I. ARTICLES

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OPINION OF THE VENICE COMMISSION ON THE PLACE OF THE CONSTITUTIONAL JUDICIARY IN A DEMOCRATIC STATE*

I. WHAT IS THE VENICE COMMISSION AND WHAT IS ITS ROLE?

The political situation that has arisen owing to the continuing series of amendments to the Polish Act on the Constitutional Tribunal has raised the temperature of the debate and at the same time has led to a situation in which substantive arguments are mixed with political ones, with the latter prevailing. It is in fact practically impossible to break through with fair and cool-headed legal argument because each is as a rule torpedoed by one that is of a political nature.

In the last twenty-six years we have frequently faced situations in which substantive arguments have been subjected to arguments of a political or ideological nature. An example here may be the recurrent debate about the Concordat or the teaching of religion in schools. These disputes, however, were determined by axiological reasons (or value judgements) based on different outlooks, which is always the case in a pluralistic society. Thus, in this, Poland is not a unique case. Similar debates are common in other stable democracies, too, and the prevalence of non-legal arguments in such debates may be to a certain extent justified.

This time, however, we are dealing for the first time with a situation in which such a politicised debate concerns one of the essential foundations of the rule of law, namely the place of the Constitution in the system of the sources of the law and the related role of the constitutional judiciary in a political system based on the separation of powers. In the course of the numerous debates on the political order in Poland carried out in 1989, the axiom of the role of the Constitution and the autonomy of the Court adjudicating on the constitutionality of the law remained intact, and despite the fact that – according to the words of) one of the authors – the role of the Constitutional Tribunal and its position has many a time irritated the government or the parliament, there were never any sudden changes in the law forced through in a manner intended to ruin its autonomy or to reduce substantially its authority.[1]

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[1] Cf. W. Łączkowski, Comments on the current developments concerning the Polish Constitutional Tribunal, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 78(1), 2016, 51–56.

The letter which the Polish Minister for Foreign Affairs sent to the Venice Commission[2] triggered off the whole arsenal of political assessments of this body, which were sometimes at variance with the true nature of this body. Thus it seems most relevant to begin with the presentation of the premises that underlay the appointment of the Venice Commission and the principles which govern its work, in order to understand the role it plays in the assessment of laws adopted in different states.

The Commission was created in 1990 on the initiative of an Italian professor of law Antonio La Pergola, who was also a judge of the Italian Constitutional Court. The creators of the Commission were convinced of the need for an institution within the system of the Council of Europe that would operate in the legal sphere, and make legal, not political assessments, free from any political debate going on in an individual state concerned, or on the European forum.

It is obvious that the Commission works in the political arena in the sense that legal matters, and constitutional matters in particular, are related to politics. Under such a broad understanding, the activities of the Commission are determined by the political situation, and take the form of a request for an opinion to be prepared, put forward by an institution of a political character. This, however, does not determine the ultimate form of the opinion which is of an entirely legal nature. The profile of the Commission's work was explicitly established when the Commission was appointed and covers legal issues only. In its work, the Commission resorts exclusively to legal methods and legal argumentation.

The assumptions underlying the work of the Commission are explicitly reflected in its official name: 'The European Commission for Democracy through Law.' It is commonly known as the Venice Commission owing to the location of its plenary meetings, but there is no doubt that this official name is key in determining its nature and essence, which constitute a combination of two elements: 'democracy' and 'law'. This name unambiguously places the Venice Commission in the system of other European institutions. The process of building democracy is undoubtedly a political process itself. Its goal is to lead to a transformation from an authoritarian system to a democratic one. In the course of this process, the temptation frequently arises to use certain mechanisms and methods known from the previous, 'non-democratic' system, as well as a tendency to resort to the power of the majority rather than to establish a dialogue and seek a compromise. In such situations law is perceived as an inconvenient limiting factor, hindering the whole process. This could be observed in many states undergoing transformation in Europe after 1990, in connection with for example the implementation of the necessary reform of the judiciary. Hence the focal interest of the Venice Commission and its concern for legal rules in the process of the democratisation of a state, or in other words in the process of the implementation of the democratic order.

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[2] Letter of the Minister for Foreign Affairs to the Venice Commission requesting opinion on the amendments to the Act on the Constitutional Tribunal of 25 June 2015 and 23 December 2015.

