Albania and Moldova, on the law on the Constitutional Court of Albania, on the Judiciary of Bulgaria, on Estonia's accession to the European Union and the Report on the execution of judgments of Constitutional Courts. Luis was also member of a Venice Commission working group with the delicate task of evaluating the work of the Constitutional Court of Belarus upon request by the Conference of European Constitutional Courts.

¹ This paper was prepared by the authors strictly in their personal capacity and does not necessarily reflect the official position of the Venice Commission or the Council of Europe

² This paper is based on the article by the authors on "The Venice Commission's Action in Africa", in: *Siyaset Bilimi, Essays in Honour of Ergun Özbudun* (2008), vol. II, pp. 165-174, and the second author's articles "The Venice Commission", in KLEINSORGE, T., Council of Europe, in Wouters, J., *International Encyclopaedia of International Laws: Intergovernmental Organizations*, Alphen aan den Rijn 2010, pp. 151-163 and "Constitutional Courts – an endangered species?", presented at the Conference "European Constitutional Democracy in Peril – People, Principles, Institutions", Budapest, 23-24 June 2016 (not yet published).

³ President of the Venice Commission of the Council of Europe.

⁴ Head of Constitutional Justice Division of the Secretariat of the Venice Commission, Secretary General of the World Conference on Constitutional Justice.

He represented the Venice Commission in numerous conferences with presentations on topics as varied as the resolution of ethno-political conflicts in federal and regional systems or the separation of powers. As a judge of the European Court of Human Rights he could no longer be a member of the Venice Commission but he kept close contacts with the Commission also after his election and he participated in conferences of the Venice Commission's presenting the Court's case-law on topics such as political parties and migrants. Recently, he participated in our Sub-Commission on Latin America.

Given that constitutional justice was at the centre of Luis Lopez Guerra's interest, we dedicate to him this contribution on the Venice Commission's action in the field of constitutional justice.

A. Supremacy of the Constitution

Constitutions are often enacted at turning points in the history of nations and steer the country towards the principles which are embodied in the Constitution. Notably after the end of a dictatorial regime, a new Constitution can guide the country towards democracy, the protection of human rights and the rule of law.⁵

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. Once the principle of the effective supremacy of a democratic Constitution is accepted, the question arises who is to ensure that other legal acts, notably legislation, do not contradict the Constitution.

Some countries have opted for full parliamentary sovereignty, leaving it to Parliament or one of its committees to ensure this control. This may work in practice when there is a well-established legal culture which enables members of Parliament to step out of their role as drafters of the laws and to assume the task of checking the constitutionality of these laws. Notably when this work is done in a smaller committee, composed of experienced Members of Parliament with sufficient legal knowledge, parliamentary control of the constitutionality of laws may be sufficient. However, such a system may also yield inadequate results when Parliament does not control its own acts with sufficient rigidity, possibly for political reasons.

An alternative could be the control of legislation by the Head of State, notably the President of the Republic. In a presidential system, the President is the head of the Government that may have drafted the very legislation which needs to be controlled. Even in parliamentary systems where the President is more remote from Government, the President typically emanates from a political

⁵ The Constitution of Spain of 1978 is a well known case in point. Following the election in 1977, the Constituent Cortes prepared a democratic Constitution, respecting the separation of powers and protecting human rights.

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party and is elected into office with the support of that party. Therefore, the argument that the control of legislative acts by political organs may remain inefficient applies to control by the President as well.

This leaves the judiciary as the best choice for an effective control of the supremacy of the Constitution. This can be the ordinary judiciary as is the case *inter alia* in the United States where the Supreme Court itself secured the power to control (or review) the constitutionality of legislation in its *Marbury v. Madison* case of 1803⁶. In order to provide the court which exercises constitutional control with sufficient legitimacy, Kelsen introduced the notion of a specialised Constitutional Court. He implemented this idea in the post WWI Constitutions of Austria and Czechoslovakia, which established Constitutional Courts. After WWII, specialised Constitutional Courts were introduced in European Constitutions in order to overcome the legacy of dictatorial regimes, as was the case first in Germany and Italy, then in Spain and Portugal and finally in Eastern Europe. The French model of a *Conseil constitutionnel* with *a priori* control of legislation was profoundly transformed by the introduction of the *question préliminaire de constitutionnalité* which introduced constitutional *a posteriori* control similar to other systems, notably that of Italy.

B. The Venice Commission

The promotion of constitutional justice was at the heart of the establishment of the Venice Commission or the European Commission for Democracy through Law, which is its statutory name. This choice of the name for the Commission was to express the conviction that sustainable democracy can only be built in a sound constitutional framework based on the rule of law.⁷

This body, which is called the Venice Commission because it meets four times a year in Venice, Italy, is an advisory body of the Council of Europe, which gives opinions on issues of constitutional law in the wide sense, including on para-constitutional legislation like electoral law, on laws on the judiciary, on

⁶ 5 U.S. 137 (1803).

⁷ The idea to establish a body of eminent lawyers, available to provide advice in constitutional matters, was that of Mr Antonio La Pergola, the Venice Commission's founder and first and long-time President until his passing away. Mr La Pergola was a professor of constitutional law of outstanding international renown who *inter alia* had been Judge and President of the Constitutional Court of Italy. Mr La Pergola was Member of the European Parliament from 1989 to 1994. Between 1994 and 2006 he was Advocate General and Judge at the Court of Justice of the European Communities. He was Minister of European Affairs of Italy at the time of the establishment of the Venice Commission – a position which was crucial for the support necessary to establish this body. He dreamt of a 'common house for judges' where constitutionalists would meet and exchange their views on common problems of constitutional law.

ombudsman laws, laws on the Constitutional Court, or laws on specific rights such as the right to assembly or on religious freedom.

The Venice Commission has 60 member States, including the 47 members States of the Council of Europe but also countries such as Brazil, Mexico, the USA, the Maghreb countries, Israel, Kazakhstan, Kyrgyzstan and South Korea. Upon Costa Rica's request, the Committee of Ministers of the Council of Europe invited this country to become the 61st member of the Venice Commission in July 2016.

Each Member State appoints an expert in constitutional law as individual member. These individual members – and the substitute members – do not represent their Government; they act in their personal capacity only. In order to safeguard their independence and to avoid any pressure on the members, they never act as rapporteurs for the preparation of opinions for their own country and they do not vote on such opinions.⁸

The Commission gives its opinions upon request by the country concerned or the organs of the Council of Europe or international organisations working with the Venice Commission, such as OSCE/ODIHR and the EU. These requests can relate to a general topic or a to specific country. The Commission itself can take up work on general topics but it cannot start work on a specific country upon its own initiative.

When they have doubts about constitutional amendments or legislation in a given country, the organs of the Council of Europe, notably the Parliamentary Assembly and the Secretary General, request opinions from the Venice Commission on these texts. In these cases, as for opinions requested by the States themselves, the Venice Commission prepares legal opinions, based on common European standards. These opinions make recommendations but these recommendations are not binding. It is the political organs who perform monitoring, whereas the Venice Commission remains an advisory organ. It is not a monitoring body.

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.

⁸ Opinions are usually adopted by consensus but without the participation of the member concerned. A similar system is called "consensus minus one" in the OSCE.

