

THE PREVENTION OF HUMAN RIGHTS VIOLATIONS

Contribution
on the occasion of the Twentieth Anniversary of the
Marangopoulos Foundation for Human Rights (MFHR)

Message by

MARY ROBINSON,

UN High Commissioner for Human Rights

Editor

LINOS-ALEXANDER SICILIANOS

Ass't Professor Dr., Faculty of Law, University of Athens

Director, MFHR

Associate Editor

CHRISTIANE BOURLOYANNIS-VRAILAS

M.A.L.D., The Fletcher School of Law and Diplomacy

Research Fellow, MFHR



ATHENS

ANT. N. SAKKOULAS PUBLISHERS

2001

MARTINUS NIJHOFF PUBLISHER

THE HAGUE NEW YORK/LONDON



The Contribution of the European Commission
for Democracy Through Law (Venice Commission)

Giorgio Malinverni

I. INTRODUCTION

The European Commission for Democracy through Law (hereinafter 'the Commission') was created at an international conference held on 19 and 20 January 1990 in Venice² in which all member states of the Council of Europe participated and which several states of Central and Eastern Europe attended as observers. A few weeks later, in May 1990, the Venice Commission was established under a partial agreement concluded within the Council of Europe.³

The Commission, whose members are independent experts who have achieved international fame through their experience in democratic institutions or their contribution to the enhancement of law and political science,⁴ was conceived as an additional instrument able to play a part in the realization of the objectives of the Council of Europe in the field of constitutional law. According to Article 1 of its Statute, it is 'a consultative body which cooperates with the member states of the Council of Europe and with non-member states, in particular those of Central and Eastern Europe'. According to the same provision, its specific field of action includes the guarantees offered by law in the service of democracy.

One of the main reasons for the creation of the Commission was the urgent need for an institutional structure capable of assisting the countries of Eastern Europe, freed from the yoke of dictatorship. One of the principal activities of the Venice Commission since its establishment has therefore been to help these fellow nations set up political and legal infrastructures needed to achieve pluralistic democracy, the rule of law and respect for human rights. The activities of the Commission are therefore based on

1 Professor at the Law Faculty of the University of Geneva, Member of the Venice Commission.

2 For this reason, the Commission is often also called the Venice Commission, which is the city where it has its seat.

3 Resolution (90) 6, adopted by the Committee of Ministers of the Council of Europe on 10 May 1990 at its 86th session.

4 Art. 3 of the Statute, resolution (90) 6, *ibid.*, appendix.

*L.-A. Sicilianos (ed.),
The Prevention of Human Rights Violations, 123-137.
© A.N. Sakkoulas / Kluwer Law International, 2001.*

the three fundamental principles of European constitutional heritage: democracy, human rights and the rule of law.

The activities undertaken by the Venice Commission to prevent violations of human rights are varied and multifaceted. It seems to me that these activities can be divided into five categories: prevention through normative activity; prevention through advisory activity; prevention through mediation; prevention through education and prevention through the promotion of European standards.

II. PREVENTION THROUGH NORMATIVE ACTIVITY

The normative activity of the Commission is exercised in three different ways: elaboration of draft conventions; adoption of declarations; and drafting of statutes for certain territories.

1. Elaboration of draft conventions

The best, and for the time being the only, example of elaboration of a draft convention by the Venice Commission is the draft convention on the protection of national minorities which a few years later became the Framework Convention of the Council of Europe for the Protection of National Minorities of 1 February 1995. It was in response to the urgent need for international regulation of the problem of minorities that the Commission, at the request of several states (Italy, Yugoslavia and Hungary), started elaborating this draft convention. First, it drew up a list of principles that were to govern the status of national minorities. Its President presented this list to the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990. The Commission subsequently added a mechanism of control and turned the list of principles into a draft convention adopted on 8 February 1991 and thereafter submitted it to the Committee of Ministers of the Council of Europe.⁵

It is general knowledge that several other projects followed this one. Approaching the matter from a slightly different angle, the Parliamentary Assembly of the Council of Europe adopted on 1 June 1993 a draft Additional Protocol to the European Convention on Human Rights. It was mainly on the basis of these two documents that the Framework Convention of the Council of Europe on the Protection of National Minorities was

⁵ Council of Europe doc. CM (91) 29. The draft was published in 12 *Human Rights Law Journal* (1991), at 270.

finally adopted. The Convention was opened to signature by states on 1 February 1995 and entered into force on 1 February 1998.