The scope of the Commission's work is not limited to the post-socialist States of Europe.[3] Created within the framework of the Council of Europe, it extends its activities to all States that are members of the Council of Europe.[4] However, owing to the strong need on the part of the new democracies, most of the work of the Commission in the last twenty five years has decidedly been devoted more to countries from Central and Eastern Europe.[5]

The Venice Commission is an institution created as a result of a Partial Agreement with the Council of Europe.[6] Although related to the Council of Europe, it is not an organ of it *sensu stricto*, and therefore the Council cannot issue directives that would be binding upon the Commission whose autonomy and independence is grounded on the independence of its members. Members of the Commission are lawyers but despite the fact that they are nominated by their individual States, they enjoy the status of an independent expert acting within their competences, knowledge and convictions; they do not receive any directives or instructions from their States. Their autonomy in the making opinions is broad.

Owing to the special Agreement which constituted the Commission, membership of the Council of Europe and the Venice Commission is not automatic. Each state which is a member of the Council of Europe must individually, regardless of its membership, apply for participation in the Venice Commission. Announce its participation in the Commission. A typical example is the United Kingdom which became a member of the Venice Commission as late as 2000 when the professional and not political character of the Commission had been clearly settled. Poland became a member of the Commission in 1992.

Time has confirmed that a professional institution basing its judgements entirely on reference to the law, without at the same time being a court, was indeed indispensable in the system of the Council of Europe.

It must be emphasised that the Commission is neither a political organ nor a court, and not a constitutional court, either. It does not interfere in the competences of the constitutional courts of other States. In its opin-

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[3] An example here may be for instance one of the most recent activities of the Commission, which is the preparation of an opinion requested by the Parliamentary Assembly of the Council of Europe of 28 January 2016 on draft amendments to the French Constitution concerning the principles of the declaration of the state of emergency and the deprivation of citizenship.

[4] It should be added that in recent years, owing to the role of the Commission and its legal authority, many States from outside the Council of Europe have declared a will to access the Commission whose current membership includes, among others, Algeria, Brazil, Chile, Israel, Kazakhstan, Kyrgyzstan, Kosovo, Mexico, Morocco, Peru, the Korean Republic, Tunisia and the USA. Many States have observer's status, e.g. Argentina, Canada, Japan, the Holy See and Uruguay.

[5] Many States had been invited to the sessions of the Venice Commission before they formally acceded to the Council of Europe, to coordinate amendments to their constitutions and acts of parliaments right from the initial stage of their transformation in accordance with the historically shaped democratic and European standards as well as international experience in the fields of democracy, human rights and the rule of law. Poland was one of them and it has participated in the work of the Commission since 1990.

[6] Resolution (90)6 on a Partial Agreement Establishing the European Commission for Democracy through Law; A subsequent resolution transformed this Agreement into the Partial and Enlarged Agreements (Statutory Resolution [93]28).

ions it refrains from analysing the compliance of laws with the constitution of a given State. This task is reserved for the constitutional court of such a State. The point of reference for the Commission is EU law in a broad sense and the European Convention on Human Rights and Fundamental Freedoms in particular, including the judicial decisions of the European Court of Human Rights (referred to as hard law) made on the basis of the provisions of this Convention. At the same time the Commission takes into account the whole area of European soft law which includes the Recommendations of the Council of Ministers of the Council of Europe, or the recommendations or resolutions of the Parliamentary Assembly of the Council of Europe or its committees. It also refers to UN documents and standards worked out on the basis of them, especially those concerning the independence of the judiciary. On these grounds, the Commission works out soft law which is then taken into account by all States, not only these to which a given opinion applies.

The Commission indicates ways in which a particular draft law, or even an Act already passed ought to be changed in order to comply with formulated European standards. Based on the opinions prepared in the context of the assessments of individual states, the Commission then develops guidelines of a general character intended to assist states concerned in the drafting of legislative Acts of both a statutory as well as of a constitutional nature.

Thus the Commission may be described as an organ providing states with legal advice in the area of public law. The Commission does not act on its own initiative, but at the request of a given State or a European organ. Its opinions are not binding. Neither is there any coercion lying at its foundations. It is vital though that States have regard to the opinions of the Commission despite the absence of a formal sanction for failure to take it into account and act accordingly, and take the Commission's recommendations into account when amending their laws, seeking to collaborate with the Venice Commission in order to work out feasible solutions. This legal authority of the Commission constitutes the foundations of its efficiency and efficacy.

