

The Venice Commission: disseminating democracy through law

Antonio La Pergola is now one of the judges at the European Court of Justice in Luxembourg. In the late 1980's, when he was Italy's Minister for European Affairs, he inspired the notion of a body composed of experts in constitutional law, to help build institutions furthering democracy and the rule of law in Europe. La Pergola's foresight was remarkable given that the Soviet Union was then still intact and it was by no means a foregone conclusion that Marxist totalitarianism would wither away as it did (although not in the way foreseen by Marx).

At a meeting in Venice in January 1990, La Pergola persuaded the European Ministers of Foreign Affairs to establish, under the aegis of the Council of Europe, a Commission for Democracy Through Law.¹ La Pergola was appointed the first President of the new Commission—a position he still holds. The Commission's offices are in the Council of Europe's headquarters in Strasbourg, run by the highly competent Secretary General (and former legal adviser to the Council of Europe), Gianni Buquicchio. The actual meetings of the Commission are held four times a year in Venice, whose Regional Authority provides premises in the magnificent Scuola Grande di San Giovanni Evangelista. For the reason of its origins and meeting place, the Council of Europe's Commission is known as the Venice Commission.

The Venice Commission was established under a "partial agreement" concluded within the Council of Europe, which means that only states of the Council of Europe which have acceded to the agreement take part in the Commission's activities and contribute to its budget. For reasons that are obscure, the United Kingdom did not accede to the Commission for its first 10 years of existence, only sending a member from June 2000. The Commission now has 42 full members² and three associate members.³ Some 10 non-European Countries have been admitted as observers.⁴ South Africa alone has the status of "special co-operation".

Although members of the Commission are appointed by their governments, they are expected to be independent in their advice and assessment, and not to act simply as spokespersons of their own governments. Many of the members are professors of law (such as Professor Giorgio Malinverni of Switzerland and Jan Helgesen of Norway). Some, like Helmut Steinberger of Germany and Jacques Robert of France, are former academics who have held or hold positions as Constitutional Court justices. A few members, like Dr Hannah

¹ The Statute of the Commission is contained in Resolution (90) 6, adopted by the Committee of Ministers of the Council of Europe on May 10, 1990 at its 86th session.

² Nearly all the Member States of the Council of Europe. Russia, which had associate status, has now signalled its intention of joining the Commission as a full member.

³ Bosnia and Herzegovina; the Federal Republic of Yugoslavia and Belarus.

⁴ Armenia, Azerbaijan, Argentina, Canada, the Holy See, Israel, Japan, Kazakhstan, the Republic of Korea, Kyrgyzstan, the United States, and Uruguay. Armenia and Azerbaijan were admitted to the Council of Europe this year.

Suchocka, former academic and then Prime Minister of Poland, are members of parliament. A handful are government ministers, but the Commission's statute is now being revised so as to exclude serving members of government from Commission membership.

The powers of the Venice Commission are advisory only. It cannot impose solutions, but nevertheless gives forthright opinions which it seeks actively to implement through dialogue and persuasion. The ultimate aims of the Commission are geared to the Council of Europe's three basic aims of promoting democracy, human rights and the rule of law. Its activities fall into the following four principal categories:

- (a) to provide advice and assistance when requested to do so;
- (b) to consider issues relating to all or many states (trans-national issues);
- (c) to provide training to government officials and to hold seminars and workshops on subjects relating to the general aims of the Commission or to the situation of particular countries, and
- (d) to provide a centre of documentation for constitutions and constitutional case law.

Advice and assistance

The bulk of the Commission's initial activity consisted of responding to requests for assistance from Member States or (less frequently) from the Council of Europe's Parliamentary Assembly, Committee of Ministers or Secretary-General. Following the dismantling of the Soviet Union, the first requests came largely from those countries wishing to build new democracies in central and east Europe, starting with the Russian constitution, as part of that country's accession process to the Council of Europe.⁵ The Commission was asked to advise generally on how to achieve objectives such as the protection of minorities and the creation of constitutional courts. It was also asked to scrutinise draft constitutions and to offer an opinion as to whether the draft met modern democratic standards. The method adopted by the Commission was normally to appoint a representative working group ("rapporteurs") with expertise in the issue to give an opinion on the matter, which would then be considered by the full Commission. The group would, whenever possible, visit the country concerned so as to listen to a variety of views. The Commission has always been willing to hear interested parties and even to have them address the Commission when the group's report is considered at a plenary hearing.

