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THAT LANDS BE SETTLED THROUGH LAW

A Few Comments on the Council of Europe and the Venice Commission

Translation in English by the author of an article entitled “Byggð séu lönd með lögum – Nokkur orð um Evrópuráðið og Feneyjanefnd”, published on pp. 275-286 of a volume entitled “Afmælisrit – Þór Vilhjálmsson sjötugur 9. júní 2000”, issued in Reykjavík 2000 by *Bókaútgáfa Orators* (publishing arm of the Society of Law Students at the University of Iceland) in tribute to Mr. Thór Vilhjálmsson, judge on the EFTA Court in Luxembourg, former professor of law, judge on the Supreme Court of Iceland and judge on the European Court of Human Rights, on the occasion of his 70th birthday on 9th June 2000.

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“The Council of Europe was founded due to strong popular currents among both high and low in the Western part of Europe, by reason of intense wishes for that to be done which might ensure that discord between the many states of this hemisphere should not yet again set off a war. ... The Council of Europe would be a political forum where the peoples might foster their accord, discuss specific actions and put them into effect in some measure.” Thus it is said in a short article on this institution by Thór Vilhjálmsson, published during the tumultuous year of 1968 in an issue of the periodical *Samvinnan* which was dedicated to Iceland and the surrounding world.

In the Statute of the Council of 5th May 1949, the governments of the participating states expressed this by declaring their conviction that the pursuit of peace based upon justice and international cooperation was vital for the preservation of human society and civilization. They stated that they wished to reaffirm their devotion to the spiritual and moral values which were the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which formed the basis of all genuine democracy. That for the maintenance and further realization of these ideals, as well as for the furtherance of economic and social progress, there was need of a closer unity between all like-minded countries of Europe. That to respond to this need and the expressed aspirations of their peoples in this regard, it would be necessary forthwith to create an organization which could bring European states into closer association.

Such was the basis for the founding of the Council of Europe, and on this basis its operations have been conducted over the five decades since passed. Iceland was not among the 10 states which signed the Statute, but was invited to become a member of the Council in its first meeting at Strasbourg in August 1949. The invitation was promptly honoured by a reply stating that the matter would be placed before the national legislative assembly in the coming winter, and in a session of the Althing on 7th February 1950, the membership was approved by resolution. It became effective upon the deposit of an instrument of accession exactly a month later. The Icelanders have ever since taken an active part in the operations of the Council in its various fields of activity, as there was reason to expect, seeing that in the forum of the Council, it is possible to maintain discourse and cooperation with other nations in respect of matters of significance for the good of the country without assuming obligations which might compromise the independence of the nation. The question of obligations by reason of membership in the Council of Europe primarily arises in connection with the making of conventions and agreements under its auspices in relation to specific matters within specified fields, and a position towards participation therein will be taken independently in each case. Among these obligations, it is the European Convention of 4th November 1950 on Human Rights and Fundamental Freedoms which has pride of place, and the Icelanders have been among the parties thereto from the outset and have now given its provisions the direct force of law in the country. p. 276

This participation in the operations of the Council has grown in intensity and diversity over the years and has led to the accession by Iceland to many other European conventions and agreements. Three members of the Althing have taken regular part in the activities of the Consultative Assembly, the tasks of which include the election of judges on the European Court of Human Rights and the Secretary-General of the Council itself. The Minister for Foreign Affairs sits in the Committee of Ministers of the Council together with his colleagues, who come together for regular meetings twice in every year. In the interim periods, meetings of the Committee are attended by the permanent representatives (ambassadors) of the member countries and other staff from their missions to the Council. Since 1997, the permanent representative of Iceland has had his residence in Strasbourg, and in 1999 it was the turn of Iceland to hold the presidency of the Committee for the traditional period of six months.