What can be observed in recent years is the strengthening role of the Venice Commission and the increased effectivity of its opinions. This is due to their recognition by different European Union bodies. The legal opinions prepared by the Venice Commission, notwithstanding the fact that the Commission is not a European Union organ, frequently constitute the grounds for the political assessment by the European Union of activities undertaken by individual states, in two situations in particular:

a) In the process of a State's joining the EU

b) In relation to Member States in emergency situations when the European standards of the rule of law are threatened.

Ad a) The Venice Commission extends support to States which are preparing to join the European Union, in the area of the harmonisation of their laws with European standards. This was, for example, true in the case of Serbia[7] and Ukraine.

[7] The Annual Progress Report on Serbia was largely based on the assessment made by the

Ad b) The use of the opinions of the Venice Commissions by the EU's organs for the assessment of actions taken by an individual State was particularly clearly seen in the case of Hungary in 2012 when the constructive response from the Hungarian government to many critical remarks formulated in the Venice Commission opinion was not only triggered by the legal arguments presented in the Commission's opinion, but also due to the activity of the EU's organs.[8]

The non-binding character of the opinions issued by the Venice Commission make it impossible for the European Court of Justice or other courts to treat them as a source of standards that can be directly applicable. However, owing to their legal value, these opinions are a rich source of information for courts and are also frequently cited in the rulings of the European Court of Human Rights.

In each of the activities in which the Commission formulates its opinion two matters can be distinguished. They refer to: (i) what constitutes the foundations of the European democratic tradition and must be absolutely respected by the Member States, and which therefore constitutes the 'European standard' and (ii) what belongs to the regulatory freedom of individual States and which arises from their diverse and rich tradition of different political systems. Wherever possible, the Commission always points to the availability of multiple scenarios of a possible solution. By doing this it makes a clear distinction between principles and the possible differentiated forms guaranteeing these principles.

II. WHY IS CONSTITUTIONAL REVIEW SO IMPORTANT?

It is an unquestionable and universally accepted truth that in some States there exists no separate constitutional court. An example frequently pointed to in discussions is the UK system. This system, however, is a logical consequence of the absence of a written constitution in the British legal system. Such a situation is particular case. Most contemporary legal systems are based on the constitution as the basic, or fundamental law. In Poland, much importance has historically been attached to a written constitution, and the fact that it was the first constitution adopted in Europe is often emphasised. Thus the Constitution as a particular legislative act belongs to the Polish tradition and identity, hence the important role of the institution created to protect the Constitution and safeguard its due position in the system of the sources of law

Today, the existence of an organ with competences to review the compliance of law with the constitution and to ensure the integral coherence of the law and the integrity of the constitutional principles as points of reference when the law must be assessed, cannot be undermined.

Since the end of World War II, constitutional courts in European States have been created in the process of a democratic transformation. It is worth recalling here that it was the United States of America that forced on the Axis

Venice Commission and Serbia's collaboration with the Commission in the legal area certainly facilitated the former to obtain the status of an official EU membership candidate.

[8] For more see: W. Hoffmann-Riem, The Venice Commission of the Council of Europe – Standards and Impact, *The European Journal of International Law* 25(2), 2014, 579–597.

powers the implementation of a special constitutional judiciary as an integral part of their democratic political systems. This is why such courts came into being first in Germany and Italy, and subsequently in Spain and Portugal. The aim of such a judiciary was to overcome and break away from the previous totalitarian system and to provide guarantees of the protection of human rights which this system violated. Generally two models of constitutional review may be distinguished: (i) the American Judicial Review model described as a dispersed review, based on the system of ordinary courts, and (ii) the Austrian Constitutional Review model in place since 1920, described as concentrated judiciary review and a separate, specialised organ in the form of the constitutional court.[9] Both models are permissible in democratic states. The selection of either depends on the circumstances of a given State and its legal tradition in particular. The former of the models, which derives from the United States, has been followed in some European States including Ireland, Switzerland and the Scandinavian countries, while the European legal system to which Poland belongs has implemented the Austrian model with a separate constitutional court.