Since joining the Commission I have appreciated the value of working in this manner, and particularly of having a broad range of background and experience represented on the working groups. For example, when considering proposals to change the method of appointing the judges on Moldova's constitutional court, it was the representatives of the "old democracies" who tended to be relaxed about the provision which permitted Parliament and the

⁵ This was at the request of the Council of Europe's Committee of Ministers. See *Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993*, CDL (94) 11.

President to nominate a minority of court members. It was the member of the working group from a "new democracy", however, who strongly insisted that, in order to create a new culture of judicial independence, the separation of powers between legislature, executive and judiciary had to be rigorously maintained.

The contact between the Commission and its Member States is a continuing one. After the establishment of the constitutions of the former Soviet states or satellites, tensions have arisen which have often resulted in amendments being proposed only a few years later. The Commission has been requested to review a number of such amendments. A large number of those concern the respective powers of the president and the legislature. Most of the initial constitutions created powerful executive presidencies (perhaps because they were well understood by former Soviet states, or perhaps because they tended to follow the model of the United States). The newly elected presidents then tended to make full use of their strong powers, often ignoring their parliaments or using the device of the referendum to overrule parliament's will, and even to amend the constitution itself. This happened in the Ukraine, Belarus, Slovenia and Moldova. This classic clash between the rival concepts of popular democracy and representative democracy led to proposals for the strengthening of parliament and the whittling down of the presidential powers. New proposals suggested that the president be head of state, rather than head of government. The Venice Commission would then be consulted as to whether these proposals were "legitimate on the basis of constitutional legal standards" and conformed with "European standards for the protection of Human Rights and Fundamental Freedoms".⁶

Particular countries with which the Commission co-operates include Albania, where the Commission gave its opinion on the first draft democratic constitution in 1991. The Commission urged a great number of changes, including a chapter on human rights, all of which were,⁷ after discussions with an Albanian delegation, adopted by the Albanian Parliament in April 1993. The draft constitution was then put to a referendum, where it was rejected. When Albania joined the Council of Europe in 1995, the Commission was asked to give an opinion on its new draft constitution. The Commission criticised a number of the provisions, including the ban on certain parties with a religious or ethnic basis and sought also to strengthen the powers of the Parliament and the independence of the judiciary.⁸ Throughout the 1990s the Commission continued to work on different aspects of the Albanian constitution, including whether to opt for a unicameral or bicameral system and the method of appointment of judges.⁹ It worked closely with the Albanian authorities to assist the detailed drafting of the constitution, article by article. As a result of these efforts the new Albanian constitution was approved in a referendum on November 22, 1998.

⁶ Letter from the Prime Minister of the Republic of Slovenia to Dr Antonio La Pergola, July 21, 2000.

⁷ See CDL (93) 13.

⁸ See the Commission's Annual Report (1994), pp. 22 *et seq.*

⁹ See e.g. CDL (95) 74 rev.

In 1999, in response to a request from the Council of Europe's Parliamentary Assembly, the Commission adopted an opinion in which it held that the death penalty was incompatible with the Albanian constitution and European human rights standards.¹⁰ The Commission's opinion was followed by the Albanian Constitutional Court which declared capital punishment unconstitutional.

Another long-standing association of the Commission has been with Bosnia and Herzegovina, producing several reports at the request of the High Representative of the international community there. One report considered the compatibility of the constitutions of the Federation of Bosnia and Herzegovina and the Serb Republic with the requirements of the Dayton Agreement.¹¹ Several opinions have been given on the questions of the electoral systems, the establishment of an ombudsman's office, and on responsibility for immigration and asylum and, particularly, on the relationship between the various courts there (the Supreme Court, Constitutional Court and separate Human Rights Court).