In its first years of operation, the Council of Europe particularly served as a forum for discussion of new pathways for economic and political cooperation among states in the Western half of the continent, which have since been travelled with conspicuous results. After the development of that cooperation gained independent momentum, the Council of Europe has continued to operate as a political forum where the affairs of the continent can be discussed on a comprehensive basis. The scope of this discussion is in principle unlimited, but in conformity with the Statute of the Council, it has in large measure been directed towards events and problems which relate to democratic stability over the continent and within individual member states from time to time. The said purpose is served by both principal organs of the Council, these being on one hand the Consultative or Parliamentary Assembly, which convenes in plenary session four // times in each year and is historically noteworthy as being the first assemblage of parliamentarians to be established with an international body. *p. 277* It is constituted by representatives from the national parliaments of the member states, who appear there in an independent capacity without direct instruction from home. On the other hand there is the Committee of Ministers, which has the highest executive power within the Council and decides upon its policies and programme of activities. Its meetings are now normally held on a weekly basis. In addition, there is the Congress of Local and Regional Authorities of Europe, which convenes once every year and works with the Committee of Ministers and the Parliamentary Assembly in an advisory capacity with respect to municipal and regional affairs. The Secretariat of the Council has its seat in Strasbourg and is manned by a large staff from the various member countries.

Beside its activities in the political arena, the operations of the Council have from the outset been directed towards the promotion of cooperation among the member states on specific projects or subject matters in the field of government, which in particular have related to law and justice, social issues, health and environmental affairs, education and culture. This activity is carried on under the auspices of the Committee of Ministers, which determines the selection of these projects in considering where cooperation may be likely to bear fruit. The examination and handling of the specific subject matters is typically entrusted to committees of experts, where all of the member states usually have the right to be represented. The work of these committees may involve the preparation of opinions or proposals on specific matters or the drafting of conventions or agreements which the member states may

then be able to conclude and ratify among themselves. It is not least the participation in this diversified activity which has proved beneficial to the Icelanders over the years, and the smaller member states have been able to pursue this cooperation more intensively than otherwise due to the principle that the costs of representation on the committees normally should be borne collectively. In the result, the conventions and agreements which have been established through endeavour of the Council now number well over one hundred.

The growing strength of the European Union and of the economic and political ties between its member countries obviously has resulted in changes in the activities of the Council of Europe over the more recent past, since these countries now have another kind of forum for mutual discussion and cooperation. But after the barriers between the Eastern and Western countries of Europe began breaking down during the nineteen-eighties, the activities also have expanded and the role of the Council has been reinforced, as there soon developed a reciprocal understanding to the effect that accession to membership in the Council of Europe by the eastern states would be the natural key to other cooperation with the states which already were members, and then membership on such basis as // provided in the founding Statute of the Council, which stipulates in Article 3 that every Member must accept the principles of the rule of law and of the enjoyment of human rights and fundamental freedoms by all persons within its jurisdiction, besides supporting the aims of the Council in other respects. As a result, the Council of Europe has in recent years been the venue for a negotiating process aimed towards a constitutional and administrative conversion from dictatorship to democracy, to similar effect as previously experienced in connection with the accession of Portugal and Spain, which now stand on solid footing among the democratic countries of the continent. In these negotiations, it has been a term of reference that the new member states also would become full-fledged parties to the European Convention on Human Rights and Fundamental Freedoms. p. 278

At the same time, the strengthening of human rights and social justice and the protection of the cultural heritage of the European nations have become an ever greater concern of the Council of Europe. The consequent activities which may be noted include an extended effort towards cooperation with countries outside Europe in support of human rights and democratic government, as well as an increased emphasis on such matters as the rights of ethnic minorities within the European states and the protection of their culture.