The same path was followed by all States which underwent a political transformation starting in 1990.[10] Attempting to build a democratic order based on the principle of checks and balances, these States created a judicial institution distinct from the ordinary judiciary. The task of this institution was the judicial review of the law exercised with the attributes of autonomy and independence.[11] In such a system, even the Parliament must respect the supremacy of the institution and may become subject to review by another state organ, and by a constitutional court in particular. Constitutional justice is the key component of the system of checks and balances in democratic states.[12] The historical experience of West European states shows that the success of democracy is intimately linked to the creation of constitutional courts. Contrary to the previous authoritarian systems though, what this really means is the supremacy of the law over politics. Constitutional law and order may only build its authority on the new authority of law.[13]

The possibility of implementing changes within the judicial power may not of course be negated. Many States reform their judiciary system, including the constitutional judiciary and another model of judicial review may be chosen.

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[9] S. Ruelke, *Venedig-Kommission und Verfassungsgerichtsbarkeit*, Georg-August-Universitaet Goettingen, Institut fuer Voelkerrecht, Dissertation, 90 ff.

[10] A view may be found in non-Polish literature on the subject that the creation of the Constitutional Tribunal in Poland already in the 1980s had contributed to the erosion of the legal system prevailing at that time—S. Ruelke, op. cit., 100.

[11] As the Venice Commission underlined in its opinion on Ukraine, the 'prevailing practice in the new democracies to protect the constitutionality of the new legal order by a specific, permanent and independent judicial body can only be welcomed', CDL-INF(1997)002 Opinion on the Constitution of Ukraine, para. 10.

[12] CDL-AD (2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges (including an explanatory note and a comparative table) and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 76.

[13] S. Ruelke, *Venedig-Kommission*, 104–107.

This, however, must be based on rational premises, and be well documented from the legal point of view.[14] There are certain points in a democracy that are independent. Pursuant to one, a ruling of the Constitutional Tribunal regarding constitutionality keeps the whole system in balance. If amendments to the Act on the Constitutional Tribunal are instrumental, or intended to serve particular purposes, this always threatens the status and authority of the Tribunal (seen as a pillar) in upholding democracy. Any change in this area, apart from substantive reasons requires just as in any other case, an explicit and unambiguous procedure to ensure maintenance of the hierarchy of the sources of law and transparency relevant to the legislation, and also to enable the parliamentary minority to be included in the real work on the proposed amendments.

Since we are dealing here with such an important pillar of democracy as the constitutional judiciary the interest of the European institutions in the changes is not at all surprising.

Being in Europe nowadays is not just an abstract concept but means belonging to a certain community whose members share a common system of values concerning the rule of law. States that are members of the Council of Europe accede to the European Convention on Human Rights. One of the guarantees of this Convention is the ability of a citizen of a given State to file a claim to the European Court of Justice alleging unjust verdicts delivered by courts of his or her country. Thus cross-border claims made to an international organ have become normal. This has been happening for over twenty years in Poland and other post-communist states in relation to individual cases. The number of claims is very substantial, and they come mainly from new democracies. In each such case it is also the law of a given State applicable to the concrete individual case, which is subject to judicial review.

One of the conditions of membership of a community such as the European Council or the European Union is the possibility *sui generis* of a review that is of an abstract nature, unrelated to any particular case, but concerning a legislative act adopted by a given State. In such a situation, the assessment is not of an individual case but of one of the pillars of the rule of law, or something which may be defined as the 'load-bearing wall' of the whole system. Thus it seems that in this context the legal aspect should not arouse such emotions as the political sphere of the discussion does. Here we come back to the role of the Venice Commission and its importance in determining, and to some extent also establishing, the European standards of the rule of law.

III. CONDITIONS FOR CONSTITUTIONAL JUSTICE IN THE OPINION OF THE VENICE COMMISSION

Constitutional justice has been the focus of interest of the Venice Commission since its inception. The fact that it was the presidents of constitutional courts and other courts with competences of judicial review who were invited to the first conference organised in October 1990 was in some way symbolic

[14] One of the authors who has written on this is W. Łączkowski, Comments on the current developments.

of the understanding of the direction of the future activities of the Commission. La Pergola, President of the Commission, emphasised at the conference the strong relationship between democracy and the efficient review of constitutionality that constituted the foundation of the rule of law.[15] In order to achieve this goal, certain criteria regarding the position of constitutional courts had to be fulfilled.