The Commission has been involved in a number of questions relating to the Moldovan constitution. In 1995 the Commission examined the Moldovan laws on the status of minorities. In 1998 the Commission considered the question of central-local relations in Moldova¹² and in 1999–2001 advised on ways of reinforcing government authority there, focussing upon the transfer of powers from the President to the legislature.¹³ In the recent Moldovan elections the Communist Party took power, and it remains to be seen whether the standards required by the Commission will be implemented.

The Ukraine is another country with which the Venice Commission has co-operated closely since 1992. Ukraine's steps to democracy began with legislation, rather than a new constitution and with an agreement on the division of powers between the President and Parliament. The Venice Commission advised a firmer constitutional base, and the adoption of more stable principles on matters concerning human rights and the independence of the judiciary.¹⁴ The draft Ukrainian constitution of 1995 took into account a number of the Commission's proposals and the Parliamentary Assembly of the Council of Europe asked the Commission again to comment on that draft. The Commission was satisfied that it sufficiently protected human rights although it regretted that the death penalty had not been expressly abolished. The death penalty was later held unconstitutional by the Ukrainian Constitutional Court following an opinion by the Commission to that effect.¹⁵ While somewhat wary of the strong executive leadership proposed under a powerful president, the Commission felt that there were sufficient checks and balances (especially

¹⁰ CDL (99) 1.

¹¹ See CDL-INF (98) 15 for a summary of the relevant work from September 1994 to June 1998 and the Opinion thereon.

¹² See CDL-INF (99) 14 re the proposed statute for Gagauzia and CDL-INF (99) 14.

¹³ See CDL (2000) 53 and CDL (99) 88.

¹⁴ The opinion of the Commission is included in the *Annual Report (1995)* pp. 17 *et seq.*

¹⁵ CDL-INF (97) 2. See also, *Annual Report (1997)* p. 58 *et seq.*

that of democratic local government) to prevent authoritarian excesses. The Commission approved the fact that the constitution abandoned the earlier proposal of direct democracy and had introduced a system of popular initiative instead. Once the constitution had been adopted, the Commission provided further advice on the appointment of the Constitutional Court, advising the use of a Judicial Services Commission and the abolition of certain courts which stemmed from the Soviet period (such as some military tribunals and the economic courts) and whose powers were excessive.¹⁶

Recently Ukraine has seen tension between the powers of the President and the Parliament (known as the Verkhovna Rada). Using the power to call a national referendum, the President called a referendum for April 2000 aimed at amending the constitution by weakening the powers of Parliament and limiting parliamentary immunity. The proposals sought to give powers to the President to dissolve the Parliament if it refused to accede to the constitutional amendments. Further powers would have put Members of the Parliament under threat of arbitrary arrest or detention. The Commission was asked to give an opinion on the matter by the Council of Europe's Parliamentary Assembly and the Secretary-General. The opinion held that the constitution could not be amended by referendum and that the proposal itself was contrary to democratic standards by shifting the balance of power too heavily against Parliament and in favour of the President and would wrongfully restrict parliamentary immunity.¹⁷ Some of the questions posed in the referendum were themselves held to be ambiguous or inconsistent. The Constitutional Court of Ukraine endorsed the Commission's opinion. The combined pressure of the Commission and the Constitutional Court persuaded the President to abandon some of his proposals. It was noteworthy that the Ukrainian member of the Commission at the time, a former Minister of Justice, Serhiy Holovaty, continually urged the Venice Commission to oppose the President's designs as strongly as possible.

Recent meetings of the Commission have dealt with opinions on the constitutions or electoral laws of Azerbaijan, Armenia, Bulgaria, Croatia, Slovenia, Kosovo, Georgia, Macedonia and even the canton of Ticino in Switzerland. The issues that arise are often novel and challenge the accumulated experience of even the oldest democracies. One such issue that has engaged the Commission more than once in the past year is the power of minority members of parliament to instigate official commissions of inquiry. At its last meeting, the Commission considered a complaint from the Prime Minister of Romania about special privileges that the Hungarian government had afforded to persons of Hungarian descent (particularly the right to enter Hungary freely) and the extent to which that might constitute interference with the autonomous affairs of a neighbouring state. A working group has been formed to engage in the complex task of constitutional reform in the

¹⁶ CDL-INF (2000) 5.