Thór Vilhjálmsson is among those Icelanders who have done more than their share in fostering the interest of the people for the activities of the Council of Europe and its institutions, besides having taken a direct part therein as a judge on the European Court of Human Rights for many years. On the occasion of Thór's seventieth birthday and the passing of the fiftieth year of operation of the Council, it would be fitting to discuss here in greater depth the results of its activities and the position of the Council at the dawn of a new century. In lieu of this, however, the intention is to comment in brief terms upon a specific institution within the realm of the Council, which is in fact celebrating its 10th anniversary at this time and has played a part in the mutual dealings above mentioned with the states of Eastern Europe, although its activities have a wider scope. This is the *European Commission on Democracy through Law*, which is commonly called the *Venice Commission* due to the fact that it does have its venue in that city, alone among the committees of the Council. The Secretariat of the Commission, however, is seated in Strasbourg.

The establishment of this Commission is based upon a so-called *partial agreement* within the Council of Europe, which implies that only those member states who wish to accede to the // agreement as a matter of interest take part in its activities p. 279 and contribute to its budget. The Statute of the Commission was adopted by Resolution (90)6 of the Committee of Ministers of the Council on 10 May 1990, further to a conference of the foreign ministers of the member states on 19-20 January 1990 in Venice where the founding of the Commission was decided. While the fall of the Berlin Wall in the preceding year may be regarded as the proximate cause for the implementation of this decision, the idea of an advisory committee of this kind goes further back in time. Dr. Antonio La Pergola, then Minister for European Affairs in the Italian Government and former professor of law and judge on the Constitutional Court of Italy, was a major promoter of the founding of the Commission. He is now a judge on the European Court of Justice in Luxembourg.

The Venice Commission set out on its career with the participation of 18 states, but practically all member states of the Council of Europe have now confirmed their accession to its membership. Interestingly, though, the British showed limited interest for the Commission in its early years, and it is first in this present year that a representative of the United Kingdom will take part in its activities as a member. The Icelanders joined the Commission in 1993, and their initial member was Dr. Magnús

Kjartan Hannesson, then lecturer at the University of Iceland. He has been engaged in the Foreign Service for the past few years and had to leave his post on the Commission in the summer of 1998, after becoming Deputy Permanent Representative of Iceland to the Council of Europe and thus being involved with the work of the Committee of Ministers itself. The present writer was then appointed a member of the Commission in his place.

Pursuant to its Statute, the Venice Commission is to be composed of independent experts who have achieved international renown through their experience in democratic institutions or by their contribution to the enhancement of law and political science. The members are one from each participating state, being appointed for a fixed term of four years at a time. In the same manner as the members of the Parliamentary Assembly, they are expected to carry out their function independently at their own responsibility without direct instruction from home. At the same time, it is a basic tenet of their position and that of the Commission that the work of the Commission should be pursued in observance of neutrality in political respects. Each participating state covers the cost of attendance of its member at regular meetings of the Commission, and the post is not salaried.

The Commission has been endowed with many eminent members, many of whom have had a long tenure. They have a varied background, but most of them come from among senior academics in the fields of constitutional, administrative or international law, judges of the supreme court, constitutional court or administrative court of the member state concerned, or members of its national parliament or higher administration. Some of them also have represented their country on // the European *p. 280*

Commission or Court of Human Rights, such as the current members from Austria and Liechtenstein. Dr. Antonio La Pergola has been President of the Commission from the outset, and the Secretary of the Commission, Dr. Gianni Buquicchio, also is an Italian. They both enjoy unqualified esteem among the members.

The member states of the partial agreement on the Commission are now 38 in number and include all of the states in the Eastern half of Europe which have acceded to membership in the Council of Europe. The other Nordic countries and Ireland were members from the beginning, and the Baltic countries are among the many others which have since joined the group. Armenia, Azerbaijan, Belarus and Bosnia and Herzegovina are associate members of the Commission, while Argentina, Canada, the Holy See, Japan, Kazakhstan, the Republic of Korea, Kyrgyzstan, Uruguay and the

United States are observers. In addition, South Africa has had special cooperation status over the past few years. It is hoped that such cooperation can continue and be extended to some other states in that continent, and cooperation with Brazil and other countries within Latin America may also come to increase in the near future.