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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's activities in the field of constitutional justice are steered by the Joint Council on Constitutional Justice, which is a mixed body, composed of members of the Venice Commission and liaison officers appointed by courts in the member, associate member⁹, observer and special status¹⁰ States of the Commission, as well as the European Court of Human Rights, the Court of Justice of the European Communities as well as the Inter-American Court of Human Rights.

The Venice Commission has a wide view of constitutional justice and its Joint Council works with and includes specialised Constitutional Courts, Constitutional Councils, Supreme Courts exercising constitutional control or Constitutional Chambers within Supreme Courts (hereinafter "the Courts"). The Venice Commission co-operates also with supreme courts in the Netherlands where constitutional control is excluded by the Constitution itself but which use the European Convention on Human Rights as the standard of review.

Foremost, the Commission assists the Courts by facilitating the exchange of information between them. The Courts publish summaries of important decisions in the Commission's *Bulletin on Constitutional Case-Law* and the database CODICES.¹¹

Finally, the Venice Commission provides *amicus curiae* briefs¹² for the Courts. Sometimes they request such opinions because they expect pressure when they have to adopt a judgment that displeases the majority. An opinion from the Venice Commission may help to protect them against such attacks.

This paper presents two of the main aspects of the constitutional justice work of the Venice Commission, the promotion of judicial cross-fertilisation and support for constitutional courts under pressure.

⁹ Belarus is associate member of the Venice Commission.

¹⁰ South Africa and the Palestinian National Authority have a special status with the Venice Commission, similar to that of observers.

¹¹ <http://www.CODICES.coe.int>.

¹² <http://www.venice.coe.int/WebForms/documents/search.aspx>, search « amicus »

II. Fostering judicial dialogue – judicial cross fertilisation

The Venice Commission facilitates judicial dialogue not as a goal in itself but it pursues a clear purpose, the promotion of democracy, the protection of human rights and the rule of law, which are the basic values of the Council of Europe. Even when the Venice Commission does not actively influence the contents of the exchanges between the Courts, the convergence of the values enshrined in the Constitutions which are applied by the Courts leads to exchanges which favour the goals pursued by the Venice Commission.

A. Bulletin on Constitutional Case-Law and the CODICES database

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 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.

Since 1972, the prestigious Conference of European Constitutional Courts¹³ 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.

Once the Venice Commission was established, Antonio La Pergola therefore invited the Presidents of the Constitutional Courts to a meeting in Piazzola sul Brenta¹⁴, Italy, to propose them the creation of a permanent network between the Courts under the umbrella of the Venice Commission. This co-operation was not to replace the existing work done at the Congresses of the Conference of European Constitutional Courts, which are organised by the Courts themselves, but it should complement these major events by providing regular information on case-law of the participating Courts. This idea was welcomed by the Court Presidents, who appointed liaison officers with the Venice Commission to provide the necessary information in the form of brief summaries (*précis*) of cases for a *Bulletin on Constitutional Case-Law* to be published by the Venice Commission in English and French, the official languages of the Council of Europe.

¹³ See below, section 0.0.

¹⁴ For the proceedings of the meeting, see CDL-STD(1990)001.

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The Belgian Court of Arbitration (now the Constitutional Court) appointed two outstanding persons as liaison officers: Rik Ryckebroe and Pierre Vandernoot were mandated by the Commission to prepare a report on the needs and possibilities of such co-operation. Their report¹⁵ set out the basic framework of the co-operation between the Constitutional Courts and equivalent bodies¹⁶ and the Venice Commission. They proposed the presentation of the *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, since 1993 the Commission has published the *Bulletin on Constitutional Case-Law* three times a year and, since 1996, it operates the database CODICES, which both report on important constitutional decisions. The database CODICES (www.CODICES.Coe.int) contains some 9,000 judgments, court descriptions, constitutions and the laws on the courts searchable in full text and via the Systematic Thesaurus of the Commission.

The *Bulletin* and later the database CODICES¹⁷ were soon appreciated by the participating Courts and the public at large, who discovered a hitherto unavailable source of information on foreign case-law. In addition to some 70 national Courts, 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 the *Bulletin* and CODICES.

As the CODICES database was already created in 1996, its structure needs to be modernised. Given that the Constitutional Courts of the EU Eastern Partnership countries (Armenia, Azerbaijan, Belarus, Moldova, Georgia and Ukraine) both use CODICES and actively contribute to it, the joint EU / Council of Europe Programmatic Co-operation Framework (PCF) supports the modernisation of CODICES. While a completely new database cannot be created with the funds available, the current CODICES database will be upgraded by simplifying its server structure and by adding new search templates. A special PCF page for CODICES will be added.

B. Venice Forum

Over time, the Venice Commission added further services to its offer to the Constitutional Courts. Since 1997, the classic Venice Forum allows for a request from one Court to all the others on comparative law and foreign case-law. In practice, a liaison officer sends a question to the Commission's Secretariat, where a first search will be done to find elements for a reply in the CODICES database and other sources available to the Venice Commission.

¹⁵ See CDL-JU(1994)002.

¹⁶ Such as the Constitutional Council of France or a Supreme Court with constitutional jurisdiction.

¹⁷ www.CODICES.coe.int.

Then the result is sent to all other liaison officers who are asked to reply directly to the liaison officer who put the question. Copies of all replies are kept in the restricted Venice Forum site for future reference.

This classic Venice Forum was soon supplemented by the Venice Forum Newsgroup, which is a site where each liaison officer can place questions to the other Courts, make announcements¹⁸ or inform about recent or upcoming decisions. While the classic Forum is available only to Courts in member and observer states¹⁹ of the Venice Commission, the Newsgroup is open to all courts linked to the Venice Commission via regional partnerships or the World Conference on Constitutional Justice (see below).

The most recent offer to the Courts is the Constitutional Justice Media Observatory. Every week, the Secretariat makes a selection of links to articles on constitutional courts and equivalent bodies (using Google alerts) and sends this list to interested liaison officers and its members. The Venice Forum website includes a list with previous articles for reference. Several Courts have informed the Commission that together with the descriptions of the Courts in CODICES these links are very useful for preparing bi-lateral contacts between the Courts and thus to focus discussions from the outset on issues of common interest.

C. Regional co-operation

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 agreement²⁰ 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 Commission²¹. The strong interest, witnessed by the accession of all 47 member States of the Council of Europe and a number of non-European countries²², is probably due to the fact that no comparable body

¹⁸ E.g. about appointments of new presidents and judges.

¹⁹ Including the Associate Member State Belarus and South Africa and the Palestinian National Authority which have a special co-operation status with the Venice Commission.

²⁰ 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.

²¹ 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. Several of the observers became members after the revision of the Statute in 2002.

²² 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, Malta, Moldova, Monaco, Montenegro, Netherlands,

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²³ In February 200 European states

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.

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 agreement²³ 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.

Due to the strong interest from non-European constitutional courts in its activities, the Venice Commission successively established cooperation with the Association of Constitutional Courts using the French language (ACCPUF), the Southern African Chief Justices Forum, the Conference of Constitutional Control Organs of Countries of New Democracy (Commonwealth of Independent States – CIS – countries), 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. The partner courts are all invited to contribute to the CODICES database.