In the opinions delivered by the Commission, the whole complex of circumstances, or conditions, was identified that had to be fulfilled in order to claim that constitutional justice had been effectively guaranteed. One such formal requirement is the procedure for adopting or amending Acts on constitutional courts. The Venice Commission expressed an opinion that collaboration between the governing coalition and the opposition had to be ensured when Acts pertaining to the political order were being drafted. The Commission was highly critical of situations in which the Acts of Parliament on the political order were being adopted in an accelerated procedure, frequently prompted by a motion put forward by an individual member of the Parliament, in a way in which the procedures of the required assessment of government drafts of new laws were avoided. All this failed to create grounds for proper consultations with the opposition or society[16] and could also produce an impression that the law had been used instrumentally. To give an example: in the opinion on Romania, the Commission had once again emphasised that 'democracy cannot be reduced to the principle of the majority, or, particularly, to the rule that the majority may do whatever it wishes to do simply because of the fact that it is the majority. Such an understanding or approach is in fact a misunderstanding of the concept of democracy which also requires that the rights of minorities be taken into account'.[17]

Apart from the formal issues connected with the provision of an appropriate procedure for drafting Acts of the Constitutional Tribunal that would comply with the rule of law, the Commission pointed to a number of other fundamentally important substantive issues required to guarantee the autonomy and impartiality of constitutional courts.[18] A catalogue of them has been compiled on the basis of experience arising from the work on the drafting of acts on constitutional courts in other countries. Each State encountered

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[15] 'Die Hauptaufgabe der Verfassungsgerichtsbarkeit ist, diese Bindung der Staatsgewalt zu kontrollieren und somit den in der Verfassung verankerten Grundprinzipien Geltung zu verleihen', S. Ruelke, *Venedig-Kommission*, 95.

[16] Such a critical opinion was also expressed in the Opinion on the Fourth Amendment to the Constitution of Hungary (CDL-AD(2013)012).

[17] CDL-AD(2012)026, 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 Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing Law N° 3/2000 regarding the organisation of a referendum in Romania.

[18] They have been collected in the compilation made by Commission (CDL-PI[2015]002). This Compilation 'should serve as a source of reference for drafters of constitutions and legislation on constitutional courts, for researchers as well as for Venice Commission members, who are requested to prepare comments and opinions on such texts.'

numerous challenges in the course of the drafting of such acts, and had to cope with the political circumstances which were the result of the existing and past (historical) political order, and the events and occurrences that were present under the previous regime. This was the reason why the Venice Commission took notice of issues which may be described as constituting pillars of the organisation and position of constitutional courts in the light of the European standards which have been developed. These issues include in particular:

a) The composition of the constitutional court, the status of a judge, the procedure for judicial appointments, the durability of the mandate.

b) The procedure of the proceedings before the constitutional court, the principles of the case-distribution.

c) The effect of the rulings of constitutional courts.[19]

Ad a) As has been emphasised above, judicial appointments and the functioning of a constitutional court are treated as a catalyst in the process of social transformation. It ensures development in a democratic direction and in the interest of the rule of law and constitutes a safeguard that the state authorities will be acting within the competences apportioned to them by the constitution, which means that they will be balanced. The legitimacy of a constitutional court and its capacity to perform these functions depend largely on its composition and the manner in which it is constituted. The selection of the judges is transparent and politically balanced, which is a necessary condition to maintain trust in the impartiality of the constitutional court.[20]

All the above are reasons why the method of choosing or nominating constitutional court judges is one of the key issues in many States and is always at the centre of the assessment performed by the Venice Commission. Different ways of constituting constitutional courts are permitted as there is no one uniform model. The Commission also accepts different procedures leading to judicial appointments but on condition that the principal goal, common to all States and the autonomy of the court and the independence of the judges are ensured, as well as the plurality of its composition. Analysing the solutions adopted in different States, three main types of selecting, or appointing, constitutional judges may be distinguished: (i) a selection made by the Parliament; (ii) nomination of judges by separate organs; and (iii) nomination by the President of the State. The Commission does not exclude any of the above ways as inadmissible under the rule of law. Even if it had reservations as to the selection of the judges of ordinary courts by the Parliament, and expressed concerns about the potential threat of strong politicisation, it did not report similar concerns with regard to judicial appointments to constitutional courts by the Parliament, owing to the special nature of this court. The choice of the judges of the Constitutional Court by the Parliament does not, in the opinion

[19] In this paper, owing to its framework, I limit myself to three key issues only related to the place of the constitutional court in the system of the functioning of the organs and the status of the judge, leaving aside the considerations pertaining to the competences of the Constitutional Tribunal, and the financial aspects of its judges.