The Commission is intended to be a consultative body, as already mentioned, and to cooperate on that basis with the member states of the Council of Europe and with non-member states. In the beginning, the latter reference was particularly directed towards the states of Central and Eastern Europe, but was not restricted to them. According to its Statute, the Commission is to have the guarantees offered by law in the service of democracy as its specific field of action. The work of the Commission is to be pursued with the objective of acquiring knowledge of the legal systems of the states concerned and an understanding of their legal culture, and of examining the problems raised by the working of democratic institutions and their reinforcement and development. The Commission especially is required to devote its attention to the constitutional, legislative and administrative principles and technique which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law. Secondly, the Commission is to set its sights on public rights and freedoms, notably those that involve the participation of citizens in the life of democratic institutions, and thirdly, it is to concern itself with the contribution of local and regional self-government to the development of democracy. In other words, it may be said that the work of the Commission is geared to those principles of the European constitutional heritage which lay at the base of the Statute of the Council of Europe, namely individual and political liberty, human rights and the rule of law.

The activities of the Commission may be roughly described as falling into three categories, where the first primarily involves consultative or advisory tasks relating to constitutional matters, // administrative principles and the administration of justice in individual countries. These tasks most often are brought forward at the initiative of the states themselves, which introduce the Commission and the Council of Europe to the various problems or projects in these fields which are of concern from time to time, but the Parliamentary Assembly and the Committee of Ministers also may ask the Commission to examine specific matters concerning the states. The tasks typically come forth in the manner that the Commission is presented with drafts or ideas for new legislation or legislative changes in the country concerned, which are examined and discussed by the Commission and subsequently commented upon by way of an opinion *p. 281*

after further consultation with representatives and institutions of the country itself. A small working group is often specifically appointed for reporting on the subject matter. The approach of the Commission generally is based on mutual discussion of the matters in issue and recommendations for their resolution, rather than attempts to impose specific solutions.

Over the past years, changes in the constitutions of states acceding to membership in the Council of Europe have held a relatively high place on the agenda of the Commission, but its work encompasses a much wider area of legislative activity, such as legislation on constitutional courts, general courts and legal procedure, election laws, laws on public administration and other rules of law having a bearing on human rights, such as rules concerning the position and rights of national minorities. The affairs of federal states and other states where regional self-government is in issue are further examples of matters receiving high attention. Among the many countries which have maintained auspicious bilateral relations with the Commission, mention may be made of Albania, Bosnia and Herzegovina, the Baltic States, the Caucasian States, Moldova and Ukraine.

Secondly, the Commission is engaged with various research and comparative study projects which extend to all of the member states or particular areas of the continent and concern the development of human rights and the functioning of democracy in specific relations. The aim of these studies typically is to identify constitutional values which are shared throughout Europe and such areas of weakness as may be found in the legislation or administration of particular states. These projects are, on one hand, undertaken as a part of the ongoing activities of the Commission, which is authorized by its Statute to initiate its own research. On the other hand, they are pursued by way of organisation of seminars and workshops, where leading experts from the academic, judicial, governmental and political fields are invited to report on topics of current interest. These seminars are generally held in cooperation with a specific university, court or institution in one of the member states. On this // front, the *p. 281*

Commission specifically has organised a series of seminars called *UniDem (Universities for Democracy) Seminars*, which have become a regular feature of its work. The transnational studies of the Commission may result in specific publication of opinions or reports on particular topics, but the Commission also has regularly published a series of works under the name *Science and Technique of Democracy*,

covering materials on the research of the Commission and from the *UniDem* seminars. The works in this collection are now close to thirty in number.