Co-operation is closest with the Conference of European Constitutional Courts due to the European origin of the Venice Commission.

i. Conference of European Constitutional Courts

The European Conference had been established in 1972 by the Constitutional Courts of Austria, Germany, Italy and Yugoslavia and organises a scientific congress every three years on a specific topic. The Courts' Presidents meet at the congresses and also a year and a half before to decide on the topic of the

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, the following countries became members: Algeria (01/12/2007), Brazil (01/04/2009), Chile (01/10/2005), Israel (01/05/2008), Kazakhstan (13/03/2012), Korea (01/06/2006), Kosovo (12/09/2014), Kyrgyz Republic (01/01/2004), Mexico (03/02/2010), Morocco (01/06/2007), Peru (11/02/2009), Tunisia (01/04/2010), United States of America (15/04/2013).

²³ In February 2002, the Commission became an enlarged agreement, allowing non-European states to become full members.

next congress and any requests for accession. The Conference grew slowly until the fall of the Berlin wall and expanded then quickly, especially until the year 2000, taking in new member Courts nearly in parallel to the accession of these countries to the Council of Europe.

In 1996, the Hungarian Presidency of the Conference invited the Venice Commission to participate in their Budapest Congress and to work together with the Conference. Since 1999, the Venice Commission prepares a working document for each congress of the Conference, presenting relevant case-law (from the CODICES database and specifically prepared for this occasion) for the congresses. The Hungarian proposal to establish a permanent Secretariat was not taken up, but the existing practice of the Conference was codified in the Statute of 1999, providing that the rotating presidencies also act as the Secretariat for the Conference.

Given that all members of the European Conference already contributed to the work of the Venice Commission through their liaison officers in the framework of the Joint Council on Constitutional Justice, it was not necessary to conclude a co-operation agreement but in 2009 the Circle of Presidents recognised the value of the co-operation with the Venice Commission in a special resolution.

ii. Association of Constitutional Courts using the French language (ACCPUF)

The Association of Constitutional Courts using the French Language (ACCPUF²⁴) was set up in 1996 and covers European French speaking countries, Canada, Haiti, Cambodia and a large number of African countries. Its founding Secretary General²⁵, Ms Dominique Remy-Granger, soon approached the Venice Commission seeking its agreement to use the 'Venice-model' of documentary exchange also for the French speaking group. At the occasion of the meeting of its Sub-Commission and the liaison officers in Vaduz in 1999, ACCPUF and the Venice Commission signed an agreement to this effect.

Since 1996, the CODICES database was already available first on CD-ROM, then via Internet. ACCPUF renounced from establishing its own database. On the basis of the Djibouti Protocol 2002 to the Vaduz agreement, ACCPUF contributes to the CODICES database. While contributions from the Venice Commission's member and observer states are published also on paper and

²⁴ Association des Cours Constitutionnelles ayant en Partage l'Usage du Français.

²⁵ While the Presidency of ACCPUF moves from country to country within the Bureau, the Secretary General is provided for by the Constitutional Council of France. In practice, the head of international relations of the Council is entrusted with the office of Secretary General of ACCPUF.

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both in English and French, contributions from the other ACCPUF members are integrated only in the French section of the database.

The co-operation established with the French speaking countries was warmly welcomed by the African members of ACCPUF, who were able not only to present their case-law within their group, but also to courts in other regions. The Commission saw this exchange as the starting point for a strategy to promote the basic values of the Council of Europe not only among its European members but also abroad. The Commission soon offered similar types of co-operation to other sub-regional bodies.

iii. Southern African Chief Justices' Forum

When the Swiss Government wanted to support the democratic transition in post-apartheid South Africa, they turned to the Venice Commission²⁶. On the basis of an agreement with the South African and Swiss Governments, the Commission provided assistance to various State institutions in South Africa, such as the Parliament, the Government, provincial Governments, the National Human Rights Commission and the Constitutional Court. Of these, the body most keen to co-operate with the Venice Commission was the Constitutional Court, headed by its admirable Chief Justice Arthur Chaskalson who – together with the other judges – forged the outstanding case-law which made the newly established Court known world-wide.

Arthur Chaskalson requested an extension of the assistance to the Constitutional Court provided by the Venice Commission to the whole Southern African region. The Swiss Government agreed to the use of the funds originally earmarked for South Africa only to benefit the whole SADC²⁷ region. The Commission was therefore able to co-operate with the whole group of mostly common law countries. In practical terms, co-operation was established on several levels: (a) Like for ACCPUF, the Venice Commission opened its CODICES database for contributions from liaison officers appointed by the Southern African Courts, this time in English language; (b) Thanks to the funds from the Swiss Government and later from Norway, Italy and Ireland, it was possible to organise meetings respectively for the Chief Justices, registrars and the liaison officers in order to tackle issues of

²⁶ Already in 1994, the Commission's President La Pergola – together with Lord Carrington and Henry Kissinger – had been invited to participate in a mediation effort in a conflict between the three political parties, the African National Congress, the National Party and the Inkatha Freedom party in South Africa.

²⁷ The Southern African Development Community is a regional economic body (www.SADC.int). The programme did not involve SADC as such but its geographical scope originally determined also the boundaries of the co-operation. Soon however, the Chief Justices of Uganda and later Kenya – countries not part of the SADC – participated in the co-operation whereas the Supreme Court of French speaking Congo (Kinshasa) did not join the English speaking group.

common concern²⁸; (c) With the support of the Venice Commission, the Chief Justices established the Southern African Judges Commission in 2003. In 2009, this body was renamed to become the Southern African Chief Justices Forum.

When the group found that the independence of the Judiciary in some countries of the region was in danger, it mandated delegations to undertake fact-finding missions in order to assist its threatened members.²⁹ In order to have a sound basis for such actions, in March 2006 the Chief Justices adopted so called "Rules of Engagement". The adoption of these Guidelines resulted in the *de facto* withdraw from the Southern African Judges Commission of the Judiciary of Zimbabwe between 2006 and 2009.

In the light of the very close relations between the Venice Commission and the Southern African Chief Justices, whose Union practically was born out of the co-operation with the Venice Commission, their statute, adopted in 2003, explicitly provides for a close exchange with the Venice Commission.

iv. Ibero-American Conference of Constitutional Justice

In 2005, the Commission was able to establish co-operation with the Ibero-American Conference of Constitutional Justice (CIJC). This co-operation took a similar form to that with ACCPUF. The CIJC includes Constitutional Courts, Supreme Courts and, interestingly from a European point of view, several Constitutional Chambers within Supreme Courts³⁰. The group not only covers most Latin-American countries but also Andorra, Portugal and Spain. The CIJC does not have a presidency but two Secretariats. The Secretariat *pro tempore* is passed on from one country to another every two years³¹ and the permanent secretariat is ensured by the Constitutional Court of Spain. The offer of co-operation was warmly welcomed by the CIJC and a number of its member courts already contribute to the CODICES database.³² Following these first contacts, a co-operation agreement was concluded in 2009.³³

²⁸ Seminars were organised on various topics ranging from judicial independence or human rights to practical topic like modernising the judiciary. The Chief Justices seminars usually adopted resolutions on how these common problems could be addressed, see www.Venice.coe.int/SACJF.

²⁹ Such actions were organised for the Judiciaries of Swaziland and Zimbabwe.

³⁰ In Europe, such a Chamber only exists in Estonia.