[20] CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, para. 48.

of the Venice Commission, violate democratic standards. There are, however, certain selection conditions to be satisfied, to ensure that the whole selection process is 'depoliticised.' One of these conditions or guarantees is already the process itself of the recommendation of candidates, done not by political bodies or assemblies but by legal or academic circles or institutions.

The application of the qualified majority system in the selection process for judges is considered extremely essential. The Venice Commission has expressed this view in many of its opinions.[21] The example of Germany has been given, where the Parliament selects judges by a two-thirds majority vote, intended to ensure the support of the opposition. The adoption of such a solution forces political parties and parliamentary groups to reach (for) a consensus.[22]

The qualified majority system does, of course, always carry a danger that the selection of a judge may be potentially blocked when a compromise cannot be found. It is not easy, either, to prevent the selection of a judge from being blocked, although it is not impossible. The Commission identified some legal instruments referred to as anti-deadlock mechanisms which may be of help in such situations. While the qualified majority principle increases the role of the minority, the anti-deadlock mechanism reduces it because in each subsequent vote the required minimum of qualified majority necessary to select a judge is lower. Being aware of difficulties related to the selection and application of an adequate and effective anti-deadlock mechanism in the process of judiciary appointments, the Commission does not favour any one and leaves the choice at the free disposal of interested States. Such a position was also expressed by the Venice Commission in its opinion on Montenegro.[23]

Regardless of these doubts, the Commission tends to be inclined towards the adoption of the qualified majority principle, which ensures the independence of the judge who at the same time, owing to the fact that different political powers participated in his or her selection, will not be perceived as a representative of one or another of these powers only. The Commission also permits another manner of selecting judges, which already exists in some States, carried out by three different state organs in equal proportions: one third selected by the Parliament, one third nominated by the President, and one third by the judiciary. Such a system is in place in Ukraine and the Commission expressed an opinion that this system, where one third of the judges are nominated by the judicial power, allows to offset the legislative and the executive powers, since the latter two are strictly political in the process of judicial appointments.[24] However, in the event of the appointment of constitutional court

[21] Compare the position of the Commission expressed in the opinion on Moldova, CDL-AD(2004)043, Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), para. 18–19.

[22] Ibidem, CDL-AD(2004)043.

[23] CDL-AD(2013)028, Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, paras. 5–8 ('One option is to provide for different, decreasing majorities in subsequent rounds of voting, […]. Other, perhaps preferable, solutions include the use of proportional methods of voting').

[24] CDL-AD(2012)009, para. 8.

judges, the Commission postulated that only judges of the higher ordinary courts and administrative courts should participate in the selection process.

The Commission devoted much attention to the development of a guarantee of the efficient functioning of constitutional courts and avoidance of a situation in which its work comes to a standstill. Hence in certain situations it accepted the prolongation of the mandate of a judge whose tenure was coming to an end but a successor had not yet been appointed.[25]

Judges ought to be appointed for a relatively long term but—in the Commission's opinion—in order to ensure the independence of a judge the mandate should not be renewable. Another positive circumstance that met with the Commission's approval was different, non-concurrent terms of the Parliament and of the constitutional court judges, which allow different parliamentary majorities to participate in the process of selecting judges.