2. Adoption of declarations

Sometimes the normative activity of the Commission is less ambitious and rather than undertaking the elaboration of draft conventions it limits itself to adopting declarations.

The Commission found that when common problems arise in several states, raising difficult technical legal problems, a comparative analysis, and even the preparation of models may be necessary. In that case, the Commission proceeds in general with the preparation of a questionnaire addressed to all its members. The Commission then prepares a report based on this questionnaire. I will only refer to three examples.

(a) Knowing how important the regulation of relations between international and domestic law is to members of the former communist bloc, the Commission set up a working group to study this question. The rapporteur of this group prepared a questionnaire addressed to the members of the Commission. On the basis of the replies received, he prepared a report containing not only a comparative study of the answers provided by the constitutional provisions and practices of European states, but also model solutions. These were presented at the Seminar on the relationship between international and domestic law that the Commission organized in Warsaw in May 1993.⁶

(b) Further to a questionnaire addressed to all member states, the Commission also prepared a report on the legal bases of foreign policy. At the end of this report, it set out the principles that must guide member states of the Council of Europe, and other states that share the same values, in the exercise of foreign policy.⁷

(c) The Commission proceeded in the same manner when it adopted the Declaration on the Consequences of State Succession for the Nationality of Natural Persons on 14 September 1996.⁸ This Declaration comprises sixteen articles that should govern this matter and regulate it in detail. In

⁶ See Council of Europe, European Commission for Democracy through Law, *The Relationship between International and Domestic Law*, Proceedings, Warsaw, 19-21 May 1993, Science and Technique of Democracy Collection, No. 5 (1993).

⁷ Council of Europe doc. CDL-DI.

⁸ Council of Europe doc. CDL-NAT (96) 7. See Council of Europe, European Commission for Democracy through Law, *Consequences of State Succession for Nationality*, Collection Science and Technique of Democracy, No. 23 (1998).

national Constitution. Thus, on 19 September 1996, the Commission gave an opinion on the compatibility of the Constitutions of the Republika Srpska and the Federation of Bosnia and Herzegovina with the Constitution of the State of Bosnia and Herzegovina.⁹ In that case too, members of the Commission in charge of this matter travelled to Sarajevo.

Similarly, one can mention the opinion given by the Commission on 18 December 1997¹⁰ on the compatibility of the draft Constitution of the autonomous Republic of Nakhitchevan with the Constitution of the Republic of Azerbaijan. This opinion was given at the request of the President of Azerbaijan. Nakhitchevan is an autonomous republic that has no common borders with the rest of Azerbaijan. An opinion along the same lines was also given on 7 May 1998 on the conformity of the Constitution of Gagauzy with the Constitution of Moldova.¹¹

The advisory activity of the Commission is not restricted to issuing opinions and submitting comments on draft Constitutions. Far from limiting itself to Constitutions in the narrow sense, it also includes draft laws closely linked to the Constitution. For example, the opinion on the draft law on nationality of the Republic of Kyrgyzstan of 15 September 1993,¹² the opinion on the law relating to the status of citizens of the former Soviet Union not holding citizenship of the Republic of Estonia of 31 May 1995,¹³ the opinion of 18 February 1998 on the electoral law of Armenia,¹⁴ the opinion of 18 November 1996 on the draft law regarding the Constitutional court of Azerbaijan,¹⁵ and the opinion on the draft law on referendum and popular initiative in the former Yugoslav Republic of Macedonia of 11 May 1998.¹⁶

The Commission gives opinions not only at the request of the authorities of the states concerned, but more and more often at the request of the bodies of the Council of Europe, in particular the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.¹⁷ Thus, on 26 March 1998, the Commission issued an opinion on legal problems resulting from the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Community of Independent States and the

- 9 Council of Europe doc. CDL (96) 56.
 10 Council of Europe doc. CDL-INF (97) 6.
 11 Council of Europe doc. CDL (98) 41 rev.
 12 Council of Europe doc. CDL (93) 46.
 13 Council of Europe doc. CDL (95) 26.
 14 Council of Europe doc. CDL (98) 10.
 15 Council of Europe doc. CDL-INF (96) 10.
 16 Council of Europe doc. CDL (98) 44.
 17 Art. 2, para. 2, the Statute.

this case too, a questionnaire was used to start with. This study arose from several problems concerning the nationality of natural persons following the collapse of the Soviet Union.