³¹ Currently, the Supreme Court of Panama holds the *pro tempore* secretariat.

³² The Inter-American Court of Human Rights is not a member of the CIJC. However, following contacts with its then President Ventura Robles, the Commission also invited that Court to contribute to the Bulletin and CODICES because its case-law is of high interest not only in Latin America but also in other parts of the world.

³³ Signed in Vilnius on 4 June 2008 at the occasion of the XIVth Conference of European Constitutional Courts at which both the then Mexican *pro tempore* and the permanent Spanish Secretariat were represented (http://www.venice.coe.int/WebForms/pages/?p=02_01_Regional_CIJC).

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v. Conference of Constitutional Control Organs of Countries of New Democracy

This Conference was established by virtue of a common declaration of Constitutional Courts of CIS members³⁴. The Courts regularly meet at the occasion of the 'Yerevan International Conferences', which take place in that city every year in October.

The Constitutional Court of Armenia ensures the Presidency and Secretariat of this Conference. The situation concerning case-law was different for this Conference as compared to co-operation with ACCPUF and the SACJF, because with the sole exception of Tajikistan, the Courts concerned already contributed to the Bulletin and CODICES on the basis of the status of their country as members of or observers to the Venice Commission. The co-operation agreement³⁵, concluded in 2003, does not relate to the publication of case law but mostly to the joint organisation of the Yerevan Conferences.

vi. Association of Asian Constitutional Courts and Equivalent Bodies

Co-operation with Asian Constitutional Courts first started bilaterally, in parallel with the Constitutional Courts of the Republic of Korea and the Constitutional Court of Indonesia in 2005. Through these courts, the Venice Commission came to be involved by the German Konrad Adenauer Foundation, which had gathered Asian Constitutional Courts and equivalent bodies in their Conferences of Asian Constitutional Court Judges.³⁶ At the 2005 conference in Ulaanbaatar, Mongolia, the Commission was able to make its offer of exchange via the CODICES database.

Already the occasion of the World Conference on Constitutional Justice in Cape Town (see below), the Courts/Councils of Kazakhstan, Kyrgyzstan and Russia expressed their interest in joining the group. After long discussions and with the support of the Konrad Adenauer Foundation and the Venice Commission, the Courts were able to draft a Statute for an Association of Asian Constitutional Courts and Equivalent Bodies, which was enacted at the 6th Conference in Jakarta in July 2010³⁷.

Since then, the membership of the AACC expanded quickly and it has now 17 members.³⁸

³⁴ <http://www.concourt.am/intconf/index-e.htm>.

³⁵ http://www.venice.coe.int/WebForms/pages/?p=02_01_Regional_CCCOCND.

³⁶ Regular participants came from the Constitutional Council of Cambodia, Constitutional Court of Indonesia, the Constitutional Court of Korea (Republic), the Constitutional Court of Mongolia, the Supreme Court of the Philippines, the Federal Court of Malaysia and the Constitutional Court of Thailand.

³⁷ <http://www.aaccei.org/ccourt?act=statute>.

³⁸ - Afghanistan, Independent Commission for Overseeing the Implementation of Constitution;

The AACC and the Venice Commission concluded a co-operation agreement in 2012, which provides for information exchange, notably contributions of important case-law of the AACC Member Courts to the CODICES database.³⁹

vii. Union of Arab Constitutional Courts and Councils

On behalf of the Union of Arab Constitutional Courts and Councils, the Constitutional Council of Algeria sought co-operation with the Venice Commission at the March 2006 plenary session of the Commission. It is interesting to note that well in advance of the World Conference, this plenary session also allowed for an exchange between regional groups because, at the same time, the Chief Justices of the Southern African Judges Commission⁴⁰ participated in the plenary and had an exchange with the Commission on “constitutional review in common law countries and countries with specialised constitutional courts”.

The Arab offer was gladly accepted by the Venice Commission and resulted in the conclusion of a co-operation agreement⁴¹, which provides for contributions to CODICES, exchange of documentation but also for the joint organisation of seminars and conferences.⁴²

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- Azerbaijan, Constitutional Court;
 - Indonesia, Constitutional Court;
 - Kazakhstan, Constitutional Council;
 - Korea, Republic, Constitutional Court;
 - Kyrgyzstan, Constitutional Chamber of the Supreme Court;
 - Malaysia, Federal Court;
 - Mongolia, Constitutional Court;
 - Myanmar, Constitutional Tribunal;
 - Pakistan, Supreme Court;
 - Philippines, Supreme Court;
 - Russian Federation, Constitutional Court;
 - Tajikistan, Constitutional Court;
 - Thailand, Constitutional Court;
 - Turkey, Constitutional Court;
 - Uzbekistan, Constitutional Court.

³⁹ <http://www.venice.coe.int/AACC/co-operation-agreement-AACC.pdf>.

⁴⁰ See above, now Southern African Chief Justices Forum.

⁴¹ http://www.venice.coe.int/WebForms/pages/?p=02_01_Regional_UACCC.

⁴² The Commission was able to co-finance some conference thanks to funds from the Government of Norway earmarked for co-operation with the Arab Courts, with a particular focus on the Palestinian National Authority. Indeed, an important element of the co-operation with the Arab Courts was the Opinion on the “Law on the Constitutional Court of Palestine” (CDL-AD(2009)014). In this opinion, the Venice Commission cautioned against the unilateral establishment of a Constitutional Court – replacing the present constitutional jurisdiction of the High (supreme) Court – during the split between the West Bank and Gaza.

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Following the participation and co-organisation of a number of seminars with the Union of Arab Constitutional Courts and Councils, the Commission organised a series of "Intercultural Workshops on Democracy", which embrace not only Constitutional Courts but also other State bodies and the academia in Arab countries.⁴³

viii. Conference of Constitutional Jurisdictions of Countries of Portuguese Language

The founding General Assembly of the Conference of Constitutional Jurisdictions of Countries of Portuguese Language took place in May 2010. However, even before that the Commission was instrumental in the establishment of this group. At the World Conference on Constitutional Justice in Cape Town in January 2009, Portuguese speaking Courts participated without yet being organised as a formal group. However, they used the occasion of the Cape Town Congress for an internal meeting, which also served as a basis for the later establishment of the Conference. Already for the 2nd Congress of the World Conference in 2011, the Portuguese speaking group participated as a formal group and the 2011 Statute of the World Conference provides for Portuguese as one of the official languages of the Conference.⁴⁴

The Venice Commission regularly participates in the Assemblies⁴⁵ of the Conference of Constitutional Jurisdictions of Countries of Portuguese Language and, like the other groups, the Conference participates in the meetings of the Bureau of the World Conference.

ix. Conference of African Constitutional Jurisdictions

Upon the initiative of the Constitutional Council of Algeria and with the support of the Government of Algeria, the Conference of African Constitutional Jurisdictions was established as an initiative of the African Union. The summit of Heads of State and Government of the Africa Union in Kampala in July 2010 mandated Algeria to lay the groundwork for such a body.

⁴³ http://www.venice.coe.int/WebForms/pages/?p=03_04_IWD&lang=EN. Since 2015, the Commission regularly organises trainings for civil servants in the framework of the UniDem Campus for the Southern Mediterranean countries:

http://www.venice.coe.int/WebForms/pages/?p=03_CampusUniDem&lang=EN.