The recent topics of this kind, which also concern the states of Western Europe, include studies on the apportionment of voting rights, on impediments to the activity of political parties and on religious education in schools, as well as a report on the organisation and control of internal security services within European states which was prepared at the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly. Rules on the financing of political parties also are under consideration. The recent *UniDem* seminars have dealt with such topics as human rights in emergency situations, the affairs of federal and regional states, the transformation of the nation-state at the dawn of the 21st century, and the principle of respect for human dignity in European case-law. It is also typical for the orientation of the Commission that the first conference under its auspices was a meeting in October 1990 at Piazzola sul Brenta between the presidents of European constitutional courts and other courts with powers of constitutional review. The Supreme Court of Iceland was there represented by Mrs. Guðrún Erlendsdóttir.

Thirdly, the Commission has devoted its effort to the promotion of exchanges of information on the activity of constitutional courts and equivalent courts in all states with which it maintains a relationship. To this end, the Commission has set up a documentation centre under the name *Centre on Constitutional Justice*, which is connected to the Commission Secretariat in Strasbourg and has the major purpose of collecting decisions of the said courts in constitution-related cases and disseminating them by publishing summaries thereof in coordinated form. This is achieved through the publication of a *Bulletin on Constitutional Case-Law*, which has been issued since 1993 in English and French, with three numbers in each annual volume. The decisions are received directly from the courts themselves by assistance of a liaison officer with each court. The participation in this dissemination work by courts all over Europe has been steadily growing, and it is to be expected that // important decisions of the p. 283
Supreme Court of Iceland in the field of constitutional law will in future be regularly reported in this forum.

Beside the regular Bulletins, the Centre on Constitutional Justice has issued special Bulletins under the same denomination where publication is made of descriptions of the said courts and their organisation and also of the national laws and rules of procedure which are basic to their operation, in order to facilitate the viewing

of decisions from the various countries in proper perspective. The latest of these Bulletins (*Special Edition - Description of Courts*) was published in the past winter and includes a brief description of the Supreme Court of Iceland and its activities.

Parallel to this, the Commission Secretariat in Strasbourg has established a computerised data base called *CODICES*, where record is kept of all judgments on constitutional matters which are transmitted to the Centre. Here may be found all decision summaries published in the Bulletin, as well as a considerable number of decisions in full length. One will also find the basic rules on each court as above mentioned, as well as many constitutions of the member states. There also has been established a *Systematic Thesaurus* of index words, designed to facilitate a search of the data base for material on specific topics. Access to the base may be had through CD-ROM discs provided by the Centre, and via the Internet.

The Commission holds regular plenary meetings four times in the year, and in between work is carried out on specific matters which are then presented in plenary and discussed as required. The Commission Secretariat is extensively involved with that work. The members also have formed several Sub-Commissions to deal with topics in specific fields, including a Sub-Commission on Constitutional Justice, on Federal State and Regional State, on International Law, on Protection of Minorities and on Democratic Institutions, as well as a governing board for *UniDem* seminars. A Sub-Commission on Southeast Europe has been recently established, and a Working Group on Kosovo is currently in action. Meetings of the Sub-Commissions are most often held in connection with the plenary meetings. It is to be noted that the Sub-Commission on Constitutional Justice holds annual meetings with the liaison officers of the various courts, either in Venice or in the home city of one of the courts.

Meetings of the Venice Commission are regularly attended by the representatives of international bodies and institutions to which it is related or maintains relations with. Foremost among these are the representatives from the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, as well as the Congress of Local and Regional Authorities, and a representative of the European Union. The representatives of individual states also frequently attend the meetings in order to express their views on specific issues under consideration and discuss them with the Commission members.

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It is the opinion of most of those familiar with the subject that the European Commission on Democracy through Law has succeeded beyond expectations in handling the tasks for which it was conceived, and that it was founded at the right time. At any rate, it is clear that its cooperation by way of consultation and reciprocal discussion with the many states in Eastern Europe and elsewhere which have been engaged in a constitutional transformation towards increased democracy has in most cases resulted in amicable relations which have been cohesively maintained after being established, so that it has been possible for the Commission to follow the developments taking place in the several countries with respect to legislation on constitutional matters, human rights and justice. It is also clear that the states of Western Europe will be able to draw valuable lessons from these developments and the mutual dialogue with the representatives of these states.