3. Adoption of statutes

During the summer of 1998, following a request from Austria who was then holding the Presidency of the European Union, the Commission prepared proposals regarding the possible distribution of power between the Federal Republic of Yugoslavia and the province of Kosovo. The Commission considered several options, from the creation of a new republic to a special status of internal self-determination for the province of Kosovo. It drew up a list of the respective competences of the central state and the autonomous province.

Finally, still as part of the normative activity, one could mention the opinion which the Commission is currently preparing at the request of the High Representative for Bosnia and Herzegovina on the reform of human rights protection mechanisms in that state.

III. PREVENTION THROUGH ADVISORY ACTIVITY

At each of its meetings the Commission has always given special importance and even priority to the support that it can provide in the drafting of the constitutional texts of the new democracies. This is a typical function of assistance and advice. The task is considerable. It is a question for these countries to lay entirely new and different foundations, breaking with the past. Their source of inspiration may well be their own national tradition, as it existed before the establishment of the communist regime, but more often than not it is based on the experience of democratic states, notably that of the member states of the Council of Europe. The Commission therefore issued, and continues to issue, opinions on drafts submitted for comments on the basis of reports prepared by some of its members which usually visited the country concerned.

The advisory activity of the Commission takes on several forms.

Opinions are mostly given on the Constitution itself. The most recent example concerns the assistance by the Commission in the revision of the Moldovan Constitution. For this purpose, the Venice Commission established a working group closely associated to the work of the Moldovan Commission in charge of drafting a revised Constitution. Several working sessions were held in Venice or in Chisinau and even in Strasbourg. In other cases, the Venice Commission is called upon to give an opinion on the conformity of Constitutions or statutes of State entities with the

European Convention on Human Rights.¹⁸ In this opinion, the Commission concluded that it was not advisable that a state be a member of both systems of human rights protection. It was also at the request of the Parliamentary Assembly that the Commission issued an opinion on the Constitution of Ukraine after the latter joined the Council of Europe. And at the request of the Committee of Ministers, the Commission examined the Constitution of the Russian Federation in the context of that state's membership procedure.¹⁹

The Commission is consulted in principle on draft texts rather than on texts already adopted and the modification of which would be much more difficult. The intervention of the Commission at different stages of the adoption process of a text makes it easier for the Commission's comments to be taken into account and is therefore a very constructive approach.

Even if opinions are mostly followed when working out the final text, it is not the aim of the Commission to impose a solution, but to exchange views through non-directive dialogue.

The following is an example of how the advisory activity worked regarding constitutional questions in Albania.²⁰

The Commission enjoyed privileged cooperation with Albania. Several times, a liaison agent of the Commission stayed in Tirana to ensure consistent relations with the Albanian authorities. Even though it started at the beginning of the democratization of the country, the process leading to the adoption of a new Constitution in Albania took several years. As from 1991, the Commission cooperated in the constitutional revisions. At that time it issued an opinion on the first draft of the democratic Constitution.²¹

The transition from a totalitarian system to a liberal democracy necessitated as a matter of urgency the adoption of constitutional provisions regarding human rights. This is the reason why emphasis was placed in the revised draft of the Constitution on the chapter concerning human rights. Following an exchange of views on this subject with an Albanian delegation,²² many changes and improvements suggested by the Commission were incorporated into this chapter which was adopted by the Parliament in April 1993.

Albania became a member of the Council of Europe in 1995. One of its undertakings upon admission was the adoption of a new Constitution

18 Council of Europe doc. CDL-INF (98) 8.

19 Council of Europe doc. CDL (94) 11.

20 Other equally good examples could be mentioned regarding cooperation with Ukraine, Bosnia and Herzegovina and Moldova.