Certain doubts have been raised with regard to the selection, or nomination of the president of the constitutional court by a political body (president, parliament). Because it is relatively common in many States that the President, not the constitutional court itself, nominates the president of the constitutional court, such a solution cannot be regarded as violating European standards. However, in the Commission's opinion, the preferred solution is one where it is the constitutional court which appoints its president since in this way the autonomy of this court is respected.[26]

The status of a constitutional judge is closely connected with the solutions governing judicial immunity. The mutual relationships between the constitutional court and the parliament regarding the waiving of judicial immunity is a particularly delicate matter. The essence of the durability of the mandate of a constitutional judge speaks for restricting or even eliminating the role of organs or bodies other than the court itself, and banning them from entering the sphere covered by the constitutional court's autonomy. Such was, too, the opinion of the Commission with reference to the draft amendments to the Ukrainian Constitution. The attempt to grant the Parliament the right to decide about remanding in custody one of the judges was assessed negatively and seen as politicisation of the procedure and a threat to judicial independence. The solution that the Commission opted for in this case was to grant the Constitutional Court sitting in full bench (in plenary session) the right to decide about the waiving of the judicial immunity of any of its judges.[27]

Ad b) The procedure of proceedings before the constitutional court

In principle, the Commission allows relatively wide regulatory freedom regarding procedure matters relating to proceedings before the constitutional

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[25] 'In some countries, vacant seats at the Constitutional Court were not filled within time for political reasons. In one case this led to the Court being unable sit owing to the lack of a quorum. In order to guarantee the uninterrupted functioning of the Constitutional Court the members of the court should continue in their functions until their successor is appointed.'

[26] CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, para. 37–38.

[27] CDL-AD(2013)014, Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges (including an explanatory note and a comparative table) and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para. 49.

court and in its opinions it refrains from any specific or detailed intervention in the regulations. It did, however, draw attention to a number of procedural issues in the context of Acts of Parliament drafted in Montenegro, which pertained to amendments to its Constitution as well as to constitutional judiciary. The remarks of the Commission, however, by their very nature, are rather guidelines of a more general character, and not applicable to any one specific country either.

The Commission touched upon a vital problem, which is the relationship between the Act on the Constitutional Court and the rules of procedure according to which the constitutional court works. In this context, the Commission identified the matters which in its opinion should to be regulated in the Act, and those that ought to be included in the rules of procedure binding on the constitutional court. Here, the Commission held a view that detailed solutions regarding the procedures for proceedings before the constitutional court ought not to be regulated in the Act on the Constitutional Court but in the rules of procedure adopted for this court. Such a technique will guarantee the autonomy of the constitutional court proceedings. Otherwise the court's autonomy could be jeopardised as each, even the smallest procedural amendment, would require a parliamentary decision (that is an amendment to the Act) which is a political decision regarding internal matters concerning the constitutional court.[28]

In the context of the Act adopted by Montenegro, the Commission articulated its reservations also with regard to the quorum necessary to make valid decisions, which in the Commission's opinion was too high, leading potentially to a situation in which the absence of one judge could paralyse the work of the constitutional court.[29]

The Commission also criticised the decision to grant the constitutional court the right to initiate proceedings which, in the opinion of the Commission, would make this court one of the actors in the political arena and would most certainly have a negative impact on the perception of its independence. Such a right would mean that either of the decisions that the court would make (to initiate or to refrain from the initiation of proceedings) would always be assessed based on political criteria.[30]

Ad c) Effect of the rulings of the constitutional court

The Commission repeated its position that rulings of the constitutional court are binding not only upon the parties to the proceedings but also upon *erga omnes* all public authorities.[31]

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[28] CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro.

[29] 'A provision setting up a minimum number for decision-making secures the autonomy and independence of the Court since otherwise the absence of a single judge is capable of paralysing the Court.' (The Commission decided that if there are seven judges, the quorum necessary to deliver a valid decision is a quorum consisting of four judges, CDL-AD[2008]030, para. 29.)

[30] CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 50.

[31] CDL-AD(2014)033, Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 9 and 11.

Thus the Commission expressed an opinion that dissenting opinions, or *vota separata* do not weaken the position of the constitutional court but, on the contrary, have a positive role. They allow a public, and, in particular, scholarly discussion about the judicial decision delivered to be conducted.[32] What is more, they should be published together with the ruling.

Apart from the issues outlined above, the Venice Commission drew attention to another important issue, namely the continuity of constitutional rulings made pursuant to the constitution which has been amended. This issue requires a separate analysis; here I only wish to point to the problem to which the Commission has attached much importance in its opinions.