⁴⁴ Already by virtue of the co-operation agreement with the Ibero-American Conference (see above), the Systematic Thesaurus (not the case-law itself) in the CODICES database has been made available also in the Spanish and Portuguese languages.

⁴⁵ <http://cjcplp.org/assembleias/>.

At a side event of the 2nd Congress of the World Conference on Constitutional Justice in Rio de Janeiro in January 2011, the Algerian Council gathered Courts from African Union countries present to discuss the idea of establishing such a conference.

The Venice Commission participated in the founding Congress of the CCJA in Algiers in May 2011 where its Statute was elaborated.⁴⁶

The Conference of African Constitutional Jurisdictions quickly acquired members on the African continent. A special problem remains the membership of the Constitutional Council of Morocco. As the Conference gathered constitutional courts and equivalent bodies from member States of the African Union, Morocco was excluded because it had left the African Union in protest against the recognition of the Western Sahara as an independent state by the Union. The Statute of the Conference of African Constitutional Jurisdictions was later amended, opening it to all African states, not only to the member states of the African Union but the Moroccan Council did not join because the Constitutional Council of the Western Sahara (DARS) had become a founding member of the Conference. Currently, Morocco considers joining the African Union again and the authors hope that this will enable the Constitutional Council (which soon will be transformed into a Constitutional Court) to join the African Conference.

x. Commonwealth Courts

The Supreme or Apex Courts in the Commonwealth are not formally united in the form of a conference or association. Nonetheless, the Statute of the World Conference considers Commonwealth Courts as one of the regional or linguistic groups and several Courts were able to become members of the World Conference by virtue of belonging to this group.⁴⁷ The Supreme Court of the United Kingdom represents the group in the Bureau of the World Conference, even if it is not a member itself.⁴⁸

During the preparation of the World Conference on Constitutional Justice in Cape Town, the Constitutional Court of South Africa and the Venice Commission decided to invite courts from the Commonwealth countries because their contribution to the Conference would be of high value and a number of Commonwealth courts were already invited by virtue of their membership in other regional groups (notably the Southern African group).

⁴⁶ <http://www.cjca-conf.org/historical/>.

⁴⁷ High Court of Australia, Supreme Courts of Ghana and Pakistan.

⁴⁸ During the 2nd and 3rd Congress of the World Conference, the Supreme Court of Canada took over this role.

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⁵⁰ <http://www.vc>

At the Cape Town Congress and during the two following congresses, the Commonwealth Courts were welcomed as the other groups traditionally co-operating with the Venice Commission. Due to some overlap in the membership, the Commonwealth group usually holds its group meeting during the congress together with the Southern African Chief Justices Forum.

D. World Conference on Constitutional Justice

As shown above, in 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 group in March 2006 in Venice, these were however always 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 groups 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 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 principles enshrined in their Constitutions. Even in countries where democracy is far from being achieved or where we had to witness steps backwards, the support for constitutional judges is a goal worth pursuing.

In some countries, the judges have little leeway; some would risk losing their position or even life if they dared to confront power outright. However, the judges are only too aware of 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 partner courts was overwhelming⁴⁹ and 93 Constitutional Courts and equivalent bodies as well as 9 regional and linguistic groups participated in Cape Town. The Conference adopted a Declaration⁵⁰, which highlights the role of constitutional justice for the protection of human rights on the basis of universal and regional

⁴⁹ To the extent that a larger venue had to be selected in view of the high number of participating courts.

⁵⁰ http://www.venice.coe.int/WCCJ/WCCJ_CapeTown_E.asp.

instruments. However, the Declaration also insists on the value of judicial cross-fertilisation 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 making proposals for the establishment of a World Association open to the Courts belonging to the regional or linguistic groups”.

The Statute⁵¹ for the World Conference was prepared before and at the second Congress in January 2011 in Rio de Janeiro, Brazil. It was adopted in May 2011 and entered into force on 24 September 2011. The Statute establishes a General Assembly, a Bureau 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.

When they need assistance, the member courts can call for good offices from the World Conference. They 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 was dedicated to the independence of the Constitutional Courts as the main subject⁵². Since then, the congresses always have a special restricted session on stocktaking on the independence of the member courts. The idea of these sessions is that the courts can present cases when they came under pressure and they can explain how they reacted. Learning from this experience should help other Courts in future similar cases. Important elements in this respect are the relations with the media, which are essential for the courts’ acceptance in society.

The 3rd Congress of the World Conference on Constitutional Justice on the topic ‘Constitutional Justice and Social Integration’ was hosted by the Constitutional Court of the Republic of Korea on 28 September – 1 October 2014. The participants of the 3rd Congress of the World Conference on Constitutional Justice adopted the Seoul Communiqué.⁵³

⁵¹ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-WCCJ\(2011\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-WCCJ(2011)001-e).

⁵² http://www.venice.coe.int/WCCJ/Rio/Papers/WCCJ_papers_E.asp. See also key-note speech at:

http://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Grabenwarter_keynotespeech.pdf.

⁵³ http://www.venice.coe.int/wccj/seoul/WCCJ_Seoul_Communique-E.pdf.

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The 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.”⁵⁴

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). The General Assembly elected the Constitutional Courts of Austria, Lithuania and Turkey as individual members of the Bureau of the World Conference.⁵⁵

A stock-taking exercise took place during the 3rd Congress on the independence of the constitutional courts, which showed that “some courts and some judges have indeed come under serious pressure from the executive and the legislative powers, from vested interests, but also from the media, which sometimes misunderstand judgments or distort the image of courts. This generally occurs when courts render decisions that displease other state powers. Several courts have been subjected to fierce and disrespectful criticism, even seeing their judgments not executed and in some cases, their budgets cut and their powers reduced and some courts had even been dissolved.”⁵⁶

Upon request, the World Conference can offer its good services⁵⁷ and – if need be – the Bureau of the Conference can make public declarations in this framework. However, the Member Courts have to request assistance and some of them may not dare calling for such help because they could be accused of being unpatriotic for calling for outside help.

⁵⁴ *Ibid.*

⁵⁵ In addition to representatives of the 10 regional and linguistic groups: Association of Asian Constitutional Courts and Equivalent Institutions, the Association of Constitutional Courts using the French Language, Commonwealth Courts, Conference of Constitutional Control Organs of Countries of New Democracy, Conference of Constitutional Courts of Countries of Portuguese Language, Conference of Constitutional Jurisdictions of Africa, Conference of European Constitutional Courts, Ibero-American Conference on Constitutional Justice, Southern African Chief Justices Forum, Union of Arab Constitutional Courts and Councils.

⁵⁶ Seoul Communiqué, *Ibid.*

⁵⁷ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-WCCJ\(2011\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-WCCJ(2011)001-e) (Articles 1 and 4.b.7).

With the accession of the Constitutional Tribunal of Cape Verde in June 2016, the World Conference on Constitutional Justice has reached the 100 membership mark, with its members hailing from all five continents.⁵⁸ The authors are proud that the Venice Commission contributed to uniting 100 Constitutional Courts, Constitutional Councils and Supreme Courts, committed to the common values of democracy, the protection of human rights and the rule of law as expressed in the Statute of the World Conference, which is essential for the promotion of these values worldwide.