21 Council of Europe doc. CDL (91) 37.

22 Council of Europe doc. CDL (93) 13.

complying with the Council of Europe's principles. In 1994, a working group of the Commission examined the draft Albanian Constitution that was submitted to a referendum – and rejected – on 6 November 1994. This opinion was communicated to the Albanian authorities after the vote, so as not to implicate the Commission in the referendum campaign.²³ The Commission found that the draft was a serious attempt to adopt a Constitution complying with European standards on democracy, human rights and the rule of law. However, the general ban on parties with a religious or ethnic basis, as well as the rule limiting leadership of 'large' religious communities to Albanian nationals born in Albania and resident in Albania for at least 20 years, were considered excessively restrictive. Furthermore, a certain number of provisions required further clarification, particularly those restricting fundamental rights, to prevent excessive limitation of those rights. Other clarifications could have been made on such matters as the relation between international and domestic law, the recourse to referendum and the respective powers of the Parliament, the President and the Government regarding international treaties; the nomination procedure of the Prime Minister could have been simplified. The Commission noted that the powers of the President of the Republic were very wide. It was also desirable to introduce at the constitutional level access to an administrative tribunal, as well as a rule ensuring the nomination of all judges for life or until retirement age so as to guarantee the independence of the judicial power.

Subject to a few exceptions, the above comments did not imply that the text was incompatible with European constitutional standards. However, when the Commission submits its comments, it prefers to indicate which provisions could be interpreted in a way opposed to these criteria, in order to avoid problems from the start rather than at the end when the law is applied.

In 1995, at the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, the Venice Commission adopted an opinion on the Albanian law on the organization of the courts, which was chapter VI of the Transitional Constitution of Albania.²⁴ At the request of the same Committee, the Venice Commission examined in 1998 the recent amendments made to the major constitutional provisions then in force in Albania concerning the High Council of the Bench, the additional provi-

23 This opinion was published in the Commission's Annual Report of Activities for 1994.

24 Council of Europe doc. CDL (95) 74 rev.

was unconstitutional and annulled it. The Parliament then suspended the Constitutional Court.

The solution to this conflict turned on the interpretation of articles 18 and 23 of the Albanian Constitution, which the Commission then proceeded to do.

The Commission did not, however, limit itself to providing what it thought was a correct interpretation of the Constitution. It called on the Constitutional Court of Albania to respect the will of the drafters of the Constitution, according to which the rotation of one third of the judges was to take place every three years. Furthermore, it invited the Albanian Parliament to abolish the law under which it had suspended the Constitutional Court. It called on these two bodies to cooperate in a spirit of mutual respect and demanded that each remain within the limits of its jurisdiction and resist the temptation of becoming an instrument in the disputes between political forces.

(b) On 18 November 1996, the Commission issued an opinion²⁷ on the amendments to the Constitution of the Republic of Belarus that were proposed by the President of the Republic and certain parliamentary groups. These proposed amendments were a reflection of a conflict that opposed the Head of State and part of the Parliament on the question of the country's political system. The Commission reached the conclusion that both the presidential draft and that of Parliament were far from conforming to the minimum standards of democracy, which constitute the foundation of the European constitutional heritage. Both drafts were of a nature to open the way to the escalation of institutional problems that could lead, in different ways, to the establishment of an authoritarian system. In the view of the Commission, neither the establishment of a system granting predominance to the President, to the point of complete control over all bodies of the State including Parliament, nor the proposal to introduce a 'government by assembly', with no system of controls or counterbalances, could be considered acceptable solutions.

(c) In the summer of 1997, a serious constitutional crisis erupted in the Republica Srpska following the dissolution of Parliament by the President of the Republic and the appointment by the President of a new Government.

By a letter dated 8 July 1997, the Office of the High Representative for Bosnia and Herzegovina submitted to the Venice Commission the following questions: whether the President of the Republica Srpska had the power to dissolve the National Assembly without consulting the Prime

sions relating to the rotation of judges of the Constitutional court and new provisions concerning public administration of illegal economic activities.²⁵ The participation of the Commission in the process of drawing up the new Albanian Constitution was ideal because the Commission was involved throughout the process. The Working Group for Albania, set up in 1997 within the Commission, participated actively in the process of drafting the new Constitution of the country. It collaborated in a consistent manner with the Albanian Constitutional Commission at the various stages of drafting. Throughout the year 1998, several meetings were held during which the different versions of the draft Constitution were examined article by article. The Commission was furthermore invited to express its opinion on the most important questions arising out of the draft such as for instance on the choice between a single chamber and a dual chamber system.