The relationship between an amendment to the constitution and rulings of the constitutional court based on the provisions of the previous constitution appeared in a specific case in Hungary. When a new fundamental law (the constitution) was adopted, the constitutional court was prohibited from making references to its earlier rulings made on the basis of the former constitutional provisions. As the authors of such a solution argued, the intention was to create room for the constitutional court which was then working on the basis of the new constitution. The Venice Commission did not share this opinion and rejected the arguments of the Hungarian authorities, claiming that a prohibition to refer to past decisions disrupts the continuity of constitutional rulings that had been based on principles which permeated the constitution and referred to fundamental democratic principles, the protection of human rights and the rule of law.[33]

IV. INSTEAD OF A CONCLUSION

The above is only an outline of a very narrow fragment of the issues relating to constitutional courts which the Venice Commission has had to cope with or with which it dealt especially in cases involving States in the process of political transformation. Despite numerous difficulties and subsequent efforts undertaken in individual States that struggled to work out their own, country-specific models of the judiciary but nevertheless based them on the European foundations of constitutional justice, the creation of these courts in all post-communist States was a considerable step towards safeguarding constitutional justice set in European legal culture and European constitutional history.[34] The work of the Venice Commission is to a large extent a guarantee of the right direction of the above process. One of the members of the Venice Commission, a professor of law and a long-term judge of the Court of Justice of the European Union, described the Venice Commission as a reputation-enhancing community. Despite its non-binding character, the soft law that the Commission develops is important

[32] CDL-AD(2009)042, Opinion on the Draft Amendments to the Law on the Constitutional Court of Latvia, para. 20–21.

[33] CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, para. 96.

[34] S. Ruelke, *Venedig-Kommission*, 763.

not only for the States that are its members, but all other States which merely collaborate with it. All these States wish to be perceived as members of a community of states adhering to the ideas of human rights, democracy and the rule of law delineated by the Venice Commission. Being a reputation-enhancing community, the Venice Commission creates an opportunity for States of to co-participate in the preparation of these standards, treating the Commission's recommendations of a part of their sovereign responsibility for the shape of the rule of law.[35]

I believe that it is worthwhile here quoting the view expressed by a long-term British representative in the Venice Commission who stated that: 'the Commission possessed the self-assurance to insist that democracy contains a set of absolute standards from which there is limited scope for deviation.'[36] To these, undoubtedly belongs the combination described as constitutional justice grounded in a mechanism of checks and balances.

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OPINION OF THE VENICE COMMISSION ON THE PLACE OF THE CONSTITUTIONAL JUDICIARY IN A DEMOCRATIC STATE

Summary

The debate on the Constitutional Tribunal in Poland that has been going on in recent months concerns one of the principal foundations of a state governed by the rule of law: the place of the constitution in the system of sources of law and the related role of the constitutional judiciary in a political system founded on the separation of powers. Throughout the recurrent discussions going on in Poland since 1989, the axiom of the role of the constitution and the autonomy of the court adjudicating on the compliance of laws with the constitution, which is an element of the European and democratic constitutional tradition, has always remained intact. The current political debate appears to undermine this axiom today.

The constitutional judiciary is an important foundation of democracy; consequently it is not surprising that the European institutions are concerned about the changes implemented in this area in any European state.

The European Union Commission, commonly referred to as the Venice Commission, plays a special role here. This role may be described as that of a specific body giving legal advice on matters of public law. The Commission acts at the request of an interested state or another European body. In its opinions it indicates certain substantive issues that are essential for ensuring the autonomy and impartiality of constitutional courts. Although the opinions of the Venice Commission are not binding, the soft law that the Commission makes is relevant not only to its Member States but also to other states which work with it and which wish to be perceived as members of a community of states sharing ideals of human rights, democracy and the rule of law as set out by the Venice Commission. As a reputation-enhancing community, the Venice Commission provides an opportunity for states to participate in the preparation of these standards, which at the same time treat the recommendations of the Commission as part of their sovereign responsibility for the shape of their legal system.

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[35] W. Hoffman-Riem, The Venice Commission, 596. (Also see H. Suchocka, W poszukiwaniu modelu ustrojowego prokuratury (w świetle prac Komisji Rady Europy „Demokracja poprzez Prawo"), *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 76(2), 2014, 161–174—editor's note.)

[36] J. Jowell, The Venice Commission – Disseminating Democracy through Law, *Public Law* 2001, P.L. Winter, 682.