⁵⁸ Albania, Constitutional Court; Algeria, Constitutional 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; Cameroun, Supreme Court; Canada, Supreme Court; Cape Verde, Constitutional Court; Chad, Constitutional Council; Chile, Constitutional Court; Colombia, Constitutional Court; Comoros, Constitutional 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; Dominican Republic, Constitutional Court; Ecuador, Constitutional Court; Egypt, Supreme Constitutional Court; Estonia, Supreme Court; Finland, Supreme Administrative Court; France, Constitutional Council; Gabon, Constitutional Court; Georgia, Constitutional Court; Germany, Federal Constitutional Court; Ghana, Supreme Court; Guinea-Bissau, Supreme Court of Justice; Hungary, Constitutional Court; Indonesia, Constitutional Court; Israel, Supreme Court; Italy, Constitutional Court; Jordan, Constitutional Court; Kazakhstan, Constitutional Council; 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; Macedonia, Constitutional Court; Madagascar, High Constitutional Court; Mali, Constitutional Court; Mauritania, Constitutional Council; Mauritius, Supreme Court; Mexico, Supreme Court; Mexico, Electoral Court of the Federal Judiciary; Moldova, Constitutional Court; Mongolia, Constitutional Court; Montenegro, Constitutional Court; Morocco, Constitutional Council; Mozambique, Constitutional Council; Netherlands, Council of State; Netherlands, Supreme Court; Nicaragua, Constitutional Chamber of the Supreme Court; Niger, Constitutional Court; Norway, Supreme Court; Pakistan, 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; Senegal, Constitutional Council; Serbia, Constitutional Court; Seychelles, Supreme Court; Slovakia, Constitutional Court; Slovenia, Constitutional 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.

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III. Defence of constitutional courts against undue pressure

Constitutional Courts are an excellent means to limit excesses of power. Therefore, those who want to exercise unchecked power often resent and fight them. The Venice Commission is aware of this problem and tries to support the Courts when there is a danger to 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. When there is undue pressure on a Court, the Commission or its President can make declarations or statements supporting the Courts.

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 USA.

Without intending to be complete, we provide below examples of cases where the Venice Commission supported constitutional Courts in difficult situations in various ways.

A. Ukraine - Reducing the budget of the court

One means to put pressure on a constitutional court is reducing its budget. Of course, such measures are never announced as such. The reasons given are always budgetary difficulties. In 1998, the Constitutional Court of Ukraine was faced with such cuts. In order to help the Court and upon the Court's request, the Venice Commission organised a seminar on the budget of the Constitutional Court in which speakers from other constitutional courts insisted that a similar reduction of the budget would be unthinkable in their country. The seminar was a sign of solidarity with the Court and allowed showing to the Government and Parliament that such reductions are at least 'unusual' in older democracies. Following the seminar, the budget was indeed reduced but less than had been feared. In 2004, the Commission repeated such an exercise with the Constitutional Court of Bosnia and Herzegovina.⁵⁹

B. Ukraine / Slovakia - Non-appointment of judges

A frequent problem for constitutional courts is the non-appointment of judges. Such non-appointment can be the result of a complicated political situation where a qualified majority for the election of judges cannot be achieved but it can also be directed specifically against the Constitutional Court.

⁵⁹ <http://www.venice.coe.int/webforms/events/default.aspx?id=17>.

In 2005, a serious constitutional crisis unfolded when the Ukrainian Parliament refused to accept the oath of constitutional judges. Parliament was competent to elect one third of the judges of the Court. Another third was appointed by the President of Ukraine and the last third elected by the Judiciary. However, the Constitution provided that Parliament was competent to accept the oath of all judges, also those chosen by the other two powers.

For apparently political reasons, Parliament refused to accept the oath even of judges who had been elected /appointed by the other two powers. Over time, this led to a situation where due to the successive retirement of judges the number of remaining judges fell below the quorum. As a consequence, the Court could not sit during a year and a half.

In this situation, the Venice Commission and the Lithuanian Presidency of the Conference of European Constitutional Courts made a joint public declaration, which called upon Parliament to elect its own quota of judges and to accept the oath of all judges⁶⁰. When the crisis was finally over and the Ukrainian Parliament accepted the oath of the judges, the Venice Commission was asked for an opinion on how such a situation could be avoided in the future. In its opinion⁶¹ the Commission recommended that there should be a default mechanism for taking the oath and that retiring judges should stay in Court until their successor took office.

These solutions have become standard recommendations of the Venice Commission; their latest application was the preliminary opinion for the Constitutional Court of Georgia endorsed by the Venice Commission in June 2016.⁶²

In Slovakia, there are currently still enough judges for the Court to sit but the President of Slovakia refuses to appoint judges who were proposed to him by Parliament. For each vacancy, the President has to choose between two candidates proposed by Parliament but out of a total of eight candidates for four vacancies, the President only chose one candidate as a judge and three vacancies remain open. The President considers that the other seven candidates are not qualified as judges of the Constitutional Court.⁶³

⁶⁰ http://www.venice.coe.int/files/2005_12_17_ukr_declaration_appointment_cc_judsituation.

61 CDL-AD(2006)016, Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine.

62 CDL-PI(2016)005, Georgia - Preliminary Opinion on the Amendments to the organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings (endorsed as CDL-AD(2016)017).

⁶³ See <http://spectator.sme.sk/c/20135805/constitutional-court-pushes-on-president-judges-refuse-cases.html>.

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The Venice Commission gave an opinion which *inter alia* stated that the President is obliged to make the appointment.⁶⁴ Some candidates appealed to the Constitutional Court, which decided that the President had this obligation but this judgment remained non-executed. Since the Declaration by the Venice Commission on undue interference in the work of Constitutional Courts in its member States in March 2016, the Commission actively follows this as yet unresolved case.⁶⁵

C. Ukraine – criminal prosecution

There are also cases of criminal prosecution against constitutional court judges for judgments which they have taken. In 2010, the Prosecutor General of Kyrgyzstan started proceedings against the judges of the Constitutional Court which had been dissolved in the revolution. Since the Maidan revolution in Ukraine, the Prosecutor General of that country investigated against the judges of the Constitutional Court who had decided in 2010 that the more liberal constitutional amendments of 2006 had been adopted unconstitutionally.

In its opinion⁶⁶, the Venice Commission had strongly criticised the Ukrainian judgment. Nonetheless, the President of the Venice Commission informally pointed out that constitutional judges can be prosecuted if there is direct proof of them being corrupted when they took a decision. However, when there is no such proof investigations against the judges amount to an interference into the work of the Court.

D. Moldova – danger of dismissal of judges

When in 2013, the Constitutional Court of Moldova adopted a judgment which displeased the governmental majority⁶⁷, the governmental majority introduced draft amendments to the law on the Constitutional Court, which foresaw that a simple majority in Parliament could dismiss a judge when they no longer had the “trust” of Parliament. These amendments were introduced in the morning of 3 May 2013, adopted in first reading before lunch and in second reading after lunch.

⁶⁴ Opinion on the procedure for appointing judges to the Constitutional Court in times of the Presidential transition in the Slovak Republic, CDL-AD(2014)015, par. 42.