The new Albanian Constitution was adopted by referendum on 22 November 1998. Thus, Albania has a fundamental law fully consistent with the standards of the European constitutional heritage – and of the Council of Europe – regarding democracy, human rights and the rule of law.

IV. PREVENTION THROUGH MEDIATION

The Commission is sometimes invited to intervene in situations of serious constitutional crisis. Its actions are then aimed at avoiding an escalation of the crisis. In such cases, it is not invited to submit an opinion on a draft Constitution, but to interpret constitutional provisions already in force.

(a) For instance, at the request of the President of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, the Commission issued on 17 April 1998 an opinion on a conflict opposing Albania's Parliament to its Constitutional Court regarding the rotation by one third of the judges of that Court.²⁶

As three judges resigned for political reasons before the expiry of their term, the Court considered that the renewal of one third of the judges had taken place following the replacement of the judges who resigned. The Parliament, for political reasons, did not share the Court's opinion and amended the article of the Constitution relating to the rotation of judges. Acting on its own initiative, the Constitutional Court took up this matter, ruled that the amendment to the Constitution made by Parliament

Minister and the President of the Assembly; whether the President of the Republic had the power to nominate a Government after having dissolved Parliament and whether the Government had the power to suspend the decision of the President to dissolve the National Assembly.

The solution to this conflict between the principal bodies of the state required also in this case a correct interpretation of the relevant provisions of the Constitution of the Republika Srpska, in particular articles 94 and 114. The Venice Commission gave its opinion to the High Representative of the International Community for Bosnia and Herzegovina only a few days after it was solicited. A serious constitutional crisis had thus been averted.

(d) Still in the Republika Srpska, and again at the request of the High Representative of the International Community in this country, the Venice Commission issued on 8 February 1999 a second opinion on the respective powers of the President of the Republic and Parliament regarding the formation of the Government. A crisis situation had indeed arisen further to consecutive refusals by Parliament to nominate candidates who were proposed by the President of the Republic to the position of Prime Minister. All these candidates belonged to political groups that did not hold a majority in Parliament, so that the country had been for several months without a Government.

In this case too, the opinion of the Commission consisted in providing a correct interpretation of the relevant provisions of the Constitution of the Republika Srpska, especially articles 70, 72, 80 and 90.

V. PREVENTION THROUGH EDUCATION

When the Commission, in the course of its advisory activity, realizes that a particular issue common to several Constitutions submitted for examination raises important technical legal questions, it will not hesitate to undertake a comparative study.

The Commission has in this manner selected certain subjects which it has studied in depth either at seminars which it organized or by entrusting one of its members with the preparation of an in-depth report, or by creating a working group.

In particular, the Commission organized, and continues to organize, a series of university level seminars for democracy – called UniDem seminars – focusing on particular subjects, often in cooperation with Central and Eastern European Universities. These seminars bring together legal experts of member states and all those who, in those countries, are involved in the implementation of the Constitution (deputies, public servants, university professors, judges, etc.). The aim of these UniDem seminars is to

contribute to the creation of a democratic culture in the legal circles of the new democracies.

(a) Constitutional justice was the subject of a first series of seminars. Aware of the importance of the administration of good constitutional justice in achieving the rule of law, the Commission organized a meeting with the Presidents of the Constitutional Courts of member states of the Council of Europe and interested states of Central and Eastern Europe on 8 October 1990. The purpose of the meeting was to bring together the experience acquired by the countries in which such bodies exist and have been functioning for a long time. The participants had before them a working document on models of constitutional jurisdiction prepared by a member of the Commission.²⁸

In the light of the results of this meeting and at the request of the Central and Eastern European states involved, the Commission decided to concentrate its efforts as a matter of priority on the question of procedure before constitutional jurisdictions. It entrusted one of its members with the preparation of a report on this question. It also organized, on this subject, UniDem seminars on the role of the constitutional courts in the consolidation of the rule of law (Bucharest, 1994), on the protection of fundamental rights by constitutional courts (Brioni, 1995) and on constitutional justice and democracy by referendum (Strasbourg, 1995). The notes from these seminars were published in the Commission's Collection entitled 'Science and Technique of Democracy'.