¹⁷ CDL-INF (2000) 11.

Federal Republic of Yugoslavia, which will include relations between Serbia and Montenegro.¹⁸

General issues

Although most of its work comes from requests for advice or assistance, the Commission is increasingly concerned to anticipate broader developments and to act proactively on what it calls "trans-national" issues. It does this by undertaking research designed to establish and guide constitutional values shared throughout Europe. This task is helped by the existence of a number of standing committees on the following subjects: constitutional justice; federal and regional states; international law; protection of minorities; constitutional reform; democratic institutions, and emergency powers.

Recent work that has been undertaken by the Commission of a comparative nature includes a survey seeking to discover whether the decisions of constitutional courts (or their equivalents) are actually implemented in practice.¹⁹ This kind of activity no doubt signals a greater emphasis on the implementation and enforcement of democratic standards. The former Soviet states, in particular, have a long experience of apparently democratic constitutions which have been largely ignored in practice. Other general surveys include one presently being undertaken under the direction of the French member Jacques Robert on the financing of political parties.²⁰ Britain's recent laws on the control of electoral expenditure and the declaration of donations may well usefully inform this study. A useful paper has recently been adapted by the Commission on the subject of guidelines for the use of constitutional referenda²¹—a document that will assist both old and new democracies. Another recent paper seeks generally to "help facilitate the settlement of ethno-political conflict in Europe".²² It contains models for central-regional relations and is informed by the new British models of devolution.

While the Commission is largely concerned with countries in the Council of Europe, it responds to requests from other countries and has sub-committees on South Africa, the Mediterranean Basin, south-east Europe and even Latin America. South Africa is the country outside Europe with which the Commission has developed its closest links. This is largely due to the fact that the Commission's President, Justice La Pergola, was a member of a group of mediators (which included Lord Carrington and Dr Kissinger) which was asked to help break the deadlock in 1994 caused by ANC and Inkatha opposition to various constitutional questions at the time. In 1996 the Commission entered into an agreement with the South African Department of Constitutional

¹⁸ For a more detailed account of the Commission's activities during its first 10 years see *Ten Years of the Venice Commission*, September 26, 2000, CDL INF (2000) 12. And see the article by Pierre Garrone, Administrative Officer in the Secretariat of the Commission, in *Revista di studi politici internazionali*, anno LXVI (1999), n. 264, pp. 527-548.

¹⁹ CDL-INF (2001) 9.

²⁰ CDL-PP (2000) 1.

²¹ CDL (2001) 10 rev. 2.

²² CDL-INF (2000) 16. This document was initiated by the Italian Chairmanship of the Committee of Ministers of the Council of Europe at its meeting on June 16, 2000.

Development aimed at encouraging exchanges between professionals in Europe and South Africa on matters of democracy and constitutional law. The exchange is by no means one way nowadays, as the Venice Commission has more than once, in its opinions on European constitutions, quoted the arguments against the death penalty put forward by the South African Constitutional Court.²³ The Commission is now seeking to encourage the setting up of a similar body to the Venice Commission in Southern Africa.

Seminars and training

The Commission is charged by its statute to improve the functioning of democratic institutions, knowledge of legal systems and the understanding of the legal cultures of countries with which it works. In addition to its own research, discussed above, it seeks to achieve these aims by means of transnational seminars and training sessions. The Commission has formed a body known as UniDem (Universities for Democracy), which has recently been given space in Trieste for a permanent "UniDem Campus", where a series of intensive seminars are being planned for civil servants from across South Eastern Europe on a number of topics.

The UniDem seminars have covered a variety of topics, from the composition of constitutional courts to constitutional aspects of the transition to the market economy, to the right to a fair trial and the principle of respect for human dignity. The proceedings of the seminars are published by the Commission under its collection on the *Science and Techniques of Democracy*. Thirty such publications now exist.