⁶⁵ <http://www.venice.coe.int/webforms/events/?id=2193>

⁶⁶ CDL-AD(2010)044, Opinion on the Constitutional Situation in Ukraine adopted by the Venice Commission at its 85th Plenary Session, Venice (17-18 December 2010).

⁶⁷ CODICES MDA-2013-1-001, Republic of Moldova, Constitutional Court, 22/04/2013, No. 4, Constitutionality review of the Decrees of the President of the Republic of Moldova no. 534-VII of 8 March 2013 on Government dismissal, in its part on maintaining in office the dismissed Prime Minister by a motion of no confidence (for suspicions on corruption) from 8 March 2013 until the formation of the new government and no. 584-VII of 10 April 2013 on the nomination for office of Prime Minister.

Early afternoon that day, the Venice Commission was informed about the imminent danger of the dismissal of all judges. Following some cross-checks, the President of the Venice Commission published the same afternoon a statement⁶⁸, which insisted that a Constitutional Court has the task of controlling the work of Parliament. Subjecting its judges to the need of being “trusted” by Parliament is in evident contradiction with the very purpose of a Constitutional Court.

This statement was right away referred to by the High Representative of the European Union for Foreign Affairs and Security Policy, Ms Ashton, in her own statement. Probably due to that intervention, the President of Moldova did not enact the law which was finally found unconstitutional by the Court itself at a later stage.

E. Hungary – exclusion of jurisdiction in budgetary matters

Due to a series of constitutional amendments in the period between 2010 and 2014, the position of the Constitutional Court of Hungary was affected negatively and the Venice Commission was called upon to assess these changes together with others which mostly related to the ordinary judiciary.

In November 2010, the Hungarian Parliament amended the Constitution and limited the control by the Constitutional Court of budgetary and financial laws to their conformity with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion or with rights related to Hungarian citizenship.

In an opinion requested by the Hungarian Government, the Venice Commission expressed its concern about this amendment insisting that “*a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights.*”⁶⁹

This limitation – applicable as long as state debt exceeded half of the GDP – was included also in the new Fundamental Law which replaced the Constitution in 2011. The Venice Commission criticised this in its opinion on the Fundamental Law⁷⁰ as well as in its 2012 Opinion on the Constitutional Court Act.⁷¹ The Venice Commission stated that such a limitation of the Constitutional Court’s powers to review gave the impression that capping the

⁶⁸ <http://www.venice.coe.int/webforms/events/?id=1703>.

⁶⁹ Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, CDL-AD(2011)001, pars. 9 and 54.

⁷⁰ CDL-AD(2011)016, par. 98. This opinion was requested by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe.

⁷¹ CDL-AD(2012)009, par. 38. This opinion was requested by the Monitoring Committee as well.

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national budget at 50 per cent of the Gross Domestic Product was seen as such an important aim that it might even be reached by unconstitutional laws.⁷²

The Venice Commission was then asked to give an opinion on the Fourth Amendment to the Fundamental Law that had been adopted in March 2013. The Commission heavily criticised problems related to the ordinary judiciary but also several points that negatively affected the position of the Constitutional Court. A series of provisions that had been annulled by the Court were quasi re-adopted on the constitutional level thus preventing their control by the Court. The Amendment prevented the Constitutional Court from referring to its previous case-law and the limitation for the Court to review matters relating to budgetary and financial acts to times when State debt exceeded half of the GDP was removed, making this limitation permanent. The Fourth Amendment also introduced a very short deadline – 30 days – for the Constitutional Court to deal with preliminary requests from ordinary courts. The Fifth Amendment brought some improvements as concerns the ordinary judiciary but the extension of this deadline from 30 to 90 days was the only point affecting the Constitutional Court which was repaired by the Fifth Amendment.

The Constitutional Court nevertheless struck down several financial provisions because it established that they contradicted human dignity.

This was the first – but not the last – case in which the Venice Commission had to deal with serious problems of a Constitutional Court in an EU member state.

F. Romania – pressure on the Court – suspension of the President

In summer 2012, the Constitutional Court of Romania came under serious pressure when Parliament suspended the President of the Republic and the Court had to give an opinion on whether or not the President had violated the Constitution. The Law on the Constitutional Court was amended by Government emergency ordinance removing the Court's competence to control the constitutionality of resolutions of the Parliament⁷³. Parliament also dismissed the Ombudsman who was the only institution that could bring abstract appeals to the Constitutional Court against emergency ordinances once they had entered into force. Happily enough, upon appeal from members of

⁷² CDL-AD(2011)016, par. 123.

⁷³ For details on this matter see the Venice Commission's Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, CDL-AD(2012)026.

Parliament, the Court found the bill amending the constitutional court law unconstitutional.

When he learned about the pressure on the Court the President of the Commission successively made two statements supporting the Court⁷⁴. Later, the Commission gave a very critical opinion on these events.⁷⁵

G. Turkey – ‘unpatriotic’ judgements

Turkey is a case where we can see a positive phase followed by serious problems for the Constitutional Court. Already in 2004, the Venice Commission had given an opinion⁷⁶ which very positively assessed the project of introducing a full individual complaint against final judgments of the ordinary courts. Due to resistance of the supreme courts, these amendments were not adopted at the time. However, in 2010 the Parliament adopted constitutional amendments which *inter alia* introduced these very changes. In its opinion on the amendments to the law on the Constitutional Court, the Venice Commission welcomed the introduction of the full individual complaint.⁷⁷

After a thorough preparation, the Constitutional Court started adjudicating individual complaints and it adopted some very important judgements, notably about access to blocked internet sites (Twitter, Facebook), which strongly displeased the authorities.⁷⁸ The Court was even accused of giving ‘unpatriotic’ judgments, as if patriotism would be relevant for the question of constitutionality.

The Venice Commission had to speak out several times on behalf of the Constitutional Court. In 2014, the President of the Commission made a statement⁷⁹ supporting the Court against undue pressure on the Court.

In March 2016 the plenary session of the Commission made a declaration which condemned a statement of the President of Turkey who had threatened the Court with abolition after it had decided that the detention on remand of two journalists was unconstitutional.⁸⁰

⁷⁴ <http://www.venice.coe.int/webforms/events/?id=1544> and <http://www.venice.coe.int/webforms/events/?id=1557>.

⁷⁵ CDL-AD(2012)026.

⁷⁶ Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, CDL-AD(2004)024.

⁷⁷ Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, CDL-AD(2011)040.

⁷⁸ <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/tur/tur-2014-2-002?f=templates&fn=default.htm>.

⁷⁹ <http://www.venice.coe.int/webforms/events/?id=1858>.

⁸⁰ The declaration refers also to Poland, Slovakia, Croatia and Georgia; <http://www.venice.coe.int/webforms/events/?id=2193>.

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⁸¹ <http://www.ven>
⁸² Case no. K 35/1

Since the failed military coup in Turkey on 15 July 2016, the Constitutional Court is in a very delicate situation. Two judges of the Constitutional Court were arrested and the Court started dismissal proceedings against them. The President of the Venice Commission made the following statement: "I strongly condemn the attempted coup d'état in Turkey; any changes in the government must follow democratic channels. Turkish media report that, since the failed coup, two judges of the Constitutional Court and five members of the High Council of Judges and Prosecutors have been arrested. More than 2700 judges have been suspended and many have been detained. Especially in reacting to a violent attempt to overthrow an elected government, it is essential to respect the rule of law. Mass dismissals and arrests of judges are not an acceptable means to restore democracy. Like any citizen, each judge has the right to a fair procedure – disciplinary and/or criminal – during which his or her responsibility must be duly proved and his or her defence rights must be respected"⁸¹.