The second action undertaken by the Commission to facilitate exchanges of experiences in the field of constitutional justice was the creation of a documentation center on constitutional case-law. The center is in a position to provide the newly established courts with a choice of easily accessible case-law from older judicial bodies. To that end, the Commission publishes three times a year a much appreciated *Bulletin on Constitutional Case-Law*.

(b) Another area in which the Commission organized UniDem seminars is that of the transition from a planned economy to a system of market economy. On this subject, two seminars were organized, the first in Moscow in February 1993 and the second one in Sofia a few months later.

(c) The emergence of the problem of the protection of minorities has been a constant concern of the Commission since the beginning of its activities.

28 H. Steinberger, *Modèles de juridiction constitutionnelle* (Council of Europe, Strasbourg, 1992).

Aware of the fact that insufficient protection of national minorities may result in grave difficulties, the Commission studied this problem by following two different approaches.

The first was to work out a draft European convention on the protection of minorities, referred to above.

As a second line of research, the Commission studied in a comparative perspective how federalism and regionalism contribute to the resolution of the problems of minorities. Some of its members prepared reports on the solutions which federal structures offer for the protection of minorities in Switzerland, Austria, Belgium and Canada.²⁹ These proven formulae could constitute, if not a 'European model' to be taken as is, at least a source of inspiration enabling the new democracies to find solutions to their problems. In the same line of thinking, the Commission started to bring together all the legal documentation available in Europe on the protection of minorities (national legislation and practice; international treaties, etc.). This collection of European data on the protection of minorities should facilitate access by interested states to the relevant documentation.

Still in a comparative perspective, the Commission entrusted one of its members with the task of drafting a well-researched and detailed questionnaire on the constitutional and legislative provisions relating to the protection of minorities in member states of the Council of Europe. A report was then prepared on the basis of this questionnaire which provided an overview of the common European regulation on this matter.³⁰

Still on the problem of minorities, the Venice Commission organized in Lausanne in April 1996, in collaboration with the Swiss Institute of Comparative Law, a Unidem seminar on the subject 'Local self-government, territorial integrity and protection of minorities'. The proceedings of this seminar were published in the 'Science and Technique of Democracy' Collection.³¹

(d) Among the general subjects recently studied by the Commission in the framework of Unidem seminars, the following should be mentioned: federal and regional states;³² law and foreign policy;³³ banning of political parties and similar measures;³⁴ financing of political parties;³⁵ participa-

- 29 Council of Europe docs. CDL-MIN (92) 7 and (93) 1 and 3.
- 30 See Council of Europe, *The Protection of Minorities*, Science and Technique of Democracy Collection, No. 9 (1994).
- 31 Science and Technique of Democracy Collection, No. 16 (1996).
- 32 Science and Technique of Democracy Collection, No. 19 (1997).
- 33 Science and Technique of Democracy Collection, No. 24 (1998).
- 34 Council of Europe doc. CDL-INF (98) 14.
- 35 Council of Europe doc. CDL-PP (99) 3.

tion in public life of persons belonging to minorities;³⁶ electoral law and national minorities;³⁷ and citizenship and state succession.³⁸

VI. PREVENTION THROUGH THE PROMOTION OF EUROPEAN STANDARDS

European constitutional law which the new democracies are ready to assimilate due to their openness to international law and the generalization of constitutional jurisdiction, also provides the Commission with a yard-stick when called upon to comment on draft constitutions submitted to it. One of the main questions that it always asks itself is whether the draft in question satisfies the criteria of European standards: universal free and genuine vote, respect for the principle of separation of powers and guarantee of the rights and freedoms of individuals and groups.

On more than one occasion, the Commission has had to point out that a draft submitted to it did not comply with European standards. This was for example the case with provisions that granted certain fundamental rights to citizens only. This was also the case of provisions that did not ensure sufficient protection to persons deprived of liberty. Basing itself on the detailed provisions of article 5 of the European Convention on Human Rights, the Commission insisted on the need for a restrictive listing of the reasons authorizing arrest and detention of a person and, in the case of detention, the need to recognize certain fundamental rights, in particular that of judicial control of the measure depriving the person of his or her freedom.