Following requests from newly established constitutional courts, the Commission has also organised a series of seminars, held at various venues in central and east Europe, on practical issues such as management of cases and budget, as well as principles relating to judicial independence and the rule of law.

Documentation

In 1991 the Commission set up a Centre on Constitutional Justice to collect and disseminate the case law of constitutional courts and equivalent bodies. The main tools of the Centre are the *Bulletin of Constitutional Case-Law* and the CODICES data base. The *Bulletin*, first published in January 1993, contains the most important decisions sent in by liaison officers of constitutional courts or their equivalents in nearly 50 countries, the European Court of Human Rights and the Court of Justice of the European Communities.²⁴ It is published three times a year in English and French. This series is augmented by a series of *Special Bulletins*, containing descriptions of courts and basic material, such as extracts from constitutions and legislation about courts. A new series, *Leading Cases*,

²³ e.g. CDL-INF (98) IR, p. 12 (Opinion on the Constitutional Aspects of the Death Penalty in the Ukraine); CDL (99) 1 p. 5 (Opinion on the Compatibility of the Death Penalty with the Albanian Constitution).

²⁴ Lord Woolf C.J. has recently appointed Sir Konrad Schiemann as the U.K. Liaison Officer to the *Bulletin* and Nicholas de Marco as Deputy Liaison Officer.

presents the basic decisions of the participating courts prior to 1993. The first issue comprises leading cases on the topics of human rights, freedom of religion. Another series on the relationship between constitutional courts and other courts is in preparation. A proposal was put to the Commission at its last meeting to co-operate with a French database containing the constitutions of 180 states and detailed documentation about international human rights instruments.²⁵

The Commission's Secretariat has also established a database called CODICES which represents about 20,000 pages of text available on CD ROM and via the internet.²⁶ It contains the summaries published in the *Bulletin*, plus the special series and the full text of over 3,400 decisions in a number of languages as well as English and French. A systematic thesaurus makes it possible to search the database under specific topics.

Conclusion

The creation of the Venice Commission in anticipation of the fall of the Soviet Union provided east and central European countries in the 1990s with a ready-made source of assistance in establishing the structures for their new democracies. Fortunately, the Commission possessed the self-assurance to insist that democracy contains a set of absolute standards from which there is limited scope for deviation. Yet the Commission is sensitive to differences of culture and context in which democracy has to be rooted. Its method of providing opinions through representative working groups ensures that the advice it dispenses properly takes into account the differing situations of countries with varied backgrounds and experience. The Commission gains legitimacy from the fact that its experienced members, although appointed by governments, are expected to provide independent advice. Although confined to an advisory role, the Commission engages actively, through negotiation and persuasion, to ensure the implementation of its proposals.

The Commission's early work on the foundational constitutions of the new democracies has not yet come to an end. This is because many of those constitutions are now in the process of being amended, refined and perfected. During this process issues have been raised which pose profound questions about democratic imperatives. Many of the matters now being considered by the Commission, such as the relationship between popular and representative democracy, the appointment of the judiciary, the financing of political parties and the protection of minorities, are as relevant to old democracies as to the new. Inevitably, the Commission is also broadening its activities, concentrating not only upon constitution-building, but upon general issues such as the conditions for popular referenda. Its present challenge will be to guide the enforcement and implementation of the constitutions which have now been established, so as to ensure that they are more than pieces of paper. Attention will also have to be given to universal standards of good and fair (and uncorrupt) public administration.

²⁵ The proposal was to link the Commission's database with that of the *Universal Encyclopaedia of Human Rights (EUDH)*—an initiative launched on January 2000 by M. Badinter, the former President of the French Constitutional Court.

²⁶ <http://CODICES.coe.int>

The Venice Commission's UniDem campus will provide an important training ground for government officials and will benefit from the support of academics in the United Kingdom. The compilation of the Commission's case law *Bulletin*, soon to be supplemented by a comprehensive collection of constitutional documentation, provides a useful source of information for practitioners and scholars.

These and the other activities of the Venice Commission are helping us all not only to fashion our democracy to the conditions of our particular climate, but to discover those necessary features of a properly democratic state—wherever it may be situated.

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