The leaders of the Icelandic people who decided half a century ago that Iceland should join the Council of Europe were unanimous in expressing the modest view that time would have to tell how influential this alliance might in fact become. It is probably fair to say that the progress towards effectiveness was slow in the beginning, apart from the influence of the Council upon the economic cooperation entered into by groups of its member states early in its career. It was also often contended in years past that the Council of Europe was a forum for words rather than action, an adage which similarly was sometimes applied to the United Nations. As an aside in lighter vein, it may be noted that this message was received by the present writer from the lips of a beautiful French medical nurse when he first made his way to Strasbourg by train from Luxembourg during the winter of 1968-1969, as a substitute for Thór Vilhjálmsson on a Committee of Experts on Comparative Law. *On parle beaucoup, mais on ne fait pas grand'chose* – this was what she mainly had heard about the Council of Europe from the folks at home.

The situation has changed to considerable degree in the course of time, so that the effects of the work of the Council of Europe may be observed in many fields of life in its member // states. The change of greatest import in the eyes of those concerned p. 285
with law and political matters, however, presumably is to be seen in the effects of the fundamental emphasis on human rights and human liberty which has marked the Council from the outset and has been expressed with growing weight in its operations and in the work of the collective institutions established under the Convention on Human Rights and Fundamental Freedoms, i.e. the European Commission of Human

Rights and the European Court of Human Rights, which now have been reorganised with the Court taking over the functions of both. The extensive development towards the augmentation of human rights in word and deed which has resulted from the activity of these institutions also progressed rather slowly for its part in the beginning, and it was not only in Iceland that courts and public authorities paid relatively little attention to their work for a long while. By the same token, it now applies not only in Iceland that attention towards the Human Rights Convention and its institutions is regarded as an obvious necessity, and this view is not only to be found with the courts and the agents of legislative and executive power, but also among the public at large. The many components of the progress achieved include an increased recognition of the independence of the judiciary and its fundamental importance for the maintenance of democracy and peace in each country and for the peaceful coexistence of nations.

In looking over the scene at the close of the century, it must be counted as extremely fortuitous that the work of these institutions had progressed to such high extent when new ways for cooperation between east and west opened up just over a decade ago. If the ink on the European Human Rights Convention had then merely been drying, the setting for this cooperation would have been different from that which has been found to exist in the past decade. The Western nations presumably would have been able to point to economic progress on their side, and to having managed to preserve a state of peace among themselves, but the call for democracy safeguarded by human rights as a basis for both would have sounded otherwise. The finding of proper ground for the establishment of a body such as the Venice Commission and of an audience for its voice in the arena of the new cooperation would have been one of the many matters more difficult to accomplish. Viewed in this light, the presence of the Commission may be regarded as a direct product of the work of the august institutions of the Convention and as an effort to extend their influence in another form.

According to the state of affairs at the dawn of a new century, it is possible to second without hesitation the opinion that the European Commission on Democracy through Law may have an important function to fulfill in the years next to come. One of the reasons is that the cooperation of nations within an undivided Europe is still in a state of formation, and the auspicious handling thereof is of the highest importance, considering also that the nations in other parts of the world will no doubt take serious note of the respective success in its further development. // But in addition to future work in the interest of this cooperation, it is also to be expected that the Commission

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may have a cause for calls upon the older member nations of the Council of Europe in connection with the development of constitutional rule and justice within their countries. In that connection, it is well to remember the old axiom that the commandments are not least likely to be broken by those who claim observing them the most truly. However this may be, the history of the last fifty years would seem to indicate very clearly that the ideals of human liberty, human rights and lands settled through law are worth holding onto firmly for yet a while.

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