Another area in which the Commission has had to intervene several times is that of judicial guarantees and fair trial. Following interventions and recommendations of the Commission, several provisions considered to be too brief or incomplete were amended on the basis of article 6 of the European Convention on Human Rights.

Without wishing to cumulate examples, it should be noted that on the basis of the European Convention on Human Rights and in particular in the light of paragraphs 2 of articles 8 to 11, the authors of several draft Constitutions, further to the indications of the Commission, listed the conditions permitting restriction of the exercise of fundamental rights: existence of a legal basis, public interest and respect for the principle of proportionality.

- 36 Council of Europe doc. CDL-MIN (98) 1.
- 37 Council of Europe doc. CDL-MIN (99) 1.
- 38 Science and Technique of Democracy Collection, No. 23 (1998).

Recently, the Commission was called upon to express an opinion on the compatibility of the death penalty with the Constitutions of two states, Ukraine and Albania.

In the case of Ukraine,³⁹ the Commission noted that the Constitution contains neither a provision expressly providing for the death penalty, nor a provision specifically abolishing this penalty. Therefore, the constitutionality of the death penalty should be approached through the interpretation of relevant provisions of the Constitution, in the light of the Constitution as a whole, but also taking into account the international obligations of Ukraine considered against the background of international developments in this field. The Commission noted the remarkable importance that the Ukrainian Constitution ascribes to the right to life and to the right to respect of human dignity. The Commission also emphasized the ambiguity of the term 'arbitrarily' in the first sentence of article 27, paragraph 2, of the Constitution⁴⁰ by pointing out that this term does not necessarily introduce an exception to the right to life and that it has at times been used as the legal basis for abolitionist positions. Furthermore, article 28 of the Constitution, which guarantees the right to human dignity and which prohibits cruel, inhuman or degrading punishment or treatment, effectively reduces to practically inexistent any possibility of instituting or carrying out the death penalty. Finally, the Commission noted that the death penalty is only admitted in the European legal system as a transitional measure and that, in any case, its carrying out is not tolerated.

In conclusion, in view of the absence of a constitutional basis explicitly authorizing the death penalty; the ambiguity of the term 'arbitrarily' in the first sentence of article 27, paragraph 2, of the Constitution of Ukraine; the fact that article 27, paragraph 2, embodies the general rule of article 6 of the United Nations Covenant on Civil and Political Rights (right to life) without adopting the exception (death penalty); the importance which the Ukrainian Constitution ascribes to the right to life; the fact that the constitutional prohibition of cruel, inhuman or degrading punishment or treatment effectively leaves no space for maintaining and carrying out the death penalty; and the evolution of European public order towards abolition of the death penalty, the Commission found that the death penalty cannot be declared to be in accordance with the Ukrainian Constitution.

At the request of the Bureau of the Parliamentary Assembly of the Council of Europe, the Commission issued a similar opinion on 11 February 1999 on the conformity of the death penalty with the Constitution of

39 Opinion of 17 April 1998, Council of Europe doc. CDL-INF (98) 1.

40 'No one can be arbitrarily deprived of his life.'

Albania.⁴¹ After examining the wording of article 21 of the Albanian Constitution ('life is protected by law') and noting the absence of express reference to the death penalty in the Constitution, the Commission analyzed how the Constitutional Courts of other countries interpreted similar provisions. Having also taken into account the jurisprudence of the European Court of Human Rights on this delicate problem, the Commission came to the conclusion that the imposition of the death penalty is incompatible with the Albanian Constitution.

VII. CONCLUSION

Established in the aftermath of the fall of the Berlin wall, the Venice Commission played an important role in the process of adoption by the countries of Central and Eastern Europe of Constitutions complying with the standards of European constitutional heritage. Constitutional engineering, which aims at drawing up Constitutions adapted to the needs of a given country, is undoubtedly an element likely to contribute to the prevention of crisis situations and hence to human rights violations.

41 Council of Europe doc. CDL (99) 1.