H. Poland – appointment of judges / quorum and voting majority

The constitutional crisis in Poland has two main topics. One is the appointment of judges, the other concerns amendments to the legislation on the procedure of the Tribunal, which would have paralysed its work. While both issues are closely interlinked, we will here focus on the legislative amendments of 22 December 2015 in this presentation. The issue of the appointment of judges is complex and it has not been solved until now. Two sets of three so-called "October" and "December judges" each were elected by the previous and current terms of the Polish Parliament and, as a consequence, the Tribunal has only 12 out of 15 sitting judges.

On 19 November 2015, the Sejm amended the first time the Act on the Constitutional Tribunal that had been adopted in June 2015. The amendment had been submitted to the Sejm only three days earlier and it was signed by the President of Poland the following day. This amendment *inter alia* would have terminated the tenure of the President and Vice-President of the Constitutional Tribunal. On 9 December 2015, the Constitutional Tribunal found that these amendments were unconstitutional.⁸²

On 22 December 2015, the Sejm adopted new amendments to the Act on the Constitutional Tribunal, which provided that decisions taken by the plenary session of the Tribunal had to be taken in the presence of 13 out of the 15 judges and decisions of the plenary required a two-thirds majority of the judges. The Tribunal was also required to hold its hearings strictly in the order

⁸¹ <http://www.venice.coe.int/webforms/events/?id=2266>.

⁸² Case no. K 35/15.

of the registration of the cases without any possibility to schedule hearings on urgent cases earlier.⁸³

These amendments entered into force with their publication on 28 December 2015. When these amendments were challenged before Tribunal, it had to decide whether and how it could deal with the case. Due to the problem of the appointments – the two sets of October and December judges – the Tribunal had only 12 sitting judges but for a decision in the plenary 13 judges were now required. In addition, the Tribunal could have not have dealt with the case in time because the amendments obliged it to terminate all other plenary cases on the docket before holding a hearing on that case. The Tribunal decided that it would decide the cases directly on the basis of the Constitution without applying the amendments in this case because they directly concerned the functioning of the Tribunal itself.

On 9 March 2016, the Constitutional Tribunal held that the amendments of 22 December were unconstitutional⁸⁴ but the Polish Government⁸⁵ announced that it would not publish the judgment because the Constitutional Tribunal had not been composed correctly according to the amendments.

On 11 March, the Venice Commission gave an opinion in which it concluded that the amendments, especially in combination, would render the Constitutional Tribunal ineffective. The Commission stated that “Crippling the Tribunal’s effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective.”⁸⁶ Even if individual complaints could be dealt with in chambers, the slowdown of the work of the Tribunal would also affect these cases.

In its opinion, the Venice Commission also supported the approach of the Constitutional Tribunal not to apply the amendments when examining their constitutionality and it strongly insisted on the publication of the judgment of 9 March 2016.

The judgment of 9 March has not yet been published but the Tribunal currently works on the basis of the Act as it stood before the amendments.

⁸³ An English translation of the amendments is available at the Venice Commission document CDL-REF(2016)009.

⁸⁴ <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/8860-nowelizacja-ustawy-o-trybunale-konstytucyjnym/>.

⁸⁵ For the position of the Polish Government, see document CDL-REF(2016)015.

⁸⁶ CDL-AD(2016)001, par. 138.

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On 7 July, the Polish Sejm adopted in second reading a new draft Act on the Constitutional Tribunal⁸⁷. That draft was adopted with amendments on 22 July 2016. Upon request by the Secretary General of the Council of Europe, the Venice Commission is preparing an opinion on this draft.⁸⁸

I. Georgia – quorum and voting majority

The situation of the Constitutional Court of Georgia degenerated following two judgements on appointment to the board of a public TV channel and on custody on remand of a former mayor of Tbilisi. The one dissenting judge in the latter case refused to sign the judgment as is required by the legislation of the Court. The Court published the judgment without that signature. Soon after that judgement, pickets were held outside the homes of the judges, even though this is expressly prohibited by Georgian legislation. It seems that the police did not intervene. In this situation, the President of the Venice Commission made a statement recalling that Constitutional Court judgements can be criticised but such criticism should be voiced in a respectful and legal manner. Notably the privacy of the judges and their families has to be respected.⁸⁹ When it appeared that there was a lack of respect towards the institution of the Constitutional Court, the Venice Commission included the case in its declaration made in March 2016.⁹⁰

The Venice Commission had to act as a “constitutional fire brigade” when on 20 May 2016, it received a request from the President of Georgia to provide an urgent opinion on amendments to the legislation on the Constitutional Court. According to the Constitution, the President had 10 days to decide whether to enact the amendments or veto them. In substance, these amendments positively provided *inter alia* that judgments can be published also if a judge refuses to sign.

However, the amendments also shifted a series of important matters from the chambers to the plenary session, provided that decisions in the plenary could be deliberated only in the presence of seven out of the nine judges and that for these decisions a two thirds majority of the judges was necessary. The explanatory note from Parliament referred to the Polish opinion⁹¹ and explained why the Georgian case was different from the situation in the Poland.

⁸⁷ CDL-REF(2016)048.

⁸⁸ In January 2016, the European Commission had started a procedure against Poland in its Rule of Law Framework. The European Commission based its own assessment on the opinion of the Venice Commission and sent its own opinion to the Polish Government on 1 June 2016. On 27 July 2016, the European Commission adopted a Rule of Law Recommendation on the situation in Poland.

http://europa.eu/rapid/press-release_IP-16-2643_en.htm

⁸⁹ <http://www.venice.coe.int/webforms/events/?id=2104>.

⁹⁰ <http://www.venice.coe.int/webforms/events/?id=2193>

⁹¹ See CDL-REF(2016)038.

The Venice Commission was able to provide it preliminary opinion⁹² within seven days. The opinion criticised the amendments and called for a lowering of the presence quorum and the majority for taking decisions.

Referring to the opinion the President vetoed the amendments and Parliament accepted the changes introduced in the veto.⁹³

IV. 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. Therefore 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.

Tools for the judicial dialogue are conferences, the *Bulletin on Constitutional Case-Law*, the CODICES and the Venice Forum. The Commission provides direct support in various forms, through its opinions on constitutions, on the courts' legislation, through *amicus curiae* briefs, through formal or informal contact with the authorities or – when necessary – through public statements.

The success of the work in the field of constitutional justice soon led to strong interest from courts and groups of courts from other regions in the world. Following the establishment of co-operation with these groups, the Venice Commission helped in the establishment of the World Conference on Constitutional Justice for which it 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. As a member of the Venice Commission until his election as a judge of the European Court of Human Rights, Luis Lopez Guerra embodies these ideas. He significantly contributed to the success of the work of the Venice Commission and we are grateful that he continued to support the Commission during his mandate at the European Court.

⁹² Georgia: Preliminary Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal proceedings, CDL-PI(2016)005, endorsed by the plenary session of the Venice Commission as CDL-AD(2016)017.

⁹³ <http://civil.ge/eng/article.php?id=29199>.

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